

SOUTHWESTERN JOURNAL OF INTERNATIONAL LAW

VOLUME XXIX

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NUMBER 2

SYMPOSIUM

RESPONSES TO *AGAINST WHITE FEMINISM*

Foreword
Faisal Kutty

SYMPOSIUM ARTICLES

Climate Chauvinism: Rethinking Loss & Damage
Nadia B. Ahmad & Victoria Beatty

Determining Development: The Impact of White Feminism on Women of Color
Syeda ShahBano Ijaz

Situating Colonial Feminism in Ibn Khaldun's Theory of '*Asabiyyah*
Saba Kareemi

Uncommon Ground: Culture and Othering in the Human Rights Project
Kathleen Cavanaugh

White Feminism in Historical Perspective
Samuel Moyn

Response to "Against White Feminism" for Symposium and special issue of
Southwestern Journal of International Law
Erum Sattar

ADDITIONAL ARTICLES

Abortion Rights in Uruguay, Chile, and Argentina: Movements Shaping Legal and
Policy Change
Nayla Luz Vacarezza

The Long History of Women's Rights Campaigns in Three South American Countries;
The Recent Legal History of Abortion Law in Uruguay, Argentina, Chile
Donna J. Guy

NOTES & COMMENTS

Isang Bagsak! Overseas Filipino Nurses Deserve a Special Path to Citizenship
Lauren Espina



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FOREWORD

By Faisal Kutty

I am honored to provide this foreword for the Law Journal Symposium, “Responses to *Against White Feminism*.” This symposium is based on the book *Against White Feminism: Notes on Disruption* by Rafia Zakaria, which provides a critical analysis of mainstream Western feminism and its limitations in being intersectional, inclusive, and transnational. It is a powerful call to action that demands a shift in the way we view and engage with feminist ideals. Zakaria argues that white feminism has centered the experiences and concerns of upper-class white women and has failed to recognize and address the diverse needs and struggles of women of color and other marginalized groups.

Zakaria’s book provides a much-needed critique of white feminism and its exclusionary practices. She highlights how white feminism has upheld privilege and cultural superiority by speaking over Black and Brown women and perpetuating colonial, patriarchal, and white supremacist ideals. Zakaria’s work follows in the tradition of intersectional feminist forebears like Kimberlé Crenshaw, Adrienne Rich, and Audre Lorde and calls for a reconstruction of feminism that centers women of color and challenges the universalization of white feminist concerns and beliefs.

The central argument of the book is that mainstream feminism is deeply rooted in whiteness and the racial privilege that accompanies it. As a result, white feminists have long been the primary voices and gatekeepers of feminist discourse, shaping the movement’s goals, values, and priorities. This has led to the marginalization and erasure of the experiences, struggles, and voices of women of color, who are often excluded from feminist spaces or forced to conform to white feminist standards. Zakaria argues that this has been an often-deliberate strategy to uphold white supremacy and maintain cultural superiority, even as feminist movements have fought for women’s rights.

The book’s critique is far-reaching and covers a wide range of topics, from the history of colonialism and imperialism to contemporary issues of sexual liberation, the aid industrial complex, and the war on terror. Zakaria shows how white feminists have co-opted the language and values of

feminism to justify their own interests and perpetuate inequality. For example, she highlights the role of white women in the British feminist imperialist savior complex, where they traveled to colonized countries to “civilize” and “save” native women from their “terrible conditions.” In doing so, they often othered, objectified, or exoticized local women and imposed Western feminist values on them, erasing their agency and cultural diversity.

Another important theme of the book is the commodification of feminist ideals, especially sexual liberation, which Zakaria argues has become a “stand-in for total liberation and empowerment.” She critiques the ways in which sex-positive feminism has been used to justify the commodification of sexual identities, leading to the exploitation of women’s bodies and desires. This is especially true for women of color, who are often fetishized and exoticized in mainstream media and popular culture.

Zakaria also takes aim at the aid industrial complex, which she argues has become a vehicle for white feminist agendas to dominate the global South. She critiques the way in which Western neoliberalism and capitalism have transformed women’s empowerment into a “buzzword that could be pinned to numerous motives,” erasing the socio-political and cultural contexts of women’s lives. This has resulted in the failure of many aid projects and initiatives that were meant to empower women, but instead perpetuated harmful stereotypes and cultural imperialism.

The book’s strongest message is its call for a more inclusive, intersectional, and transnational approach to feminism that fully includes women of color and their experiences. Zakaria argues that a reconstruction of feminism is necessary to disrupt the hegemony of white feminism and its complicity with colonialism, patriarchy, and white supremacy. She cites the work of intersectional feminist forebears Kimberlé Crenshaw, Audre Lorde, and Gayatri Chakravorty Spivak as examples of feminist thought that has challenged the status quo and values the experiences of marginalized women.

The implications of the book for the feminist movement are profound. It challenges us to rethink the way we approach feminist activism, discourse, and solidarity. It demands that we confront the ways in which our own privilege and biases shape our understanding of feminism and limit our ability to support the struggles of women of color. It also reminds us that feminism cannot be divorced from broader socio-political and cultural contexts and that it must be grounded in the realities and experiences of all women, not just those who have the privilege of being heard.

As the global feminist movement continues to grow and evolve, it is essential to recognize and address the unique experiences and needs of women of color and other marginalized groups. The book argues that we must challenge the dominant narrative of white feminism and work towards a more inclusive and intersectional feminist framework that recognizes and values the diverse experiences and identities of all women.

The Law Journal Symposium is an important platform to continue this conversation and engage with Zakaria's work critically. It is comprised of six articles, each addressing a different aspect of feminism, human rights, and social justice. The first article, co-authored by Professors Nadia Ahmad and Victoria Beatty, challenges the concept of "Climate Chauvinism" and proposes new ways of thinking about loss and damage. The second article, written by Syeda ShahBano Ijaz, explores the impact of white feminism on women of color and questions the notion of "Determining Development." Professor Saba Kareemi situates colonial feminism in Ibn Khaldun's theory of *asabiyyah* in the third article, while Professor Kathleen Cavanaugh examines culture and othering in the human rights project in the fourth article. Professor Samuel Moyn contributes a historical perspective on white feminism in the fifth article, and the final article, written by Dr. Erum Sattar, is a direct response to "Against White Feminism." Overall, the Symposium provides a fresh exploration of feminism, race, and social justice in today's world.

I look forward to reading the various responses and perspectives shared in this symposium and hope that it contributes to a more nuanced and inclusive understanding of feminism.

As we continue to fight for gender equality and justice, we must recognize the diverse needs and experiences of women and work towards a more inclusive and intersectional feminist framework that uplifts all women. Zakaria's work challenges us to examine the ways in which systems of oppression are interconnected and urges white feminists to actively work towards building a more inclusive and intersectional feminist movement. I hope that the responses published in this volume will be a valuable contribution to the ongoing conversation about how we can create a more just and equitable world for all women.

CLIMATE CHAUVINISM: RETHINKING LOSS & DAMAGE

Nadia B. Ahmad* and Victoria Beatty**

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INTRODUCTION: “LIFT ME UP”

“And yet it is still so tempting for white women to interpret their own ascent as a matter of pure merit, and their own quest for parity as the most urgent priority. It is so easy to be unconcerned with domination, silencing, and oppression when they are perpetrated on those you barely see.”

– Rafia Zakaria, author and journalist¹

The rise of white feminism has decentered and disempowered women of color and Third World voices in academic discourse based on historical delineations of colonialism and slavery. In this Article, we consider the impact of this erasure in the international law arena related to climate change discussion of loss and damage. The spillover effect of the pedestal on which white feminism is placed occurs in political implementation and international negotiation from the corporate world to the foreign policy arena. More specifically, we examine how white feminism has hindered climate change adaptation and environmental protection by deprioritizing frontline and vulnerable communities.

In particular, we explore the normative implications of Rafia Zakaria’s *Against White Feminism: Notes on Disruption* as an entry point for this discussion. Zakaria’s book serves as a counter-manifesto to white feminism’s alignment with colonial, patriarchal, and white supremacist ideals, instead centering itself on the perspectives of women of color. Zakaria considers the legacy of the British feminist imperialist savior complex and what she describes as “the colonial thesis that all reform comes from the West” to the condescension of the white feminist-led “aid industrial complex” and the conflation of sexual liberation as the “sum total of empowerment.”² Zakaria’s arguments build on the work of intersectional feminists, Kimberlé Crenshaw, Adrienne Rich, and Audre Lorde.

This Article proceeds in three parts. Part I provides background information on the impacts of climate change and unequal burden on non-whites. This part contemplates white feminism as a risk multiplier in climate change. Part II delves into our personal accounts of hurricanes and intersections of white feminism. Part III explores the stalemates in

1. RAFIA ZAKARIA, *AGAINST WHITE FEMINISM: NOTES ON DISRUPTION* 173 (2021).

2. *Id.* at 72-75, 110, 120.

international climate negotiations as an opportunity to rethink loss and damage as a mechanism for climate change adaptation.

I. “DROWNING IN AN ENDLESS SEA”

Climate change impacts sea level rise along with hurricane frequency and intensity. In addition, climate change can decrease the speed of hurricanes, which in turn increases precipitation and flooding.³ The warmer seas also impact the ferociousness of the hurricanes themselves. Rapid industrialization, fossil fuel emissions, ocean acidification, pollution, and the warming planet create a deadly brew for the weather. Climate change has been a political issue since the 1970s and 1990s, but four countries, in particular, have politicized climate change issues on partisan lines.

The United States, Canada, Australia, and the United Kingdom demonstrate the most extreme rifts as to climate change, according to a study from the Yale Program on Climate Change Communications.⁴ The United Kingdom served at the helm of the colonial empire for centuries and the United States, Canada, and Australia were the dominant English-speaking colonies. In an article in *The Financial Times*, other academics used language such as “political culture war,” “ideology and personal values,” “age and gender,” “cultural projects and subtexts,” and “egalitarianism and radical individualism” to describe the divide in political views regarding climate change.⁵ The word “race” was not mentioned once. Evolving attitudes on climate change are not simply based on cultural beliefs, politics, and media. Race is a more important and determinative criteria when determining the “views” on climate change because it is hard for people of color to deny the impacts of climate change when they belong to the frontline communities that are disproportionately impacted.

White males have dominated the field of U.S. climate negotiations. The White House sent three Black women out of a team of sixteen people as a part of the U.S. delegation to COP 27, but no other women of color—no Latinas, no Asian women, no Native American women, no Muslim women, no Arab women—to the First African COP in an Arab and African

3. *Hurricanes and Climate Change*, CTR. FOR CLIMATE AND ENERGY SOLS., <https://www.c2es.org/content/hurricanes-and-climate-change/> (last visited Jan. 17, 2022).

4. Jennifer Carman et al., *Americans’ Willingness to Prepare for “Climate Change” vs. “Extreme Weather,”* YALE PROGRAM ON CLIMATE CHANGE COMM’N. (Sept. 23, 2021), <https://climatecommunication.yale.edu/publications/americans-willingness-to-prepare-for-climate-change-vs-extreme-weather/>.

5. Sarah Murray, *How Climate Change Became Political*, FIN. TIMES (Oct. 31, 2021), <https://www.ft.com/content/4bac715b-2812-4610-a528-dc8db9ecd635>.

country.⁶ Even the American Bar Association sends white men as observers on international climate negotiations.⁷ Progress for diversity has been agonizingly slow, and time is not on the side of climate advocates.

A. Hurricanes

Our Fall 2022 semester in Orlando, a city over thirty miles inland, included two hurricanes, which shut down our law school for a total of six academic days. As women of color, we share our reflections on past hurricanes later in this Article, but we also pause to share the importance of our perspectives in how we decipher and code the politics of international climate change.

In Florida, we are situated in a low-lying peninsula surrounded by water on three sides. Current residential sites are “partly determined by history, looking at historical settlement patterns and land-use decisions” and those historical trends affect risk from flooding and hurricanes.⁸ NOAA modeling predicts a rise in Category Four and Five hurricanes in the future.⁹ A review of hurricanes from 1979 to 2017 indicates an increase in the number of major hurricanes and a decrease in the number of smaller hurricanes.¹⁰

6. *U.S. Delegation to the 2022 UN Climate Conference (COP 27)*, U.S. DEP’T OF STATE (Nov. 2, 2022), <https://www.state.gov/u-s-delegation-to-the-2022-un-climate-conference-cop27/>.

7. Amanda Robert, *ABA Observers Will Share Their Takeaways from the UN Climate Change Conference in Glasgow*, AM. BAR ASS’N. J. (Nov. 24, 2021, 8:59 AM), <https://www.abajournal.com/web/article/aba-members-attend-and-reflect-on-international-climate-change-conference>.

8. Katie Sinclair, *Water, Water Everywhere, Communities on the Brink: Retreat as a Climate Change Adaptation Strategy in the Face of Floods, Hurricanes, and Rising Seas*, 46 *ECOLOGY L.Q.* 259, 262, 267-68 (2019) (“After the devastation of Hurricane Katrina, over four hundred lawsuits were filed by property owners in the Lower Ninth Ward and St. Bernard Parish against the federal government; all alleged that the government’s construction of the levees and the MRGO contributed to the extensive flood damage. Plaintiffs attempted to recover under different theories. In *Katrina Canal Breaches*, plaintiffs brought a tort claim against the Army Corps of Engineers for negligently building the MRGO and failing to maintain the levee systems. Plaintiffs in *St. Bernard Parish I* took a different route, alleging that flooding caused by the construction of the MRGO constituted a ‘taking’ under the Fifth Amendment and that flood victims were entitled to just compensation. The failure of both sets of plaintiffs to recover under these lawsuits shows the current limits of litigation to adequately address compensation for hurricane and flood victims, and the need for an alternative approach that not only increases compensation but also reduces the risk of future property losses.”).

9. *CTR. FOR CLIMATE AND ENERGY SOLS.*, *supra* note 3.

10. *Id.* (“Warmer sea temperatures also cause wetter hurricanes, with 10-15 percent more precipitation from storms projected. Recent storms such as Hurricane Harvey in 2017 (which dropped more than 60 inches in some locations), Florence in 2018 (with over 35 inches) and Imelda in 2019 (44 inches) demonstrate the devastating floods that can be triggered by these high-rain hurricanes.”).

When Hurricane Katrina struck New Orleans in 2005, “the historical inequities in settlement patterns ripple through to the modern day.”¹¹ Hurricane Katrina also showed that “the poor have little or no capacity to escape rising waters or extreme weather events.”¹² None of what happened in New Orleans in 2005 was a surprise or unexpected: “Despite clear indications that the White House knew the levees might fail, the ‘surprise alibi’ was used to justify the horrific delays in bringing relief to those trapped in city.”¹³

B. Sea Level Rise

In the United States, Florida remains “the most vulnerable state in the nation to sea level rise, with Miami having the largest amount of exposed assets and the fourth-largest population vulnerable to sea level rise in the world.”¹⁴ These grim predictions for Florida also play out for other major

11. Sinclair, *supra* note 8, at 262.

12. Jonathan Lovvorn, *Climate Change Beyond Environmentalism Part I: Intersectional Threats and the Case for Collective Action*, 29 GEO. ENV'T L. REV. 1, 20 (2016) (“This problem is exacerbated because low-wealth countries have less infrastructure and resources to deal with disasters—creating a devastating one-two punch of no individual capacity for escape and no prospects for government rescue. That the people of New Orleans experienced this exact knock-out blow while living in the wealthiest country in the world should be a piercing climate change wake-up call for any public interest organization that advocates for the interests of the economically disadvantaged, either internationally or here in the United States.”).

13. Joshua P. Fershee, *The Rising Tide of Climate Change: What America’s Flood Cities Can Teach Us About Energy Policy, and Why We Should Be Worried*, 39 ENV'T L. 1109, 1124–25 (2009) (“For as many as six days, people at the Superdome were trapped in ‘squalid and inhumane conditions’ without adequate food and water, not to mention the lack of medical care, functioning toilets, or air conditioning in the stifling New Orleans heat. The surprise was not that New Orleans was underwater—rather, it simply was a surprise that New Orleans did not end up under water a day earlier.”).

14. Julia Toscano, *Climate Change Displacement and Forced Migration: An International Crisis*, 6 ARIZ. J. ENV'T L. & POL'Y 457, 466–67 (2015) (“Miami-Dade County’s estimated beachfront property value is more than \$14.7 billion, not including infrastructure. With sea levels expected to rise between nine inches to two feet by 2060, threatening the sustainability of the state’s beaches, much of this beachfront property will succumb to rising surges and disappear among the waves. In addition, in an attempt to prevent beach erosion, Miami-Dade County is spending roughly \$32 million for beach erosion prevention and beach re-nourishment between 2013 and 2017. Moreover, Miami-Dade County alone has more people living less than four feet above sea level than any other state except Louisiana. With approximately 95% of Florida’s sixteen million residents living within 35 miles of coastal areas and sea levels expected to rise from eight inches to 2.5 feet by 2100, Florida’s coastal regions are vulnerable to being overwhelmed by rising seas and floods caused by increasingly occurring storm surges. Besides the vertical rise of the sea, Florida residents are also susceptible to the horizontal advancement of ocean water. The Natural Resources Defense Council reported that the horizontal advance of ocean water flowing inland is 150 to 200 times the vertical rise. Consequently, sea level rising is going to directly cause flooding of homes, hotels, and property within 200 to 250 feet of the

cities across the world but the slow rate of change projected for these cities makes it harder to sound the alarm in their respective cases.¹⁵ Sea level rise is complex, but the legal issues related to the lawyer's duty to confront the sea level rise *denier* are simple and stem from elementary legal concepts. "Complete failure to consider facts associated with sea level rise and obvious legal doctrines related to property, torts, and administrative law likely constitutes a breach of the lawyer's duty of care to the client."¹⁶

II. "KEEP ME SAFE—SAFE AND SOUND"

We coin the phrase "climate chauvinism" to build on the formulation of "environmental chauvinism,"¹⁷ as a move away from the "business as usual" formulation of environmental law making.¹⁸ Western courts, namely in the United States, have failed to forge new jurisprudence to match the momentum that the urgency of the climate action moment requires.¹⁹ Further, oil and gas companies, like ExxonMobil, have engaged in deceitful

current shoreline, resulting in significant damage to Florida's cities, beaches, ecosystems, tourist centers, infrastructure, economy, and agriculture systems.").

15. Robin Kundis Craig, *A Public Health Perspective on Sea-Level Rise: Starting Points for Climate Change Adaptation*, 15 WIDENER L. REV. 521, 524–25 (2010) ("Sea-level rise poses two fundamental challenges for community, state, and regional governments trying to formulate adaptation strategies. First, sea-level rise is slow, measured in millimeters per year, and the full extent of climate change-driven sea-level rise is expected to take centuries to manifest. This is a planning horizon outside the political ken of most governmental bodies; indeed, planning horizons longer than a few decades are extremely rare. Second, scientists are still uncertain regarding the extent of the problem. Specifically, how high will the oceans rise?").

16. Keith W. Rizzardi, *Sea Level Lies: The Duty to Confront the Deniers*, 44 STETSON L. REV. 75, 79–80 (2014) ("In property and environmental law, due diligence is a customary feature of many transactions, requiring the lawyers and other professionals to help clients ascertain whether a course of action should or should not be pursued. In tort law, including malpractice law, parties, including lawyers, may be held liable for negligence if they breach their duty to a person and that failure causes injury. In matters of administrative law, basic judicial doctrines dictate that although agencies receive deference in complex matters of science, courts will often take a 'hard look' at the facts to ensure that the government has not failed to consider an important aspect of the problem, including climate change.").

17. J.J. Spoon and C.J. Williams, (2022). *Environmental chauvinism? Explaining issue expansion among non-mainstream parties.*, PARTY POL. 0(0) (2022). <https://doi.org/10.1177/13540688221117262>.

18. "Many unglamorous cases have been filed and decided, failing to get into the headlines. But the result is that the aggregate effect of all those 'unimportant' cases has been lost in the commentary, completely crowded out by predictions of waves of common law nuisance claims and the next 'big' regulatory case. The fact is that there have been few common law cases, none reaching the merits, and few 'big' cases like *Massachusetts v. EPA* and *American Electric Power v. Connecticut*, while there have been scores of cases building up a case law under a variety of statutes." David Markell & J.B. Ruhl, *An Empirical Assessment of Climate Change in the Courts: A New Jurisprudence or Business As Usual?*, 64 FLA. L. REV. 15, 85–86 (2012).

19. *Id.*

tactics to evade regulatory measures to curb carbon emissions.²⁰ This superiority on the part of First World countries in implementing climate solutions is problematic and is rooted in white racial supremacy and white racial capitalism.²¹ The hubris of these First World countries is compounded by large transnationals that halt and sidestep any regulatory regimes that would lead to comprehensive environmental protection, cognizable reductions in carbon emissions, and a means to protect the weak and vulnerable from the catastrophic disasters that are compounded by climate change impacts. We refer to these complex dynamics as “climate chauvinism.” Sociology, political science, and comparative law have used the term “cultural chauvinism” as “the claim that cultural differences prevent us from adopting and adapting the superior procedural devices of other legal systems.”²² The origins of the term, chauvinism, hail to Napoleonic France.²³ Western policymakers are planning, prepping, and

20. Thomas Landers, *A New Path to Climate Justice: Adaptation Suits Against Private Entities*, 30 GEO. ENVTL. L. REV. 321, 326 (2018).

In light of recent investigations about what ExxonMobil may have known and not disclosed about climate change, CLF bills its lawsuit as an effort to “Expos[e] ExxonMobil’s Dangerous Campaign of Deceit and Denial.” More recently, driven in part by the same alleged deception, New York City sued five oil companies, including ExxonMobil, seeking compensation for the enormous costs of addressing the effects of climate change. Meanwhile, because the current President and Congress are determined to roll back U.S. climate regulations, the courts have become an increasingly important venue for achieving climate change solutions and remedies. On a more theoretical level, many law journal articles have discussed the mismatch between existing statutes, which strive to maintain an ecological status quo, and climate change, which is eroding that very notion. (internal citations omitted) *Id.*

See also Kirsten Engel & Jonathan Overpeck, *Adaptation and the Courtroom: Judging Climate Science*, 3 MICH. J. ENV’T & ADMIN. L. 1, 17 (2013); J. Brent Marshall, *Geoengineering: A Promising Weapon or an Unregulated Disaster in the Fight Against Climate Change?*, 33 J. LAND USE & ENV’T L. 183, 188 (2017); Raina Wagner, *Adapting Environmental Justice: In the Age of Climate Change, Environmental Justice Demands A Combined Adaptation-Mitigation Response*, 2 ARIZ. J. ENV’T L. & POL’Y 153, 163 (2011).

21. “While relying on GHG-based industries, the Global North exploited resources of the Global South and built a one-sided global economic architecture without sharing their technology, goods, or information to include the Global South in their success.” Madison Shaff, *International Law and Climate Displacement: Why A Climate Justice Approach Is Needed*, 52 TEX. ENV’T L.J. 59, 63 (2022).

22. John H. Langbein, *Cultural Chauvinism in Comparative Law*, 5 CARDOZO J. INT’L & COMP. L. 41, 48–49 (1997).

23. *Chauvinism*, BRITANNICA (last visited April 8, 2023), <https://www.britannica.com/topic/chauvinism>.

Another word that the French gave us is chauvinism. This word is derived from a French soldier, Nicolas Chauvin. Chauvin served in the French army under Napoleon, whom he came to idolize. Even after Napoleon’s final defeat at Waterloo in 1815 and his exile to St. Helena, Chauvin and many of his comrades remained devoted to Napoleon and the cult of military glory.

analyzing worse case scenarios when a number of geographic regions and spots are already facing dire climate upheaval.²⁴ Climate change adaptation is a luxury and manifestation of First World policies. Countries like Pakistan and Haiti are already experiencing climate catastrophe that is worsened by rich countries shutting their borders to those displaced by disasters.

In the following personal narratives, we share how we experienced climate chauvinism and recalled past climate disasters to inform the current situation. Having both grown up in Florida in the dangerous path of hurricanes and as women of color law professors, we draw upon our intersectional experiences.

A. *Nadia's personal account*

I rattled on about the military carbon emissions, the theory of coloniality, and racial capitalism at the ClassCrits Conference in Houston. I was speaking rapidly, reading passages from the article that I was reviewing. I made my points. I laid out my argument. The Q&A session was ending. It was the last panel of the day's conference. My flight was also leaving that day, so I wouldn't be attending the conference dinner. I was in my element, but out of my comfort zone. Pakistan was not top of mind in Texas.

I wanted to add in one more comment. And then it hit me. To speak about Pakistan. I was rough and raw, and I couldn't speak, because of the raw emotions. I could not collect myself even if I tried. When I wanted to

Chauvin's excessive patriotism become so well known that in 1831, it became the subject of a play, *La Cocarde Tricolore* by Charles T. and Jean Hippolyte Cogniard. In it, a character named Chauvin was so outrageously zealous in his hero worship of Napoleon and his insistence on the inherent superiority of all things French that his name became synonymous with excessive patriotism or nationalism.

Since its origin in the nineteenth century, the word has expanded its definition. It is no longer confined to patriotism or nationalism; it can now be used to mean "undue partiality to one's own group or kind" or "a prejudiced belief in the superiority of one's own group."

When the word is used in these extended senses, most authorities recommend the use of some qualifying word or words to demonstrate that the original meaning is not the intended one. A few examples are linguistic chauvinism, literary chauvinism, and, of course, the ever-unpopular male chauvinism.

24. Mia Hammersley, *The Right to A Healthy and Stable Climate: Fundamental or Unfounded?*, 7 ARIZ. J. ENV'T L. & POL'Y 117, 145 (2017). See also Philip Rathgeb, Martin Gruber-Risak, *Deserving Austrians First: The Impact of the Radical Right on the Austrian Welfare State*, 42 COMPAR. LAB. L. & POL'Y J. 43, 43-44 (2021); Andrew Kent, *The Jury and Empire: The Insular Cases and the Anti-Jury Movement in the Gilded Age and Progressive Era*, 91 S. CAL. L. REV. 375, 381-82 (2018).

mention my country of origin, I was swarmed with a flood of emotions that my normally composed self could not restrain. It was the first time it happened to me during an academic talk. Just three weeks earlier, my own state experienced a catastrophic storm. How do I describe the urgency of the situation?

To see my city flooded, wind debris shattering and uprooting lives, including my own. The semester where the tree fell on my house. If what was happening there in Pakistan was happening to me in Florida, I couldn't just rattle on about it. The Americans can send bombs, drones, and military aid to Pakistan until the cows come home, but only send meager international aid. Even President Biden referred to Pakistan as a dangerous country. Those who were most at threat of climate change were vilified. I felt as if Americans did not have the heart to care about Pakistan's disastrous monsoon floods.

U.S. climate leaders say that they can hear the cries of desperation from Pakistan, but they don't actually hear us. They don't care about us. Am I not allowed feelings, or emotions, and just have to carry on as if nothing has happened? How many fires can I put out? How do I explain the flooding in Pakistan when I felt everyone was looking at me like I was from Mars when I just said the word "Pakistan?"

B. Victoria's personal account

The first time I understood there was a difference in how people experienced climate disasters, I was ten years old. As a Miami baby, even at ten, I was used to hurricanes. But in the days before Hurricane Andrew, it was different. Everyone was scared.

The windows stood out the most. Those belonging to the richer houses were covered in hurricane shutters, the average-looking homes had windows covered in sheets of plywood, and the worst-looking, especially those I saw on my way to tennis practice every day, had windows draped in masking tape.

My childhood was spent playing tennis afterschool in the heart of Miami. It was my mother's way of sprinkling Black culture into an otherwise white-washed, private school education. When my best friend stopped coming to practice after the storm, I called her. Through tears, she told me her family had lost everything. The 174 mph winds had flattened her home, and her small Haitian family, consisting of her, her mother, and her older sister, were living in their car because the shelters were not safe for them. Eventually, they moved to Atlanta and I never saw her again.

I later learned she was one of more than 100,000 Miamians displaced by the storm.²⁵ Poor people suffered the most, but poor Black and brown women, particularly immigrants, suffered worst of all. Whether it was the inability to procedurally apply for available resources, avoiding government rescue workers for fear of deportation, living in neighborhoods without electricity or trash removal for months, or the increase in crimes against women both in and outside the domestic home, in those weeks after the storm these women suffered under policies and practices that simply did not account for them at all.²⁶

I have no idea what covered my friend's windows in the days before the storm. But if I were to guess, a poor family of Haitian Black women living in the path of a category 5 hurricane... neither masking tape, plywood, nor shutters could have saved them from what was to come.

C. *White Privilege*

According to medical researchers, the first cholera death was a twenty-eight year-old, mentally ill man from Mirebalais, Haiti.²⁷ His neighbors said he wandered the streets nude and liked to drink and bathe in the Latem River.²⁸ In Haiti, the Meye River feeds the Latem River. He could not have known that miles away, the UN peacekeepers' raw sewage had contaminated the Meye River.²⁹ The peacekeepers came to Haiti to aid in earthquake recovery and contracted cholera while on a previous mission in Nepal.³⁰ Twenty-four hours after he experienced his first choleric symptom, the young man from Mirebalais was dead.³¹ His death was followed by an additional 9,792 deaths and the infection of 820,000 more.³² It took six

25. Betty Morrow & Elaine Enarson, *Hurricane Andrew Through Women's Eyes: Issues and Recommendations*, 14 INT'L J. MASS EMERGENCIES & DISASTERS 5, 9 (1996).

26. *Id.* at 6-8, 11-12.

27. Louise C. Ivers & David A. Walton, *The "First" Case of Cholera in Haiti: Lessons for Global Health*, 86 AM. J. TROP. MED. HYG. 36-38 (2012).

28. *Id.* at 36.

29. Camila Domonoske, *U.N. Admits Role in Haiti Cholera Outbreak That Has Killed Thousands*, NAT'L PUB. RADIO (Aug. 18, 2016, 1:27 PM), <https://www.npr.org/sections/thetwo-way/2016/08/18/490468640/u-n-admits-role-in-haiti-cholera-outbreak-that-has-killed-thousands>.

30. *Id.*

31. Ivers & Walton, *supra* note 27, at 36.

32. Daniel H.F. Rubin et al., *Reemergence of Cholera in Haiti*, 387 N. ENG. J. MED. 2387, 2387-89 (2022) ("Cholera was absent from Haiti until an inadvertent introduction by United Nations security forces in October 2010. The ensuing epidemic sickened 820,000 people and caused 9,792 reported deaths.").

years for the UN to admit that its peacekeepers caused the Haitian cholera outbreak.³³

When the Institute for Justice and Democracy in Haiti sued the UN for the loss and damage incurred by the Haitian people, it lost.³⁴ Represented by the United States, the UN asserted immunity from suit and refused to address the requests to install a national water and sanitation system on the island, make reparation payments to cholera victims and their families, and a public apology.³⁵

Cholera remained on the island for nine years, until the last reported case in January, 2019.³⁶ Then in October 2022, a cholera outbreak ensued again, and by December, it infected 13,672 Haitian people and killed 283.³⁷ Scientists concluded that the strain likely descended from the *Vibrio cholerae* strain that caused the 2010 epidemic.³⁸

Twenty-three years later, now that the world can see the loss and damage, the disease, death, and suffering that came at the hands of the UN in the days following the worst earthquake the country had seen, why is the UN not required to pay for the damage to the Haitian people?

And in all this, what of the women's experience? During the recovery period, the needs of Haitian women were overlooked, particularly in the reporting done by white women. In the UN's self-applauding Haitian case study of the contribution of women to the humanitarian response after the earthquake, the report noted, "while rates of 'transactional' sex increased, there was no evidence of an increase in sexual violence as such."³⁹

But according to MADRE, a nonprofit working with organizations in Port-au-Prince seeking justice for women in Haiti, in its statement submitted to the UN Human Rights Council in May 2010, a delegation of U.S. lawyers and women's health specialists concluded that rapes in the camps were dramatically underreported, and the majority of women they interviewed were raped by two or more individuals.⁴⁰

33. Jonathan M. Katz, *U.N. Admits Role in Cholera Epidemic in Haiti*, N.Y. TIMES (Aug. 17, 2016), <https://www.nytimes.com/2016/08/18/world/americas/united-nations-haiti-cholera.html>.

34. See *Georges v. United Nations*, 834 F.3d 88, 98 (2d Cir. 2016) (affirming judgment of lower court for lack of subject matter jurisdiction).

35. Domonoske, *supra* note 29.

36. Rubin et al., *supra* note 32.

37. *Disease Outbreak News; Cholera – Haiti*, WORLD HEALTH ORG. (Dec. 13, 2022), <https://www.who.int/emergencies/disease-outbreak-news/item/2022-DON427>.

38. Rubin et al., *supra* note 32.

39. Irina Mosel, *Evaluation of UN Women's Contribution to Increasing Women's Leadership and Participation in Peace and Security and Humanitarian Response*, OVERSEAS DEV. INST. 119, 129 (2013), <http://cdn-odi-production.s3.amazonaws.com/media/documents/8967.pdf>.

40. MADRE, *Post-Earthquake Violence Against Women in Haiti: Failure to Prevent, Protect and Punish*, RELIEFWEB (May 18, 2010), <https://reliefweb.int/report/haiti/post->

Residents of the Global South disproportionately bear a greater burden of climate change, and the women of the Global South remain the greatest of these burden carriers; yet, even in activism, their cries are continuously ignored. “Toxic colonialism” is a phrase coined by Jim Puckett of Greenpeace to refer to the “dumping of the industrial wastes of the West on territories of the Third World.”⁴¹ The risk of this transboundary movement of hazardous waste to Third World countries has deleterious effects to its Black and brown residents,⁴² particularly since these developing nations rarely have adequate technology or infrastructure to properly dispose of the toxic waste.⁴³ Waste employees lack proper protective gear and inadequate structural protections to prevent leakage of toxic waste to the water, soil, or crops.⁴⁴

As one of the largest global hazardous waste generators, the U.S. is a significant contributor to the transboundary movement of toxic waste.⁴⁵ Between 2020 and 2021, the U.S. exported 200,000 tons of plastic to Latin America and the Caribbean making it the largest exporter of this type of waste in the region.⁴⁶ The top exporters of waste as of 2021 were Japan, the U.S., the Netherlands, and Germany, and the top recipients of waste were Malaysia, Indonesia, India, and Thailand.⁴⁷ It remains, however, the women, who carry the greater burden of a life inhaling the fumes of toxic waste disposal.

earthquake-violence-against-women-haiti-failure-prevent-protect-and-punish (“From January 13-March 21, KOFAVIV tracked 230 incidents of rape in 15 camps in Port-au-Prince. There are over 500 camps in the capital. Medecins Sans Frontiers reported 68 cases of rape in the month of April at one of their clinics in Port-au-Prince.”).

41. Laura A. W. Pratt, *Decreasing Dirty Dumping? A Reevaluation of Toxic Waste Colonialism and the Global Management of Transboundary Hazardous Waste*, 35 WM. & MARY ENV'T L. & POL'Y REV. 581, 587 (2011) (quoting Tam Dalyell, *Thistle Diary: Toxic Wastes and Other Ethical Issues*, NEW SCIENTIST, July 4, 1992, <https://www.newscientist.com/article/mg13518285-900-thistle-diary-toxic-wastes-and-other-ethical-issues-comment-from-westminster-by-tam-dalyell/>).

42. See Pratt, *supra* note 41, at 587.

43. *Id.*

44. Alexia Dreau, *Why is the Global Waste Crisis a Social Justice Issue?*, ZERO WASTE EUR. (Feb. 18, 2022), <https://zerowasteurope.eu/2022/02/why-is-the-global-waste-crisis-a-social-justice-issue/>.

45. Pratt, *supra* note 41, at 610.

46. María Fernanda Ramírez Ramos, *From “Backyard” to “Dumpster”*: This is How the US is Using Latin America as its Dumping Ground, LATIN AM. POST (Oct. 12, 2022), <https://latinamericanpost.com/42329-from-backyard-to-dumpster-this-is-how-the-us-is-using-latin-america-as-its-dumping-ground>.

47. *Id.*

III. “HOLD ME DOWN”

Poisoned women give birth to poisoned children. “Recent body burden analysis has shown that [toxic] chemicals do get passed onto children during pregnancy.”⁴⁸ Women of the Third World whose countries suffer from pollution due to chemicals emitted from toxic waste experience “reproductive, developmental, immunological, hormonal, and carcinogenic effects...”⁴⁹ But if developed nations are continually allowed to turn a blind eye once the trash leaves their shores, and bear no fiscal or ethical responsibility to facilitate its proper disposal, the burden of toxic colonialism on the women of the Global South will impact generations.

Within America’s boundaries, environmental racism manifests itself in the forms of government-driven placements of factories and waste sites in communities of color through zoning and land use regulations, as well as race-based resource-allocation that causes infrastructures in Black and brown neighborhoods to crumble under the pressures of climate change.

It’s five times more likely for a Black child to have lead poisoning from proximity to a waste site than a white child. Even wealthy Black families are more likely to live next to a waste site than low-income white families. Black Americans are exposed to 56% more pollution than they produce. Latinx Americans are exposed to 63% more pollution than they produce, and white Americans are exposed to 17% less pollution than they produce. Native Americans are also suffering constant environmental injustices.⁵⁰

A. *Cancer Alley*

Consider the story of Sharon Lavigne, a Black woman from St. James Parish, Louisiana.⁵¹ Specifically, she resides within the eighty-five-mile stretch from New Orleans to Baton Rouge along the Mississippi River, dubbed “Cancer Alley” or “Chemical Corridor,” because it contains the

48. *Women Disproportionately Vulnerable to Health Risks from Chemical and Waste Pollution*, BASEL, ROTTERDAM, STOCKHOLM CONVENTION (Mar. 1, 2019), <http://www.brsmeas.org/?tabid=7965> (“Due to a combination of socio-economic, cultural, and physiological factors, women and girls are disproportionately vulnerable to the harmful impact of pollution from chemicals and waste.”).

49. *Id.*

50. Sam Davis with Amber Skinner, *Environmental Racism in the United States*, DOGWOOD ALLIANCE (Jan. 3, 2022), <https://www.dogwoodalliance.org/2022/01/environmental-racism-in-the-united-states/>.

51. Nina Lakhani, *Cancer Alley Campaigner Wins Goldman Prize for Environmental Defenders*, THE GUARDIAN, (June 15, 2021, 3:30 EDT), <https://www.theguardian.com/us-news/2021/jun/15/sharon-lavigne-goldman-prize-cancer-alley-campaigner>.

largest cluster of cancer cases in the United States.⁵² The Lung Cancer Center reported that fifty different toxic chemicals pollute the air along this stretch of land.⁵³ The corridor is ninety percent Black, low-income residents.

In 2018, when St. James Parish's majority-white council re-zoned yet another predominately Black residential area for industrial use two miles from Ms. Lavigne's home to accommodate a \$1.25 billion dollar Chinese-owned plastics plant, Ms. Lavigne led the resistance.⁵⁴ With the Tulane environmental law clinic and through her faith-based environmental justice organization, Rise St. James, she mounted such an opposition that the company withdrew its land use application.⁵⁵

Ms. Lavigne's efforts were immeasurable, but it will take more than a brave Black grandmother to remove approximately 200 and growing petrochemical plants, pipelines, and oil depots currently operating in the corridor.⁵⁶ Most know the story of Cancer Alley; yet no one has ever taken legal or fiscal responsibility. Michael Regan, an Environmental Protection Agency ("EPA") administrator, embarked on a "Journey to Justice" tour speaking to Cancer Alley residents, and on January 26, 2022, he announced his plan to conduct unannounced inspections of the plants along Cancer Alley.⁵⁷ Regan noted that the EPA also purchased \$600,000 of mobile air pollution monitoring equipment.⁵⁸

Of recent note, the EPA sent a Letter of Concern dated October 12, 2022, to the Louisiana Department of Environmental Quality and the Louisiana Department of Health for the disparate adverse impact of Black residents living the "Industrial Corridor" experience.⁵⁹ The EPA alleges discrimination and that the strategic placement of the factories and failure

52. Megan O'Leary, *Lung Cancer in Louisiana's Cancer Alley*, LUNG CANCER CTR. (Feb. 10, 2022), <https://www.lungcancercenter.com/news/cancer-alley-louisiana/>; *see also* Lakhani, *supra* note 51.

53. O'Leary, *supra* note 52.

54. Lakhani, *supra* note 51.

55. *Id.*

56. O'Leary, *supra* note 52.

57. *Id.*

58. *Id.*

59. Letter from U.S. Env't Prot. Agency, Off. of Env't Just. & External Civ. Rts., to Dr. Chuck Carr Brown, Sec'y, Louisiana Dep't of Env't Quality and Dr. Courtney N. Phillips, Sec'y, Louisiana Dep't of Health (Oct. 12, 2022), <https://www.epa.gov/system/files/documents/2022-10/2022%2010%2012%20Final%20Letter%20LDEQ%20LDH%2001R-22-R6%2C%2002R-22-R6%2C%2004R-22-R6.pdf>. [hereinafter EPA Letter].

to adequately warn residents of air toxicity violates their civil rights.⁶⁰ Yet, even in this Letter of Concern, neither liability nor compensation is mentioned as a possible remedy.

These American stories are interminable. In 2008, 1,000,000,000 gallons of coal ash were dumped in the Emory River in Kingston, Tennessee, a city where ninety percent of its residents are white. The EPA labeled the ash as hazardous and authorized the Tennessee Valley Authority to transport the coal ash waste to Uniontown, Alabama, a city where ninety percent of its residents are Black.⁶¹ The Tennessee Valley Authority subsequently reclassified the waste as non-hazardous.⁶² The waste remains in Uniontown to this day.⁶³

And for the record, as of the writing of this Article, the Black residents of Jackson, Mississippi, still do not have clean drinking water.⁶⁴ Although the crisis was directly caused by Mississippi's main water facility failing due to unprecedented flooding in September 2022, the failure originates from the neglect of white-led governments to invest any of the billions of federal dollars the state has received in the water infrastructure of a majority Black city.⁶⁵

B. *Loss & Damage*

Racial capitalism leads to environmental injustice which is resolved only through money and resource allocation that both eliminate the threat and compensate victims for the damage and loss. Victims must be restored “insofar as possible (and desirable) to their pre-impact physical and emotional status.”⁶⁶

60. Jennifer Hijazi, *EPA Finds Evidence of Disparate Impacts in ‘Cancer Alley’ (1)*, BLOOMBERG L. (Oct. 13, 2022, 1:44 PM), https://news.bloomberglaw.com/environment-and-energy/epa-finds-evidence-of-disparate-health-impacts-in-cancer-alley_

61. See Davis, *supra* note 50.

62. *Id.*

63. *Id.*

64. Dr. Mel Michelle Lewis, *Climate and Environmental Injustice: Thousands Without Water in Jackson, Mississippi*, AM. RIVERS (Sept. 2, 2022), https://www.americanrivers.org/2022/09/climate-and-environmental-injustice-thousands-without-water-in-jackson-mississippi/?gclid=Cj0KCQiA1sucBhDgARIsAFoytUt1u9iiRQCMjIYu9UEHRD_EvKCCvrdr16A3W2nOIXMDSt58r19zpXsaAuizEALw_wcB.

65. *Id.*

66. Manuel Rafael Alba, *Natural Disaster and Household Recovery in the Aftermath of Hurricane Andrew: A Case Study of Four Hispanic Households in South Miami Heights*, FIU ELEC. THESES & DISSERTATION (July 14, 1995), <https://digitalcommons.fiu.edu/cgi/viewcontent.cgi?article=2369&context=etd> (citing Anthony

Until the major contributors to global warming assent to this form of recovery, a critical mass of climate change victims is accumulating. Over the next ten years, it is likely most of us will become what Lerner dubbed, accidental activists, residents of sacrifice zones—the most polluted and poisoned places, fighting to ensure that those who cause global warming allocate sufficient resources to those who suffer from global warming.⁶⁷

Liability avoidance is a global theme. The Paris Agreement expressly excludes the right of victims to seek compensation or sue for liability.⁶⁸ Even in America today, there has yet to be a clear win in environmental justice cases. In the landmark case *Bean v. Southwest Waste Management Corp.*, and a string of subsequent cases, plaintiffs lost despite apparent, targeted, environmental racism for failure to prove an intent to discriminate or because the courts found no private right of action for victims to enforce federal regulations.⁶⁹ In both the international and nation-wide contexts, there exists a shroud which serves to cover and protect those countries, corporations and local governments that need it the least.

Laura Pulido argues environmental racism cannot capture the full scope of what is happening to Black and brown people as a result of climate change. She complained that the term “environmental racism” has been conveniently limited by courts to require a demonstration of clear malice and hostility, a burden that, absent a whistleblower, is hard to irrefutably prove.⁷⁰ Environmental racism therefore fails to capture the structural and hegemonic forms of racism that contribute to racial inequality. She opts

F.C. Wallace, *TORNADO IN WORCESTER: AN EXPLORATORY STUDY OF INDIVIDUAL AND COMMUNITY BEHAVIOR IN AN EXTREME SITUATION* 392 (National Academy of Sciences 1956)).

67. Robert D. Bullard, *Steve Lerner's Sacrifice Zones: The Front Lines of Toxic Chemical Exposure in the United States*, 119 *ENV'T HEALTH PERSP.* 6 (June 2011) (book review), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3114843/pdf/ehp-119-a266a.pdf>.

68. Paris Agreement to the United Nations Framework Convention on Climate Change art. 8, Dec. 12, 2015, T.I.A.S. No 16-1104, <https://www.state.gov/wp-content/uploads/2021/05/16-1104-Environment-and-Conservation-Multilateral-Paris-Agreement.pdf>.

69. See *Bean v. Sw. Waste Mgmt. Corp.*, 482 F. Supp. 673 (S.D. Tex. 1979); see also *R.I.S.E., Inc. v. Kay*, 768 F. Supp. 1144, 1149 (E.D. Va. 1991) (Black Baptist church sued county for a landfill placement and lost for failure to prove discriminatory intent, despite court's acknowledgement that Blacks in King and Queen County had been disproportionately impacted by landfill placements since 1969); see also *James Emory, Inc. v. Twiggs Cnty.*, 883 F. Supp. 1546 (M.D. Ga. 1995); See *Alexander v. Sandoval*, 532 U.S. 275, 294 (2001) (finding that, despite evidence of disparate impact, Title VI of the Civil Rights Act of 1964 does not include a private right of action).

70. Laura Pulido, *Rethinking Environmental Racism: White Privilege and Urban Development in Southern California*, 90 *ANNALS OF THE ASS'N OF AM. GEOGRAPHERS* 1, 13 (Mar. 2000).

instead to broaden the label by recapturing environmental racism as simply, “white privilege.”⁷¹

“A focus on white privilege enables us to develop a more structural, less conscious, and more deeply historicized understanding of racism. It differs from a hostile, individual, discriminatory act, in that it refers to the privileges and benefits that accrue to white people by virtue of their whiteness.”⁷²

Legally, it is difficult to prove UN peacekeepers were allowed into Haiti with cholera because they hate Haitians or wanted to harm them. However criminally negligent their behavior may have been. But, white privilege does explain why the UN is not liable for the outbreak.

White privilege explains how the EPA not only acknowledges Cancer Alley is killing Black people specifically, but the local governments seem to be targeting Black neighborhoods; and yet do not hold a single parish liable nor require a single factory to provide substantive remuneration to restore the residents of this poisonous corridor. While it may be difficult to prove the corridor exists because local governments do not care about the health of its Black residents, white privilege explains their protection, at the expense of Black lives.

This point is why the loss and damage fund conceptually created and agreed to at the global climate summit COP27 came as such a shock. By all accounts, the results of the 2022 UN convention on climate change were minimal, until developing countries unified in an unprecedented way to lobby for environmental justice. Marshaled by Pakistan, a country where millions are still missing after severe flooding, which “contributes 0.8% of the global carbon footprint,” these nations corralled 200 countries, including the U.S., to agree to a loss and damage fund.⁷³ The idea is that smaller countries that cannot simply “avoid or adapt” to climate change-induced disasters are compensated for the damage those disasters cause by the countries who are responsible for the lion’s share of environmental abuse.⁷⁴

The agreement is notable because in many respects the sheer creation of the fund is a tacit admission of the reality of climate change and the perpetrators of it. But is it enough?⁷⁵ Can it address the complexities of the

71. *Id.*

72. *Id.*

73. Martina Ijini, *What is ‘Loss and Damage’ Compensation?* EARTH.ORG (Nov. 7, 2022), <https://earth.org/loss-and-damage/>.

74. *Id.*

75. Saleemul Huq & Roger-Mark De Souza, *Not Fully Lost and Damaged: How Loss and Damage Fared in the Paris Agreement*, Wilson Ctr. (Dec. 22, 2015), <https://www.wilsoncenter.org/article/not-fully-lost-and-damaged-how-loss-and-damage->

damage caused by environmental racism, particularly when its greatest impact is on those at the intersection of race, gender, and class? While international bodies, including UNFCCC, have recognized loss and damage as distinct from adaptation because of harms that have already occurred.⁷⁶ The impacts of climate change are severe and profound.⁷⁷

CONCLUSION

In America, like the globe, Black and brown women are at the forefront of environmental activism;⁷⁸ yet, they are not represented in climate policy-making, despite bearing the greater burden.⁷⁹ The UN estimates women represent eighty percent of people displaced by climate change.⁸⁰ Notwithstanding, out of the 110 leaders at COP27, only seven of them were women.⁸¹ According to the Women's Environment and Development Organisation, COP27 had the lowest concentration of women leaders since 2015.⁸²

The transformational change Zakaria calls for in the global feminist movement—a change that shares power with women of color, does not

fares-the-paris-agreement; and Bonnie Smith, *Adapting the Paris Agreement*, 4/18/2016 GEO. ENV'T L. REV. ONLINE 1, 1 (2016).

76. Jacob Wise, *Climate Change Loss and Damage Litigation: Infeasible or A Useful Shadow?*, 38 WIS. INT'L L.J. 687, 700 (2021). See also Cinnamon P. Carlame, *From Covid-19 to Climate Change: Disaster & Inequality at the Crossroads*, 12 SAN DIEGO J. CLIMATE & ENERGY L. 19, 21 (2021): "In contrast to the acute harms of natural disasters and pandemics, the violence and disruption of climate change threatens to engulf us storm by storm, fire by fire, inch by inch of sea level rise before we can even agree that it is a disaster worth trying to avoid, minimize, or prepare for." *Id.*

77. Myanna Dellinger, *Rethinking Force Majeure in Public International Law*, 37 PACE L. REV. 455, 463 (2017): "Time has now come to rethink the ability of nation states, as well as private parties, to avoid financial liability based on weather events that were once successfully argued to be unpreventable and unforeseeable by the parties. "Extreme" weather events are no longer so; they are becoming the order of the day. '[L]aw is itself a human construct.' Excuse doctrines based on unwarranted perceptions that we have not and cannot affect the weather must be reconstructed to reflect modern on-the-ground reality. The law is often considered to adapt too slowly to the realities of modern life, such as in the technical areas and, here, the scientific and meteorological. At the same time, the general public is losing faith in the judiciary's ability to progressively solve some of today's most urgent societal problems." (Internal citations omitted) *Id.*

78. Bullard, *supra* note 67.

79. Jessica Kutz, *Representation, Protection, Restitution: Women Lay Out Key Demands at COP27 Climate Summit*, THE 19TH (Nov. 15, 2022, 1:10 PM PST), <https://19thnews.org/2022/11/women-cop27-climate-environment-demands/>.

80. Esme Stallard, *COP27: Lack of Women at Negotiations Raises Concerns*, BBC NEWS (Nov. 16, 2022), <https://www.bbc.com/news/science-environment-63636435>.

81. *Id.*

82. *Id.*

white-wash women's experiences, nor presume solutions that neither consider nor consult Black and brown women—is the same transformational change required in this global fight for environmental justice. Our very lives depend on the ability of the collective to find creative, impactful, and feasible solutions that halt our extinction. However, the sustainability of even the best of these solutions is impractical without the contributions of the indigenous women to whom our history belongs.

DETERMINING DEVELOPMENT: THE IMPACT OF WHITE FEMINISM ON WOMEN OF COLOR

Syeda ShahBano Ijaz*

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“Against White Feminism” has been called a “counter-manifesto” and a “call to arms,” but most importantly, it is a propulsive synthesis of how American feminism fails women of color—propulsive because by succinctly capturing all those dimensions in one place, Zakaria has created the force needed for the discourse on feminism to move forward, and in some ways, to move beyond its current “whiteness.”

This essay will elaborate upon the consequences of white feminism for marginalized women of the south. I attempt to highlight how the objectives of white feminism—identified as “shared power over systems with men”¹—reinforce the obstacles of patriarchy for women of color. Instead of creating inclusive institutional solutions, white feminism privileges women of one dominant culture, situating them as the new norm that every other woman must navigate. The dangers of white feminism play out on two parallel stages: first, women of color situated in the west must conceal cultural diversity to lay claims to any feminist policy. Second, the

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1. KOA BECK, WHITE FEMINISM: FROM THE SUFFRAGETTES TO INFLUENCERS AND WHO THEY LEAVE BEHIND 12 (2021).

trajectories through which women of the global south can attain development are determined by the tenets of white feminism. From determining which women “really need saving,”² to what development policies will help save them, the narratives of marginalized women are written by proclaimed white feminists even as the agencies of marginalized women are written off.

I. MULTICULTURALISM AND FEMINISM: FAILING AT WHITE FEMINISM IN AMERICA

The debate on whether feminism can accommodate multiculturalism is not new. In “Is multiculturalism bad for women?,”³ Okin stresses the importance of individual human rights over special group rights. She argues that minority groups cannot claim exceptions to women’s rights based on cultural differences. To draw out the tension between feminism and cultural diversity,⁴ Okin cites polygamy as an example of a practice shielded from criticism under the guise of a cultural norm. This is to show that minority cultural norms can be oppressive towards women when men have more power within these cultures. Feminists should not, therefore, create excuses for the brutalization of women in minority cultures. Instead, she urges liberals to understand that within-group gender hierarchies can disadvantage minority women and that the job of western liberals is to guarantee them the same set of rights as white women. She, therefore, creates a justification for assimilation based on the progress that white feminists have made: progress that need not nuance itself to create room for cultural diversity.

Yet, this spiel in favor of assimilation fails to account for the privilege, the whiteness, and the implicit biases of the author herself. Several responses to Okin’s essay point to her choice of examples in speaking of patriarchal minority cultures. Politt questions why violence against women in some cultures is considered to emanate from rigid religious or cultural rites, while violence against women in the west is seen as corrigible.⁵ Politt suggests “that is partly because of multiculturalism’s connections to Third Worldism, and the appeals Third Worldism makes to white liberal guilt, and partly because Americans understand that Russia and Italy are dynamic

2. Lila Abu-Lughod, *Do Muslim Women Really Need Saving? Anthropological Reflections on Cultural Relativism and its Others*, AM. ANTHROPOLOGIST 104(3), 783 (2002).

3. Susan Okin, *Is Multiculturalism Bad for Women*, in IS MULTICULTURALISM BAD FOR WOMEN 7, 7-24 (Joshua Cohen et al. eds., 1999).

4. *Id.*

5. Katha Pollitt, *Whose Culture?*, in IS MULTICULTURALISM BAD FOR WOMEN 27, 27-30 (Joshua Cohen et al. eds., 1999).

societies in which change is constant and cultures clash.”⁶ Whiteness, therefore, drives the bias in identifying the cultures that feminism might need to accommodate. It then imposes stereotypes on those cultures to incorrectly assume that certain patriarchal norms are unchanging and, in doing so, strips the agency of minority women who have been fighting against these norms from within.

In the chapter of “Is Solidarity a Lie?,” Zakaria fleshes out the role that minority women are expected to play in white feminism.⁷ “We are expected to be tellers of sad stories, where we detail how our particularly brutal men, our inherently flawed culture, our singularly draconian religion (but never the actions or inactions of white people) have caused us indescribable pain.”⁸ These women are not expected to know what they want or how to mount a fight against the patriarchy on their own. Instead, they serve as trophies that white saviors can amass as mementos of their feminist efforts.

Casting women from non-white cultures as women who need saving effectively silences them. No one is listening to minority women when they seek safeguards that could help them succeed within their own cultural frameworks. This is true, both in how women of color are treated in the west, and how they are purportedly “saved” in their homes. Policies are drafted for the betterment of women that ascribe to the dominant white culture, including nuclear families, the absence of multigenerational households, and a stoic resistance against the gendering of household chores. To want to succeed despite these circumstances is seen as a betrayal of feminism’s core ideals. In short, women who want a share of the advances of feminism should first prove their “whiteness.” What white feminism overlooks is that instead of rescuing women of color, stipulating whiteness worsens their burden. They are now tasked with the dual charge of tackling structural hurdles and concurrently proving their commitment to white feminism.

Early on, Zakaria writes, “you do not have to be white to be a white feminist,” rather than a white feminist is someone who “refuses to consider the role that whiteness and racial privilege play in universalizing white feminist concerns, agendas, and beliefs as being those of all feminism and all feminists.”⁹ Any idea, behavior, or policy that—in the name of feminism, professing to better the situation of a woman or a group of women—ends up upholding a social structure that favors white women

6. *Id.* at 28-29.

7. RAFIA ZAKARIA, AGAINST WHITE FEMINISM: NOTES ON DISRUPTION 34-55 (2021).

8. *Id.* at 55.

9. *Id.* at 3.

over other women is a manifestation of white feminism. In other words, the normative ideal—the aspirational equality that all women are struggling for—is defined by the white woman. If white women are sex-positive, choose to procreate later in life or not at all, wear pantsuits to work, and let their hair down, then progress for other women is measured by their ability to appropriate this reality for themselves. Effectively, white feminism replaces—for white feminists—the ethnocentric ideal of a white man with the equally ethnocentric ideal of a white woman.

The violence that this new ideal unleashes against women of color often comes from people who self-profess to be feminists. This violence happens in schools, the corporate workplace, and academia. This violence happened to me: a publicly Muslim immigrant and woman of color who became a mother during the early years of graduate school. Like Zakaria, I often dressed in bright colors—going against not only the white feminist aesthetic but also the NYC aesthetic—and was quick to share domestic troubles with my graduate school advisors. This was a cultural misstep. In white culture, academic advisors are only interested in metrics of professional success and envision the same conversations with their female students as they do with their male students. Successful women aren't the ones who give birth and own it, they are the ones who either choose not to give birth or on the rare occasion that they do, try to hide it. Successful women shield their advisors from their immigrant worries and pretend to be white (and anchored in the country); they emulate the lifestyle choices of their advisors. At one point, one of my advisors asked me why my work was slow even though it had been a while since I had given birth. Instead of recognizing birthing as purely feminine labor, she wanted to equate it to a medical problem a white man would face and overcome. I had to overcome my motherhood, my race, and my religion to be successful. The unfortunate part is that these people—who committed violence against me by letting their expectations of whiteness gatekeep me from academia—professed to be feminists. They taught courses on affirmative action and engaged in feminist conversations. They drowned their liberal guilt by sectioning out their feminism to only that subset of “white enough” women who deserved it. To me, they advised ways to shed my identity or to understand that owning it would mean divorcing academia. One of my colleague's unsolicited advice touched on this explicitly when he wrote, “this is a tough moment, and for young women and especially mothers the tradeoffs are brutal. You can be successful in this program but it probably requires a restructuring of your life, such that you have a lot more time for school.” While I do not question my colleagues's commitment to liberal (white) feminism, they place the burden of change squarely on my shoulders. The

school and the program are not tasked with changing their structural inequities to help a woman in my situation succeed; in fact, the structural flaws are not even acknowledged. Yet, I, by being a woman and a mother, have now situated myself to face “brutal” tradeoffs and must choose. This incident exemplifies what whiteness does to feminists: it effectively blinds them to their acts of dispossessing women of opportunities, because those opportunities exist only for those who can adequately assimilate.

Whiteness then encapsulates the tension between assimilationism and multiculturalism that Okin foregrounds in her book.¹⁰ My advisors could ask why you expect to succeed if you are willing to bear the inequities that your culture mounts against women. But who gets to define what is an inequity, or an act of resistance? And how are you choosing to understand my culture? What are your sources?

II. WHO PUT YOU IN CHARGE OF DEVELOPING ME? WOMEN IN THE GLOBAL SOUTH AND THE WHITENESS OF DEVELOPMENT POLICY

The implicit biases of white feminism also have an impact on the conceptualization of and contributions to the development of women in the global south. Starting from funding allocations to the choice of projects, going all the way to the monitoring and evaluation, development policy is riddled with racism. It continues to center whiteness in the practice of foreign policy, with white experts choosing to make decisions on behalf of marginalized women. White women have historically participated in colonial agendas, and continue to do so in the contemporary strategizing of developing the third world. They extend their “whiteness” to foreign policy: “from a postcolonial feminist view whiteness may be treated as an assumption that several white women make that they have the knowledge and obligation to be ready to jump to the aid of ‘Other’ women (whether Other women need it or want it or not).”¹¹ Let us focus on the two aspects of this “whiteness”: knowledge and obligation.

The unquestioned assumption that experts in the west have better knowledge of development strategies has guided the trajectory of how developmental foreign policy unfolds in the global south. This racialized hierarchy of knowledge cannot be addressed simply by diversifying the faces of development agencies around the world. Take the example of the Benazir Income Support Program (BISP) in Pakistan, an unconditional cash

10. See Susan Okin, *Is Multiculturalism Bad for Women*, in *IS MULTICULTURALISM BAD FOR WOMEN* 7, 7-24 (Joshua Cohen et al. eds., 1999).

11. Jawad Syed & Faiza Ali, *The White Woman's Burden*, in *32 THIRD WORLD QUARTERLY* 349, 350-51 (2011).

grant program targeted toward women. The program seeks to empower women by providing them with a quarterly cash payment that amounts to almost \$9 per month; this is a substantial amount in a country where the poverty line is about \$13 per month. This program was launched against the backdrop of the microfinance revolution and a “ghost statistic” that women spend almost ninety percent of their income on their children, as compared to men spending only thirty to forty percent.¹² While this statistic has never been verified, Moeller warns that “even when quantitative data are valid, they often produce very limited understandings of the complex realities of girls and women’s lives and the conditions that produce poverty and inequality.”¹³ Most of this research relies on statistical methods that have poor external validity and are often contextually specific; yet, development agencies are quick to cite studies housed at large universities as they draw up plans to meet their obligations. The big data revolution also disadvantages the implementation of these programs by imposing the need for continued monitoring and evaluation. Again, taking the example of BISP, the payments are disbursed using a biometric verification system which allows the program to collect regular data on how well the program is functioning and how any corruption-related leakages are. This data determines future tranches of aid for the program and incentivizes the take-up of technology that prioritizes the placement of multiple points of data collection, but also introduces myriad last-mile gaps. In my dissertation research, I show that households receiving BISP are more likely to demand last-mile services to address problems of access introduced by donors’ need to be data-driven and corruption-free. Both these concerns ignore realities on the ground and attempt to, as Zakaria writes, depoliticize poverty in the global south. Underdevelopment is not something that can be magically “fixed” by the knowledge and the money generated in the west: particularly not by shifting its development on brown and indigenous women of color who are more suited as the subjects of development than its drivers.¹⁴

But “whiteness” is not just about the knowledge that steers development; it is also about the obligation. It defines the “white women’s burden” and their continued blindness to the racialized hierarchy that maligns their efforts to address their own liberal guilt. Recently, I came to know of an organization, “Open Philanthropy,” a research and grantmaking

12. Kathryn Moeller, *The Ghost Statistic that Haunts Women’s Empowerment*, THE NEW YORKER 1, Jan. 4, 2019, <https://www.newyorker.com/science/elements/the-ghost-statistic-that-haunts-womens-empowerment>.

13. *Id.*

14. Rafia Zakaria, *What Makes Foreign Policy “Feminist”?*, THE BAFFLER, Mar. 28, 2022, <https://thebaffler.com/latest/against-german-feminism-zakaria>.

non-profit institution in the U.S. This organization is part of a larger group of such likeminded organizations, including GiveWell and Good Ventures. I was introduced to Open Philanthropy through my graduate school; they recently hired several newly minted PhDs in Political Science, citing their commitment to effective altruism (i.e., generosity based on substantive empirical research). This is again a nod to big data and the ability to signal transparency and rigor. Even though I'm a quantitative social scientist, I worry about how empirical research is defined. The credibility of empirical research is often couched in how statistically sophisticated it is, which already excludes many areas of giving where data collection is difficult or cannot produce savvy graphics. But moving beyond this knowledge aspect, it is interesting to note that Open Philanthropy was founded by two white billionaires, Dustin Moskovitz and Cari Tuna. Inspired by Singer's *The Life You Can Save* (2009), they joined a club of rich Americans committed to channeling their obligations through evidence-based giving by signing Bill Gates' and Warren Buffet's Giving Pledge. It is not objectionable that a set of white liberals have chosen to address their obligations, but they do so through organizations they create, direct and monitor closely based on their principles of what does or does not count as "effective altruism."

Zakaria elaborates on why the need to be a helicopter philanthropist via foreign development policy is problematic: "to be clear, it is not that FGM (Female Genital Mutilation) is not a cruel practice—it is the fact that white feminists in Germany are deciding which issues are central to women's empowerment in heavily Muslim countries like Mauritania and Burkina Faso."¹⁵

III. RECOGNIZING AGENCY AND MAKING ROOM FOR DIFFERENCE: MARCHING IN STEP FOR FEMINISM, NOT JUST WHITE FEMINISM

In feminism, the notion of effectiveness without inclusivity is flawed. If effective development is dictated by where agencies get the most bang for the buck, then they will gravitate towards disproportionately placing the burden of development on women since it is easier to show an impact when you choose to help the very destitute. On the other hand, if effectiveness is grounded in empirical research, only programs that have instituted data collection processes such as BISP will receive foreign aid flows. Research itself is closely shaped by the notion of effectiveness: it is cheaper to do a large-n survey in some areas that already have well-established survey companies than in difficult-to-reach populations. The big data revolution is

15. *Id.*

partially responsible for the move towards developing countries: while graduate students could do a field experiment in the global south, they were usually unable to afford one in Europe or North America. This, paired with the path dependency of research, can lead to skewed priorities for development. For example, Punjab is the most heavily studied region of Pakistan because of the prevalence of survey companies and research think tanks, all part of a broader research infrastructure that was established by early Pakistani-American academics, most of whom hailed from the country's affluent region of Punjab. This has only served to cement inequities, rather than address them, through development.

Recently, Open Philanthropy circulated an open prompt, winning responses to which could win up to \$25,000. The prompt asked, “[w]hat new cause area should Open Philanthropy consider funding?” When I received this prompt, I knew that I could most convincingly justify increased funding to BISP because: a) data on its transparency and effectiveness vis-à-vis selected metrics of women development exists and b) because I could propose to conduct a new survey with BISP recipients *in Punjab* to better understand how the increases in money could be used. Even I, a brown immigrant academic, had to cave into some existing structural inequities, which continue to inform how development can unfold. But for Open Philanthropy, this prompt, its circulation amongst elite U.S. graduate schools and its evidence-based responses manifest its core “whiteness.”

The most compelling way to move from white feminism to inclusive feminism is to recognize women as agents, across different cultures and different contexts. Whether it is recipients of foreign aid, or the expats involved in foreign policy making, there needs to be cultivated a renewed accommodation for cultural diversity. As Zakaria contends, in its current form, aid not only imposes saving on women who haven't asked for it, but it also chooses for them *how* they should be saved.¹⁶ Similarly, the move towards community-driven development in the aid literature, which emphasizes seeking input from the natives, essentially assumes away the agency of the recipients. The idea that giving a marginalized woman X will change her behavior in predictable ways has formed the thrust of developmental social science, focusing narrowly on the predictive power of policies. Yet, this predictive power is itself biased by those who launch the studies (white), those who fund the studies (white), and those who field the studies (often natives aspiring to be white). It has become imperative to

16. ZAKARIA, *supra* note 7, at 56-74.

question our predictive margins and to acknowledge that people/women in other cultures have agencies of resistance that might surprise us. We must build that capacity for surprise into our social scientific development models and the consequences of foreign aid. And concurrently, we should be open to that capacity for a surprise when we are dealing with women from other cultures and when we are dealing with women from our own cultures who might not yet have achieved whiteness successfully or may simply not be interested in getting there. We should not focus on exiting whiteness to replace it with another idea but let go of the idea of one perfect ideal altogether.

Finally, I just want to respond to Zakaria's opening by suggesting that the next meeting should not be in a wine bar. It should be at a chai spot, where some good ol' doodh patti can provide the caffeine kick that encourages us to be our true, authentic selves.

REFERENCES:

- Abu-Lughod, Lila. (2002). "Do Muslim Women Really Need Saving? Anthropological Reflections on Cultural Relativism and its Others," *American Anthropologist*, 104(3): 783-790.
- Ali, Fawzi and Jawwad, Syed. (2011). "The White Woman's Burden: from colonial 'civilization' to Third World 'development'," *Third World Quarterly*, 32(2): 349-365.
- Beck, Koa. (2021). *White Feminism: From the Suffragettes to Influencers and Who They Leave Behind*. New York, NY: Simon & Schuster.
- Bian, Junru. (2022). "The racialization of expertise and professional non-equivalence in the humanitarian workplace," *The Journal of International Humanitarian Action*, 7(3).
- Bruce-Raeburn, Angela. (2019). "Opinion: International development has a race problem," *Devex*.
- Kymlicka, Will. (1999). "Liberal Complacencies," in *Is Multiculturalism Bad for Women*, eds. Joshua Cohen and Martha Nussbaum. Princeton, NJ: Princeton University Press.
- Moeller, Kathryn. (2019). "The Ghost Statistic that Haunts Women's Empowerment," *The New Yorker*.

Okin, Susan. (1999). "Is Multiculturalism Bad for Women?" in *Is Multiculturalism Bad for Women*, eds. Joshua Cohen and Martha Nussbaum. New Jersey: Princeton University Press.

Politt, Katha. (1999). "Whose Culture?" in *Is Multiculturalism Bad for Women*, eds. Joshua Cohen and Martha Nussbaum. New Jersey: Princeton University Press.

Zakaria, Rafia. (2021). *Against White Feminism: Notes on Disruption*. New York, NY: W.W. Norton & Company.

Zakaria, Rafia. (2022). "What Makes Foreign Policy Feminist?" *The Baffler*.

SITUATING COLONIAL FEMINISM IN IBN KHALDUN'S THEORY OF 'ASABIYYAH

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“Feminism itself has never been disaggregated from the white gaze. It has become the only kind of feminism we recognize or even have language for. And that means that, most of the time, when women speak ‘feminism’ they unintentionally take on the cadence and concerns of whiteness.”¹

- Rafia Zakaria, author and journalist.

In her powerful discussion of the War on Terror, Rafia shows the devastating impact white feminism had on legitimizing the invasion of Afghanistan, creating chaos in the lives of Afghan women and children while claiming to advocate on their behalf.² Prior to Rafia, Junaid Ahmad was among the few scholars who discussed the ways in which the Afghan War had been framed as the good war as opposed to the invasion of Iraq.³

Viewed within the framework of feminism as sisterhood and solidarity, the actions of white feminists would be deemed a betrayal of the cause. To me, however, the more interesting phenomenon is the actions of the other types of white feminists—coloured women, and men, who become agents of empire or hegemony when they attain positions of power in Western society. I am talking about Condoleezza Rice's role in the War on Terror,⁴ about Oprah hosting propaganda against Saddam Hussain on her talk show,⁵ about Huma Abedin as Hillary Clinton's aide while the latter plotted

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1. RAFIA ZAKARIA, *AGAINST WHITE FEMINISM: NOTES ON DISRUPTION* 11 (2021).

2. *Id.* at 70.

3. Dialogue of Civilizations, *Junaid Ahmad (Pakistan) – Assistant Professor, Lahore University of Management Sciences*, YOUTUBE (Dec. 24, 2014), https://www.youtube.com/watch?v=1_dMcOqTxF4.

4. Office of the Press Secretary, *Dr. Condoleezza Rice Discusses the War on Terror on “60 Minutes,”* THE WHITE HOUSE (Mar. 28, 2004, 11:15 AM), <https://georgewbush-whitehouse.archives.gov/news/releases/2004/03/20040328.html>.

5. Ann Brown, *Tricknology: Remembering When Oprah Winfrey Helped the U.S. Military Industrial Complex Sell the Iraq War to the American Public*, THE MOGULDOM NATION (Mar. 17,

to overthrow Gadaffi.⁶ When I discuss hegemons, I mean not just Obama bombing Pakistan and Afghanistan,⁷ but also Mike Tyson literally destroying most of historical Tashkent to build a Hilton and a theme park despite local protests.⁸

While reading Rafia's book, I was relieved to see someone else viewing the Afghan War as I did, but I also felt that there must be a better way to conceptualize the actions of Americans abroad collectively. There was something missing in her framing of feminism in empire and that was considering the actions of colonizing nations as a collectivity, regardless of their race and gender. In this context, I argue that Ibn Khaldun's concept of '*asabiyyah*' provides a more holistic framework to understand Western colonialism.⁹ While still considered to lie at the periphery of international relations theory, Ibn Khaldun can provide an alternative, non-Western lens to view imperialism and the rise of sovereign power.

According to Ibn Khaldun, '*asabiyyah*' is the bond of social cohesion that exists between groups of people.¹⁰ This social solidarity is marked by a shared sense of purpose.¹¹ The stronger the '*asabiyyah*' of a nation, the more likely it is to become a conquering nation, regardless of gender and race.¹² Conquered nations, on the other hand, try to imitate conquerors in their language and lifestyle, but lack the virtues that makes the latter dominant.¹³ I argue that America, and other Western nations, as international actors have shown a strong sense of shared purpose in their colonizing mission. Regardless of race and gender, whoever attains a position of power will continue the colonizing legacy of their predecessor, whether the mission is war, policy making, or social welfare initiatives.

This colonizing mission is backed by institutional strength, whether political or economic. When intergovernmental bodies such as the United Nations (UN) Security Council give five permanent member states veto

2021), <https://moguldom.com/342066/tricknology-remembering-when-oprah-winfrey-helped-sell-the-iraq-war-to-the-american-public/>.

6. Conor Friedersdorf, *Hillary Defends Her Failed War in Libya*, ATLANTIC (Oct. 14, 2015), <https://www.theatlantic.com/politics/archive/2015/10/hillary-clinton-debate-libya/410437/>.

7. Sarah Kreps et al., *Biden Can Reduce Civilian Casualties During US Drone Strikes. Here's How.*, BROOKINGS (Jan. 19, 2022), <https://www.brookings.edu/articles/biden-can-reduce-civilian-casualties-during-us-drone-strikes-heres-how/>.

8. *Mike Tyson Is A Real Estate Owner in "Tashkent City,"* KUN.UZ (Sept. 21, 2018, 11:10 AM), <https://kun.uz/en/news/2018/09/21/mike-tyson-is-a-real-estate-owner-in-tashkent-city>.

9. 1 IBN KHALDŪN, *THE MUQADDIMAH: AN INTRODUCTION TO HISTORY 3* (Franz Rosenthal trans., Pantheon Books, 1958).

10. *Id.*

11. *Id.*

12. *Id.*

13. *Id.* at lxxxiii-lxxxiv.

powers, their leaders, regardless of their race or gender, will promote their nation-state's global interests, maintaining the colonial status quo. Concurrently, international law is framed on the doctrines of state equality and state sovereignty.¹⁴

These intergovernmental bodies also take part in the patronizing mission of defining which development projects would be suitable for indigenous women, often without consulting them on feasibility and sustainability. Rafia gives an example of this when she discusses the UN Population Fund Representative dismissing the idea of ordering grinding mills for rural women in Ghana because in their opinion doing so had no connection to reproductive health.¹⁵ When developing countries fight back, such as by advocating for creating the United Nations Conference on Trade and Development, such organizations often get co-opted by blocs of dominant states such as the European Union, who then use them as their think tanks.¹⁶

I also argue, in conformity with Ibn Khaldun's theory that conquered nations imitate conquering nations, that non-white colonial elites in the developing world co-opt and impose Western theories of feminism on indigenous people disregarding local histories, conditions, and sensitivities.¹⁷

This process of co-opting Western ideologies begins with diaspora communities trying to forge and maintain their own identities in their chosen homes. Nonprofits operating for the benefit of racialized women adopt the language of the host colonial nation, as Rafia puts it, to become more "relatable."¹⁸ The immigrant woman can only fit in when she learns the appropriate "soft skills," especially if she wants to have a seat at the table. This is a bargaining exercise however, and in order to be accepted, the immigrant must necessarily denounce parts of her "primitive" culture and beliefs.¹⁹ I can personally relate to this struggle based on my brief career in Toronto's non-profit industry, which only lasted one year. I was working with a group of Muslim women training various institutions in Toronto on forced marriage and violence against women. Despite being the only person in the group with actual lived experience of the topics we were

14. *Voting System*, UNITED NATIONS SEC. COUNCIL, <https://www.un.org/securitycouncil/content/voting-system> (last visited Feb. 27, 2023).

15. ZAKARIA, *supra* note 1, at 157-58.

16. RESEARCH HANDBOOK ON THE EUROPEAN UNION AND INTERNATIONAL ORGANIZATIONS 172 (Ramses A. Wessel & Jed Odermatt eds., 2019).

17. KHALDUN, *supra* note 9, at 3.

18. ZAKARIA, *supra* note 1, at 6.

19. *Id.* at 9.

providing training on, I grew increasingly disillusioned with the initiative because of my half-white, half-brown, lesbian boss's condescending uprightness. The reason for her behaviour was my unintentional inability to be woke and politically correct. I was not born in Canada, and was therefore unaware of the nonprofit industry's nuances and subtleties. Because I was also new to the country, despite being third generation Canadian, I was also "Fresh Off the Boat," a group that those born in the diaspora try to distance themselves from because the new immigrant represents "back home." And "back home" is necessarily backward.

My un-wokeness caused my boss to call me out in public on a few occasions. During a work meeting, I was recounting a story I had read in Mumtaz Mufti's *Alakh Nagri*, about a Muslim mother publicly putting charcoal on her son's face and parading him around a village for kidnapping a Hindu girl during the Indo-Pak Partition of 1947.²⁰ Though I was celebrating the mother's justness, I was told off because the act of painting someone's face black was racist. I am baffled to this day how an illiterate brown woman living in a small village in India would ever know that her action was offensive. I met the same fate when I described someone at a conference we attended as "the lady with the afro," unaware that this was problematic. At other times, group members, despite being ethnically Pakistani themselves, mocked my accent and indigenous (desi) habits. I eventually left the organization. In contrast to its claim of being the flagbearer of Muslim women's rights in Canada, I felt that the group's outlook further marginalized immigrant women who lacked the tools to convey their ideas in woke terms, as well as those who would never be completely onboard its agenda due to religious and cultural concerns. In negotiating their space in the Western non-profit world, people of colour have to forego their beliefs and values. The reason is that the only white feminist group that cedes them any space is liberals. And liberal ideology swings on the pendulum of one logical fallacy: You are either with us or against us. Any reservation to liberal values implies that you are ignorant and therefore stand discredited and canceled.

Diasporas also adopt the sense of moral superiority, smugness, and hegemonizing tendencies of the colonizing nations they migrate to, even when claiming to act in opposition to colonialism by being "woke." Wokeness gives a sense of superiority over white people, while allowing those from the diaspora to dress, act, and speak like the colonizer. An example is adopting the virtue of rebellion that Rafia refers to.²¹ The non-

20. MUMTAZ MUFTI, ALAKH NAGRI (2005).

21. ZAKARIA, *supra* note 1, at 11.

profit I was working for proudly published a comic book about a young brown girl facing abuse at home while keeping silent about it at her predominantly white high school, where she struggled to fit in. In the end, the girl liberates herself by leaving her family and her culture. The last illustration shows her cycling wearing shorts to symbolize her freedom, resolving to live her life on her own terms.

The problem with promoting rebellion as a virtue from an international development perspective is that it fails to teach conflict resolution and the ability to renegotiate one's place in existing setups. Rebellion can further isolate women and push them into more dangerous situations. Rebellion burns bridges rather than building them. While colonial feminists tie power to rebellion, it also creates the narrative of the perpetual victim who can only be saved by leaving behind anything that connects her to her ancestors. In this created self-image of the perpetual victim, the survivor lacks the agency to change the dynamics that created her trauma, and to break cycles of abuse that could hurt others in her family. The virtue of resilience, as Rafia advocates, is closer to the attribute of empowerment for precisely that reason. It grants women the agency to change their circumstances while being grounded in the cultures they were raised in.

I can speak to this as someone who decided to move back to my parental home despite my past experiences. I decided that it was important for me to be with my family, but I also had to learn to control my own impulses, set boundaries, become financially independent, while having empathy. The people who helped me negotiate my space, learn forbearance, and to receive the love and care I needed from my family members, were older women who belonged to Sufi tariqas rather than the archetypal empowered liberal feminist.

As someone who teaches family law in Pakistan, I see NGOs inadvertently teaching the virtue of rebellion while conducting their trainings on women's rights. In a recent workshop at my law school, a local organization taught students about the provisions in the *nikahnama* (marriage contract form) so that they, especially female students, could know their rights before they signed it. This is a good exercise, and one which I had been conducting in my lectures for at least three years prior to this workshop. However, this knowledge has little value without training students how they, or their clients, could negotiate their priorities with family members and prospective spouses without being confrontational. Most marriages in Pakistan are still arranged and even the parents' ability to negotiate their children's preferences with the other contracting party depends on their socio-economic status.

This mode of imparting information about women's rights brings me back to Ibn Khaldun's theory that conquered nations imitate colonizers in their mannerisms without acquiring the characteristics that made the latter conquerors. Since liberal virtues represent the values of the conquering, colonizing nation they eventually seep into feminist discourses amongst the elites in developing states like Pakistan. These elite feminists acquire the language of their colonizers, advocating for the same values, because to them they represent enlightenment even as they alienate the local populace whose dire economic circumstances give them little room to defend anything other than their right to live with dignity.

In certain circumstances, indigenous elites co-opt white liberal feminist problems to be their own and adopt the latter's narratives in their fight against patriarchy. An example is the placards protesting the stigma against menstrual periods in the Aurat Marches that have been held on international women's day in Pakistan for the last few years. One placard read, "Stop being menstrual phobic."²² Another translated from Urdu, reads, "Your brain rather than menstrual pads is dirty."²³ There are significant barriers for women around menstrual hygiene in Pakistan and women should have access to information about managing their health. However, these placards, among others that stirred controversy, co-opt the language of rebellion while unnecessarily antagonizing brown men. During my Muslim Personal Law and Islamic Jurisprudence lectures I have to discuss menstruation in my classrooms because it is tied to Islamic divorce law and to the larger question of women's legal capacity. Most of my students are young men who belong to either rural landowning or business backgrounds—exactly the demographic that Aurat March participants would regard as the uneducated, patriarchal enemy. Male receptiveness to these topics depends on how one frames them. As with any human interaction receiving respect depends on giving it. The typical reaction I get from my students is somewhere between bewilderment, confusion, and in some cases down right bashfulness because they do not understand women's bodies. My students have always been respectful because I use

22. Photograph of protester with "Stop being Menstrual Phobic" placard at the Aurat Marches in Pakistan, <https://i.dawn.com/primary/2018/03/5aa21b835ac7a.jpg>.

23. Aswa N. Warraich, at *National Press Club, Islamabad*, FACEBOOK (Mar. 8, 2021), https://web.facebook.com/photo/?fbid=1397150640621756&set=bc.AbohQkH2_S_R_jhOmuW91cF2phMEN_tn_wfnUtWn277D8t_Rweg8VBAo9KGGcm21DXRQMGASwaSjU219qoM1bL7VuKzw576PpHnsJ9vml1RdCF-MH800uHvJGLDPiyo8yH_fCIJM1FGIFmEQ66Ltz&opaqueCursor=AboJEVykCvMap12kwFTTINeNc3FkP.

language that is dignified in keeping with local traditions while getting my point across.

As for the placards' content, I argue that these assumptions about "menstrual phobia" are based on Judeo-Christian views of menstruation as a curse, co-opted from colonial feminism. Under Islamic law, menstruation is a temporary illness which exempts women from offering their five daily prayers while rewarding them of the same in the hereafter. For me, as with most practicing Muslim women, menstruation is a time of relief and joy. Islamic law gives menstrual blood the same ruling as anything that exits from the private parts. It is impure. However, Islam commands Muslims to be in a state of purity to the extent achievable. That is God's requirement to achieve His presence. Regarding menstruation as a curse is different from Islamic law's recommendation that all human beings remain as clean as possible.

Liberal feminist activists in the global south also adopt Western values without realizing that they are marginalizing communities that are already vulnerable. An example is Pakistan's Transgender Persons (Protect of Rights) Act, 2018 which subsumes "intersex" and "khwaja sira" into the definition of "transgender." Section 2 (1) (n) of the Act defines Transgender persons as follows:

"Transgender Person" is a person who is—

- (i) Intersex (Khunsa) with mixture of male and female genital features or congenital ambiguities, or
- (ii) Eunuch assigned male at birth, but undergoes genital excision or castration; or
- (iii) a Transgender Man, Transgender Woman, Khawajasira or any person whose gender identity and/or gender expression differs from the social norms and cultural expectations based on the sex they were assigned at the time of their birth.²⁴

The Act's definition of transgender met both local and international resistance, despite being hailed as progressive legislation. The International Commission of Jurists critiqued the Act's failure to distinguish between intersex and transgender persons.²⁵ The Commission's report stated that gender identity is distinct from being born with variations in sexual anatomy, reproductive organs, or chromosome patterns. Intersex and transgender people face challenges distinct from each other despite some

24. The Transgender Persons (Protection of Rights) Ordinance, No. 13 of 2018, THE GAZETTE OF PAKISTAN EXTRAORDINARY, MAY 24, 2018.

25. *Pakistan: Transgender Persons (Protection of Rights) Act, 2018 – A Briefing Paper*, INT'L COMM. OF JURISTS 1, 7 (2020).

overlap. The Commission commented on the Act's failure to recognize the distinct legal protections intersex people required.

Intersex activists in Pakistan denounced the Act for further marginalizing them. Though Islamic law recognizes intersex people and grants them special rights, they still face discrimination in the Muslim majority country. Almas Bobby, Shemale Foundation of Pakistan's president, argued that intersex people face discrimination from birth, as opposed to transgenders.²⁶ Their families often discard them, and they are therefore unable to receive higher education and work in socially acceptable jobs. Transgender activists, on the other hand, belong to the elite class and are typically more educated—the two foremost trans rights activists are a doctor and a lawyer. On the other hand, none of the intersex community leaders have such qualifications. Conflating the two distinct groups would allow anyone to state that they are transgender and claim scholarships and job opportunities which intersex people should be entitled to.

Bobby, who had transitioned from being a dancer to a real estate agent after becoming a devout Muslim, claimed the Act had the colonial agenda of imposing Western norms. Bobby had played a pivotal role for intersex rights in Pakistan after successfully litigating at the Supreme Court for distinct identity cards in 2012.²⁷ The judgment would eventually pave the way for the Transgender Persons Act though Bobby's original intention in their petition was, among other issues, to distinguish intersex people from transgenders. Bobby, in addition to demanding shariah guaranteed inheritance rights to intersex people in the suit, had argued for medical examination to prevent men from cross-dressing and acting as Khwaja Siras, a tribal community intersex people often end up joining after being expelled from their families.²⁸ The reason was that such men would often be involved in crime rings and Bobby, as a leader of the Khwaja Sira community, received complaints that these individuals were involved in molesting and raping children.²⁹ Bobby argued that these activities furthered the stigma around intersex people, even though they were physically incapable of committing such crimes.³⁰

Despite intending the opposite, the judgment would further marginalize the intersex community by terming them Khwaja Sira. The then Chief

26. PNN News, *Almas Bobby Blasting Over Transgender Bill* | PNN News, YOUTUBE (Sept. 25, 2022), <https://www.youtube.com/watch?v=GkHWG39c7Tk>.

27. *Khaki v. Rawalpindi*, (2009) 63 PLD (SC) 188 (Pak.).

28. *Muhammad Aslam Khaki v. SSP Operations Rawalpindi and others*, (2013) PLD (SC) 188 para. 2 (Pak.).

29. *Id.* para. 5.

30. *Id.*

Justice of Pakistan, Iftikhar Chaudhary, asked Bobby's counsel, Aslam Khaki, which word to use for intersex on Urdu language identity cards. Khaki stated that the cards should state "Khwaja Sira," an act he, and Bobby, would later regret.³¹

Khwaja Siras are a unique part of the subcontinent's culture. They constitute both intersex people and eunuchs, though Bobby argues that only the former category are real Khwaja Siras.³² They are organized as "tribes" in different localities with a guru heading each one. Khwaja Siras choose the tribe they want to follow based on its profession.³³ Unfortunately the "professions" available to them are limited: begging, dancing, and prostitution.³⁴ Khwaja Siras acknowledge that they are incapable of bearing children and remain unmarried.

Though the Supreme Court placed intersex rights into the ambit of disability law, transgender rights activists in collaboration with elite feminists used the Khwaja Sira label to extend their own agenda. When the Court originally heard Bobby's petition most Pakistanis including the judges and Khaki were unaware of the distinction between Khwaja Siras, intersex, and transgender. In a conservative country like Pakistan, having detailed public conversations about genitalia is considered inappropriate. Add this to a legal system where judgments are delivered in English, though it is a non-native language. Anyone who reads the judgment can ascertain Chaudhary's command of the language themselves.

When the Transgender Persons Act was passed in the National Assembly, Bobby as well as other Khwaja Sira leaders opposed it, stating that the law makers drafted it without consulting them.³⁵ Even though Khwaja Siras are considered social pariahs who engage in unreligious activities, the vast majority still uphold the supremacy of Islamic law. They argued that phrases such as "gender identity" would eventually pave the way for legitimizing gay marriage as well as taking away the few

31. Meher Mehtab, *Khwaja Siras of Pakistan: A Community*, DAILY TIMES (Sept. 12, 2017), <https://dailytimes.com.pk/117213/khwaja-siras-of-pakistan-a-community>.

32. *Transgender community slams Almas Bobby's 'true khawajasira' comment*, PAKISTANTODAY (June 19, 2018), <https://archive.pakistantoday.com.pk/2018/06/19/transgender-community-slams-almas-bobbys-true-khawajasira-comment>.

33. Anmol Irfan, *From Sacred to Shunned: The Khwaja Sira and trans rights in Pakistan*, SUNDAY LONG READ (May 22, 2022), <https://sundaylongread.com/2021/05/22/from-sacred-to-shunned-the-khwaja-sira-and-trans-rights-in-pakistan>.

34. *Id.*

35. Sarah Zaman, *Pakistan's Progressive Transgender Law Faces Opposition 4 Years Later*, VOA (Sept. 28, 2022), <https://www.voanews.com/a/pakistan-s-progressive-transgender-law-faces-opposition-4-years-later-/6768168.html>.

educational and employment opportunities they had.³⁶ The Act did not require any medical examination to classify individuals as transgender.³⁷

Bobby and Khaki, along with other Khwaja Sira activists, and Jamaat e Islami challenged the Act's legitimacy at Pakistan's Federal Shariat Court.³⁸ The Court hearings, which aim to review the Act's repugnancy to Islamic law, are still ongoing at the time of writing this article.

Elite feminist organizations such as Aurat March, in collaboration with transgender rights activists, have opposed the review in a rather tone-deaf manner. The organization advocated that the Act receive consistent public support, while defending self-perceived gender identity.³⁹ Actively supporting trans rights activists, organizers have argued that medical examinations are against human dignity.⁴⁰ When Bobby opposed their stance on public platforms, transgender activists organized a smear campaign against them, claiming they were actually a "fake Khwaja Sira" themselves.⁴¹ Bobby did not respond to the allegations. However, when I discussed the topic with Aslam Khaki, he confirmed that they were actually intersex.

Nadeem Kashish, a Khwaja Sira rights activist, has also criticized the Act for its colonial agenda while further marginalizing those it claims to protect.⁴² Kashish's family cast him out after he struggled with gender dysphoria in his teenage years.⁴³ He later joined a tribe of eunuch Khwaja Siras but did not undergo castration.⁴⁴ He left the tribe after his guru molested him. Kashish eventually married his female cousin and had a son,

36. *Id.*

37. *Id.*

38. Xari Jalil, *Federal Shariat Court Allows Petitions Against Transgender Law Sparking Backlash from Trans Activists*, VOICE PK (Sept. 21, 2022), <https://voicepk.net/2022/09/federal-shariat-court-allows-petitions-against-transgender-law-sparking-backlash-from-trans-activists>.

39. Human Rights Commission of Pakistan (@HRC87), TWITTER (Dec. 30, 2022, 2:47 AM), <https://twitter.com/AuratMarchKHI/status/1609142226545688576>.

40. Xari Jalil, *Pakistan's Transgender Rights Bill is a Small Step Towards a Big Leap*, THE WIRE (May 18, 2018), <https://thewire.in/lgbtqia/pakistans-transgender-rights-bill-is-a-small-step-towards-a-big-leap>.

41. *Transgender Community Slams Almas Bobby's 'True Khawajasira' Comment*, PAK. TODAY (June 19, 2018), <https://archive.pakistantoday.com.pk/2018/06/19/transgender-community-slams-almas-bobbys-true-khawajasira-comment/>.

42. Irfan, *supra* note 33.

43. Arhaba Waseem, *'Critics of the law do not know the law': Transgender people decry objections to rights bill*, LOK SUJAG (Nov. 23, 2021), <https://loksujag.com/story/transgender-protection-act-2018-eng>.

44. *Id.*

but he was one of the first people to advocate against guru culture.⁴⁵ He later created a shelter home and built a mosque for Khwaja Siras. Kashish has also been advocating for creating educational programs directed at parents of both intersex children and those who show signs of gender dysphoria.⁴⁶ He argues that parents often lack the skills to manage their special predicament, a situation exacerbated due to the stigma and shame attached to discussing these issues.⁴⁷ They end up excommunicating their children, which makes them vulnerable to further abuse.⁴⁸

In a recent podcast, Kashish, who has been advocating for the rights of Khwaja Siras for almost two decades, outlined how LGBTQ activists, in collaboration with elite feminists, hijacked their movement.⁴⁹ Kashish wanted Khwaja Siras to live a life of dignity and created an NGO to create alternative career pathways for the community.⁵⁰ The government later hired them as the Punjab AIDS Control Program's (PACP) project coordinator and directed them to work with Khwaja Siras engaged in prostitution. While Kashish was excited that the program would give him a platform to redirect Khwaja Siras to more meaningful careers, he would soon find out that the LGBTQ community was funding it. Kashish was directed to promote "safe sex" and distribute condoms even to those who tested positive for AIDS. Kashish eventually exposed the program and had it closed down.⁵¹

When Kashish later set up his shelter home, a female NGO director approached with an offer to help with funding. Kashish took up the offer because he was having difficulty registering his own NGO. The NGO director told him that she would take them to the American embassy with the condition that he wear a sari. Kashish had stopped dressing in feminine clothing but obliged as the NGO director told him that would help them secure funding. When Kashish went to the U.S. Embassy, the NGO director introduced him as gay. He was taken aback but kept quiet.

45. Jon Boone, *Pakistan transgender leader calls for end to culture of 'gurus,'* THE GUARDIAN (Dec. 25, 2016), <https://www.theguardian.com/society/2016/dec/25/pakistan-transgender-leader-culture-of-gurus--nadeem-kashish>.

46. *Id.*

47. *Id.*

48. *Id.*

49. Raja Zia ul Haq, *Confessions of a Khawajasara | Maulvi With an Attitude*, YOUTUBE (Dec. 10, 2022), https://www.youtube.com/watch?v=7WOz0z_mTAM.

50. Marginalised: Caught between two worlds, THE EXPRESS TRIBUNE (Apr. 13, 2013), <https://tribune.com.pk/story/535000/marginalised-caught-between-two-worlds>.

51. Punjab project for Aids control suspended, DAWN (May 21, 2010), <https://www.dawn.com/news/893577/punjab-project-for-aids-control-suspended>.

Kashish lamented his own inability to do grassroots work which reflected the actual needs of Khwaja Siras because funding was tied to promoting a colonial agenda. The Federal Shariat Court, however, recognized Kashish's advocacy and recently directed the Ministry of Human Rights to establish a Child Protection Unit for the welfare of eunuch and intersex children.⁵²

Despite the Act's failings, elite feminists, adopting the colonial language of white feminism, deem anyone who criticizes it as an uninformed religious zealot. Any recourse to local realities, cultural values, or religious beliefs is considered an invalid argument and is often accompanied by a condescending smirk. In conformity with Ibn Khaldun's theory, the only effective way to convince them is by arguing that there are dissenting voices in the West.

52. *Shariat Court Orders to Set Up Unit for Eunuch Children*, THE NATION (Dec. 16, 2022), <https://www.nation.com.pk/16-Dec-2022/shariat-court-orders-to-set-up-unit-for-eunuch-children>.

UNCOMMON GROUND: CULTURE AND OTHERING IN THE HUMAN RIGHTS PROJECT

Kathleen Cavanaugh*

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INTRODUCTION

In reconstructing the notion of feminism and the centering of whiteness within the feminist movement, Rafia Zakaria’s *Against White Feminism: Notes on Disruption* foregrounds several questions that have long plagued the international human rights movement.¹ Are there, as Harris has argued, “universally valid moral beliefs and right and wrong rules and modes of conduct?”² or “is universalism barely disguised ethnocentrism, a cultural imperialism?”³ Zakaria’s work wonderfully captures feminism’s global, long-standing affinity with colonial, patriarchal, and white-centered/saviour ideals, and finds amity with Matua Mateo’s “saviours and savages”⁴

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1. RAFIA ZAKARIA, *AGAINST WHITE FEMINISM: NOTES ON DISRUPTION* (2021).
2. MARVIN HARRIS, *THE RISE OF ANTHROPOLOGICAL THEORY: A HISTORY OF THEORIES OF CULTURE* 13 (1st ed. 1968).
3. See RUTH BENEDICT, *PATTERNS OF CULTURE* 45-46 (1st ed. 1934).
4. In his 2001 piece, *Savages, Victims and Saviors: The Metaphor of Human Rights*, Makau Mutua argues that “[t]he human rights movement is marked by a damning metaphor. The grand narrative of human rights contains a subtext that depicts an epochal contest pitting savages, on the one hand, against victims and saviors, on the other.” See Makau Mutua, *Savages, Victims and Saviors: The Metaphor of Human Rights*, 42 *HARV. INT’L L. J.* 201 (2001).

critique of human rights. *Saving* the non-Western, non-White, subaltern Other from “oppressive”⁵ cultures and “traditional harmful practices”⁶ is part of both projects—universalizing and civilizing missions that provide “a single formulation” of how to understand the world, thus reinforcing the power of elites “to produce and reproduce worlds familiar to white privilege.”⁷ As this article will detail, in pursuit of eradicating difference, the law—both domestic and international—has become an important ally.

There has been substantive and conflicting scholarly debate that is preoccupied with the question of women’s rights as human rights, specifically asking: to what extent “should and can law, with its attribution of right and wrong, exoneration and punishment, be used to eradicate a cultural practice?”⁸ There are distinct approaches that endeavor to answer this question. On one end of the continuum, human rights law is read as “impeccable with everything else being adjusted to maintain that assumption.”⁹ Yet, as Isabelle Gunning reminds us, international law itself has long been “criticized as the embodiment and imposition of Western values on the other peoples of the world.”¹⁰ This has been particularly acute, “against ... women whatever their cultural background.”¹¹ There are a variety of other accounts that occupy the space within these two rather polar positions, gravitating to one side or the other on the universalist–cultural relativistic understanding of rights. Although the universalist/relativist debate continues to play out in scholarly and activist debates, both Zakaria and Gunning provoke us to rethink (and, indeed, emancipate) “the language, discourse and difference”¹² embedded in this “right versus wrong” discourse.

Before entering into this contentious space, a few points are worth noting. First, there is a significant crossover in the approaches by anti-imperialist feminists and critical legal theorists to the international human

5. Leti Volpp, *Feminism Versus Multiculturalism*, 101 COLUM. L. REV. 1181, 1202 (2001).

6. See Isabelle R. Gunning, *Arrogant Perception, World-Travelling and Multicultural Feminism: The Case of Female Genital Surgeries*, 23 COLUM. HUM. RTS. L. REV. 189, 213 (1992).

7. Sonia Tascón & Jim Ife, *Human Rights and Critical Whiteness: Whose Humanity*, 12 INT’L J. OF HUM. RTS. 307, 323 (2008).

8. Gunning, *supra* note 6, at 189.

9. MASHOOD A. BADERIN, *INTERNATIONAL HUMAN RIGHTS & ISLAMIC LAW* 4-5 (1st ed. 2003).

10. Gunning, *supra* note 6, at 192.

11. *Id.* at 193.

12. Joan Scott’s earlier work looks at how these terms have been appropriated within feminist scholarship. See Joan W. Scott, *Deconstructing Equality-Versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism*, 14 FEMINIST STUD. 33, 34 (1988).

rights regime—both camps read it from its colonial roots to its current day manifestation as both an instrument of oppression and emancipation.¹³ To read law, particularly international human rights law, from this point of departure is not to scarecrow the debates, ignore the historical context within which the international human rights machinery sprung, or disregard the slow (but steady) evolution of the human rights corpus from its paradigmatic Western orientation. Rather it is to argue that foregrounding the colonial/imperial roots of the law has pried open a space allowing for a radical reconceptualization of the universalizing imaginary of human rights within feminist theory and human rights discourse, as well as in the rhetoric within UN documents. Whilst progress in language and discourse has happened, Zakaria's argument, which this article supports, is that in practice, these changes are not fully realized for the majority of women.

This article will take forward some of the critiques raised in *Against White Feminism* by exploring the ways in which “gender justice” has manifested within human rights discourse and practice. Section 1 will examine the well-worn but still unresolved universality versus cultural relativity debate. Section 2 will focus on feminism, gender, and women's rights and specifically look at the ways in which the “equality versus difference” debate in feminism is reproduced within the human rights discourse. Section 3 will look at the ways in which anti-imperialist critiques of rights play out within the international (and regional) human rights law arenas. The final section will propose ways that both feminists and human rights activists can move the conversations (and challenges), captured by Zakaria's work, forward.

THE UNIVERSALITY OF OTHERING

The question of universality versus cultural relativity is a well contested but yet unresolved debate within human rights. On the one side, relativists contend that culture and context must be necessary to understand, as well as apply, international legal norms and principles.¹⁴ They argue that

13. This is particularly true of scholars aligned with the Third World Approach to International Law (TWAAIL). For more on TWAAIL and international human rights, see Makau W. Mutua, *What is TWAAIL?*, 94 AM. SOC'Y OF INT'L L. PROC. 31 (2000); Opeoluwa Adetoro Badaru, *Examining the Utility of Third World Approaches to International Law for International Human Rights Law*, 10 INT'L COMM. L. REV. 379 (2008); B.S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 INT'L COMM. L. REV. 3, 26 (2006).

14. Cultural relativism is not a legal concept and was not developed for legal application; its roots are found in anthropology and philosophy. Importantly, cultural relativism is not disassociated completely from the norms of universality. Rather those who adopt this approach argue that we reason through a process of enculturation; the way we see and understand the world and shape our values and norms is mediated through our experiences and a priori concepts. *See*

in exerting hegemonic control over the historical social formation of the international legal system, the key instruments of international human rights law “reflect a liberal individualism prevalent in the West, and ignore the importance of group membership, of duties, and of respect for nature prevalent in many non-western cultures.”¹⁵ In contrast, universalists reject this particular reading of the development of the human rights machinery, arguing that it is both selective and incomplete and believe that there are basic and shared normative rights and values, “for all without distinction.”¹⁶

More recent scholarship situates this debate in a postcolonial framework, mapping out the continuity between the colonial past and the colonial present and examining the relationship between culture and power. Derek Gregory’s work, for example, posits that colonization is a cultural process as it “involves the production, circulations, and legitimation of means through repetitions, practices, and performance that enter fully into the constitution of the world.”¹⁷ Through this analytical lens, the colonial present is articulated through legal constructs. Whilst Gregory’s discussion takes place primarily outside of the field of law, scholars from the Third World Approach to International Law (TWAIL) have situated the application of law in the “colonial present.”¹⁸ This approach argues that modern international law (the colonial present) cannot be separated from the historical, cultural, economic, and political backdrop of the European colonial project. Whilst its shape and form differ,

the conquest and domination between the “Occident and the Orient” find[s] its contemporary articulation in alternative spheres; that is within a public international law framework—from international economic and trade law to human rights and the laws governing the use of force (jus ad

BENEDICT, *supra* note 3, at 278; Ruth Benedict, *Ideologies in the Light of Comparative Data*, in AN ANTHROPOLOGIST AT WORK 383 (Margaret Mead, ed., 1959); and MELVILLE J. HERSKOVITS, CULTURAL RELATIVISM: PERSPECTIVES IN CULTURAL PLURALISM 14-15, 32, 93, 101 (Frances Herskovits ed., 1973). For a good overview of more general approaches to cultural relativism within and beyond anthropology, see Alison Dundes Renteln, *Relativism and the Search for Human Rights*, 90 *AM. ANTHROPOLOGIST* 56 (1988).

15. Guyora Binder, *Cultural Relativism and Cultural Imperialism in Human Rights Law*, 5 *BUFF. HUM. RTS. L. REV.* 211, 213 (1999).

16. Yet as understandings of cultural relativism tend to be posited in contrast to the principle of universality within human rights, some of the narrative framework is lost, which, in turn, simplifies a more complicated relationship between the two approaches.

17. DEREK GREGORY, *THE COLONIAL PRESENT* 8 (1st ed. 2004).

18. See Mutua, *supra* note 13. Additionally, see the work of Antony Anghie, John Reynolds, Rémi Bachand, Pooja Parmar, and Upendra Baxi.

bellum) and international humanitarian law (*jus in bello*) in the context of the state of exception of the “global war on terror.”¹⁹

Tellingly, in debates pitting cultural relativists against human rights universalists, the areas and issues that interest women seem to be, in general, negatively affected.²⁰ On the one hand, states do devise culturally specific arguments as a means of subjugating the rights of women, of minorities, and so on.²¹ Yet, on the other, within feminist approaches,

culture and cultural diversity have entered into the women’s human rights discourse primarily as a negative and subordinating aspect of women’s lives and invariably displaced onto a first world/third world divide. In the process colonial assumptions about cultural differences between the West and “the Rest” and the women who inhabit these spaces are replicated. Some cultural practices have come to occupy our imaginations in ways that are totalizing of a culture and its treatment of women, and that are nearly always overly simplistic or a misrepresentation of the practice.²²

Severed from this particular reading of relativism and re-inserting the difference, post-structuralist, post-orientalist, and feminist scholarship from the global south (among others) is increasingly disrupting the ethnocentric universality²³ that is deeply embedded in the gender justice discourse. As Deniz Kandiyoti has observed, there is “[a]n affinity (...) developed between post-colonial scholarship and feminist criticism in so far as they focus on process of exclusion and domination implicit in the construction of the ‘universal’ subject.”²⁴

When unpacking the conceptualization of a universal truth, this scholarship identifies two problematic assumptions. First, the liberal conception of formal “equality” that “invites us to assume that everyone wishes to be treated like we would like”²⁵ fully captures the diversity of

19. Kathleen Cavanaugh, *Narrating Law*, in ISLAMIC LAW AND INTERNATIONAL HUMAN RIGHTS LAW 25 (Anver Emon, Mark Ellis and Benjamin Glahn eds., 2012).

20. Jill Steans, *Debating Women’s Human Rights as a Universal Feminist Project: Defending Women’s Human Rights as a Political Tool*, 33 REV. OF INT’L STUD. 11, 11 (2007).

21. This is less, I would argue, about creating a space for the voices of otherness, but as one hegemonic technique.

22. Ratna Kapur, *Un-Veiling Equality: Disciplining the “Other” Woman Through Human Rights Discourse*, in ISLAMIC LAW AND INTERNATIONAL HUMAN RIGHTS LAW 265, 278 (Anver Emon, Mark Ellis and Benjamin Glahn eds., 2012).

23. See Chandra Talpade Mohanty, *Under Western Eyes: Feminist Scholarship and Colonial Discourses*, 12/13 BOUNDARY 2 333, 335 (1984).

24. Deniz Kandiyoti, *Reflections on the Politics of Gender in Muslim Societies: From Nairobi to Beijing*, in FAITH AND FREEDOM WOMEN’S HUMAN RIGHTS IN THE MUSLIM WORLD 19, 19-20 (Mahnaz Afkhami ed., 1st ed. 1995).

25. Martti Koskenniemi, *The Politics in the Temple, Order, Justice and the UN: I Dialectical Review*, 6 EUR. J. INT’L L. 325, 343 (1995).

women's experiences. Joan Scott has noted, "[t]he only alternative, it seems to me, is to refuse to oppose equality to difference and insist continually on differences—differences as the condition of individual and collective identities, differences as the constant challenge to the fixing of those identities, history as the repeated illustration of the play of differences, differences as the very meaning of equality itself."²⁶ The second assumption is that there are "genuinely 'non-violative' relations between the Self (the 'West') and its Other."²⁷ If what is required for entry into the respective epistemologies of feminism and human rights is a language and knowledge production based on a set of assumptions and behaviours, how do we rethink (and, indeed, emancipate) their respective vocabularies?

"DISRUPTING" THE DISCOURSE

The work of Judith Butler is a useful starting point in rethinking (and disrupting) the language associated with feminism and human rights and the binary thinking captured in the "equality-versus-difference" debate. In problematizing gender, she notes that when addressing "the question of what constitutes gender (in)equality, and indeed in the first instance, 'human rights,'" it is necessary to keep both of these concepts "disconcertingly open to interrogation."²⁸ As a category, gender is "confused with sex," creating oppositional binaries²⁹ and normatively essentializes womanhood.³⁰ Butler rightly observes that "... gender is not always constituted coherently or consistently in different historical contexts, and intersects with racial, class, ethnic, sexual, and regional modalities of discursively constituted identities."³¹

Constructing a generalized and foundational understanding of women as a homogenous group, essentialized to the condition of white women, results in a type of "epistemological imperialism."³² "Western" feminism is predicated on a specific understanding of womanhood as "educated, modern, as having control over their own bodies and sexualities, and the

26. Scott, *supra* note 12, at 46.

27. Dipesh Chakrabarty, *Marx after Marxism: A Subaltern Historian's Perspective*, 28 *ECON. AND POL. WKLY.* 1094, 1094 (1993).

28. Steans, *supra* note 20, at 19.

29. JUDITH P. BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 30 (1st ed. 2006).

30. *Id.* at 11.

31. *Id.* at 4.

32. See Judith Butler, *Mereley Cultural*, 227 *NEW LEFT REV.* 33, 37-38 (1998).

freedom to make their own decisions,”³³ whereas the “Other” (read as non-Western women often formerly referred to as “third world” women) are victim-subject, lack agency and are often idealized and gendered images of, “the veiled woman, the powerful mother, the chaste virgin, the obedient wife.”³⁴ From this positionality, “modernization” or “Westernization” increases gender justice.

Such an essentialist reading has three effects. It creates, as Joan Scott has argued, a binary opposition that offers a choice to feminists of either endorsing “equality” or its presumed antithesis, “difference.”³⁵ Secondly, this particular understanding of gender justice “others” women’s feminist organizing when it is not structured around familiar values, such as anti-traditionalism, independence from men, and the elimination of gender roles. Lastly, as Gunning has argued, crossing these epistemological borders and entering into spaces and unfamiliar practices creates “...a distance between ‘me’ and ‘the other.’ The ‘other’ is unlike me. The other has no independent perceptions and interest save for that which I impose. If there is voice given to the ‘other’ that suggests she is organized around her own interests, it is seen as evidence of defectiveness in the ‘other.’”³⁶

Deeply embedded in these readings are theoretical and conceptual underpinnings that require essentializing the subject as “the immigrant woman victim of minority culture;”³⁷ a “death by culture.”³⁸ Saving the “Other” requires a distinction to be drawn between, “[a] female subject... and a victim subject of her uncivilized culture and male compatriots.”³⁹ As Lila Abu Lughod has argued, the framing of a powerless “Other” essentializes (and in some cases, re-orientalizes) the “native subject.”⁴⁰ Feminist analyses of “other” women’s situations underplay “[p]ositionality” that is, “the social location from which one analyzes the world,”⁴¹ and often

33. Chandra Talpade Mohanty, ‘Under Western Eyes: Feminist Scholarship and Colonial Discourses’ (1984) 12/13 *boundary 2* 333, 337

34. *Id.* at 335, 352.

35. Joan Scott, *Deconstructing Equality-Versus-Difference: Or, the Uses of Poststructuralist Theory for Feminism*, 14 *FEMINIST STUD.* 32, 34 (1988) (equality-versus-difference can also be understood as feminism-versus-multiculturalism). *See also* Susan M. Okin, *Feminism and Multiculturalism: Some Tensions*, 108 *ETHICS* 661, 664 (1998).

36. Gunning, *supra* note 6, at 199.

37. Volpp, *supra* note 5, at 1183.

38. *Id.* at 1185.

39. Dianna Otto, *Lost in Translation: Re-Scripting the Sexed Subjects of International Human Rights Law*, in *INTERNATIONAL LAW AND ITS OTHERS* 318, 328 (Anne Orford ed., 2009).

40. Lila Abu-Lughod, *Do Muslim Women Really Need Saving? Anthropological Reflections on Cultural Relativism and Its Others*, 104 *AM. ANTHROPOLOGIST* 783, 788 (2002).

41. Lila Abu-Lughod, *Orientalism and Middle East Feminist Studies*, 27 *FEMINIST STUD.* 101, 107 (2001). *See also* Gunning, *supra* note 6, at 202.

(mistakenly) attributes gender injustice to culture or tradition (the culturalist explanation) without understanding the empirical context. In such an ethnocentric approach,

Essentialized interpretations of culture are used either to justify violation of women's rights in the name of culture or to categorically condemn cultures "out there" as being inherently primitive and violent towards women. Both variants of cultural essentialism ignore the universal dimensions of patriarchal culture that subordinates, albeit differently, women in all societies and fails to recognize women's active agency in resisting and negotiating culture to improve their terms of existence.⁴²

As Abu Lughod has argued, where human rights are used to enforce this negative conception of freedom, *saving* women (from family, community, religion, and culture...), they have become a vehicle for Western feminist imperialism.⁴³

GENDER JUSTICE

While there is significant writing that unpacks the notion of the "universality" of human rights from a variety of different perspectives, there are four main anti-imperialist feminist critiques: that "individualism, autonomy (and its associations with the secular worldview) and gender-role eliminativism" are important for achieving gender justice;⁴⁴ that the process of generating rights for women is fraught with inequalities and power differences; decontextualizing rights negates (and indeed whitewashes) the complexity of actual lives and situations; and that in pursuit of gender justice, feminists and human rights advocates have "run the risk of turning patriarchal."⁴⁵ This section will focus on how each of these critiques plays out within the international (and regional) human rights law arenas.

One point of intersection between broader critiques of human rights and the specific challenges by feminist writers is the notion that universal ideals, such as rights, equality, and freedom, are drawn from Western

42. Alexandra Xanthaki, *Against Integration, for Human Rights*, 20 INT'L J. OF HUM. RTS. 815, 830 (2016) (quoting Rep. of Yakin Ertuk, at 25, U.N. Doc. A/HRC/4/34 (2007)).

43. See Abu-Lughod, *supra* note 40.

44. SERENE J. KHADER, *DECOLONIZING UNIVERSALISM: A TRANSNATIONAL FEMINIST ETHIC* 3 (2018).

45. As I will discuss later, this manifests two ways, both in discourse (projecting a type of patriarchal othering separate from the Western "self") and in practice, in how feminist strategy has been adopted by international human rights enforcing mechanisms when "saving" women drawn from minority cultures from their cultural or religious selves. Azizah Y. Al-Hibri, *Is Western Patriarchal Feminism Good for Third World/Minority Women?*, in *IS MULTICULTURALISM BAD FOR WOMEN?* 41, 44 (Susan M. Okin ed., 1999).

Enlightenment liberalism and, as such, are neither universal nor neutral.⁴⁶ As these ideals are foundational to the framing (and reading) of international human rights law, the very vehicles used to promote and protect human rights in the international fora are, as Ratna Kapur has argued, part of the teleological narrative of Western Enlightenment.⁴⁷ While there are credible debates that suggest that the historical origins of human rights are far more inclusive (and emphasize the possibilities contained within its evolutiveness), what is clear is that human rights, in practice, reproduce rather than challenge “hegemonic understandings of culture and gender.”⁴⁸ As I noted earlier, these understandings embed notions of individuality, secularism, and “whiteness” and reduce the complexity of human experience to a singular understanding: a form of “cultural tyranny.”⁴⁹

There is no doubt that human rights have, at the international level, advanced women’s rights by providing a language and remedy for gender inequality. Yet it was primarily feminists from the Global North that shaped a particular understanding of gender rights⁵⁰ that, in turn, informed how the international machinery worked to remedy gender oppression. Through these interventions, international human rights discourses, as articulated

46. For a good overview of this critique see generally Joseph Oloka-Onyango & Sylvia Tamale, “*The Personal is Political, or Why Women’s Rights are Indeed Human Rights: An African Perspective on International Feminism*,” 17 HUM. RTS. QUARTERLY 691 (1995); see also Arati Rao, *The Politics of Gender and Culture in International Human Rights Discourse*, in WOMEN’S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES 164 (1995); and Martin Chanock, “*Culture’ and Human Rights Orientalising, Occidentalising and Authenticity*,” in BEYOND RIGHTS TALK AND CULTURE TALK (2000); Vasuki Nesiah, *Toward a Feminist Internationality: A Critique of U.S. Feminist Legal Scholarship*, 16 HARV. WOMEN’S L.J. 189 (1993); and RATNA KAPUR, GENDER, ALTERITY AND HUMAN RIGHTS: FREEDOM IN A FISHBOWL (2018).

47. See generally Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the “Native” Subject in International/Post-Colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1 (2002).

48. *Id.* at 33.

49. ZAKARIA, *supra* note 1, at 7.

50. There are several writers who have critiqued the ways in which gender equality has been framed around a particular reading of patriarchy as monolithically universal and women as—a cross-culturally singular, homogeneous group with the same interests, perspectives, goals and similar experiences. See generally Chandra Mohanty, *Feminist Encounters: Locating the Politics of Experience*, 1 COPYRIGHT 30 (1987); and Chandra Mohanty, *Under Western Eyes: Feminist Scholarship and Colonial Discourse*, in THIRD WORLD WOMEN AND THE POLITICS OF FEMINISM 51 (Chandra Mohanty et al. eds., 1991). For how this played out within international forums, see Celina Romany, *On Surrendering Privilege: Diversity in Feminist Redefinition of Human Rights Law*, in FROM BASIC NEEDS TO BASIC RIGHTS: WOMEN’S CLAIMS TO HUMAN RIGHTS 543 (1995). For a good overview of women’s rights as human rights development, see Laura Parisi, *Feminist Perspectives on Human Rights*, OXFORD RSCH. ENCYCLOPEDIAS OF INT’L STUD. 547 (2017).

within UN forums and in UN documents, focus on the elimination of male control over a women's body and sexuality through separatism, matriarchy, or lesbian politics; fighting against pornography and prostitution and later, by drawing a link between gender and class oppression.⁵¹ This was, as Third World/ Post-Colonial Feminists⁵² would argue, a race and class blind "white feminism" that failed to take account of the complexity of women's lives⁵³ and that created an unequal partnership that preferred the needs of "white women" over women of color who continued to be subject to systems of racial and international oppression. These unequal power relationships between (predominately) white and brown feminists are integral to the story of the "white savior industrial complex."⁵⁴ And while UN bodies (and other international actors) have responded to theoretical developments in feminist discourse by adopting the feminist concept of "intersectionality," this may be more of a normative than substantive change. Empirical studies of UN treaty bodies and other UN initiatives suggest that the way in which key indicators of gender equality progress (such as patriarchy and empowerment) are measured continue to be informed by liberal "white" feminism.⁵⁵

The final critique asserts that gender justice feminists and human rights advocates have often adopted strategies and approaches that are intolerant of religious and cultural differences. Practices that involve women, their clothing, their bodies and their legal status (such as veiling, genital cutting (FGC/FGM), polygamy, and forced marriages) are, as Seyla Benhabib

51. See e.g., REBECCA J. COOK, HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES (1994); JULIE PETERS & ANDREA WOLPER, WOMEN'S RIGHTS, HUMAN RIGHTS: INTERNATIONAL FEMINIST PERSPECTIVES (1995); and NIAMH REILLY, WOMEN'S HUMAN RIGHTS: SEEKING GENDER JUSTICE IN A GLOBALIZING AGE (2009).

52. Third World (anti imperial) feminists' agendas were framed around gender, class, racial & international oppression; western feminists' indifference to colonial legacy; international power differentials, dependency, poverty, SAPs, militarism, violence against women, and ecological deterioration; fighting against neocolonialism, capitalism, and cultural hegemonies.

53. This critique of human rights features prominently in the work of Lila Abu-Lughod, who concluded: "I have called into question the capacity of any rights frameworks to capture the complexity of actual people's lives." See LILA ABU-LUGHOD, DO MUSLIM WOMEN NEED SAVING? 221 (1st ed. 2013).

54. ZAKARIA, *supra* note 1, at 56. The examples Zakaria gives in Chapter 3 are illustrative but, unfortunately, are not uncommon both in terms of how "aid" for empowerment is conceived and distributed but, as well, how equality is enforced through international human rights law.

55. See Zehra F. Kabasakal Arat, *Globalization, Feminisms, and Women's Empowerment: Comments on Rhoda E. Howard Hassmann's Article, "Universal Women's Rights Since 1970,"* 10 J. OF HUM. RTS. 458, 463 (2011). See also Cassandra Mudgway, *Can International Human Rights Law Smash the Patriarchy? A Review of 'Patriarchy' According to United Nations Treaty Bodies and Special Procedures,* 29 FEMINIST LEGAL STUD. 67 (2021).

rightly notes, sites of cultural and moral conflict.⁵⁶ Gender justice advocates argue that these are patriarchal practices that cannot be reconciled with gender equality, with women's equal value, with their autonomy, dignity, and freedom. Yet this "universalized" understanding limits patriarchy to mean culture and "harmful traditional practices" and represents an essentialized "understanding of women's experiences: that of white, western and middle-class women."⁵⁷ This, in turn, creates a type of patriarchal Othering, "an artificial binary between 'first world' and 'third world' women [where] [f]irst world women are characterized as political agents, whereas third world women are the homogenous victimized 'other.'"⁵⁸

Whilst this approach has been subject to significant critique from within both feminism and human rights, its stickiness is found in UN official documents and international human rights law court decisions. This is true when examining the Committee proceedings of the 1981 Convention on the Elimination of All Forms of Discrimination against Women (CEDAW),⁵⁹ one of the most important international vehicles for advocating women's rights. CEDAW has a large number of state parties (182 at the time of this writing) who have committed to protecting and ensuring women's human rights.⁶⁰ Gender equality, under CEDAW, includes dismantling social, religious, and cultural structures which foster the subordination of women by men. Article 5(a)⁶¹ of the treaty directs states to take measures to eliminate gender stereotypes by modifying "social and cultural patterns of conduct" that reinforce negative gender stereotypes "and the idea of inferiority." The Committee tasked to ensure compliance with CEDAW has read "social and cultural patterns of conduct" to include religious, traditional, and customary beliefs, ideas, rules, and

56. SEYLA BENHABIB, *THE CLAIMS OF CULTURE: EQUALITY AND DIVERSITY IN THE GLOBAL ERA* 84 (2002).

57. Mudgway, *supra* note 55, at 70.

58. *Id.*

59. Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 [hereinafter CEDAW].

60. *Status of Ratification: Convention on the Elimination of All Forms of Discrimination Against Women*, UNITED NATIONS HUM. RTS., <https://indicators.ohchr.org/> (last updated Jan. 27, 2023).

61. This language has been replicated under Article 12(1) of the Istanbul Convention that states: "Parties shall take the necessary measures to promote changes in the social and cultural patterns of behaviour of women and men with a view to eradicating prejudices, customs, traditions, and all other practices which are based on the idea of the inferiority of women or on stereotyped roles for women and men." See Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence art. 12, May 11, 2011, C.E.T.S. 210.

practices. Critics have argued that Article 5's underlying message is that "traditional" practices or beliefs (read as harmful or barbaric) be replaced with "modern" (read Western) practices and beliefs.⁶² One study has detailed how this approach, in practice, has affected the work of CEDAW as well as other UN treaty bodies. Cassandra Mudgway has empirically unpacked how UN treaty bodies (with a specific focus on CEDAW's concluding observations) have used the notion of "patriarchy" when evaluating some states parties but not others:

To summarise, the CEDAW Committee is presenting "patriarchy" in a limiting way by connecting "patriarchal attitudes" to certain harmful practices. Such practices are overwhelmingly associated with the "Global South" and a narrowly constructed concept of "culture" under article 5. This risks "othering" or "exotifying" patriarchy itself. Moreover, this approach represents a traditional concept of patriarchy as being the overt subordination of women by men. This is concerning because this narrow conceptualisation is followed by other treaty bodies [sic].⁶³

Reading patriarchy as "the exclusive domain of the other"⁶⁴ is also visible in the jurisprudence of the European Court of Human Rights, especially where the Court has dealt with the issue of veiling. For example, in the case of *Dahlab v. Switzerland*, a case declared inadmissible by the European Court of Human Rights (ECtHR), the applicant was a Swiss teacher in a public primary school who had converted from Catholicism to Islam.⁶⁵ In applying cantonal law aimed at preserving the secular character of public schools, the school authorities prohibited the applicant from wearing the hijab when teaching (although the State acknowledged that the applicant never attempted to disseminate her religious teachings to her students).⁶⁶ The Swiss government's argument, one supported by the Federal Court of Switzerland and, subsequently, the ECtHR, was underpinned by the principle of *laïcité* (neutrality).⁶⁷ The Swiss government argued that to preserve the "religious peace" in the community, some restrictions on the civil servants' right to manifest their religion or belief

62. See Sally Engle Merry, *Human Rights Law and the Demonization of Culture (and Anthropology along the Way)*, 26 POL. & LEGAL ANTHROPOLOGY REV. 55 (2003).

63. Included in her study are Concluding Observations and/or General Comments of the Human Rights Committee, the Committee on Economic Social and Cultural Rights, the Committee on the Rights of the Child, and the Committee on the Rights of Persons with Disabilities. See Mudgway, *supra* note 55, at 67, 84 (2021).

64. Susanna Mancini, *Patriarchy as the Exclusive Domain of the Other: The Veil Controversy, False Projection, and Cultural Racism*, 10 J. CON 411 (2012).

65. *Dahlab v. Switzerland* 2001-V Eur. Ct. H.R. 447, 451.

66. *Id.* at 451-52, 456.

67. *Id.* at 455.

were necessary.⁶⁸ This was even more compelling in an educational setting, where students may be more easily influenced and “religious peace” must be protected with extreme care (the Court paid specific attention to the young age of the applicant’s students).⁶⁹ The Court characterized the headscarf as a “powerful external symbol” that was “imposed on women by a [religious] precept... *hard to square with the principle of gender equality*,”⁷⁰ thereby weighing in on the debate as to whether this particular religious manifestation was one of free choice or coercion.

The ECtHR was to adopt a similar approach in *Sahin v. Turkey*,⁷¹ which involved the expulsion of a twenty-four-year-old medical student at the University of Istanbul for defying a 1998 decision by the Vice Chancellor of the University of Istanbul prohibiting wearing a hijab in lectures, courses, or tutorials. The 2004 decision by a seven-judge chamber of the ECtHR found that there had been no violation of the applicant’s Article 9 (freedom of religion) rights.⁷² In its ruling, the Court argued that “the University of Istanbul’s regulations imposing restrictions on the wearing of Islamic headscarves and the measures taken to implement them were justified in principle and proportionate to the aims pursued and, therefore, could be regarded as necessary in a democratic society.”⁷³ The case was later referred to the Grand Chamber where the decision was upheld.⁷⁴ Using the same reasoning as in *Dahlab* case, the Court held that limitations on the headscarf may be justified in order to promote gender equality because the headscarf was a “powerful external symbol’ . . . imposed on women by a religious precept” and, as such, was “hard to reconcile with the principle of gender equality.”⁷⁵

Importantly, in these cases, the Court drew on a number of European states’ court decisions and legal debates concerning the Islamic headscarf and state education in Belgium, France,⁷⁶ Germany,⁷⁷ the Netherlands,

68. *Id.* at 454-55.

69. *Id.* at 456, 463.

70. *Id.* at 463.

71. *Sahin v. Turkey*, 2005-XI Eur. Ct. H.R. 173, 181-183, https://www.echr.coe.int/Documents/Reports_Recueil_2005-XI.pdf.

72. *Id.* at 208.

73. *Id.* at 195-96.

74. *Id.*

75. *Id.* at 205.

76. In *Sahin*, ECtHR explicitly quoted the French National Assembly’s bill of February 2004, which banned “visible” religious symbols in state primary and secondary schools. *Id.* at 192.

77. *Id.* at 193 (quoting BVerfG, 2 BvR 1436/02, Sept. 24, 2003, ¶ 10-11 https://www.bundesverfassungsgericht.de/SharedDocs/Entscheidungen/EN/2003/09/rs20030924_2bvr143602en.html).

Switzerland, and the United Kingdom. When measured against restrictions on religious dress for men, the *Sahin* case also reveals a marked difference in the Court's approach. In *Arslan v. Turkey*, a case involving the wearing of religious dress at a religious procession in Ankara by members of the Muslim sect Tarikat Aczmendi, the Court found that the state's conviction of the men violated Article 9.⁷⁸ Despite both cases involving the wearing of religious dress in public, the Court drew a "fallacious"⁷⁹ distinction between public educational institutions in *Sahin* and the public square in *Arslan*.⁸⁰ As Bronwyn Roantree has compellingly argued, if the purpose of this differentiated treatment is the promotion of gender equality, then,

[...] as Arslan demonstrates, far from promoting gender equality, by upholding the prohibition on the headscarf the Court is re-entrenching gender discrimination with its willingness to accept men's self-ascriptions of their intentions, even when there is significant evidence contradicting their claims, yet rejecting the same self-ascriptions from women. By rejecting women's own statements of their intentions, the Court is effectively erasing women's agency, an erasure made even more problematic because it is done in the name of gender equality.⁸¹

As Susanna Mancini has rightly argued, "... the ban on the veil suggests that women have only one way to exercise their rights correctly, and it regulates them accordingly. That is, it makes a political use of women's bodies."⁸²

WHAT NEXT?

Centering feminism on gender alone has sidelined the impact of whiteness, class, culture, imperialism, and religion on gender parity. Zakaria's stealth critique, and that of other anti-imperialist feminists, demonstrates that this white-centered feminism has served as the voice of gender equality without reconciling it with its dimensionality. This is not just an academic or conceptual problem. As this article has detailed, it has manifested in the ways in which the human rights discourse and its advocates understand and agitate for gender equality. In moving the feminist discourse on women's rights forward, the challenge is,

78. See *Ahmet Arslan & Others v. Turkey*, App. No. 41135/98, ¶¶ 6-7, 52 (Apr. 10, 2010), <https://hudoc.echr.coe.int/eng?i=001-97380>.

79. Bronwyn Roantree, *Gender and Religious Dress at the European Court of Human Rights: A Comparison of Sahin v. Turkey and Arslan v. Turkey*, 87 *FORDHAM L. REV.* 101, 110 (2018).

80. *Id.* at 110 (referring to *Arslan v. Turkey*, App. No. 41135/98, Eur. Ct. H.R. 49 (2009)).

81. *Id.* at 111-12.

82. Mancini, *supra* note 64, at 422.

[...]to think of ways in which to express their politics without subjugating other subjectivities through claims to the idea of a “true self” or a singular truth about all women. The re-envisioning of the subject of women’s rights discourse leads to a reformulation of the notions of agency and choice. It is an agency that is neither situated exclusively in the individual nor denied because of some overarching oppression. It is situated in the structures of social relationships, the location of the subject, and the shape-shifting of culture. It is located in the recognition that the post-colonial subject can and does dance, across the shaky edifice of gender and culture, bringing to this project the possibility of imagining a more transformative and inclusive politics.⁸³

There are a number of ways that feminists are re-envisioning this space, in both language and practice. Ayelet Shachar’s work, for example, moves beyond a “religious particularist”⁸⁴ and “secular absolutist”⁸⁵ construct. She proposes an “intersectionist or joint-governance framework”⁸⁶ that provides an alternative to “a clear rejection of the simplistic either-your-culture-or-your-rights approach.”⁸⁷ This “transformative accommodation”⁸⁸ of “privatised diversity,”⁸⁹ is an intersectional approach that provides “a more context-sensitive analysis that sees women’s freedom and equality as partly-promoted (rather than inhibited) by recognition of their “communal” identity.”⁹⁰ And in her 2019 book, *On Gender, Alterity and Human Rights*, Ratna Kapur provides an overview of useful and sustainable alternatives to the human rights discourse outside of a liberal formulation. In this pathbreaking work, Kapur moves away from human rights as a freedom project,⁹¹ explores what alternative registers might look like, and examines what reimagining human rights within such a vision could be.⁹²

83. Ratna Kapur, *The Tragedy of Victimization Rhetoric: Resurrecting the “Native” Subject in International/Post-Colonial Feminist Legal Politics*, 15 HARV. HUM. RTS. J. 1, 37 (2002).

84. Ayelet Shachar, *Should Church and State Be Joined at the Altar? Women’s Rights and the Multicultural Dilemma*, in CITIZENSHIP IN DIVERSE SOCIETIES 199, 213-17 (Will Kymlicka & Wayne Norman eds., 2000).

85. *Id.* at 209-213.

86. Ayelet Shachar, *Privatizing Diversity: A Cautionary Tale from Religious Arbitration in Family Law*, 9 THEORETICAL INQ. L. 573, 596-97 (2008).

87. *Id.* at 597.

88. *Id.* at 602.

89. *Id.* at 575.

90. *Id.* at 579.

91. RATNA KAPUR, *GENDER, ALTERITY AND HUMAN RIGHTS: FREEDOM IN A FISHBOWL* 111 (1st ed. 2018).

92. *See id.*

While there is much work being done to reimagine and reconfigure how we advance gender justice, Zakaria's eloquent analysis reminds us just how much work remains. *Against White Feminism* amplifies and centers a critical conversation. It is not a call to abandon the feminist project or the potentiality of human rights but rather to press for "transformative change" by "removing the dichotomy between an essential 'good' of the Truth of universalism and the 'Otherness' of anything that lies outside."⁹³ It is only in doing so, Zakaria concludes, that "what whiteness has done to feminism, what it has stolen from it...can be cast out—through vocal and visible upheavals of structures of power."⁹⁴

93. Cavanaugh, *supra* note 19, at 17, 26.

94. ZAKARIA, *supra* note 1, at 209.

WHITE FEMINISM IN HISTORICAL PERSPECTIVE

Samuel Moyn*

Rafia Zakaria's blistering and brilliant *Against White Feminism* is so successful on its own terms that it leaves little to add—especially for a white male who lacks the standing to do so.¹ But, since the book challenges ongoing attempts to rethink international history so provocatively, whether inadvertently or intentionally, it cannot hurt to share a few notes about how. The book is not trying to be a history, of course. It combines the personal and the political to extraordinary effect, while drawing on scholarship for the sake of public ends. Yet, among the other things she does in the book, Zakaria provides some hypotheses that place white feminism in historical perspective. She deserves far more than an answer from movements and thinkers; *Against White Feminism* also demands a rethinking of where the appalling complex came from and how it took on its current form, for the sake of imagining a different feminist solidarity beyond it.

The most obvious historical thesis in Zakaria's book is that white feminism is still tethered to colonial origins. White supremacy goes back a long way, but Zakaria is right to intuit that it has to be connected to the imperial meridian of world history, roughly between 1850 and 1950, when a “global color line” was established just at the time feminism rose in prominence across the Atlantic with internationalist aims.² Already, in her second chapter, Zakaria dwells on the example of Englishwoman Gertrude Bell to show that “the habit of centering the white woman when talking about the emancipation of women of color has a genealogy.”³ Zakaria draws on scholars of imperial history, such as Antoinette Burton and,

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1. RAFIA ZAKARIA, *AGAINST WHITE FEMINISM: NOTES ON DISRUPTION* (2021).
2. MARILYN LAKE & HENRY REYNOLDS, *DRAWING THE GLOBAL COLOUR LINE: WHITE MEN'S COUNTRIES AND THE INTERNATIONAL CHALLENGE OF RACIAL EQUALITY 2* (Catherine Hall et al. eds., 2008).
3. ZAKARIA, *supra* note 1, at 18.

further on, Durba Mitra, to document the importance of the colonial origins of white feminism, not least when it comes to moral regulation of sex and the selective obsession with instilling virtue among brown women.⁴ In another chapter, Zakaria alludes to colonial precedents for concern for “atavistic” practices, like genital mutilation, honor killings, and widow burning. Zakaria persuasively argues that this exemption of white male violence from scrutiny in the domestic politics of imperial states burnishes the moral credentials of Western civilization to be imposed around the world.⁵

Just now, there is an explosion of scholarly interest in “women’s internationalism.”⁶ And given the exclusion of white feminism itself from most international history written of, by, and for men, some essential rectification is taking place. Zakaria suggests, however, that it would be a mistake to sever this current attempt to emphasize women in the past of international relations without revealing the deep intersection with global racialization. The movements in which early feminist internationalism was prominent around the turn of the twentieth century—the height of empire—are cases in point for Zakaria’s perspective.

For example, the campaign to institutionalize some kind of interstate peace (frequently articulated explicitly in racial terms as a “white peace”) or to suppress trafficking in East European women (openly figured as “white slavery”) were obviously racialized to their core.⁷ They were white women’s movements on behalf of those in the white world—with few precious exceptions. Such feminism wasn’t just a matter of hierarchical double standards; it provided a powerful rationalization for geopolitical dominion. As Zakaria puts it, claims of “moral supremacy” were useful “in order to justify colonial expansion and control.”⁸

The essential historical premise of *Against White Feminism*, then, is both powerful and true. As Zakaria concludes, even today, feminist politics needs to be uprooted from its sources in empire, and the racializing soil in which it grew. Otherwise, feminists risk repeating age-old stratagems of

4. See *id.* at 32-55, 104-39 (the latter discussing DURBA MITRA, *INDIAN SEX LIFE: SEXUALITY AND THE COLONIAL ORIGINS OF MODERN SOCIAL THOUGHT* (2019)).

5. *Id.* at 140-67.

6. See, e.g., *WOMEN’S INTERNATIONAL THOUGHT: A NEW HISTORY* (Patricia Owens & Katharina Rietzler eds., 2022).

7. See, e.g., DUNCAN BELL, *DREAMWORLDS OF RACE: EMPIRE AND THE UTOPIAN DESTINY OF ANGLO-AMERICA* (2020); JEANNE MOREFIELD, *THE POLITICAL WORLDS OF SEX TRAFFICKING: FROM THE LEAGUE OF NATIONS TO QANON* (forthcoming).

8. ZAKARIA, *supra* note 1, at 146.

uplift that are also about “celebrat[ing] white women as having gone further in their battle for equality than feminists of color have.”⁹

Important as is this clue that Zakaria gives to understanding the genealogy of white feminism, what also interests me is what happened in between then and now, on the book’s implicit historical narrative. To put things in the strongest possible terms, the era of decolonization after empire is absent from Zakaria’s book—even though her own project is partly a continuation of some of the impulses born in that era between imperial past and our present. However, let’s come back to this fact.

After starting with the long term of empire, Zakaria shifts her historical lenses to the short term of the last few decades, without stopping the medium term of what transpired in between. Our era is one, she persuasively surmises, characterized American hegemony, especially its military interventionism since 1989. And she also stresses that white feminism of this age accompanied neoliberal economics. Starting in the age of empire, white feminism came into its own in the epoch of American and neoliberal rule. Both are points of supreme importance, as they reveal the historical settings in a postcolonial world of American militarism and neoliberal “globalization,” in which white feminism took on many of the forms that Zakaria so powerfully criticizes.

Some of the best chapters in *Against White Feminism* are about the entanglement of white feminism with American militarism. Zakaria has a hard-hitting section on American white feminism at the 1893 World’s Fair—scant years before America’s most demonstrative overseas imperial venture in the Spanish-American war and its aftermath.¹⁰ But then there was a time lapse before the war on terror, as Zakaria arrestingly writes, became America’s “first ‘feminist’ war.”¹¹ Citing anthropologist Lila Abu-Lughod, Zakaria suggests persuasively that white feminism has turned a blind eye to warmongering or even cheered it on—and I would add that this itself shows that such flawed traditions can become even more compromised, since white feminism in the last century has undergone a general drift from pacifist to militarist.¹²

What happened to America, the European imperial powers, and white feminism? Given her emphasis on a (British) colonial genealogy, Zakaria’s depiction of the contemporary militarization of feminism presupposes the

9. *Id.* at 166.

10. *Id.* at 36-41.

11. *Id.* at 81.

12. *Id.* at 84-86; see generally SAMUEL MOYN, *HUMANE: HOW THE UNITED STATES ABANDONED PEACE AND REINVENTED WAR* (2021) (discussing feminist origins and participation in antiwar movements).

rise of American hegemony. It also requires some story about its reassertion and even intensification in the unipolar moment after 1989, which set the stage for the aspects of the war on terror she persuasively decries.¹³ And Zakaria also has some briefer, if not more excellent, things to say about neoliberalism with which white feminism evolved in tandem, especially after the end of the Cold War.¹⁴ As with militarism, one might also wonder: how did white feminism get entangled with it?

It is here I want to query how to restore the era of decolonization to the making and unmaking of white feminism. Historians will work for years on detailing and specifying the makings of a militarist and neoliberal syndrome whose limits Zakaria so powerfully identifies in her book. What is sketchier in her book, but perhaps even more important to retrieve, are the decolonizing and socialist traditions of global feminism that came before their militarist and neoliberal ones—and which might influence what succeeds them. The only time these traditions appear in *Against White Feminism* is in Zakaria's epic denunciation of Kate Millett, the "lesbian Socialist feminist who believed in a robust internationalism," but who, Zakaria persuasively shows, could not overcome the limitations of white feminism in her memoir of her trip to Iran in 1979.¹⁵

As with her ambivalent and somewhat regretful takedown of feminist theorist Simone de Beauvoir, Zakaria has the goods on Millett. She shows that Millett's "radical" stance when it came to Iran was disrespectful, hierarchical, and patronizing—more in keeping with white feminism than a challenge to it. Yet to understand what to take from Millett's career—especially given Zakaria's own critiques of American militarism and economic neoliberalism—a fuller account of what happened to feminism across the twentieth century is critical. For one thing, it is crucial to know where socialist feminism fits in general. It has not been altogether absent from even recent arguments for transcending "lean in" feminism of the neoliberal era.¹⁶ And far more important, it is pivotal to come to grips with an era in which white feminism was most significantly challenged by the attempt to institutionalize a global women's movement in the era of decolonization.

As Zakaria emphasizes throughout her book, there have long been women around the world—even if Gertrude Bell could not see them—who

13. KAREN ENGLE, *THE GRIP OF SEXUAL VIOLENCE IN CONFLICT: FEMINIST INTERVENTIONS IN INTERNATIONAL LAW* 50-79 (2020).

14. *See* Zakaria, *supra* note 1, at 64-65.

15. *Id.* at 48-49, 51.

16. *See also* NANCY FRASER, *FORTUNES OF FEMINISM: FROM STATE-MANAGED CAPITALISM TO NEOLIBERAL CRISIS* (2013).

advocated for lifting patriarchal oppression. But both organizationally and institutionally, the liberation from empire meant that international feminism transformed in the 1960s and 1970s. Like the rest of world order, it was really at this point that feminism itself was most fundamentally challenged.

In the memory of most in the global north, the true breakthrough of an authentically global feminism came in the neoliberal 1990s, notably at the Beijing United Nations World Conference on Women in 1995 (best known to Americans because Hillary Clinton proclaimed there that “women’s rights are human rights”). But the earlier period was much more transformative, for challenging the militarism and neoliberalism, which sat well with so many in the 1990s (including Clinton), but also whether white women should continue to lead global feminism in the first place. Indeed, from this perspective, Zakaria is setting up the question of how a militarist and neoliberal white feminism *foreclosed* alternatives and *overthrew* movements that had arisen in between the colonial past and our present.

If this interregnum era is shadowy in Zakaria’s account, it is because the same is true in history and memory. But there are a few observations to make about it. With decolonizing and socialist feminism in the ascendancy, the focus of international advocacy was on gaining political and economic power for women. Consider, most prominently, the priorities of the 1979 United Nations Convention on the Elimination of All Forms of Discrimination against Women. And coming in the aftermath of a storied women’s conference in Mexico City, the treaty—even more boldly—connected these priorities for women to the most general transformation of world politics. For example, the treaty calls in its preamble for a “new international economic order”—an allusion to postcolonial demands—while also indicting aggression and occupation that great powers regularly visited on other states.¹⁷

By contrast, for a range of compelling and disturbing reasons, in the 1990s the terms of feminist convergence between the global north and south concerned violence against women, a mobilizational cause which turned out to fit much better with the priorities of the feminism that Zakaria critiques in her book. This was not accidental. As feminist international law scholar Karen Engle has recently argued, “we cannot fully understand the 1990s without awareness of how the women’s human rights movement

17. G.A. Res. 180, U.N. GAOR, 34th Sess., Supp. No. 46, at 193, U.N. Doc. A/34/46 (1979) (entered into force Sept. 3, 1981); *see also* JOCELYN OLCOTT, INTERNATIONAL WOMEN’S YEAR: THE GREATEST CONSCIOUSNESS-RAISING EVENT IN HISTORY (2021) (chronicling disputes between the agendas of first-world women such as Betty Friedan and feminists and global south); CELIA DONERT, WHOSE UTOPIA?: GENDER, IDEOLOGY, AND HUMAN RIGHTS AT THE 1975 WORLD CONGRESS OF WOMEN IN EAST BERLIN, *in* THE BREAKTHROUGH: HUMAN RIGHTS IN THE 1970S 68-79 (Jan Eckel & Samuel Moyn eds., 2014).

began to displace other important feminist approaches during that time.”¹⁸ Countering great power militarism and arguing for economic fairness on a global scale ranked high on the list of such approaches.

This is hardly to say there is some past feminism that has already been deracialized in the past to surgically extract and transplant to the present—any more than it is true of visions of world order generally. Everything remains compromised by the legacies of empire and race, including the beliefs of advocates and priorities of movements. At the same time, the profound racialization not just of oppression but even of reform schemes, past and present, that aim to lift it cannot mean that there is nothing to recapture in between the colonialism of one age and the militarism and neoliberalism of another.

So, in the end, I am left by Zakaria’s masterful indictment wondering whether, precisely because it is so powerful, the lost age between the colonial era and the present day might help recover some of the new starting points the book demands. Needless to say, they will not help unless they are reconfigured for a very different situation today. It is in recognition of this truth that Zakaria has done her most important work, and her book, in effect all by itself, is a new starting point for imagining the very different future for which she so memorably calls.

18. Karen Engle, *Looking Back to Think Forward: What We Might Learn from Cold War Feminist Movements*, 116 AJIL UNBOUND 264 (2021).

RESPONSE TO “AGAINST WHITE FEMINISM” FOR SYMPOSIUM AND SPECIAL ISSUE OF SOUTHWESTERN JOURNAL OF INTERNATIONAL LAW

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This is a profoundly important book. It is also incredibly timely. It blends the personal and the political in a way that is seamless and offers a model of how the personal is in fact the political, and vice versa. What is particularly important about this book is that it asks to be both brought within academic circles as well as expanded out toward a more general readership. I hope that with this intervention and overall collective efforts we can help spread the message of this book in all the myriad directions in which it needs to reach.

For the purposes of this intervention, I will not lay out the main arguments of the book but urge everyone to read it for themselves. Given the way that its argument unfolds, I assure you that it is worth your time. What I will do instead is pull out some salient themes that the author advances which may serve as useful guideposts for future readers before I move into offering some examples to support those themes. Let me say broadly that, for the most part, the author neither commits to nor reveals a lot about what her personal positions or experiences might be. This may sound contradictory at first, because it seems that this book is both political as it develops from personal experience and is also very much led by a thoughtful reflection on those personal experiences. Interestingly though, the fact that the author does not commit to a position or reveal what she believes does not detract from the strength of her arguments. It is instead a strength of the way that the argument must unfold. This means that in many ways it should not be necessary for her audience to demand that she

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commits to revealing more about herself and her experiences and her opinion on particular debates. This is a good thing. It also reinforces her entrance into these spaces because a reader should not need to know more about how a minority woman comes to engage in these debates and domains than a white woman. This makes an enormous amount of sense and is in many ways fair. If, a white woman during the colonial era or a feminist in the current era would neither be asked to share nor declare her own stance and personal choices on issues that she is working on professionally then neither should the author. It is a key strength of this book that the author can engage with arguments without having to feel that she needs to reveal her personal choices and stances on issues. Her opening vignette is a case in point where she describes an evening with other feminists at a wine bar in New York.¹ Without giving too much away, she declines a drink from the shared sangria pitcher, nurses a single Diet Coke, and yet does not really tell us whether she consumes alcohol or not until the very end of the vignette.² This seems right such that to have an opinion and to recount her personal experience she has kept the focus rightly on her female companions that evening. She kept her focus on how these feminist women allowed her to pay for the sangria—in other words—how they treated other people outside of a certain dominant group, in that case.

One of the arguments that Zakaria makes very cogently is that the history of exploitation and of looking at colonized cultures as inferior is embedded into the structure of modern-day feminism, making it the dominant form of feminism as defined and inhabited by white women.³ A particularly striking and powerful example that she gives is the idea that some crimes, typically emerging from other cultures, are more morally reprehensible than others.⁴ For instance, honor killings among Muslim majority societies draw heavier scrutiny.⁵ Similarly, she draws parallels between the perception towards honor killings to the understanding and configuration of Sati during the colonial era.⁶ She draws two implications from these examples, the historical and the current, and points out that one of the things that this bias does is that it somehow denotes Brown or Black women as being unable to curtail the worst cultural practices of their own cultures such that they are somehow unable to civilize the men in their

1. RAFIA ZAKARIA, *AGAINST WHITE FEMINISM: NOTES ON DISRUPTION 1-2* (2021).

2. *Id.* at 10.

3. *Id.* at 11.

4. *See id.* at 140-67.

5. *Id.* at 141.

6. *Id.* at 145.

societies.⁷ At the same time, what this bias also does is that it shields white women and white feminists from the vast number of crimes against women that exist in white majority societies. Drawing on her legal training, she then offers the example of the heat of passion defense in American criminal law and how the way that that should be understood is very much in line with these other crimes against women committed in lands overseas.⁸ So, Zakaria identifies a failure by white women and white feminists to acknowledge that there is much that is anti-women in their own societies which leads to terrible crimes that the legal system enables. Meanwhile, this approach allows them the room and space and moral superiority of being able to work overseas because there they are working to end terrible crimes endemic to those cultures and societies.⁹ This mindset and approach that Zakaria cogently points out has this powerful dual shielding effect, as it were, and is both an intellectual and moral failure to compare like tendencies wherever they may be found. Overall, such inherent but perhaps unseen and unacknowledged contradictions are something Zakaria is very keen to point out and, in this instance, does so very clearly and effectively.

As has been noted in other contexts, the charge of terrorism is more easily applied to brown and black perpetrators in Western societies as an indictment of an entire group or religion captured broadly by Islamophobia.¹⁰ In contrast, acts of terror perpetrated by white men in white majority societies in the West are often portrayed as the feelings of the particular individuals charged with crimes who may sometimes belong to particular radicalized groups.¹¹ This is especially the case in the context of the January 6, 2020 attack on the U.S. Capitol. Radicalized groups who entered the building have been characterized as belonging to particular white majoritarian racist groups such that their actions are not conceived nor portrayed as somehow an indictment of broader white and Western society.¹² Further, no link is directly made from the perpetrators to Christian fundamentalism or some kind of religious fundamentalism that could have driven their actions. When Brown and Black men act, their actions are quite easily and certainly more directly portrayed as stemming from significant moral failings of their culture, religion, and society more broadly. There is then a very clear dividing line in our conceptual analysis

7. *Id.* at 154-55.

8. *Id.* at 154.

9. *Id.* at 156.

10. *Id.* at 110.

11. *Id.* at 166.

12. See Brian Duignan, *January 6 U.S. Capitol Attack*, BRITANNICA (Feb. 15, 2023), <https://www.britannica.com/event/January-6-U-S-Capitol-attack>.

of the motivators of one kind of violence versus another which has significant impacts not only for those societies, but also for the work that may be done to counter such injustices across other societies.¹³ The kind of world Zakaria envisages building is one where white feminism can acknowledge the harms that are hidden within it that disable it from being able to do a clear-eyed conceptual analysis in a way that allows a more progressive agenda to be developed. She explains that only then can broad and intersectional coalitions be built within and across societies such that like issues are treated alike.¹⁴ This would then allow room for potential solutions to emerge. Any potential solutions still have to be highly context specific for their particular societies and studied carefully for their potential relevance across societies. That could be the kind of world that Zakaria would want to inhabit. The primary focus of the book is on the causes of concern to white feminism, but radicalization of society is an issue that affects everyone such that women must be a part of trying to evolve solutions across and within societies for similar problems.

Overall, Zakaria's intervention is not calling for a mere recognition of identity within broader structures that remain unchanged—this is the heart of the challenge that she is raising.¹⁵ She is also honest enough to make clear that this is something that she has personally and professionally grappled with, whether for instance to take a position within an organization at a particular time.¹⁶ The dilemma is whether the ultimate goal is to dismantle inherently unjust structures such that striking down is necessary before a restructuring can happen in the ways that are needed, or whether change can incrementally come from within. She seems to have arrived in life towards a position that leans more heavily towards the conclusion that change from within structures with inherent problems is essentially a non-starter.¹⁷ Despite good intentions, working within structures cannot accomplish change as quickly as present-day challenges demand. Therefore, it seems like change must come from outside—not only from wholesale criticism and critique, but also from efforts that build on and build out a vision as it should be. Those are the kinds of challenges that people dissatisfied with current structures face. It is no mean task to build functions to do all the minutiae of specific everyday tasks that are required to maintain institutions that are inherently nonracist, for instance, or institutions that are truly intersectional in their approach. This is something

13. ZAKARIA, *supra* note 1, at 166.

14. *Id.* 198-200.

15. *Id.*

16. *Id.* at 197.

17. *Id.* at 194.

that today's reformers, and especially feminist reformers from excluded minorities, are faced with. Unfortunately, for the task at hand, there do not yet seem to be examples in a sustained way at scale that Zakaria can point to that could be models of how to set up these envisaged structures. It is not at all a requirement that a critique such as this book must showcase examples of successfully reconstituted and reconceptualized institutions. Zakaria as a theorist and as a practitioner is well within her rights to both point out shortcomings and then exhort mainstream feminism as well. No doubt, she does this to inspire countless dissatisfied and excluded others to do the hard work of institution-building that the challenges we face require.

In these necessarily brief reflections of Zakaria's book, it is particularly important to pause and pay some deeper attention to some of the book's arguments in a way that does not take away from the importance of her other arguments and overall interconnected claims. In the book's third chapter, Zakaria fundamentally takes on the ideas that she is concerned with in a way that overlays and overlaps with the idea of "development," that is, in myriad ways, so much of the work that feminists are engaged with.¹⁸ She highlights that the idea of empowerment was originally conceived by an Indian feminist, Gita Sen, and her colleagues and researchers in the 1980s.¹⁹ In time, the idea of empowerment was taken over and incorporated bereft from its political underpinnings as something that development organizations and non-governmental organizations commit to. As Zakaria makes clear, when the idea of empowerment is contextualized and historicized it is clearly about political power and not just something that can be bestowed upon a recognized group through a comprehensively technocratic and modern policy-oriented framework.²⁰ This is a very powerful intervention. One of the ironies of what she is pointing out is that even when nonwhite feminists produce a fundamental challenge to the existing order, the discourse can still be incorporated into global development frameworks and paradigms in a way that silences these activists and the fundamental change for which they are working. It is a system that puts people in their prescribed boxes and offers them recognition in a formal way, but because the recognition is a grant rather than something obtained more organically, the result of whether actual empowerment and goals are achieved remains questionable.

This is a particularly deep insight of Zakaria's work where she is linking feminism and the global development agenda as popularly conceived. Development frameworks and the networks of recognized

18. *Id.* at 58.

19. *Id.* at 57-58.

20. *Id.* at 65.

experts who operate them are financed in ways that define the very work that occurs in other less developed places and countries.²¹ Her challenge thus is feminism as currently constituted. She links the ways in which feminism is organized and has come to be through a tracing of its historical antecedents and under-acknowledged social and cultural contexts to the kinds of societies that are likely to emerge, within the center and the periphery, from within this conception. As she points out, something conceived so narrowly and without an appreciation of its proper contextual underpinnings can only hope to achieve narrow, limited gains. This poverty of imagination is a particular tragedy and, while it may well be an unintended tragedy as Zakaria points out, this outcome is something that global feminists and white feminists should take very seriously. It is undoubtedly the case that this is an actual disempowerment rather than the empowerment that white feminists had set out to achieve through their work.²² But the sad contradiction of the gap between their intended actions and actual outcomes, as Zakaria points out, is nevertheless happening and it is absolutely necessary to acknowledge the reality of the outcome to be able to address the shortcomings of the current approach. Of course, as we know, it is very hard to look oneself in the mirror. And let's make no mistake, Zakaria is holding up a mirror to white feminists. And the question is whether they are bold enough to be able to look at themselves and the contradictions inherent in their work—the true images as Zakaria is showing them and asking them to see. Can that recognition and that image once seen lead to real change rather than cause white feminists to look away from perhaps an uncomfortable image?

Naturally, most of us prefer not to acknowledge our shortcomings. It requires a lot of strength to see ourselves for who we are and the histories from which we emerge, the paths we take, and our own individual journeys. It is especially difficult to see the realities of structures as they really are. This challenge is simply because of the embeddedness of existing commitments of norms and to how things are regularly done. But Zakaria is laying down that challenge. And it does behoove us to look at where the movement of feminism as currently broadly conceived—“white feminism,” as she describes it—has come from and where it needs to head to. Without a real look, change will be impossible.

Zakaria also points out a very important corollary, perhaps again unintended as many consequences may well be, that feminists in developing countries are more likely to be branded as pro-Western agents

21. *Id.* at 62.

22. *Id.* at 66.

in their jurisdictions because of their very alignment with white feminists.²³ This is particularly so as funding for the causes they work on may come from international donor organizations and richer, friendly, foreign partner countries.²⁴ It is thus easier for opponents of these activists to accuse them of wanting to bring Westernized ideas to those societies. This is a real problem because being branded a Western agent makes these activists' work that much harder—a double whammy that they must contend with. So, we have here again, as so much of what Zakaria focuses on, a problem that we can understand as being two sides of the same coin. The issue in this case is whether being aligned with feminism broadly is in fact helpful to feminists within majority nonwhite countries because doing so labels them as Westernized and colonized in terms of the ideas that they wish to bring to their societies.²⁵ At the same time, her insight also highlights that even if Western feminists want to help their sisters in other places, nevertheless their well-intentioned efforts may be doing more harm than good.²⁶ This again needs to be honestly evaluated. And if white feminism would be more honest in its real impact and be more critical of its own antecedents, that honesty may actually help non-Western and nonwhite feminists working to fight their own societies' harms.

Going forward it is very important for us to think about how Zakaria's ideas can become more widely dispersed and considered in the study and literature of feminism. What I have in mind specifically is how the work enters the very curricula that she described as having learned from and the shortcomings of that literature and the questions and concerns that it conceived. Zakaria's perspective is particularly important and perhaps our discussion here through this special issue and conference will attract a wider interest in her ideas within the domains of white feminism and higher education in the West, which is where her intervention is targeted. We must envisage a path by which her ideas achieve a broader purchase and are read more widely. Will higher education educators of the future be honest enough and bold enough to engage with her ideas and introduce them to their students? It is certainly hoped that that will be the case, but it is by no means guaranteed. There is after all an established discourse, and an established discourse is difficult to shift. Zakaria's bold and honest intervention attempts to do just that. The other strand of her ideas finds purchase within the so-called developing world. It is not yet clear whether feminists in non-Western, nonwhite majority jurisdictions will take up these

23. *Id.* at 82-83.

24. *Id.* at 90.

25. *Id.* at 88-89.

26. *Id.* at 91.

ideas, engage with them, and use them in their curricula and discourse. The work that is required is on many interconnected aspects. White feminists need to incorporate and study Zakaria's ideas as coming from someone who is attempting to hold up a mirror to them and their antecedents and issuing a challenge to them to do better in the future. At the same time, a question remains of whether there is a danger that with her focus on white feminism as the dominant form of feminism, her project is too far removed from the struggles that nonwhite women are waging in their societies. Another aspect of the question is whether nonwhite women feminists will find it useful to study these ideas in ways that will help them shape what they are doing. Zakaria, as she has informed us, is an immigrant to America, is naturalized, and is thereby a long-standing citizen. Could it perhaps be that her concerns are now too far removed to be of much immediately-felt use to societies in which nonwhite women are the majority? In the spirit of true intellectual and practical inquiry as well as in the quest for more just outcomes, I hope sincerely that all feminists everywhere will rise to the challenge and take Zakaria's ideas seriously such that they can help create a different order—one that is fairer, more just and equitable, and that has the heart to acknowledge its own shortcomings. Hopefully feminists everywhere will be inspired to be an actor for positive good in the world.

ABORTION RIGHTS IN URUGUAY, CHILE, AND ARGENTINA: MOVEMENTS SHAPING LEGAL AND POLICY CHANGE

Nayla Luz Vacarezza*

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I. INTRODUCTION

For decades, Latin America and the Caribbean was a region known for having the most restrictive legislation in the world regarding abortion. Indeed, in 2018, the Guttmacher Institute reported that more than 97% of the women in the region lived under highly restrictive legislation.¹ Abortion was legal only in Cuba, Puerto Rico, Guyana, and Uruguay.² Legal limitations on abortion not only affected fundamental rights but also provoked serious damage to women's and pregnant people's health and lives. In fact, at the time, Latin America was reported to have the highest abortion rates in the world, with a considerable proportion of unsafe procedures being a concerning cause of preventable ill-health and death.³

Now, just five years after publication of the mentioned Guttmacher Institute report, the regional legal scenario seems to be shifting towards liberalization. Of course, the persistence of total bans on abortion in countries like Honduras, Nicaragua, El Salvador, Suriname, the Dominican Republic, Jamaica, and Haiti stave off naïve optimism.⁴ But in the last few years, the region saw an extraordinary rise in social mobilization to decriminalize abortion. This transnational political process became known as the *Marea Verde* (Green Tide) because of the consistent use of triangular green kerchiefs/scarves by activists in mass protests that started in Argentina in 2018.⁵ Finally, after decades of political organizing, the movement achieved a series of victories in both the legislative and judicial spheres.

The national courts proved to be an effective means to move towards decriminalization. In April 2021, the Ecuadorian Constitutional Court decriminalized abortion in cases of rape.⁶ Months later, in September 2021, a historic ruling by the Mexican Supreme Court of Justice declared that abortion criminalization is unconstitutional, opening possibilities for legal

1. *Fact Sheet. Abortion in Latin America and the Caribbean*, GUTTMACHER INST., (Mar. 2018), https://www.guttmacher.org/sites/default/files/factsheet/ib_www-latin-america.pdf.

2. *Id.*

3. SUSHEELA SINGH ET AL., *ABORTION WORLDWIDE 2017: UNEVEN PROGRESS AND UNEQUAL ACCESS* (2018).

4. *The World's Abortion Laws*, CTR. FOR REPROD. RTS., <https://reproductiverights.org/maps/worlds-abortion-laws/> (last visited Jan. 25, 2023).

5. See NAYLA LUZ VACAREZZA, *The Green Scarf for Abortion Rights: Affective Contagion and Artistic Reinvention of Movement Symbols*, in *AFFECT, GENDER AND SEXUALITY IN LATIN AMERICA* 63, 64 (Cecilia Macón, et al. eds., 2021).

6. Corte Constitucional del Ecuador [CC] [Constitutional Court of Ecuador] Apr. 28, 2021, SENTENCIA NO. 34-19-IN/21, p. 50 (Ecuador).

reform at the state level.⁷ In February 2022, another historic ruling by the Colombian Constitutional Court decriminalized abortion until the twenty-fourth week of pregnancy.⁸

Progress within the legislative route was also significant, especially in Latin America's Southern Cone. The Uruguayan Parliament was the first in South America to legalize abortion in 2012.⁹ Then, in September 2017, Chile abandoned the total ban imposed by dictator Augusto Pinochet to authorize the termination of pregnancy on three grounds.¹⁰ Finally, the Argentinian Congress passed a landmark law authorizing abortion until the fourteenth week of pregnancy in December 2020.¹¹

Focusing on Uruguay, Chile, and Argentina, this article explores the diverse political strategies of the abortion rights movement and their impact on the legal and policy changes we are currently witnessing. Feminist and women's organizations have used the institutional channels of democracy to advocate for legal reform and developed strategies that exceed the boundaries of institutional politics.¹² On the one hand, they introduced bills through popular initiatives and lobbied legislators, pursued court litigation, worked to facilitate access to care in the formal medical system in cases permitted by the law, and mobilized in the streets to demand change.¹³ At the same time, movements developed other strategies at the margins of the law that also made decisive contributions to the shifting panorama of abortion politics in the region.¹⁴ In particular, since the late 2000s, feminist and women's organizations have supported access to safe medication

7. Despenalización del Aborto, Pleno de la Suprema Corte de Justicia de la Nación [SCJN] [Supreme Court of Justice of the Nation] Décima Época, Sept. 2021, ACCIÓN DE INCONSTITUCIONALIDAD 148/2017 (Mex.).

8. Corte Constitucional de Colombia [CC] [Constitutional Court], febrero 21, 2022, SENTENCIA C-055/22, (p. 1) (Colom.).

9. Law No. 18987, Ley sobre Interrupción Voluntaria del Embarazo. Ley de Aborto [Law No. 18987 of October 30, 2012 Law on Voluntary Interruption of Pregnancy. Abortion Law, Oct. 30, 2012] (Uru.).

10. Law No. 21.030, Regula La Despenalización de la Interrupción Voluntaria del Embarazo en Tres Causales, Septiembre 23, 2017, Diario Oficial [D.O.] (Chile) [Law No. 21.030, Regulates the Decriminalization of the Voluntary Interruption of Pregnancy on Three Grounds, Sept. 23, 2017, Official Diary [D.O.] (Chile).

11. Law No. 27610, Acceso a la Interrupción Voluntaria del Embarazo, Enero 15, 2021, Boletín Oficial (B.O.) (Arg.) [Law No. 27610, Access to the Voluntary Interruption of Pregnancy, Jan. 15, 2021, Official Bulletin (B.O.) (Arg.).

12. Barbara Sutton & Nayla Luz Vacarezza, *Abortion Rights and Democracy: An Introduction*, in ABORTION AND DEMOCRACY: CONTENTIOUS BODY POLITICS IN ARGENTINA, CHILE, AND URUGUAY 1, 1 (Barbara Sutton & Nayla Luz Vacarezza eds., 2021).

13. *Id.*

14. *Id.*

abortion without professional supervision in restrictive legal contexts.¹⁵ In sum, this article shows how, through the use of diverse political strategies, these movements have not only reshaped policy and law at a national level but are also contributing to reimagining abortion politics and movement strategies at a global level.

The first section of the article offers an analysis of the political process that led to legal change through parliament in Uruguay, Chile, and Argentina. In these three countries, abortion liberalization was a major victory for women's and feminist movements after decades of persistent organizing within civil society. However, the path to changes in legislation met with a great deal of resistance and entailed intense political negotiations to achieve any progress. As a result, new legislation is usually not exactly what the movements hoped and aimed for. This section offers a review of the legal landscape before and after reform, considering gains as well as limitations with regard to the effective protection of bodily autonomy and the goals of reproductive justice. Even when movements have achieved legal change, they note a series of shortcomings: new laws still tend to impose unnecessary procedural hurdles for access, position the clinical setting as the only place where legal abortion can be performed, place medical professionals as gatekeepers for abortion access, regulate conscientious objection in ways that become barriers to access, and retain different degrees of criminalization. These movements therefore do not end with legal change. On the contrary, they continue their efforts to monitor policy implementation, demand effective access, defend hard-won gains from conservative attacks, and strategize ways to move forward.

The second section of the article analyzes the activism of feminist networks for access to safe abortion in Uruguay, Chile, and Argentina. In each country, these organizations have shared information on how to safely induce abortions using medication without medical supervision, offering comprehensive support throughout the process. This section also considers the implications of legal reforms and regulations (particularly regarding abortifacient medications) for this kind of activism. It also reflects on their impact on overall access to safe abortions outside the medical system. Lastly, this section shows the extent to which activist organizations are not merely defying or working counter to the law. Besides securing access to safe abortions and discouraging the use of other unsafe methods, these organizations have articulated legal strategies to protect their activism, developed alliances with the formal healthcare system, participated in

15. See Raquel Irene Drovetta, *Safe Abortion Information Hotlines: An Effective Strategy for Increasing Women's Access to Safe Abortions in Latin America*, 23 REPROD. HEALTH MATTERS 47 (2015).

public discussion about legal change, and worked to break cultural stigma around abortion.

Abortion rights have become an issue fraught with tensions worldwide, with significant progress and setbacks showing just how central to contemporary politics gender, sexuality, and reproduction are. While Latin America seems to be moving towards liberalization with the impetus of the Green Tide, that trend is not occurring in all regions. Most notably, through the 2022 *Dobbs v. Jackson Women's Health Organization* decision, the Supreme Court of the United States overturned *Roe v. Wade*, the 1973 ruling that established a constitutional protection to abortion.¹⁶ Knowing the hard way that rights cannot be taken for granted, progressive political actors and movements have now begun to look to Latin America for inspiration on how to face political challenges old and new.

The cases of Argentina, Chile, and Uruguay show that movements can be decisive actors in the quest for legal and policy change regarding abortion. The palpable victories we now see result from decades of grassroots political organizing, forging wide political alliances within civil society, and deploying multiple political strategies simultaneously. Indeed, movements in these countries combined already established forms of civic participation, advocacy, and mobilization with more confrontational and direct-action strategies. From their point of view, legal change is a critical and essential step in a more ambitious and long-term effort to secure substantive bodily autonomy, sexual freedom, and reproductive justice.

II. ABORTION RIGHTS MOVEMENTS AND LEGAL CHANGE

In Argentina, Chile, and Uruguay, struggles for abortion rights are deeply entwined with the struggles for democracy after dictatorships that brutally repressed lives and political ideas.¹⁷ Beginning in the 1980s, women's and feminist movements pushed to include women's, sexual, and reproductive rights in the new democratic agendas. The pioneering *Comisión por el Derecho al Aborto* [Commission for the Right to Abortion] in Argentina is an example of relevant attempts that were made to prompt public debate and legal change.¹⁸ As a result, this demand started to gain traction within women's and feminist movements, although it failed to move beyond those spheres during that decade.

16. See *Dobbs v. Jackson Women's Health Org.*, 142 S.Ct. 2228 (2021).

17. Sutton & Vacarezza, *supra* note 12, at 3.

18. Mónica Tarducci, *Escenas Claves de la Lucha por el Derecho al Aborto en Argentina* [Key Arenas in the Struggle for Abortion Rights in Argentina], 14(3) SALUD COLECTIVA 425, 425-26 (2018).

The 1990s were marked by the United Nations Conferences in Vienna (1993), Cairo (1994), and Beijing (1995) that created transnational structures of support for the demand for sexual and reproductive rights. In Uruguay, for example, the *Comisión Nacional de Seguimiento de Beijing* [Beijing National Follow-Up Commission] monitored the commitments adopted by the Uruguayan state and demanded their fulfillment.¹⁹ Besides providing transnational validation, the human rights framework was relevant at the local level because it resonated with the history of struggles for democracy and justice for the crimes of the dictatorship.²⁰ Although restrictive abortion laws remained unchanged at the national level, feminist transnational cooperation also grew in 1990 with the launch of the *Campaña 28 de Septiembre por la Despenalización y Legalización del Aborto en América Latina y el Caribe* [28th of September Campaign for the Decriminalization and Legalization of Abortion in Latin America and the Caribbean] at the Fifth Latin American and Caribbean Feminist Meeting held in San Bernardo, Argentina.

Efforts by the movement to coalesce with other political actors were key in the 2000s. Through connections with other social struggles, abortion ceased to be a demand limited to the feminist and women's movement. In Uruguay, the *Coordinación Nacional de Organizaciones Sociales por la Defensa de la Salud Reproductiva* [National Coordination of Social Organizations in Defense of Reproductive Health] was created in 2002.²¹ In Argentina, the *Campaña Nacional por el Derecho al Aborto Legal, Seguro y Gratuito* [National Campaign for the Right to Legal, Safe, and Free Abortion], was created in 2005.²² And in Chile, *Miles por la Interrupción del Embarazo* [Thousands for the Interruption of Pregnancy] was launched in 2010, and was the first civil society campaign to demand abortion on certain grounds.²³ To different extents, these coalitions galvanized political

19. SONIA CORREA & MARIO PECHENY, *ABORTUS INTERRUPTUS: POLÍTICA Y REFORMA LEGAL DEL ABORTO EN URUGUAY* [ABORTION INTERRUPTED: ABORTION POLICY AND LEGAL REFORM IN URUGUAY] (2016).

20. Barbara Sutton & Elizabeth Borland, *Abortion and Human Rights for Women in Argentina*, 40 *FRONTIERS: A J. OF WOMEN STUD.* 27, 27 (2019).

21. NIKI JOHNSON ET AL., *LA INSERCIÓN DEL ABORTO EN LA AGENDA POLÍTICO-PUBLICA URUGUAYA 1985-2013: UN ANÁLISIS DESDE EL MOVIMIENTO FEMINISTA* [THE INSERTION OF ABORTION IN THE URUGUAYAN POLITICAL-PUBLIC AGENDA 1985-2013: AN ANALYSIS FROM THE FEMINIST MOVEMENT] (2015).

22. *EL ABORTO COMO DERECHO DE LAS MUJERES. OTRA HISTORIA ES POSIBLE* [ABORTION AS A WOMEN'S RIGHT. ANOTHER HISTORY IS POSSIBLE] (Ruth Zurbriggen & Claudia Anzorena eds., 1st ed. 2013).

23. Cora Fernández Anderson, *The Case of Chile: Co-Opting the Demand for Abortion Reform*, in *FIGHTING FOR ABORTION RIGHTS IN LATIN AMERICA: SOCIAL MOVEMENTS, STATE ALLIES AND INSTITUTIONS* 103, 105 (2020).

alliances between feminist and women's organizations with unions, universities, student organizations, public figures, representatives of political parties, healthcare professionals, lawyers and legal scholars, religious actors, and organizations within the LGBTQ+, Black, and Indigenous communities, among others. At the same time, structural inequality and recurring economic crises during these years revealed that, far from impeding abortion, criminalization was simply making it unsafe, shattering the health and lives of women, especially if they were poor.²⁴ As a result, abortion was increasingly introduced to public debate as a social justice and public health issue. However, even with expanding social support and left-leaning governments in power, legal change remained blocked during this decade.²⁵

In 2012, the legalization of abortion in Uruguay ushered in a new phase for the movement. A few years later, huge popular mobilizations against gender violence and femicides, such as *Ni Una Menos* [Not One Woman Less], showed the feminist movement's capacity to set public agendas and opened up possibilities to increase political pressure for abortion reform.²⁶ In 2017, Chile moved from a total abortion ban to decriminalization on three grounds. The next year, parliamentary debate on the legalization of abortion was opened for the first time in Argentina, with huge street mobilizations in support of the change. Although the 2018 attempt was defeated in the Senate, mobilizations marked the emergence of the Green Tide and positioned abortion legalization as a compelling and urgent matter at a transnational level. During those years, movements worked hard to bolster an open public debate, gain wide popular support, and achieve what they call the "social decriminalization of abortion."²⁷ Finally, after more than thirty years of struggle, abortion was legalized in Argentina. In December 2020, legislators approved a bill legalizing abortion and President Alberto Fernández signed it into law in January 2021.

24. Mario Pecheny et al., *Mobilizaciones por la interrupción voluntaria del embarazo en Argentina y Uruguay: Esperas que no son dulces*, 47(3) CANADIAN J. OF LATIN AM. AND CARIBBEAN STUD. 390 (2022).

25. Merike Blofield & Christina Ewig, *The Left Turn and Abortion Politics in Latin America*, 24 SOC. POL.: INT'L STUD. IN GENDER, STATE & SOC'Y 481, 488 (2017).

26. Mariela Daby & Mason W. Moseley, *Feminist Mobilization and the Abortion Debate in Latin America: Lessons from Argentina*, 18 POL. & GENDER 359, 388 (2022).

27. María Alicia Gutiérrez, *Rights and Social Struggle: The Experience of the National Campaign for the Right to Legal, Safe, and Free Abortion in Argentina*, in ABORTION AND DEMOCRACY: CONTENTIOUS BODY POLITICS IN ARGENTINA, CHILE, AND URUGUAY 157, 161 (Barbara Sutton & Nayla Luz Vacarezza eds., 2021).

In short, together with essentially feminist claims, such as the right to make decisions regarding one's body and sexual freedom, movements developed comprehensive claims for abortion as a demand related to democracy, citizenship, human rights, and social justice.²⁸ The movements' capacity to mobilize and involve different sectors of society was a key political factor for achieving legal change and was the result of decades of less visible, though constant, work by activists. Starting during the transition to democracy after the dictatorships of the 1970s and 1980s, movements aimed to change the law and end the criminalization of abortion as part of a broader effort to transform and shape democratic institutions. Progressive abortion law reforms are the most tangible proof of a change built "from the bottom up," through democratic participation, the involvement of civil society, and political coalition-building.

Even so, these legal changes do not reflect all the movements' aspirations. Rather, they should be interpreted as the result of inescapable political compromises. In fact, the scope of abortion reform is different in each country. While Uruguay and Argentina went from authorization on specific grounds to legal abortion on request based on gestational age limits, Chile moved from a total ban to authorization on specific grounds. Even so, none of the three countries decriminalized abortion altogether, and they continue to use penal law to regulate abortion. In other words, actual legal changes seem to be more gradual and moderate, rather than radical.

Currently, overregulation and unnecessary procedural requisites are a main concern from a feminist point of view. In Uruguay, although abortion is legal, those seeking care must battle with complicated routes to access, multiple mandatory visits to healthcare facilities, and obligatory wait times, among other obstacles. These kinds of regulations, which also exist in Chile, condition the right to choose and become barriers to access. Moreover, these procedural hurdles are not present in any other type of medical care and therefore establish abortion as something exceptional, further reinforcing social stigma.

The crucial role assigned to healthcare institutions and professionals is another concern, especially in Uruguay and Chile. Medical professionals are simultaneously positioned as guardians of the legal order and guarantors of a safe and effective healthcare practice.²⁹ On the one hand, they are

28. Barbara Sutton & Elizabeth Borland, *Framing Abortion Rights in Argentina's Encuentros Nacionales de Mujeres*, 39 FEMINIST STUD. 194, 227 (2013).

29. Agustina Ramón Michel & Mercedes Cavallo, *El Principio de Legalidad y las Regulaciones de Aborto Basadas en los Médicos*, in *EL ABORTO EN AMÉRICA LATINA. ESTRATEGIAS JURÍDICAS PARA LUCHAR POR SU LEGALIZACIÓN Y ENFRENTAR LAS RESISTENCIAS CONSERVADORAS* 31, 41 (Paola Bergallo, et al. eds., 2018).

given the power to decide who is authorized to have an abortion (e.g., certifying legal grounds or controlling lawful procedures for access); as a result, the healthcare system and medical professionals end up acting as gatekeepers. On the other hand, medical professionals have been established as the necessary condition for both abortion safety and legality. Therefore, abortion becomes over-medicalized, in disregard of scientific evidence and guidelines confirming that self-managed abortion with medication can be safe and effective.³⁰ More so, these laws criminalize individuals who seek access to abortion outside the medical system because they face different barriers or are operating outside the limited provisions of the law. In contrast to Chile and Uruguay, Argentina has moved to a model where access to the formal healthcare system is considered a right and not a requirement for an abortion to be legal.

The regulation of conscientious objection is also a delicate matter given the importance that medical professionals and institutions have within the framework of these laws. To different extents, the three countries have recognized the right of healthcare professionals to individually object to being part of abortion care. Uruguay and Chile have gone further to also recognize institutional conscientious objection, permitting religious and conservative healthcare institutions to refuse to provide abortion care. Although procedural regulations limit these protections to different extents, compliance monitoring is not easy, and conscientious objection becomes another relevant obstacle to access.

Ultimately, legal change was a major milestone for women and pregnant people in each country. Even so, it is important to note that from the movements' perspective, legal change secures a critical baseline of protections but is not the end of the road. Movement efforts continue after legal reform to demand full compliance with the law, monitor policy implementation, defend what has been achieved from conservative attacks, and strategize ways to move forward.

II. A. Uruguay: From Harm Reduction to Legality with Guardianship

Uruguay was the first South American country to legalize abortion. In October 2012, approval of the Voluntary Interruption of Pregnancy Law (No. 18987) was widely celebrated as a milestone for women's rights in the region. Nevertheless, parliamentary negotiations over the original bill led to a series of compromises that limited protections granted by the law and increased requirements to access care.

30. World Health Organization [WHO], ABORTION CARE GUIDELINE (2022), <https://www.who.int/publications/i/item/9789240039483>.

Before legalization, a 1938 law amending the Criminal Code was still in force and authorized judges to mitigate punishment in certain cases such as “honor,” rape, serious risk to health or life, or economic hardship.³¹ Since the end of the military dictatorship in 1985, feminist and women’s organizations advocated for abortion rights as a central issue for the new democratic period. In the early 2000s, Uruguay suffered a grave economic crisis and was “among the countries with the highest maternal mortality rate from abortion complications.”³² Responding to this alarming statistic, the feminist movement coalesced with multiple social and political actors in an effort to legalize abortion and formed the National Coordination of Social Organizations in Defense of Reproductive Health.

Medical professionals working in the public health system were key to advancing the cause. They dealt with the human costs of unsafe abortion while acknowledging the legal restrictions that kept them from being able to provide care. A risk and harm reduction strategy was developed to mitigate the effects of unsafe methods, provide information about the use of misoprostol for safe termination of pregnancy outside a medical setting, and offer post-abortion care.³³ This model reduced maternal morbidity and mortality and led to abortion being considered a pressing public health issue.³⁴

During those years, the movement succeeded in placing abortion rights on the public agenda as part of a wider demand for sexual and reproductive rights in collaboration with sympathetic legislators.³⁵ In 2008, the movement obtained an important victory when the Uruguayan Parliament approved the comprehensive Law on Sexual and Reproductive Health.³⁶ The original text included articles legalizing abortion, but they were soon vetoed by then President Tabaré Vázquez. After that setback and with new

31. Law No. 9763, Código Penal Modificación, Febrero 14, 1938 [Law No. 9763 of February 14, 1938 for the Penal Code Modification] (Uru.).

32. Leonel Briozzo et al., *Unsafe Abortion in Uruguay*, 85 INT’L J. GYNECOLOGY & OBSTETRICS 70, 72 (2004).

33. Leonel Briozzo et al., *A Risk Reduction Strategy to Prevent Maternal Deaths Associated with Unsafe Abortion*, 95 INT’L J. GYNECOLOGY & OBSTETRICS 221, 221 (2006).

34. Leonel Briozzo, *From Risk and Harm Reduction to Decriminalizing Abortion: The Uruguayan Model for Women’s Rights*, 134 INT’L J. GYNECOLOGY & OBSTETRICS S3, S3 (2016); Ana Labandera et al., *Implementation of the Risk and Harm Reduction Strategy Against Unsafe Abortion in Uruguay: From a University Hospital to the Entire Country*, 134 INT’L J. GYNECOLOGY & OBSTETRICS S7, S7 (2016).

35. Cora Fernández Anderson, *The Case of Uruguay: Working Together Towards Comprehensive Abortion Reform*, in FIGHTING FOR ABORTION RIGHTS IN LATIN AMERICA. SOCIAL MOVEMENTS, STATE ALLIES AND INSTITUTIONS 66 (2020).

36. Law No. 18426, Ley Sobre Salud Sexual y Reproductiva [Law No. 18426 of December 12, 2008 Law on Sexual and Reproductive Health], Diciembre 12, 2008 (Uru.).

President José Mujica in office, another legal abortion bill was introduced in 2011. Following intense political negotiations to obtain the necessary votes, the law was finally passed in October 2012.

The Voluntary Interruption of Pregnancy Law establishes abortion as a healthcare benefit provided free of cost within the National Integrated Health System. This important measure recognized not only the right to terminate a pregnancy but the need to ensure broad and equitable access to services. However, access to care is guaranteed only for citizens and migrants who have been legally residing in the country for at least one year. Singling out abortion as the only healthcare practice that requires nationality or residence further stigmatizes abortion and places migrants in unequal conditions.³⁷

Uruguayan law authorizes voluntary termination of pregnancy within certain time limits. Abortion is permitted, in general, until the twelfth week of pregnancy. After that, and until the fourteenth week, abortion is allowed only if the pregnancy is the result of an “act of rape duly accredited through criminal complaint.”³⁸ The law does not establish time limits when pregnancy poses a serious risk to the health of the pregnant person or when there are fetal malformations incompatible with extra-uterine life.

One notable feature of the law is the establishment of several procedural requirements to access legal abortion. Women and pregnant persons seeking care must attend three successive medical consultations. At the first appointment, the person must report “the circumstances resulting from the conditions in which conception occurred or situations of economic, social, familial, or age-related hardship that, in their judgement, are an obstacle to continuing with the pregnancy.”³⁹ The second appointment involves an interdisciplinary team made up of at least three healthcare professionals: a gynecologist, a mental health professional, and a social worker. Following the provisions of the law, at that appointment, the healthcare team must offer information about the “inherent risks” related to the practice and offer alternatives to abortion, including adoption and economic support programs for motherhood. The law explicitly states that the aim of this consultation is to “help overcome the reasons that might lead

37. Alejandra López-Gómez et al., *Push and Pull. The Rocky Road to Legalization of Abortion in Uruguay*, in *ABORTION AND DEMOCRACY. CONTENTIOUS BODY POLITICS IN ARGENTINA, CHILE, AND URUGUAY* 117, 126 (Barbara Sutton & Nayla Luz Vacarezza eds., 2021).

38. Law No. 18987, *Ley Sobre Interrupción Voluntaria del Embarazo. Ley del Aborto* [Law No. 18987 of October 30, 2012 Law on Voluntary Interruption of Pregnancy. Abortion Law], art. 6, Octubre 30, 2012 (Uru.).

39. Law No. 18987 art. 3, Octubre 30, 2012 (Uru.).

a woman to interrupt her pregnancy.”⁴⁰ This appointment is followed by a mandatory “reflection period” of at least five days. Finally, at the third appointment, the person must make their decision known to a gynecologist, who is now allowed to provide care. A fourth post-abortion consultation is offered for follow-up and contraceptive counseling.

This complicated route is burdensome to those seeking abortion, slows down resolution of a time-sensitive matter, and ends up becoming an obstacle to accessing care. Requisites like the obligation to justify one’s choice throughout multiple medical appointments ends up limiting autonomy and can be interpreted as paternalistic and condescending to patients. Furthermore, the role assigned to the healthcare system and medical professionals is designed to control compliance with the strict procedures sanctioned by the law. The multidisciplinary approach was meant to frame abortion as a multifaceted issue and allow for task-sharing among different professions, but, because of human resources constraints and a high prevalence of conscientious objection, it ended up becoming yet another barrier to access.⁴¹ The mandatory “reflection period” runs counter to the World Health Organization guidelines on abortion care that recommends against introducing unnecessary delays that may, in the end, jeopardize access.⁴²

Susan Wood, Lilián Abracinkas, Sonia Correa and Mario Pecheny noted that the law establishes abortion as a “procedure that should be authorized in certain cases and under medical surveillance, in order to avert harm, but falling short of recognizing women’s right to decide on reproductive matters.”⁴³ Far from being conceptualized as a normal and fundamental healthcare service, abortion is viewed as something exceptional that must be closely supervised by medical professionals. Furthermore, Lucía Berro Pizzarossa stated that the law “does not represent a lessening of control but rather a shift in the forms of control: from criminalization to medical control.”⁴⁴ In the same direction, Susana Rostagnol and Magdalena Caccia pointed out that procedural requisites, the obligation to access abortion only through the formal healthcare system, and

40. *Id.*

41. Bianca M. Stifani et al., *From Harm Reduction to Legalization: The Uruguayan Model for Safe Abortion*, 143 INT’L J. OF GYNECOLOGY & OBSTETRICS 45, 47-48 (2008).

42. See WHO, *supra* note 30, at 61.

43. Susan Wood et al., *Reform of Abortion Law in Uruguay: Context, Process and Lessons Learned*, 24 REPROD. HEALTH MATTERS 102, 105 (2016).

44. Lucía Berro Pizzarossa, “Women Are Not in the Best Position to Make These Decisions by Themselves:” *Gender Stereotypes in the Uruguayan Abortion Law*, 1 UNIV. OF OXFORD HUM. RTS. HUB J. 25, 30 (2019).

medical control over the process can be easily interpreted as forms of guardianship over women's bodies and autonomy.⁴⁵

Conscientious objection is another important aspect to consider. The Voluntary Interruption of Pregnancy Law protects conscientious objection for gynecologists and healthcare personnel as long as they individually declare their choice before the competent authorities.⁴⁶ A subsequent regulatory decree established the procedures and conditions for the exercise of conscientious objection.⁴⁷ Shortly after, a group of gynecologists challenged the decree before the administrative court on the grounds that it restricted their freedom of thought, resulting in a ruling that annulled several limitations to conscientious objection.⁴⁸ Uruguayan regulations now allow medical professionals to refuse to participate in any practices related to abortion, in addition to the procedure itself.⁴⁹ There is also protection for an institutional right to "ideological objection" (*objeción de ideario* in the original Spanish) that allows private healthcare institutions to abstain from providing abortion services.⁵⁰ Monitoring reports by feminist organizations indicate that conscientious objection has become one of the biggest obstacles to abortion access, with 100% of the gynecologists in some regions of the country abstaining from providing care.⁵¹

Furthermore, abortion is still considered a crime by the Criminal Code.⁵² In fact, all abortions that take place outside the healthcare system, do not comply with the strict lawful procedures, or fall out of the narrow time limits established by the law may be subject to criminal prosecution. As stated by Alejandra López-Gómez, Martín Couto and Lucía Berro Pizarossa, "[t]he liberalization of access to abortion provided by the Uruguayan abortion law actually reflects not a decriminalization of

45. Susana Rostagnol & Magdalena Caccia, *Women's Bodies, an Eternal Battlefield?*, in *ABORTION AND DEMOCRACY: CONTENTIOUS BODY POLITICS IN ARGENTINA, CHILE, AND URUGUAY* 136, 138 (Barbara Sutton & Nayla Luz Vacarezza eds., 2021).

46. Law No. 18987 art. 11, Octubre 30, 2012 (Uru.).

47. Decree No. 375/012, Reglamentación de la Ley Sobre Interrupción Voluntaria del Embarazo. Ley del Aborto [Regulation of Voluntary Interruption of Pregnancy Law. Abortion Law], art. 28-35 (Uru.).

48. See Tribunal de lo Contencioso Administrativo [High Court of Administrative Affairs] Aug. 11, 2015, ALONSO, JUSTO Y OTROS CONTRA PODER EJECUTIVO, ACCIÓN DE NULIDAD, DECISIÓN 586/2015 (Uru.).

49. Lucía Berro Pizarossa, *Legal Barriers to Access Abortion Services Through a Human Rights Lens: The Uruguayan Experience*, 26 *REPROD. HEALTH MATTERS* 151, 155 (2018).

50. *Id.*

51. See MUJER Y SALUD EN URUGUAY, 2007-2017 SISTEMATIZACIÓN DE 10 AÑOS DE MONITOREO PARA LA INCIDENCIA SOCIAL, CONOCER LA REALIDAD PARA CAMBIARLA [SYSTEMIZATION OF TEN YEARS OF MONITORING FOR SOCIAL ADVOCACY, KNOW THE REALITY TO CHANGE IT] 47 (2018) (Uru.).

52. CÓDIGO PENAL NO. 9155 [CÓD. PEN.] [CRIMINAL CODE] art. 325-28 (Uru.).

abortion, but an affirmation of abortion's illegality—except in certain circumstances.”⁵³

The terms under which abortion was legalized do not reflect the aspirations of the movement at the time but rather shed light on the political negotiations that had to take place to secure legalization. With good reason, activists argue that the law “became old.”⁵⁴ Overregulation created multiple barriers to access in the formal health system, and continued criminalization produced unnecessary legal, health, and social risks for those who face obstacles or whose personal circumstances leave them outside of the narrow provisions of the law.

Since passage of the law, feminist organizations such as *Mujer y Salud en Uruguay* [Women and Health in Uruguay] have monitored its implementation and pushed for full application of new policies in the entire country.⁵⁵ In March 2020, the inauguration of right-leaning President Luis Lacalle Pou initiated a new political era after three terms of left-leaning governments by the *Frente Amplio* [Broad Front] party. A few months into his presidency, Lacalle Pou asserted that there must be a “policy that discourages abortion” and that his government had a “pro-life agenda.”⁵⁶ Movements have therefore redoubled their efforts to protect the law and its implementation, noting that, despite its shortcomings, it still represents a substantive step forward. Indeed, since 2012, the Voluntary Interruption of Pregnancy Law has secured a basic standard of legal protections and cost-free access to care that cannot be taken for granted.

II. B. Chile: From Total Ban to Grounds for Extreme Situations

In September 2017, Chile abandoned its total ban on abortion with passage of the Law that Regulates the Decriminalization of Voluntary Interruption of Pregnancy on Three Grounds (No. 21030). The law introduced modifications to the Chilean Sanitary Code that regulates all matters related to health. In doing so, the Sanitary Code now allows

53. López-Gómez, *supra* note 37, at 125.

54. Alejandro Prieto, *Consagrada pero obstaculizada, la pionera ley de aborto uruguayana cumple 10 años*, AGENCIA EFE (Oct. 23, 2022), <https://efe.com/mundo/consagrada-pero-obstaculizada-la-pionera-ley-de-aborto-uruguayana-cumple-10-anos/>.

55. *Informes Observatorio Nacional en Género y Salud Sexual y Reproductiva*, Mujer y Salud en Uruguay, <https://www.mysu.org.uy/web/que-hacemos/observatorio/informes-observatorio/> (last visited Jan. 25, 2023).

56. Lacalle Pou, “Hay que tener una política de desestímulo de los abortos,” EL PAÍS (May 4, 2020), <https://www.elpais.com.uy/informacion/politica/lacalle-pou-hay-que-tener-una-politica-de-desestimulo-de-los-abortos>.

abortion under three circumstances: risk to the life of the pregnant person, fetal unviability outside the womb, and rape.⁵⁷

Chile's first Criminal Code, approved in 1874, criminalized abortion with no exceptions.⁵⁸ Later, in 1931, the first Sanitary Code was approved, and it authorized abortion on therapeutic grounds for the first time.⁵⁹ In 1968, a new Sanitary Code was introduced upholding abortion for therapeutic purposes.⁶⁰ All in all, authorization for abortion on therapeutic grounds was in force for fifty-eight years.⁶¹ But, in September 1989, one of dictator Augusto Pinochet's last official decisions was to introduce a total ban on abortion that stated: "No action may be carried out intended to cause abortion."⁶² This regulation made Chile one of the countries with the most draconian laws on abortion, resulting in a burdensome legacy for future democratic governments.

Nearly thirty years had to pass before permissions for abortion in certain circumstances were reinstated. In 2010, Thousands for Pregnancy Interruption (also known as MILES for its Spanish acronym) launched a campaign for abortion on three grounds, and three years later they presented the first bill for abortion reform drafted by civil society organizations.⁶³ In 2014, Michelle Bachelet became President for the second time after campaigning with a political program that included abortion legalization on certain grounds. Later, in January 2015 she introduced a bill to legalize abortion under three circumstances that were more limited than the one presented by MILES. This situation created serious tension within both moderate and more radical sectors of the movement aiming for "free abortion," meaning legal abortion on demand and without restrictions.⁶⁴

The presidential bill went through a long process, which included introduction of several modifications and challenges to the legislation's constitutionality. The alterations limited rights and guarantees in different

57. CÓDIGO SANITARIO [CÓD. SANIT.] [HEALTH CODE] art. 119 (Chile).

58. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 342-45 (1874) (Chile).

59. *See* Decreto con fuerza de Ley [Decree-Law] No. 226, art. 226 (1931) (Chile).

60. *See* Decreto con fuerza de Ley [Decree-Law] No. 725, art. 119 (1968) (Chile).

61. Paz Robledo Hoecker et al., *Proceso de Despenalización de la Interrupción del Embarazo en Tres Causales de Chile. Mirada desde la Salud*, in *ABORTO EN TRES CAUSALES EN CHILE. LECTURAS DEL PROCESO DE DESPENALIZACIÓN* 27, 29 (Lidia Casas Becerra & Gloria Maira Vargas eds., 2019).

62. Law No. 18826, Sustituye Artículo 119 del Código Sanitario, [Substitutes Article 119 from the Sanitary Code] (1989) (Chile).

63. Fernández Anderson, *supra* note 23, at 105.

64. Gloria Maira Vargas & Carola Carrera Ferrer, *Estrategias feministas para la despenalización del aborto en Chile. La experiencia de la Mesa Acción por el Aborto*, in *ABORTO EN TRES CAUSALES EN CHILE. LECTURAS DEL PROCESO DE DESPENALIZACIÓN* 181 (Lidia Casas Becerra & Gloria Maira Vargas eds., 2019).

areas, such as definition of the legal grounds, gestational limits, conscientious objection, and confidentiality, among others.⁶⁵ After approval of the law in both legislative chambers, the Constitutional Court confirmed constitutionality of the law and expanded protections for conscientious objection. Finally, the Law that Regulates the Decriminalization of Voluntary Interruption of Pregnancy on Three Grounds was passed in September 2017.

Although the new legislation marks important progress with respect to the total ban, it is still highly restrictive since it authorizes abortion only in fairly extreme situations. For instance, the law does not include exceptions for when there are risks for the pregnant person's health that are not life-threatening. Similar to Uruguayan legislation, the Chilean law sets forth a series of requirements to demonstrate legal grounds and medical professionals are given a crucial role. In all cases, medical professionals must certify the legal grounds and are therefore positioned as gatekeepers of abortion access. A medical surgeon must also intervene in all cases, severely limiting the range of healthcare professionals who are allowed to provide care. One medical diagnosis is needed when the pregnancy poses a risk to the life of the pregnant person. Meanwhile, two diagnoses made by medical specialists are required when the embryo/fetus has malformations incompatible with life outside the womb. No gestational time limit is set in either of these cases. Finally, in the case of rape, a medical team must confirm sexual abuse. Also, gestational age must not exceed twelve weeks (or fourteen weeks when the assaulted person is under fourteen years of age).⁶⁶ These extremely narrow time limits do not take into account how difficult early detection of pregnancy can be in cases of sexual violence, especially for girls and adolescents. Confidentiality for women over eighteen years of age is another shortcoming regarding the rape exception.⁶⁷ Hospital directors must inform the Prosecutor's Office when an abortion on the grounds of rape is requested, and this can result in a criminal investigation even against the assaulted person's will.⁶⁸

Medical professionals are also required to provide "verbal and written information on the alternatives to interruption of pregnancy, including available social, economic, and adoption support programs."⁶⁹ Like the process in Uruguay, women must be informed of alternatives to abortion

65. Gloria Maira et al., *Abortion in Chile: The Long Road to Legalization and its Slow Implementation*, 21(2) HEALTH AND HUM. RTS. J. 121, 122 (2019).

66. CÓDIGO SANITARIO [Health Code] art. 119 (Chile).

67. Maira et al., *supra* note 65, at 125.

68. *See* CÓDIGO SANITARIO [Health Code] art. 119 bis (Chile).

69. CÓDIGO SANITARIO [Health Code] art. 119 (Chile).

when requesting a specific type of medical care: the termination of pregnancy. Though the Chilean law states that this information is not meant to influence the woman's decision, this mandatory step in the procedure sets abortion apart as something exceptional and inherently less preferable than carrying a pregnancy to term. According to the law, certain information must be given regardless of the woman's willingness to receive it, while other information must not be shared. In fact, the law prohibits all advertising about abortion services, and thus public information about abortion rights and routes to access are extremely limited.⁷⁰

Also similar to what occurred in Uruguay, conscientious objection became a disputed issue in courts. The original bill introduced by President Michelle Bachelet allowed the attending physician to individually invoke conscientious objection and be released from the obligation to provide abortion care. Debate in Congress widened that protection to include all intervening health professionals, including nurses and nurses' aides, midwives, and anesthetists.⁷¹ After congressional approval, a ruling of the Constitutional Court introduced further protections to conscientious objection in two main areas.⁷² First, the ruling installed broad protection for institutional conscientious objection, overturning the legislative decision to keep conscientious objection a right of natural persons (and not juridical persons).⁷³ The Constitutional Court based this decision not only on the protection of freedom of conscience and religious freedom but also on the protection of the right to associate and the autonomy of civil associations.⁷⁴ Second, the Constitutional Court allowed conscientious objection for all personnel involved in abortion care, not only professionals.⁷⁵

The Law that Regulates the Decriminalization of Voluntary Interruption of Pregnancy on Three Grounds introduced modifications to the Criminal Code but still criminalizes abortion.⁷⁶ Specifically, it imposes

70. CÓDIGO SANITARIO [Health Code] art 119 quáter (Chile).

71. Maira et al., *supra* note 65, at 125.

72. Tribunal Constitucional [T.C.] [Constitutional Court], Aug. 28, 2017, SENTENCIA NO. ROL 3729-17 (Chile).

73. Rodolfo Figueroa G., *Objeción de conciencia en el fallo del Tribunal Constitucional sobre el proyecto de ley que despenaliza el aborto en tres casuales*, in *ABORTO EN TRES CAUSALES EN CHILE. LECTURAS DEL PROCESO DE DESPENALIZACIÓN 151, 151* (Lidia Casas Becerra & Gloria Maira Vargas eds., 2019).

74. Verónica Undurraga Valdés, *La sentencia de aborto del Tribunal Constitucional de Chile: Evitando la excepcionalidad en el trato de la mujer embarazada como sujeto de derecho*, in *ABORTO EN TRES CAUSALES EN CHILE. LECTURAS DEL PROCESO DE DESPENALIZACIÓN 121, 121* (Lidia Casas Becerra & Gloria Maira Vargas eds., 2019).

75. Rodolfo Figueroa G., *supra* note 73, at 158-59.

76. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 342-45 (Chile).

prison time for women who, outside the limits established by law, self-induce abortion or seek help from a third person to terminate a pregnancy.⁷⁷

After almost three decades of complete prohibition of abortion, the Law that Regulates the Decriminalization of Voluntary Interruption of Pregnancy on Three Grounds is a leap forward that nonetheless protects only a very basic standard of rights for very limited and extreme situations. Under the law's provisions, women and pregnant persons are not considered free to choose but rather are authorized to terminate a pregnancy under very limited circumstances. Even under those circumstances that they have not chosen or provoked, the law imposes several procedural hurdles on the route to access. Instead of placing healthcare professionals and institutions as upholders of sexual and reproductive rights, it positions them as gatekeepers. Indeed, healthcare institutions and professionals are given the right to refuse to provide care, further complicating access.

Given this situation, organizations like *Mesa Acción por el Aborto en Chile* [Committee for Abortion Action in Chile] have pushed to secure full implementation of the law through monitoring and advocacy.⁷⁸ Also, with the motto "Three Grounds Are Not Enough," activists continued to work toward legal reform. Only ten months after legalization on three grounds, they participated in the introduction of a new bill proposing abortion on demand until the fourteenth week of pregnancy, though it was ultimately defeated.⁷⁹ Following the 2019 popular uprisings known as the *Estallido Social*, abortion rights movements also got involved in the historical process of reforming the 1980 Constitution approved during Augusto Pinochet's dictatorship. A wide coalition of political organizations, the *Asamblea Permanente por la Legalización del Aborto* [Permanent Assembly for Abortion Legalization] was formed in 2021 with the aim of introducing a popular initiative to include abortion as a protected right under the new Constitution. The initiative far surpassed the popular support needed, was later approved by the Constitutional Convention, and was finally included in the draft of the Constitution.⁸⁰ A popular referendum rejected the draft in September 2022, and Chile missed the opportunity of

77. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 344 (Chile).

78. MESA ACCIÓN POR EL ABORTO EN CHILE, <https://www.accionaborto.cl/> (last visited Jan. 25, 2023).

79. *La Cámara de Diputados de Chile rechazó la despenalización del aborto y el proyecto será archivado*, CNN EN ESPAÑOL (Nov. 30, 2021, 1:02 PM), <https://cnnespanol.cnn.com/2021/11/30/diputados-chile-rechazo-despenalizacion-aborto-proyecto-archivado-orix/>.

80. Cora Fernández Anderson, *Chile Becomes First Country in the Americas to Protect Abortion Rights in Its Constitution*, MS. MAGAZINE (Apr. 4, 2022), <https://msmagazine.com/2022/04/04/chile-abortion-constitution-feminism/>.

becoming the first country in the world to protect abortion as a constitutional right.⁸¹

II. C. Argentina: From Inaccessible Grounds to Legal Abortion

In December 2020, the Argentine Congress approved the Access to Voluntary Interruption of Pregnancy Law (No. 26710). The new regulation went into effect shortly after, in January 2021, securing the right to abortion by decision of the pregnant person until the fourteenth week of pregnancy.⁸² After that, and without established time limits, abortion is still permitted on two grounds: when the pregnancy was the result of rape and when the health of the pregnant person is in danger. In the case of rape, the only requirement for authorization of abortion is a sworn statement by the pregnant person made before the healthcare professional.⁸³ In the case of danger to the life, or health of the pregnant person, the law does not set specific requirements.⁸⁴

Before the legal shift, the 1921 Argentine Criminal Code allowed abortion only on two specific grounds: (1) to prevent danger to the life or health of the woman; and (2) “if the pregnancy is the result of a rape or indecent assault on an idiot or demented woman.”⁸⁵ Besides being questionable for using derogatory language, the cited wording allowed for a variety of interpretations. It was not clear if the rape clause allowed all women subjected to sexual violence to have an abortion or if the permission in cases of rape was restricted to mentally ill or handicapped women. To clarify the scope of permissions, the wording received modifications during the dictatorships, but soon after the return to democracy in 1984, the original wording was reinstated.⁸⁶ In any case, an “informal rule” ensured a *de facto* ban on all abortions, and the practice was rarely available in the health care system.⁸⁷

81. Jack Nicas, *Chile Says ‘No’ to Left-Leaning Constitution After 3 Years of Debate*, N.Y. TIMES (Sept. 4, 2022), <https://www.nytimes.com/2022/09/04/world/americas/chile-constitution-no.html?smid=url-share>.

82. Decree No. 14/2021, *Promúlgase Parcialmente la Ley No. 27610* [Partial Enactment of Law No. 27610], Jan. 14, 2021 (Arg.).

83. Law No. 27610 art. 4, [Boletín Oficial] B.O. (Arg.).

84. *Id.*

85. CÓDIGO PENAL [CÓD. PEN.] [CRIM. CODE] art. 86 (1921) (Arg.).

86. MALA HTUN, *SEX AND THE STATE: ABORTION, DIVORCE, AND THE FAMILY UNDER LATIN AMERICAN DICTATORSHIPS AND DEMOCRACIES* 148 (2003).

87. Paola Bergallo, *The Struggle Against Informal Rules on Abortion in Argentina*, in *ABORTION LAW IN TRANSNATIONAL PERSPECTIVE. CASES AND CONTROVERSIES* 143, 143 (Rebecca J. Cook, Joanna N. Erdman & Bernard M. Dickens eds., 2014).

Since the democratic transition, women's and feminist organizations fought to place abortion on the public agenda.⁸⁸ In 2005, the movement came together at the National Campaign for the Right to Legal, Safe and Free Abortion, which was a wide alliance of hundreds of political organizations with the aim of decriminalizing and legalizing abortion.⁸⁹ The triangular green kerchief/bandana was established as their symbol and activists have persistently used it as an emblem since then. The Campaign began presenting popular initiative bills in Congress in 2007. In addition, activists and organizations that were part of the Campaign participated in court cases, demanding access to abortion care in cases permitted by law.

Paola Bergallo pointed out that, starting in 2005, court litigation became the route to clarifying the grounds and forcing the issuance of guidelines for access.⁹⁰ Later, in March 2012, the Supreme Court of Justice issued a landmark ruling about abortion in the *F., A.L.* case. The Court confirmed a prior decision of the Superior Court of Chubut Province that authorized an abortion for a fifteen-year-old adolescent who was raped.⁹¹ Most importantly, the ruling clarified the correct interpretation of the Criminal Code's grounds considering human rights standards: abortion was not punishable when the health of the pregnant person was in danger or when pregnancy was the result of rape, regardless of the pregnant person's mental condition.⁹² Also, the Supreme Court established the state's duty to provide legal abortion services and implement protocols for access.⁹³ This led to gradual and uneven progress for access to abortion in cases permitted by the law. Despite its significance, this "procedural turn" led to implementation and interpretation deficits.⁹⁴ Noncompliance with the ruling also demonstrated the Argentine judiciary's lack of enforcement power.⁹⁵ Ultimately, the whole process showed that the ground's model was not enough and that movements needed to insist on pursuing legal abortion available upon request.

88. MABEL BELLUCCI, *HISTORIA DE UNA DESOBEDIENCIA: ABORTO Y FEMINISMO* (2014).

89. Gutiérrez, *supra* note 27, at 159.

90. Bergallo, *supra* note 87, at 144.

91. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 13/3/2012, "F., A.L. s/ medida autosatisfactiva," Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (2012-259-28) (Arg.).

92. María Eugenia Monte, *Abortion, Sexual Abuse and Medical Control: The Argentinian Supreme Court decision on F., A.L.*, 26 *SEXUALIDAD, SALUD Y SOCIEDAD* 68, 75 (2017).

93. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 13/3/2012, "F., A.L. s/ medida autosatisfactiva," Fallos de la Corte Suprema de Justicia de la Nación [Fallos] (2012-259-14) (Arg.).

94. Bergallo, *supra* note 87, at 165.

95. Andrea F. Noguera, *Argentina's Path to Legalizing Abortion: A Comparative Analysis of Ireland, the United States, and Argentina*, 25 *SW. J. OF INT'L L.* 356, 359 (2019).

In 2018, the Campaign presented its abortion legalization bill for the seventh time and, finally, parliamentary debate was opened for the first time. At this point, the Campaign had become a country-wide movement with alliances in numerous sectors of civil society. Also, healthcare professionals, abortion accompaniment organizations, teachers, and university professors organized within the Campaign, forming specific networks for advocacy.⁹⁶ That was how the movement managed to put abortion at the center of the public agenda and to mobilize millions of people on the streets while Congress was in session. However, the bill failed to pass the Senate. Another attempt to legalize abortion was made in 2020, this time with the support of President Alberto Fernández. Despite the difficulties posed by the COVID-19 pandemic, decades of organizing finally paid off, and the movement achieved a milestone for the region when abortion was legalized.

Notably, a series of the Campaign's demands were included in the Argentine law. Not only were abortion and post-abortion care secured by the law, but also services related to the prevention of unintended pregnancies, such as information, sex education, and contraceptive methods.⁹⁷ These were among the Campaign's central demands in its consistent framing of abortion as integral to sexual and reproductive rights as a whole, and within the broader scope of human rights.⁹⁸ The Campaign's slogan "Sex education for choice, contraception to prevent abortion, and legal abortion to prevent death," also shows its comprehensive approach to abortion. Secondly, the law establishes that all services must be provided free of charge in both public and private healthcare institutions.⁹⁹ The Campaign always framed abortion as a matter of social justice and, therefore, another central demand was securing equitable access to comprehensive healthcare. Thirdly, the law recognizes abortion rights not only for women, but also for "persons with other gender identities who have the ability to become pregnant," including trans men, non-binary, queer-identified, and gender non-conforming people.¹⁰⁰ Since 2016, the bills presented by the Campaign demanded the inclusion of people with different gender identities in line with the groundbreaking Gender Identity Law (No. 26743) that Argentina passed in 2012.¹⁰¹

96. Gutiérrez, *supra* note 27, at 164-66.

97. Law No. 27610 art. 2, Jan. 15, 2021, 34.562 B.O. 3 (Arg.).

98. Sutton & Borland, *supra* note 20.

99. Law No. 27610 art. 12, Jan. 15, 2021, 34.562 B.O. 3 (Arg.).

100. Law No. 27610 art. 1, Jan. 15, 2021, 34.562 B.O. 3 (Arg.).

101. Barbara Sutton & Elizabeth Borland, *Queering Abortion Rights: Notes from Argentina*, 20 (12) CULTURE, HEALTH, & SEXUALITY 1378, 1388-89 (2018).

Furthermore, the Access to Voluntary Interruption of Pregnancy Law stipulates that abortion care must be provided within a period not exceeding ten days following request.¹⁰² This provision recognizes that abortion is a time-sensitive issue and that any delays are, in fact, barriers to access.

Healthcare personnel are obligated by the law to offer dignified treatment and guarantee privacy, confidentiality, autonomy, access to information, and quality care for patients. While the law secures access to information and comprehensive healthcare, it also states that “these services are not obligatory for the patient, nor are they a conditioning factor for implementation of the practice.”¹⁰³ In other words, the law does not require all abortions to go through the healthcare system, nor does it stipulate that abortions must always be performed by healthcare professionals.¹⁰⁴ Unlike in the cases of Uruguay and Chile, the Argentine law does not place medical professionals in the role of gatekeepers, nor does it position the clinical setting as a condition for the legality of abortion. In other words, access to medical care is introduced in the law as a right but not an obligation or condition for legality of the practice. Abortion by medication that is administered outside the healthcare system is not outlawed and, specifically, the law stipulates that receiving post-abortion care is a right “without prejudice if the decision to abort may have been contrary to the legally authorized cases.”¹⁰⁵

Regarding conscientious objection, the law states that “[a]ny healthcare professional who may have to intervene directly in the interruption of pregnancy has the right to exercise conscientious objection.”¹⁰⁶ That is, the law recognizes conscientious objection as an individual right that protects only professionals who are directly involved in the abortion procedure.¹⁰⁷ Other professionals, technicians, and personnel who perform tasks indirectly related to abortion, such as cleaning services, nursing care, anesthesia, sonography, etc., cannot invoke the right to conscientious objection. Professionals who appeal for this protection are required to refer the patient to another professional without delay. Also, they cannot deny patients post-abortion care or abortion services when the life or health of

102. Law No. 27610 art. 5, Jan. 15, 2021, 34.562 B.O. 3 (Arg.).

103. Law No. 27610 art. 6, Jan. 15, 2021, 34.562 B.O. 3 (Arg.).

104. Cecilia Marcela Hopp, *El Nuevo Artículo 86 del Código Penal: Del Aborto Como Ilícito a la IVE Como Derecho*, RUBINZAL CULZONI (Mar. 26, 2021), https://www.researchgate.net/publication/350411290_El_nuevo_articulo_86_del_Codigo_Penal_Del_aborto_como_ilicito_a_la_IVE_como_derecho.

105. Law No. 27610 art. 2, Jan. 15, 2021, 34.562 B.O. 3 (Arg.).

106. Law No. 27610, art. 10, Jan. 15, 2021, 34.562 B.O. 3 (Arg.).

107. Agustina Ramón Michel et al., *Objeción de conciencia en la Ley sobre Interrupción del Embarazo de Argentina*, 15 SERIE DOCUMENTOS REDAAS 1 (2021).

the pregnant person is in danger. Finally, unlike in Uruguay and Chile, there is no protection for institutional conscientious objection. In cases where all personnel in a particular facility invoke conscientious objection, the healthcare institution must put referral mechanisms in place, assuming all the associated costs.¹⁰⁸

The Criminal Code was also modified by the new abortion law. As a result, abortion is not a crime when it is performed within the time limits and grounds provided by the law. It is penalized when performed without consent of the pregnant person and, after the fourteenth week of pregnancy, if the stipulated grounds are not observed. A new article establishes prison time for public officials, healthcare institution authorities, healthcare professionals, or personnel who “unduly delay, hinder, or deny, in violation of current regulations, the practice of abortion in legally authorized cases.”¹⁰⁹

Social mobilization for the legalization of abortion in Argentina ignited what is now known as the “Green Tide,” a contagious and vigorous movement for abortion rights that has moved across national borders. The terms under which abortion was legalized are also relevant and were successfully shaped by the movement. Medical professionals and institutions are not positioned as gatekeepers but rather as aides in abortion access. They are required to provide cost-free care within ten days and guarantee privacy, confidentiality, autonomy, access to information, and quality care for patients. Also, comprehensive medical care is settled as a right and not as an obligation or condition for legality. Individual conscientious objection is recognized, but with several limitations. Despite all this, abortion by decision of the pregnant person was not removed from the Criminal code.

After legalization, the Campaign redirected its efforts to advocate for policy implementation and respond to a variety of conservative attacks. In 2021, a member of the *Red de Profesionales por el Derecho a Decidir* [Network of Healthcare Professionals for the Right to Choose], Miranda Ruiz, was arrested for allegedly causing an abortion without consent.¹¹⁰ The case against Miranda Ruiz was ultimately dismissed, but she had to go through criminal proceedings for an entire year.¹¹¹ In addition to

108. Law No. 27610, art. 11, Jan. 15, 2021, 34.562 B.O. 3 (Arg.).

109. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 85 bis (Arg.).

110. Natalie Alcoba, ‘It’s Crazy’: The Doctor Who Faces Jail in Argentina for Giving a Legal Abortion, THE GUARDIAN (Apr. 19, 2022), <https://www.theguardian.com/global-development/2022/apr/19/doctor-faces-jail-in-argentina-legal-abortion-miranda-ruiz>.

111. *Sobresayeron a la médica Miranda Ruiz*, Página 12 (Sept. 24, 2022), <https://www.pagina12.com.ar/484359-miranda-ruiz-sobreseida>.

participating in Miranda Ruiz's defense, feminist and human rights organizations also monitor challenges the law has received in courts, though none of these have prospered so far.¹¹² Civil society organizations continue to monitor policy implementation to demand and strengthen access.¹¹³

III. FEMINIST NETWORKS FOR SAFE ABORTION

In parallel with efforts to legalize abortion, movements in Argentina, Chile, and Uruguay have been working at the margins of the law to support safe access to abortion with medications. To fully grasp the relevance of these political strategies, it is essential to understand why medication abortion has "the potential to change everything for the better for women who need an abortion."¹¹⁴

In the 1990s, scholars began documenting Brazilian women's use of the pharmaceutical misoprostol to terminate pregnancies.¹¹⁵ This drug, a prostaglandin originally formulated to treat gastric ulcers, has side effects of uterine contractions and miscarriage. Simply put, poor Brazilian women discovered how to use these side effects to their own advantage, and this knowledge was disseminated by word of mouth until public health researchers started to investigate the matter. It took years of research and experimentation by women themselves before the World Health Organization (WHO) recognized that misoprostol in combination with mifepristone was an effective, safe, and convenient method to induce medication abortion and thus, included it on its complementary Essential Medicines List in 2005.¹¹⁶ Since then, successive editions of the WHO Essential Medicines List and WHO Guidelines for Abortion Care have included regimes of misoprostol plus mifepristone, and misoprostol alone,

112. See AMNISTÍA INTERNACIONAL, LA LEY 27610 DE INTERRUPCIÓN VOLUNTARIA DEL EMBARAZO. EL LITIGIO COMO HERRAMIENTA PARA DEFENDER Y FORTALECER SU IMPLEMENTACIÓN. ANÁLISIS A UN AÑO DE SU VIGENCIA (2021).

113. *Proyecto Mirar*, <https://proyectomirar.org.ar/> (last visited Jan. 25, 2023).

114. Marge Berer & Lesley Hoggart, *Medical Abortion Pills Have the Potential to Change Everything About Abortion*, 97 CONTRACEPTION 79, 79 (2018).

115. See Margareth Arilha & Regina Maria Barbosa, *Cytotec in Brazil: 'At least it doesn't kill,'* 1 REPRODUCTIVE HEALTH MATTERS 41 (1993); see also Sarah H. Costa & M. P. Vessey, *Misoprostol and Illegal Abortion in Rio de Janeiro, Brazil*, 341(8855) THE LANCET 1258 (1993); Helena Lutésia Coêlho et al., *Misoprostol: The Experience of Women in Fortaleza, Brazil*, 49 CONTRACEPTION 101 (1994).

116. World Health Organization, *The Selection and Use of Essential Medicines*. REPORT OF THE WHO EXPERT COMMITTEE (2005); see also Katrina Perehudoff et al., *Realising the Right to Sexual and Reproductive Health: Access to Essential Medicines for Medical Abortion as a Core Obligation*, 18 BMC INT'L HEALTH & HUM. RTS. 1 (2018).

to induce medication abortion. Additionally, a growing body of evidence demonstrates the effectiveness and safety of self-managed abortion with activist support outside the clinical setting.¹¹⁷

Thereby, misoprostol began to live a “double life.”¹¹⁸ On the one hand, it is an essential medicine recommended for treating gastric ulcers that also has obstetric uses such as cervical ripening and labor induction, termination of pregnancy, and prevention or treatment of postpartum hemorrhage. On the other hand, outside legal medical practice, misoprostol (alone or in combination with mifepristone) is increasingly used as a safe and dependable method to self-induce abortion. Most importantly, in restrictive legal contexts, misoprostol is replacing other dangerous methods and making abortion safer than it used to be.¹¹⁹

Since the late 1990s, NGOs and political organizations advocating for reproductive rights in restrictive legal contexts developed different strategies to facilitate access to misoprostol and educate women about its safe use to induce abortion.¹²⁰ In June 2008, with support from the Dutch organization Women on Waves, Ecuadorian activists launched the first Latin American hotline offering information about how to safely terminate a pregnancy using misoprostol.¹²¹ Abortion information hotlines rapidly spread in other Latin American countries, adapting their strategies to new local contexts.¹²² A few years later, another political strategy for medication abortion support emerged: abortion accompaniment. In the early 2010s, feminist groups began to offer reliable information and counseling throughout the entire process, as well as person-centered support for those who decide to terminate pregnancies with medications. Either with in-person meetings, telephone conversations, or internet-based messaging platforms, these activists are building a new holistic model of feminist and community-based abortion care. In 2018, twenty-one groups of abortion

117. See Heidi Moseson et al., *Effectiveness of Self-Managed Medication Abortion with Accompaniment Support in Argentina and Nigeria (SAFE): A Prospective, Observational Cohort Study and Non-Inferiority Analysis with Historical Controls*, 10 *THE LANCET GLOB. HEALTH* E105 (2021); Heidi Moseson et al., *Effectiveness of Self-Managed Medication Abortion Between 13 and 24 Weeks Gestation: A Retrospective Review of Case Records from Accompaniment Groups in Argentina, Chile, and Ecuador*, 102 *CONTRACEPTION* 91 (2020).

118. Silvia De Zordo, *The Biomedicalisation of Illegal Abortion: The Double Life of Misoprostol in Brazil*, 23 *HIST., CIÊNCIAS, SAÚDE - MANGUINHOS* 19, 20 (2016); Mariana Prandini Assis & Joanna N. Erdman, *In the Name of Public Health: Misoprostol and the New Criminalization of Abortion in Brazil*, 8 *J. OF L. & THE BIOSCIS.* 1, 4 (2021).

119. SINGH ET AL., *supra* note 3.

120. Naomi Braine & Marissa Velarde, *Self Managed Abortion: Strategies for Support by a Global Feminist Movement*, 9 *WOMEN'S REPROD. HEALTH* 183 (2022).

121. See Drovetta, *supra* note 15.

122. *Id.*

accompaniment from fifteen different countries came together to launch the *Red Feminista Latinoamericana y Caribeña de Acompañantes de Aborto* [Latin American and Caribbean Feminist Network of Abortion Accompaniment].¹²³

These feminist and community-based health practices were built in response to the criminalization of abortion and failures by national governments to care for the health and life of women, trans men, and nonbinary people in need of safe abortions. According to Mariana Prandini Assis and Joanna N. Erdman, in addition to providing essential health services that are otherwise unavailable or inaccessible, this activism challenges the “medico-legal paradigm,” according to which abortion safety can only be secured by legal and medical control of provision and access.¹²⁴ In response, these organizations advocate for the total decriminalization of abortion and have been vocal participants in public debates on abortion reform. They also question the clinical setting as the only place where safe and legal abortion can take place, as well as the paternalistic role that laws usually assign to healthcare professionals. Instead, they advocate for a model of care that is free of stigma, person-centered, and horizontal in order to look after both physical and emotional well-being.¹²⁵ Their activism has contributed to reshaping public discussions around abortion policy and law.

Publications by Lucía Berro Pizarossa, Rishita Nandagiri and Patty Skuster, point out that laws and regulations around abortion, even when they bring about liberalization, often establish models of medicalization and criminalization that create vulnerabilities and legal risks for these groups and the people they assist.¹²⁶ Also, Mariana Prandini Assis and Joanna N. Erdman stated that regulations that establish misoprostol (and mifepristone) as highly controlled drugs can be considered a new form of abortion criminalization and do not benefit public health.¹²⁷ Therefore, rather than

123. See RED FEMINISTA LATINOAMERICANA Y CARIBEÑA DE ACOMPAÑANTES DE ABORTO, <https://redcompafeminista.org> (last visited Jan. 25, 2023).

124. Mariana Prandini Assis & Joanna N. Erdman, *Abortion Rights Beyond the Medico-Legal Paradigm*, 17 GLOB. PUB. HEALTH 2235, 2236 (2021).

125. See Suzanne Veldhuis et al., ‘Becoming the Woman She Wishes You to Be’: A Qualitative Study Exploring the Experiences of Medication Abortion Acompañantes in Three Regions in Mexico, 106 CONTRACEPTION 39, 43 (2022); Chiara Bercu et al., *In-Person Later Abortion Accompaniment: A Feminist Collective-Facilitated Self-Care Practice in Latin America*, 29 SEXUAL AND REPROD. HEALTH MATTERS 121, 132 (2022).

126. Lucía Berro Pizarossa & Rishita Nandagiri, *Self-Managed Abortion: A Constellation of Actors, a Cacophony of Laws?* 29 SEXUAL AND REPROD. HEALTH MATTERS 23, 26 (2021); Lucía Berro Pizarossa & Patty Skuster, *Toward Human Rights and Evidence-Based Legal Frameworks for (Self-Managed) Abortion: A Review of the Last Decade of Legal Reform*, 23 HEALTH AND HUM. RTS. 199, 208 (2021).

127. See Prandini Assis & Erdman, *supra* note 124.

outlawing these feminist initiatives and restricting access to essential medications, states should move forward to recognize the role of these activists as public health agents and harness the potential for collaboration.

III. A. Uruguay: Feminist Organizations Confront the Shortcomings of the Law

Since early 2000, medication abortion was central to the risk and harm reduction strategy that preceded the legalization of abortion in Uruguay. At the time, misoprostol was gaining ground against other (often unsafe) methods to terminate pregnancies through word of mouth, information shared by feminist organizations, and health professionals' practices of harm reduction.¹²⁸

After legalization in 2012, all official technical guidelines established medication abortion as the preferred method for the termination of pregnancy. This decision was based on broad scientific evidence regarding the safety and efficacy of medication abortion, medical professionals' experience with the method built when risk and harm reduction policies were in force, and the lack of healthcare infrastructure to provide other methods.¹²⁹ In fact, reports on implementation of the law conducted by civil society organizations show that reliance on medication abortion resulted in a lack of provision of other methods, such as manual vacuum aspiration.¹³⁰

Uruguay was the first country in the Southern Cone to authorize misoprostol and a combined medication pack containing mifepristone and misoprostol to terminate pregnancies.¹³¹ In fact, these medications were swiftly included by the Ministry of Health in the country's essential medicines list following the legalization of abortion.¹³² These medications are provided free of cost both by public health services and private medical insurance.¹³³ In parallel to its consolidation as the preferred method for

128. SUSANA ROSTAGNOL, *ABORTO VOLUNTARIO Y RELACIONES DE GÉNERO: POLÍTICAS DEL CUERPO Y DE LA REPRODUCCIÓN* (2014).

129. See Verónica Fiol et al., *The Role of Medical Abortion in the Implementation of the Law on Voluntary Termination of Pregnancy in Uruguay*, 134 INT'L J. OF GYNECOLOGY AND OBSTETRICS S12 (2016).

130. MUJER Y SALUD EN URUGUAY, *SERVICIOS LEGALES DE ABORTO EN URUGUAY. LOGROS Y DESAFÍOS DE SU FUNCIONAMIENTO* (2018).

131. CONSORCIO LATINOAMERICANO CONTRA EL ABORTO INSEGURO [CLACAI], *MIFEPRISTONA Y MISOPROSTOL EN SEIS PAÍSES DE AMÉRICA LATINA: PROCESOS DE REGISTRO Y DISPONIBILIDAD* (2017).

132. Ordinance No. 73/013, *Modificación al Formulario Terapéutico de Medicamentos con la incorporación de Fármacos Ginecológicos* [Modification to the Therapeutic Formulary of Medicines Adding Gynecological Pharmaceuticals] (2013) (Uru.).

133. CLACAI, *supra* note 131.

legal abortion, both misoprostol and mifepristone became highly controlled drugs. These medications are only accessible through pharmacies in healthcare institutions, a prescription is required for access, and the prescription is always withheld by the pharmacy for greater oversight on the drugs' circulation.¹³⁴

This situation resulted in the creation of illegal markets and it associated medication abortion with drug-related offenses.¹³⁵ Indeed, Lucía Berro Pizarrossa and Patty Skuster point out that regulations now impede dependable access to medications in the formal market and hinder safe abortion with medications outside the processes set by the law.¹³⁶ The risk and harm reduction strategies that were crucial in the process that paved the way to legalization are hardly ever in place.¹³⁷ Consequently, abortion seekers have to resort to clandestine and potentially unsafe providers of the medications when their situations fall outside the provisions of the law (e.g., because they are migrants with less than a year of residence in Uruguay, or because they could not access care before the time limit was reached).¹³⁸

The feminist organization *Mujeres en el Horno* was launched in 2014, when abortion was already legalized in Uruguay, as a response to the shortcomings of abortion laws and policies. The phrase “*en el horno*” literally means to be “in the oven.” In the vernacular language of the region, it is usually used when someone is stuck in a very difficult and overwhelming situation in which there are no alternatives. The organization promotes sexual and reproductive rights and, from 2014 to 2020, maintained the *Línea Aborto Información Segura* [Safe Information Abortion Hotline]. Both by phone and email, they provided information about legal abortion services and safe abortion with medication before, during, and after the procedure. In an extensive report on their work, they acknowledge the importance of legalized abortion and value the provision of services in the health system.¹³⁹ At the same time, they criticize the

134. *Id.* See also Berro Pizarrossa & Skuster, *supra* note 126.

135. *Las pastillas del abuelo. Operación Pharma II: Procesaron a otras tres personas por la venta de misoprostol*, MONTEVIDEO PORTAL (Oct. 13, 2017), <https://www.montevideo.com.uy/Noticias/Operacion-Pharma-II-procesaron-a-otras-tres-personas-por-la-venta-de-misoprostol-uc664128>.

136. Berro Pizarrossa & Skuster, *supra* note 126, at 200.

137. MUJER Y SALUD EN URUGUAY, ABORTO EN CIFRAS. DATOS DE URUGUAY AL 2021 (2021), https://issuu.com/mujerysaludenuruguay/docs/aborto_en_cifras_-_mysu_09-21.

138. Fernanda Kosak, *El mal que no terminó con despenalizar*, EL PAÍS (Mar. 11, 2018), <https://www.elpais.com.uy/que-pasa/mal-termino-despenalizar.html>.

139. COLECTIVA FEMINISTA MUJERES EN EL HORNO, EXPERIENCIA FEMINISTA DE ACOMPAÑAMIENTO DE ABORTO EN URUGUAY. INFORME Y ANÁLISIS DE LA ATENCIÓN EN LA LÍNEA ABORTO INFORMACIÓN SEGURA 2015-2020 (2021).

constraints and outright medicalization of abortion. Specifically, they show how strict time limits, arduous routes to access, conscientious objection, and provisions that hinder access for migrant women are important shortcomings of the legislation. Also, based in the systematization of their work, they identify other barriers such as a lack of services throughout the national territory, delays in access to care, mistreatment, and violence during the process.

The end of 2020 marks the emergence of *Las Lilas—Red de Acompañamiento Feminista en Aborto de Uruguay* [The Purple Women—Network of Feminist Accompaniment of Abortion in Uruguay]. The organization was launched as a political response in challenging and difficult times. First, incoming right-leaning and self-proclaimed “pro-life” President Luis Lacalle Pou put the movement on alert. And in addition, the COVID-19 pandemic created specific challenges to accessing sexual and reproductive health services in Uruguay.¹⁴⁰

In that complex scenario, Las Lilas started providing information and support to access safe and accompanied abortions. There are Las Lilas groups in different parts of the country, and they can be reached by phone, email, and social media. To promote the effective exercise of rights protected by the law, Las Lilas share information about the route to access legal abortion, available health services, and how to deal with possible problems. They also offer information on safe abortion with medications and sexual and reproductive rights in general. Las Lilas advocate for the healthcare system’s full compliance with the abortion law and report diverse non-compliance situations, such as a non-implementation of the risk and harm reduction strategy that should be in place for women who fall outside the protection of the law.¹⁴¹ They have also intervened in grave cases such as the death of a fourteen-year-old girl after seeking abortion care in the healthcare system in 2021.¹⁴²

Autonomous feminist organizations like *Mujeres en la Horno* and *Las Lilas* are confronting the obstacles created by the shortcomings of law and policy. They contribute to full implementation of the abortion law by

140. Leonel Briozzo et al., *Análisis del impacto de la pandemia COVID-19 sobre la calidad de los servicios de salud sexual y reproductiva*, 36(4) REVISTA MÉDICA DEL URUGUAY 436 (2020).

141. LAS LILAS – RED DE ACOMPAÑAMIENTO FEMINISTA EN ABORTO & MUJER Y SALUD EN URUGUAY, *ACOMPANAR ABORTOS COMO PRÁCTICA POLÍTICA* (Sept. 2, 2022), <https://clacai.org/iniciativas-2021/acompanar-abortos-como-practica-politica>.

142. LAS LILAS – RED DE ACOMPAÑAMIENTO FEMINISTA EN ABORTO & MUJER Y SALUD EN URUGUAY, *DOCUMENTACIÓN SOBRE CASO DE FALLECIMIENTO DE ADOLESCENTE DE 14 AÑOS EN URUGUAY EN MARCO DE PROCESO DE ABORTO LEGAL 5* (2021), <http://clacaidigital.info/handle/123456789/1409>.

demanding effective compliance with abortion policies and acting as intermediaries between users and the healthcare system. At the same time, they share information and create structures of collective support for those who encounter obstacles that make access impossible or who fall outside the provisions of the law.

III. B. Chile: Navigating Legal Restrictions to Expand Access

Beginning in the early 2000s, and during the total abortion ban, illegal pregnancy termination practices began to change due to the dissemination of knowledge about how to use misoprostol.¹⁴³ Use and circulation of this drug was and remains highly restricted by the Institute of Public Health, which authorizes, regulates, and controls pharmaceutical products in Chile.¹⁴⁴ At that time, misoprostol was only registered for treatment of gastric ulcers, and licenses to manufacture and sell it for gynecological uses were time and again refused.¹⁴⁵ Restrictions on its commercialization were also put in place and, as of 2009, the drug is no longer available at commercial pharmacies.¹⁴⁶ After legalization on three grounds, misoprostol and mifepristone were formally authorized for gynecological use.¹⁴⁷ But these medications remain highly controlled and can only be legally obtained through medical institutions or authorized private institutions, under strict protocols and with medical supervision. As in Uruguay, this has resulted in the creation of illegal markets for the pills, sometimes connected with drug dealers and traffickers. Prices, then, are not controlled in any way, and the authenticity and quality of the drug is not guaranteed. Users can still securely access the medication through feminist and women's organizations such as Women Help Women, who sends the medication by mail.¹⁴⁸

143. Lidia Casas & Lieta Vivaldi, *Abortion in Chile: The Practice Under a Restrictive Regime*, 22 REPROD. HEALTH MATTERS 70, 73 (2014).

144. CÓDIGO SANITARIO [CÓD. SANIT.] [HEALTH CODE] art. 96 (Chile).

145. Eduardo Chia, *Aborto farmacológico y libertad de información en Chile*, in EL ABORTO EN AMÉRICA LATINA. ESTRATEGIAS JURÍDICAS PARA LUCHAR POR SU LEGALIZACIÓN Y ENFRENTAR LAS RESISTENCIAS CONSERVADORAS 271, 277 (Paola Bergallo, Isabel Cristina Jaramillo Sierra & Juan Marco Vaggione eds., 2018).

146. Irma Palma Manríquez et al., *Experience of Clandestine Use of Medical Abortion Among University Students in Chile: A Qualitative Study*, 97 CONTRACEPTION 100, 102-03 (2018).

147. Asociación Chilena de Protección de la Familia (APROFA), *APROFA logra registro de Mifepristona y Misoprostol, un avance en derechos en nuestro país*, CHILE APROFA TU DECISIÓN, TU LIBERTAD (Nov. 20, 2019), <https://www.aprofa.cl/2019/11/20/aprofa-logra-registro-de-mifepristona-y-misoprostol-un-avance-en-derechos-en-nuestro-pais/>.

148. Sara Larrea et al., *'No One Should Be Alone Living This Process': Trajectories, Experiences and User's Perceptions About Quality of Abortion Care in a Telehealth Service in Chile*, 29 SEXUAL AND REPROD. HEALTH MATTERS 213, 214 (2021).

In 2009, the group *Feministas Bío Bío* [Bío Bío Feminists], from the city of Concepción, launched the first hotline offering information about safe medication abortion in Chile. Shortly after, *Línea Aborto Chile* [Chile Abortion Hotline] passed into the hands of another organization called *Lesbianas y Feministas por el Derecho a la Información* [Lesbians and Feminists for the Right to Information]. They began to launch hotlines in different cities, and in 2012, published the book *Línea Aborto Chile: El Manual* [*Chile Abortion Hotline: The Handbook*], which was available both in hardcopy and to download for free from the Internet.¹⁴⁹ The book contains information about the Chilean legal framework, instructions for safe use of misoprostol to terminate pregnancy, and users' testimonials. Later, due to political divisions, the *Línea Aborto Libre* [Free Abortion Hotline] was launched.¹⁵⁰ Besides maintaining the hotlines and publishing information in different formats, these organizations held in-person workshops to further disseminate advice on medication abortion.

In general terms, these early organizations had “no political affiliation beyond feminist activism and [did] not lobby for legislative reform because they reject any dialogue with the State or government representatives.”¹⁵¹ Even so, they considered their practice to be protected by the right to information codified in the Chilean Constitution and rooted in international human rights law.¹⁵² Organization protocols state that they only share publicly available information from dependable sources like the World Health Organization to persons of legal age.¹⁵³ No information on how to get the medication or help to acquire it was provided.¹⁵⁴

Another abortion access initiative was launched in 2016 by lesbian feminist activists who were part of the hotline. In addition to providing information about safe medication abortion, the new political organization *Con las Amigas y en la Casa* [With Friends and at Home] began to offer accompaniment and support during the entire process. Activists meet in-person with people seeking abortion and offer support that acknowledges their needs and respects their autonomy. This initiative seeks to center feminist care and solidarity among women while also affirming self-

149. LESBIANAS Y FEMINISTAS POR EL DERECHO A LA INFORMACIÓN, *LÍNEA ABORTO CHILE: EL MANUAL ¿CÓMO LAS MUJERES PUEDEN HACERSE UN ABORTO CON PASTILLAS?* (1st ed. 2012).

150. Cecilia del Carmen Loaiza Cárdenas, *Estrategias de amor e información entre mujeres: La línea aborto libre. Una propuesta de investigación feminista* 1, 4 (Jan. 7, 2016) (B.A. thesis, Universidad de Chile) (on file with Universidad de Chile).

151. Casas & Vivaldi, *supra* note 143, at 75.

152. Chia, *supra* note 145.

153. Lieta Vivaldi & Benjamín Varas, *Agencia y resistencia feminista en la prohibición del aborto en Chile*, 1(1) *DERECHO Y CRÍTICA SOCIAL* 139, 156 (2015).

154. *Id.*

managed abortion outside of medical institutions and without medical supervision as safe and effective.¹⁵⁵ It is important to add that their lesbian feminist approach to abortion is fundamental to these political experiences. Organizations present their work as a practice of “love between women” and call for people to “abort heterosexuality,” arguing that being lesbian and aborting are both forms of resistance to patriarchal and heterosexist norms.

These organizations are also working to normalize abortion as an everyday and self-affirming practice. In fighting against abortion stigma, they create the conditions for a more honest and better-informed public debate. However, this emphasis on social and cultural change should not be interpreted as a flat rejection of institutional and legal change. Instead, this is a political stance that reminds us that effective legal and policy change must be built and sustained “from the bottom up.”

In that vein, after legalization of abortion on three grounds in 2017, With Friends and at Home launched the project *Observadoras de la Ley de Aborto* [Abortion Law Watchers].¹⁵⁶ Although they continue to work as *acompañantes* regardless of legal restrictions, they also believe in their role as activists to achieve full implementation of the law. That is why, through this new project, they offer accompaniment for women seeking legal abortion, monitor abortion services within the formal healthcare system, and promote alliances with healthcare professionals. This new dimension of their activism has allowed them to better understand barriers to accessing legal abortion services. In fact, they began to see why women and girls that may be protected by the law many times prefer to self-manage their abortion outside the medical system due to confidentiality issues or concerns about violence and ease of access, among others.

Indeed, these organizations are developing a new stage of political incidence through dialogue with state institutions. In the last few years, they have been participating in political processes seeking to achieve legal change. From the activists’ point of view: “Legal abortion is not and never will be our political ceiling, though it is a minimum [degree] of dignity for which we are going to work until we reach it.”¹⁵⁷ To that end, in 2021, activists participated in the legislative debate on the decriminalization of

155. See Lieta Vivaldi & Valentina Stutzin, *Exploring Alternative Meanings of a Feminist and Safe Abortion in Chile*, in *ABORTION AND DEMOCRACY: CONTENTIOUS BODY POLITICS IN ARGENTINA, CHILE, AND URUGUAY* 226 (Barbara Sutton & Nayla Luz Vacarezza eds., 2021).

156. See OBSERVADORAS DE LA LEY DE ABORTO, <https://olachile.org/> (last visited Jan. 25, 2023).

157. Comité Editorial Gaceta OLA, *Presentación*, GACETA (Chile), Sept. 28, 2021, at 3 (author’s translation).

abortion until the fourteenth week of pregnancy, although the project was ultimately rejected.¹⁵⁸ Also, during the unaccomplished process of constitutional reform, they were active participants in the Permanent Assembly for the Legalization of Abortion.

In Chile, feminist organizations are doing much more than facilitating access to safe abortion outside the medical system. Their role of sharing knowledge and providing support was, of course, crucial during the total abortion ban and still is, given that the law only authorizes abortion in extreme situations and under strict procedures. Also, they work to change cultural meanings and representations around abortion and to bolster an honest public debate on the subject. Furthermore, they continue to push for full implementation of the law by monitoring services and working closely with healthcare professionals. More recently, they became a relevant actor in the efforts to fully legalize abortion. As such, their contributions are not restricted to what happens outside of the law or state institutions. On the contrary, their activism is reshaping public discussions around abortion policy and legislation.

III. C. Argentina: Synergies Between the Formal Healthcare System and Feminist Organizations

During the 2000s, Argentina saw a particular interaction between medical, activist, and popular practices around abortion with misoprostol.¹⁵⁹ At the time, healthcare professionals were beginning to learn about misoprostol from their patients and recreated the Uruguayan public health strategies of risk and harm reduction. Feminist activists also learned about misoprostol in their own transnational networks, through connections with healthcare professionals, and from other women. Crosslinks between actors contributing to safe abortion access inside and outside the formal healthcare system restructured the political scenario of abortion politics in Argentina.

Although a prescription was formally required and misoprostol was not authorized for gynecological use, it was fairly easy to buy a formulation containing a combination of misoprostol and diclofenac authorized for rheumatoid arthritis in retail pharmacies.¹⁶⁰ Only in 2010 did the National Administration of Medications, Food and Medical Products authorize

158. Fabian Cambero, *Chile Lawmakers Knock Down Bill to Ease Abortion rules*, REUTERS (Nov. 30, 2021), <https://www.reuters.com/world/americas/chile-lawmakers-knock-down-bill-ease-abortion-rules-2021-11-30/>.

159. Sandra Salomé Fernández Vázquez & Lucila Szwarc, *Aborto medicamentoso. Transferencias militantes y transnacionalización de saberes en Argentina y América Latina*, 12(12) REVIISE - REVISTA DE CIENCIAS SOCIALES Y HUMANAS 163, 174 (2018).

160. CLACAI, *supra* note 131.

misoprostol for gynecological use.¹⁶¹ However, pills containing misoprostol alone were only available in healthcare settings.¹⁶² In 2018, another misoprostol-only product was registered both for institutional use and commercial sale.¹⁶³ After legalization, mifepristone became available in clinical settings thanks to registration waivers and was formally registered in March 2023.¹⁶⁴

Before legalization, the first abortion hotline was launched in 2009 by the organization *Lesbianas y Feministas por la Descriminalización del Aborto* [Lesbians and Feminists for Abortion Decriminalization]. The hotline was called *Aborto: Más Información, Menos Riesgos* [Abortion: More Information, Less Risks] and was inspired by the pioneering experience of the first Latin American hotline, launched the year before in Ecuador. This activism for access to safe abortion outside the healthcare system produced a substantive transformation in abortion politics in Argentina at least in three ways. First, it further expanded the movement's political goals, which until that time has focused almost entirely on legal change. Second, drawing on the history of LGBTQ+ struggles for healthcare, activists became lay experts on abortion and promoted a community-based model in which abortion safety does not depend on medical practitioners or clinical settings.¹⁶⁵ Third, they created an original lesbian perspective that aimed to take abortion “out of the closet” using LGBTQ+ visibility and pride politics to challenge the stigma surrounding abortion.¹⁶⁶

As was the case in Chile, Lesbians and Feminists' legal strategy was centered on the right to information. Also, with slogans such as “Women have already decided that abortion is legal,” they argued that criminalizing abortion did not stop people from having abortions but merely created health and legal risks for them. The slogan is also a testimony to their efforts to legitimize abortion and women's decisions. For these activists,

161. JASON BOWER ET AL., MARKET ASSESSMENT FOR MEDICAL ABORTION DRUGS IN ARGENTINA (2021).

162. CLACAI, *supra* note 131.

163. BOWER ET AL., *supra* note 161, at 7.

164. SILVINA RAMOS ET AL., REPORTE TEMÁTICO 2022. CALIDAD: EL DESAFÍO A DOS AÑOS DE LA LEY DE ABORTO 10 (2022). See also *Aborto legal: la ANMAT autorizó la comercialización de mifepristona* PÁGINA 12 (March 8, 2023), <https://www.pagina12.com.ar/529827-aborto-legal-la-anmat-autorizo-la-comercializacion-de-mifepr>.

165. Julia McReynolds-Pérez, *No Doctors Required: Lay Activist Expertise and Pharmaceutical Abortion in Argentina*, 42(2) SIGNS: J. OF WOMEN IN CULTURE AND SOC'Y 349, 366-67 (2017).

166. Ana Mines et al., ‘*El aborto lesbiano que se hace con la mano.*’ *Continuidades y rupturas en la militancia por el derecho al aborto en Argentina (2009-2012)*, 7(9) BAGOAS - ESTUDOS GAYS: GÊNERO E SEXUALIDADES 133 (2013).

speaking out about abortion and normalizing it was key to paving the way for legal change.

In 2010, they published the book *Todo lo que querés saber sobre cómo hacerse un aborto con pastillas* [Everything You Want to Know About How to Self-Induce an Abortion with Pills], which contained complete and detailed information about safe abortion with misoprostol.¹⁶⁷ At the end of 2011, the first edition of ten thousand copies sold out, and the digital version of the book was downloaded for free five hundred thousand times.¹⁶⁸ Due to high demand, the book was updated and re-edited in 2012.¹⁶⁹ Besides disseminating information through the hotline and in different publications, media appearances, and political events, Lesbians and Feminists prepared reports about their work. They responded to an estimated of five thousand calls per year.¹⁷⁰ The hotline was active until June 2018.

A few years after the creation of the abortion hotline, a new political strategy for access to medication abortion emerged within the Campaign for the Right to Legal, Safe, and Free Abortion. Since 2012, *Socorristas en Red (Feministas que Abortamos)* [Network of First Responders (Feminists Who Abort)] offers information and support during the entire abortion process, both in-person and by phone. Socorristas defied existing restrictive legal frameworks through public and direct-action strategies. They never tried to hide their endeavors or work to build an underground abortion service. On the contrary, they have always operated based on an “ethics of risk,” organizing collective in-person meetings as a political strategy to break the silence and isolation imposed by criminalization and cultural stigma.¹⁷¹ Activists are very vocal about what they do, and they also publicly advertise their services through different media and internet outlets, social media, posters, graffiti, and stickers.

By aiding safe abortion access without stigma, Socorristas further contributed to the legitimation of women’s and other pregnant people’s decisions regarding their bodies. They also pushed for broad social change

167. LESBIANAS Y FEMINISTAS POR LA DESCRIMINALIZACIÓN DEL ABORTO, *TODO LO QUE QUERÉS SABER SOBRE CÓMO HACERSE UN ABORTO CON PASTILLAS* (1st ed. 2010).

168. LESBIANAS Y FEMINISTAS POR LA DESCRIMINALIZACIÓN DEL ABORTO, *QUINTO INFORME DE ATENCIÓN DE LA LÍNEA ABORTO: MÁS INFORMACIÓN, MENOS RIESGOS* (2012), <http://clacaidigital.info/handle/123456789/451>.

169. LESBIANAS Y FEMINISTAS POR LA DESCRIMINALIZACIÓN DEL ABORTO, *TODO LO QUE QUERÉS SABER SOBRE CÓMO HACERSE UN ABORTO CON PASTILLAS* (2d ed. 2012).

170. *La “Línea Aborto: Más Información, Menos Riesgos”, Recibe 5.000 llamadas al Año*, TELAM DIGITAL (Oct. 4, 2013, 5:36 PM), <https://www.telam.com.ar/notas/201310/35322-la-linea-aborto->.

171. BELLUCCI, *supra* note 88, at 397, 409.

that necessarily included legal reform, along with a shift in cultural representations, perceptions, and ideas around abortion. As part of the Campaign, they sought to effect legal change and worked for the “social decriminalization of abortion.”¹⁷² From their point of view, abortion must be legitimized and supported “from the bottom up” in order to secure meaningful legal and social change.

Even when Socorristas were working to promote the safety of abortion outside the clinical setting, they always strove to build different kinds of collaborations with the formal healthcare system. From its inception, the organization expressed an “interest in establishing links with healthcare sectors that are friendly to the cause.”¹⁷³ Over the years, activists have made efforts to identify and build alliances with healthcare professionals in favor of legalization, doctors who provided legal abortion and post-abortion services in the healthcare system, professionals willing to prescribe misoprostol, and healthcare professionals who were unable or unwilling to offer care but referred patients to Socorristas as a safe alternative for abortion.¹⁷⁴ That was how, before legalization, they managed to open up possibilities for access to permitted abortions in cases of rape and risk to the life or health of the pregnant person. Also, they managed to build referral and counter-referral networks with healthcare professionals. Namely, professionals referred patients to Socorristas when the professionals could not offer care, and Socorristas also referred women to “friendly” healthcare professionals for abortion and post-abortion care, sonograms, etc.

Another important aspect of Socorristas is their commitment to producing and disseminating systematic knowledge about their activities. Since 2014, they have produced reliable data and annual reports in which they analyze the sociodemographic characteristics of the people they support and demonstrate the effectiveness of their strategy for safe abortion.¹⁷⁵ To give an idea of the scope of their activism, at this point, the Network brings together fifty-six distinct organizations distributed throughout the country. From 2014 to 2021, Socorristas supported 49,995

172. Gutiérrez, *supra* note 27, at 160-61.

173. Florencia Maffeo et al., *Parteras de nuevos feminismos. Socorristas en Red – feministas que abortamos: una forma de activismo corporizado y sororo*, 20 REVISTA VENEZOLANA DE ESTUDIOS DE LA MUJER 217, 218 (2015) (Arg.).

174. See Julia Burton & Guillermina Peralta, *Redes en torno al aborto clandestino: Vínculos de socorristas y sistema de salud en Neuquén, Argentina*, 3 CLIVAJES REVISTA DE CIENCIAS SOCIALES 159, 160 (2016) (Mex.).

175. See Julia Burton, *Prácticas feministas en torno al derecho al aborto en Argentina: Aproximaciones a las acciones colectivas de Socorristas en Red*, 7 REVISTA PUNTO GÉNERO 91, 101 (2017) (Arg.).

medication abortions outside the healthcare system.¹⁷⁶ During the same period, they supported access to 10,547 abortions within the formal healthcare system.¹⁷⁷ These data show the relevance of Socorristas' work as a whole and, particularly, the impact of their work in collaboration with the formal healthcare system.

Since the abortion law came into effect in 2021, Socorristas have continued to offer support in medication abortion outside the medical system. They have also been working to disseminate information about the law, increase cooperation with the healthcare system, and demand full implementation of new abortion policies. Their model of feminist and community-based healthcare grew at the edges of the law and medical authorities, but they managed to influence discussions around legal change and abortion safety.

Although Argentina's abortion legislation does not outlaw abortion outside the clinical setting or abortion accompaniment, Socorristas' activists have recently been arrested under "illegal exercise of medicine" charges.¹⁷⁸ This is very concerning given that their endeavors are a testimony to the relevance of collaboration, synergies, and integration between activist-based and institutional health care to expand access to abortion and empower individuals and communities.¹⁷⁹ In short, Socorristas' work must be defended and held up as an example of the extent to which the work of activists is integral to effecting substantive legal and policy change.

IV. REIMAGINING ABORTION POLITICS: HOW MOVEMENTS SHAPED LEGAL AND POLICY CHANGE

After decades of struggle, movements for abortion rights in Uruguay, Chile, and Argentina finally achieved legal reform. These mobilization processes gave rise to the Green Tide that has shaken the regional political landscape in recent years with significant successes such as abortion

176. SOCORRISTAS EN RED (FEMINISTAS Y TRANSFEMINISTAS QUE ABORTAMOS) DURANTE EL AÑO 2021: *Sistematización de acompañamientos a abortar 9-10* (2022) (Arg.).

177. *Id.*

178. *Villa María: detuvieron a dos integrantes de Socorristas en Red y una médica a pedido del MPF*, PÁGINA 12 (Dec. 23, 2022, 1:30 PM), <https://www.pagina12.com.ar/510473-villa-maria-detuvieron-a-dos-integrantes-de-socorristas-en-r>.

179. See generally Susan Yanow et al., *Self-Managed Abortion: Exploring Synergies Between Institutional Medical Systems and Autonomous Health Movements*, 104 *CONTRACEPTION* 219 (2021); Monica Dragoman et al., *Integrating Self-Managed Medication Abortion with Medical Care*, 108 *CONTRACEPTION* 1 (2022); Marge Berer, *Reconceptualizing Safe Abortion and Abortion Services in the Age of Abortion Pills: A Discussion Paper*, 63 *BEST PRAC. & RSCH. CLINICAL OBSTETRICS & GYNAECOLOGY* 45 (2020).

liberalization in Colombia and Mexico. The color green and the emblematic green kerchiefs also appeared in the streets of the United States after the *Dobbs v. Jackson Women's Health Organization* ruling, as a symbol of transnational resistance and solidarity. The Green Tide, rapidly becoming a hemispheric movement, is a testimony to the power of grassroots organizing in shaping legal change and resisting conservative attacks.

The role of movements in the political processes that led to legal changes in Uruguay, Chile, and Argentina can offer important lessons at a time when abortion policies have become an arena for debate at the global level. First, these movements worked for decades “from the bottom up” to establish abortion as a demand with broad social support. To do so, they built political alliances that went well beyond the limits of the feminist and women’s movement that garnered support both from a wide variety of organized sectors of society and from representatives of different political parties. These movements also developed arguments in favor of legal change that surpassed both the liberal and individualist frameworks of “choice,” as well as the more typically feminist notions of sexual freedom and bodily autonomy. Their work associating abortion with democracy, citizenship, human rights, public health, and social justice was important to gaining societal support and building demand for a law that guaranteed free of cost and effective access to abortion care (in the case of Uruguay and Argentina). Moreover, in their effort to legitimize abortion “from the bottom up,” these movements utilized forms of direct action that facilitated access to safe, stigma-free medication abortion. This “social decriminalization of abortion” is the result of all those efforts and is what gives substance to legal change.

Second, movements reshaped the ways in which we think about care and legal regulation of abortion. These movements maintained a critical position with regards to criminalization and the imposition of requirements for access to abortion. Procedural hurdles are considered forms of guardianship and of control over the autonomy of women and pregnant people in general. They also criticized the overmedicalization of abortion and the paternalistic role the law tends to assign to the healthcare system and medical professionals. In addition to offering critical perspectives regarding regulatory frameworks, these movements drove a transformation of the models of abortion care in which people needing abortions, instead of healthcare professionals, are placed at the center. They demonstrated that neither medical professionals nor the healthcare system is always necessary for an abortion to be safe and effective. They also showed that good quality information, activist support, and dependable access to medication is key to secure abortion safety. Although these activists’ aspirations are not

necessarily reflected in legal reforms, they continue their fight to ensure that laws and care normalize abortion rather than stigmatize against it.

Third, these movements do not consider legal change to be the end point of their struggle. Rather, new laws are considered a basic standard that must be maintained and defended in order to continue moving forward. Following legal reform, movements have a key role in generating awareness about new rights, monitoring implementation, and uplifting people and communities as agents of change. Networks that support abortion access outside the healthcare system are a fundamental part of this new stage. Despite liberalization of abortion laws, evidence shows that pregnant persons still resort to abortions outside medical settings for a variety of reasons, including avoiding procedural hurdles, unnecessary delays, and logistical difficulties or because they are afraid of being mistreated or do not trust in the standards of privacy and confidentiality in medical institutions.¹⁸⁰ For that, the implementation of new legal frameworks can be strengthened by forging cooperative connections between, on the one hand, feminist organizations that promote community healthcare strategies and, on the other, formal medical institutions.

Finally, these movements know very well that both rights and public policy on abortion can be reversed. They also understand that the only way to continue moving toward substantive reproductive freedom and justice is to stay alert and to defend hard-won achievements from conservative attacks.

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180. See Sonia Chemlal & Giuliano Russo, *Why Do They Take the Risk? A Systematic Review of the Qualitative Literature on Informal Sector Abortions in Settings Where Abortion is Legal*, 19 BMC WOMEN'S HEALTH 1, 7 (2019).

**THE LONG HISTORY OF WOMEN’S
RIGHTS CAMPAIGNS IN THREE SOUTH
AMERICAN COUNTRIES; THE RECENT
LEGAL HISTORY OF ABORTION LAW IN
URUGUAY, ARGENTINA, CHILE.**

Donna J. Guy*

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I would like to thank Professor Jonathan Miller and the Southwestern Law School for inviting me to comment on the sparkling presentation of Professor Nayla Vacarezza. I have read many of her works and I think this paper ranks among one of her best. How fortunate we are to have her here with us in Los Angeles! Her discussion on abortion rights, legal limitations, politics, and the impact of vibrant Latin American women’s movements, complicates legal issues associated with abortion rights as well as offers strategies to expand these rights all over the Americas.

After I finished reading this terrific study, I asked myself what could I add or critique? How could I possibly add new perspectives? Should I claim illness and recuse myself? I so wanted to meet Nayla and see

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Jonathan again, the latter option would have been impossible. I decided to think more about the early history women's movements and popular action that led everyday women in Latin America, as in the United States, to challenge their societies through education and participation in international activities. I am as inspired by their efforts as those who led the proabortion movement. I am also fascinated at how female sterilization along with the day-after-pills, around since 1980, have enabled women to take charge of their reproductive needs despite opposition from the state, the medical community, and the church. Everyday women, rich and poor are part of the solutions in both regions of the world paralleled by legal reforms that succeeded with the efforts of feminist politics that have shifted over time.

BRIEF HISTORY OF SOUTH AMERICAN REPRODUCTIVE RIGHTS CAMPAIGNS

Since the 19th century, the three countries under Vacarezza's study, Argentina, Uruguay and Chile, have had high rates of literacy for both men and women as a result of public education. The 19th and 20th centuries' waves of European immigrants helped develop the agriculture industry, such as cattle raising in Argentina and Uruguay. In Chile, although European immigration was more modest, mining became the engine of progress. Yet, female education was still important to Chile. European ideas of eugenics and the science of promoting healthy characteristics in children led campaigns in South America to focus on mothering and childrearing; these campaigns were often led by women.¹

By the mid-19th century, the plight of unwanted babies and children was precarious at best. With few legal rights, they totally depended upon their parent's recognition, but many men refused to do this. At that time, abandoned illegitimate children often ended up in orphanages after being abandoned at foundling wheels, and illegal abortions occurred. Both led to high levels of child mortality. The local and national archives, as well as statistical reports, attested to the need to reduce this level, and municipalities in large cities such as Montevideo and Buenos Aires hired public health physicians to improve children's conditions and enable them to reach adulthood. They, too, supported campaigns for educating women to care for their offspring. Bad parents often found themselves in court.

The value placed upon healthy children with parents to populate the relatively empty lands, along with religious institutions operating orphanages, later promoted reproduction, mothering, and laws against

1. NANCY LEYS STEPAN, "THE HOUR OF EUGENICS": RACE, GENDER, AND NATION IN LATIN AMERICA (1st ed. 1991); JULIA RODRIGUEZ, CIVILIZING ARGENTINA: SCIENCE, MEDICINE, AND THE MODERN STATE (2006).

abortion. High levels of female education, however, also led to campaigns for female suffrage in South America in the 1940s, as well as reproductive rights and divorce campaigns thereafter. This quick historical discussion provides a background for South American campaigns for reproductive rights.

COMPARISON BETWEEN U.S. AND LATIN AMERICAN FEMINIST CAMPAIGN HISTORIES

While legal decisions in the U.S. Supreme Court in 2022 removed women's constitutional right to an abortion available from 1975 to 2022 in a democratic regime, in South America, the pro-abortion movement now flourishes in a region that has long been dominated by alternating democratic and military regimes, as well as strong anti-abortion religious, eugenic and paternalistic influences. How did this come about?

I would like to contextualize the current feminist campaigns in the U.S. and Latin America by talking about the early histories of feminisms in both regions that include not only suffrage, but also highly popular feminist campaigns that defend mothers' and children's rights. In the early years of the U.S. suffrage movement, campaigns for the vote outpaced those for child rights, but both existed and were interlocked. Katherine Marino's prize-winning 2019 book, *Feminism for the Americas: The Making of an International Human Rights Movement*, makes it clear that secular Latin American feminism was marked by maternal feminism, long before battles for suffrage and abortion.² Their countries, influenced by positivism and eugenics, endorsed scientific campaigns to reduce infant mortality, protect child rights, and promote scientific maternal child raising. Heavily influenced by the male-dominated Pan American Child Congresses, a group of male physicians, lawyers, and educators who promoted programs to reduce infant and child mortality and prevent juvenile delinquency among the many boys who lived in the streets peddling papers and stealing. It began as a group parallel to the more politically oriented Pan American Congresses. Initially only men attended, but many had educated wives who also had expertise in these issues. After, Latin American educated women insisted on attending the meetings as full members. They were officially

2. KATHERINE MARINO, *FEMINISM IN THE AMERICAS: THE MAKINGS OF A HUMAN RIGHTS MOVEMENT* 6 (2019). *See also* LUCIA LIONETTI & DANIEL MIGUEZ, *LAS INFANCIAS EN LA HISTORIOGRAFIA ARGENTINA: INTERSECCIONES ENTRE PRACTICES, DISCURSOS E INSTITUCIONES* [CHILDHOODS IN ARGENTINE HISTORIOGRAPHY: INTERSECTIONS BETWEEN PRACTICES, DISCOURSES AND INSTITUTIONS] (2010).

welcomed after 1927 to the Pan American Child Congresses.³ All were deeply influenced by the role of the U.S. Children's Bureau and in 1937, they welcomed Katherine Lenroot to the Pan American meetings.⁴ Together, they energetically promoted the protection of minors and mothers in the U.S., as well as the scientific teachings of *puericultura*, or scientific mothering and childrearing. They also introduced these teachings in public schools, while U.S. educators focused on home economics.⁵

Because these were prestigious international meetings, women returned to their homelands determined to pass laws, giving them more power over their children and their household. This was an elitist group of feminists, but their impact led to the passage of Children's Codes and insisted on greater attention to juvenile delinquency.⁶ They also arranged to have the meetings occur in their own homelands thereby empowering women even more.⁷ The power of these women could be seen easily until the 1960s, when they began to retire while young supporters of female suffrage began to impact each country, and women of diverse backgrounds served in legislatures.⁸

PRESENT DAY U.S. AND INTERNATIONAL ANTI-ABORTION LAWS

The new anti-abortion laws in the United States, both national and state-wide, have forced reproductive clinics to close and threaten to eliminate the right to obtain contraceptive pills by mail. The Supreme Court and unwritten abortion rights and current debates are more responsive to political ideologies and do not mention, but are influenced, by patriarchal and religious beliefs. I truly believe that in both cases, this anti-abortion movement represents the negative vestigial elements of 20th century maternalist campaigns. Amid these differences, feminists and women in the Americas from all walks of life have clearly marked their desire to control their own wombs; and their choices can be seen by the frequency they have chosen different anti-contraceptive methods.

Nayla's discussion begins with a 2018 report from the Guttmacher Institute, a U.S. foundation that has been tracking reproductive rights all

3. See DONNA J. GUY, WHITE SLAVERY AND MOTHERS ALIVE AND DEAD: THE TROUBLED MEETING OF SEX, GENDER, PUBLIC HEALTH, AND PROGRESS IN LATIN AMERICA 33, 36 (2000).

4. *Id.*

5. *Id.* at 43.

6. *Id.* at 54-56.

7. *Id.* at 57-58.

8. *Id.* at 56-58.

over the world since 1992.⁹ Its 2022 report noted the challenges facing reproduction rights all over the world, especially in the United States due to the *Dobbs v. Jackson Women's Health Organization* case that eliminated national constitutional abortion rights for women.¹⁰ But in terms of Latin America, the situation had improved remarkably since 1918, when women had few legal choices. The proportion of all pregnancies in Latin America and the Caribbean ending in abortion increased between 1990-1994 and 2010-2014, from 23% to 32%.¹¹ Women, especially those who had already given birth, often chose tubal ligation—female sterilization—usually after giving birth.¹² They were not about to wait for permission to use new legal contraceptive methods, although in some countries like Peru, Bolivia, and Chile, forced tubal ligation became a state tactic to control proliferation of non-whites, HIV-infected babies and leftists.¹³ In 2018, approximately 23% of South American women listed sterilization for birth control, compared to 18% who used birth control pills. What do these statistics mean? Either reversible forms of birth control such as the pill, IUDs, and injectable contraceptive were too expensive or had undesirable side effects, or those involving male contraceptives lacked female input. As more reliable contraceptive methods become available, sterilization has become less frequent in South America, but the day-after-pills are not free and often cost as much as 22 USD.¹⁴

Colombia, an exception to this, chose the implementation of free sterilization as part of public family planning programs that began in the 1960s, and represents the principal agent promoting family planning since 2011.¹⁵ Nevertheless, accusations of forcible sterilization of developmentally disabled girls have been made in Colombia.¹⁶ Female

9. *Fact Sheet: Abortion in Latin America And the Caribbean*, GUTTMACHER INST. (Mar. 2018), https://www.guttmacher.org/sites/default/files/factsheet/ib_aws-latin-america.pdf.

10. Rachel K. Jones et al., *Long-Term Decline in US Abortions Reverses, Showing Rising Need for Abortion as Supreme Court Is Poised to Overturn Roe v. Wade*, GUTTMACHER INST., <https://www.guttmacher.org/article/2022/06/long-term-decline-us-abortions-reverses-showing-rising-need-abortion-supreme-court> (last updated Dec. 1, 2022).

11. *Abortion in Latin America and the Caribbean*, GUTTMACHER INST. tbl.1 (Mar. 2018), <https://www.guttmacher.org/fact-sheet/abortion-latin-america-and-caribbean>.

12. Apoorva Jadhav & Emily Vala-Haynes, *Informed Choice and Female Sterilization in South Asia and Latin America*, 50 J. BIOSOCIAL SCI. 823 (2018).

13. *Id.*

14. Luis Bahamondes et al., *The Use of Long-Acting Reversible Contraceptives in Latin America and the Caribbean: Current Landscape and Recommendations*, 2018 HUM. REPROD. OPEN 1 (2018).

15. Jadhav & Vala-Haynes, *supra* note 14.

16. *Id.*

sterilization remains extremely popular in Latin America and in other parts of the world, and we must explore this reality.¹⁷

Even in the United States, between 2015 and 2017, female sterilization was the most common form of birth control for women aged 30-49.¹⁸ A recent study showed that almost 40% of women aged 40-49 have been sterilized, compared to 21% for those aged 30-39.¹⁹ I was astonished by these figures and they raise important issues about abortion accessibility even in the 21st century.

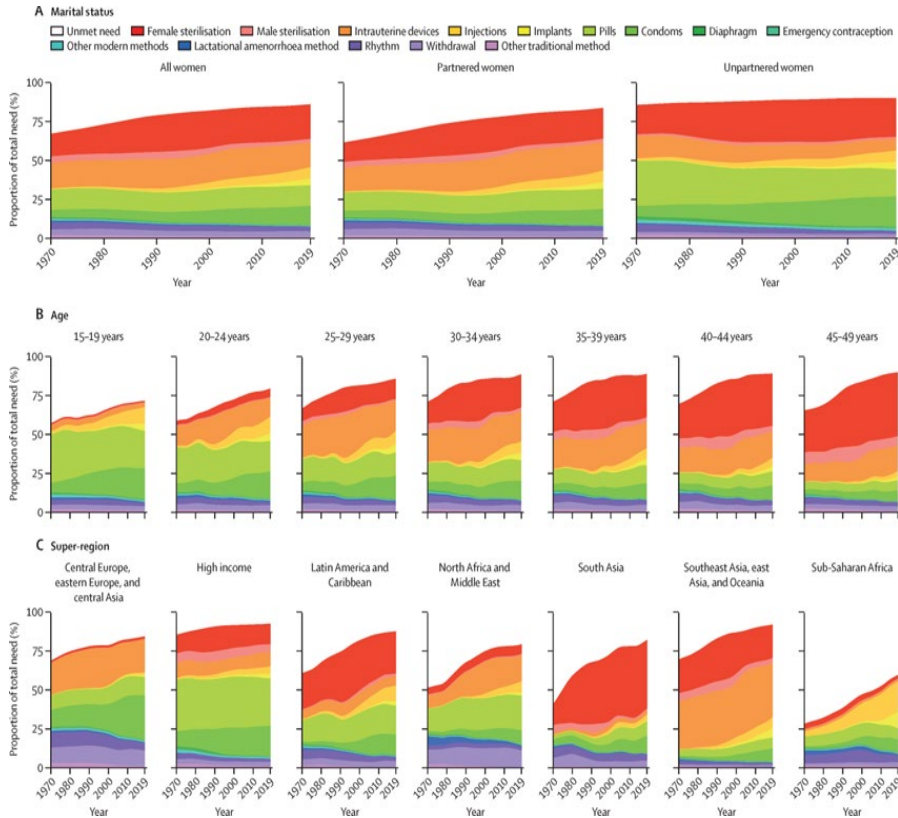
For women in South America who did not have access to temporary birth control or sterilization, illegal abortions equaled the percentage of pregnancies prevented by sterilization. But unsafe abortions meant continued high maternal and infant death rates as well as poor medical care, especially in rural areas.

17. *Id.*

18. Kimberly Daniels & Joyce Abma, *Current Contraceptive Status Among Women Aged 15-49: United States, 2015-2017*, CDC (Oct. 2020), <https://www.cdc.gov/nchs/products/databriefs/db388.htm>.

19. *Id.*

WORLD-WIDE TOTAL CONTRACEPTIVE USE BY AGE,
PARTNERED AND UNPARTNERED WOMEN, AND REGION,
1970-2019²⁰



TUBAL LIGATION AND STERILIZATION AS A COMMON CONTRACEPTIVE
CHOICE

As a result of increased contraceptive use, the frequency of abortion has decreased in Latin America. In the last thirty years, tubal ligation has been the principal cause.

According to the Guttmacher organization, the number of unintended pregnancies in Latin America and the Caribbean have gone from 94 per

20. Annie Haakenstad et al., *Measuring Contraceptive Method Mix, Prevalence, and Demand Satisfied by Age and Marital Status in 204 Countries and Territories, 1970–2019: A Systematic Analysis for the Global Burden of Disease Study 2019*, 400 THE LANCET 295, 311 (2022).

1,000 women in 1994 to 69 per 1,000.²¹ Abortion, however, has only been reduced by 3%.²² We can probably conclude from this data that birth control measures, both surgical and mechanical, have been extremely successful in lowering unintended pregnancy, while the number of abortions have only been reduced since 2014 from 33 per 1,000 to 32 per 1,000 women aged 15-49.²³ The need for accessible abortion services has not diminished.

CONCLUSION

We have all seen the picture of Lady Law envisioned as a blindfolded woman using scales to measure justice, right and wrong, crime and innocence. The fact that abortion issues are particular to women, while the laws have, until recently, been promulgated and adjudicated by men, raises the fundamental issue of how and when abortion laws can be fairly and evenly applied. As Nayla has pointed out, legal mandates to appear before judges, be interviewed, and, in the case of rape, forced to denounce the rapist, all invade women's privacy. Abortion is still directly linked to privacy rights, often of the poor and minors, of married, single, LGBT, and rural women as well as those living in urban areas. But not all women share the same views on abortion rights. So how does Lady Law guide and inform abortion needs, politics and law? Only through constant revisions of abortion legislation and turning public knowledge of reproduction, laws, and custom into power.

This was recognized by Chilean feminists in 2010 when they published *Everything You Want to Know About Getting an Abortion with Pills*, a campaign followed by organized demand for access to safe and free abortion.²⁴ Pro-Abortion feminists in Argentina followed suit. Argentine feminists also found out about misoprostol from feminists and public health officials involved in abortion politics in neighboring countries.²⁵ The pill could be purchased in Argentina in modified forms, and soon the news spread to women all over the country. At the same time, Argentina's anti-abortion campaign became ever more important. However, the difficulty

21. *Unintended Pregnancies and Abortion in Latin America and the Caribbean*, GUTTMACHER INST. (2022), <https://www.guttmacher.org/fact-sheet/unintended-pregnancy-and-abortion-latin-america-and-caribbean>.

22. *Id.*

23. *Id.*

24. *See* LESBIANAS Y FEMINISTAS POR LA DESCriminalIZACIÓN DEL ABORTO, TODO LO QUE QUERÉS SABER SOBRE CÓMO HACERSE UN ABORTO CON PASTILLAS [EVERYTHING YOU WANT TO KNOW ABOUT GETTING AN ABORTION WITH PILLS] (2010).

25. *Id.*

remains for poor women to access these drugs without going through the same steps as other contraceptives.

The question I wish to raise regards future strategies for the feminist birth control movement is: how will changing reproductive strategies, ones that may cast aside the need for current restrictions on women, affect the future of abortion politics? If women increasingly rely on new forms of birth control and the day-after-pill, what will happen to conservative demands to link abortion to legal and medical specialists? What will happen to married women's desire for tubal ligation? This question is relevant not only to Latin American feminist politics, but also to legal efforts to control abortion rights in the United States. Already the day after pill, mifepristone, along with a second pill, misoprostol, are sold in U.S. public pharmacies and on university campuses without constitutional protection. In Argentina, only misoprostol is sold. In Chile, these pills are not available outside clinics, and in Uruguay, both pills are available but with restrictions. I would argue that free access to both pills will mark future campaigns along with safer birth control pills and injections. However, tubal ligation represents the most stable form of permanent birth control for women in difficult familial or political situations.

ISANG BAGSAK! OVERSEAS FILIPINO NURSES DESERVE A SPECIAL PATH TO CITIZENSHIP

Lauren Espina*

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I. INTRODUCTION

Filipino nurses hold the American healthcare system together. This is by design. When the U.S. colonized the Philippines in 1898, and through the first half of the 20th century, it trained Filipinos to treat American soldiers and established colonial policies to groom Filipino nurses to work in the U.S.¹ For Filipinos in the Philippines, nursing became a reliable path to financial security and encapsulated the distinct Filipino cultural trait of prioritizing community care over individual needs.² But under the U.S. foreign labor certification process, where visas tie employees to their employers, Filipino nurses are often subjected to harsh conditions, iron-clad contracts, and even held hostage under threat of deportation and financial devastation.³

During the COVID-19 pandemic, when hate crimes against Asian Americans rose by 149% across the largest U.S. cities,⁴ Filipino nurses put their lives on the line to treat and comfort patients when U.S.-born nurses would not.⁵ As a result of their dedication to others and the systemic exploitation of overseas workers, Filipino nurses in the U.S. have lost their lives to COVID-19 at startling, disproportionate rates. They account for 4% of registered nurses in the U.S., but 31.5% of nurses who have died of COVID-19.⁶ Filipino nurses put their lives at risk in exceptional ways for the American public, doing so under hazardous working conditions as a

1. Catherine Ceniza Choy, *Why Are There So Many Filipino Nurses in California?*, ZÓCALO PUBLIC SQUARE (Sept. 30, 2019), <https://www.zocalopublicsquare.org/2019/09/30/why-are-there-so-many-filipino-nurses-in-california/ideas/essay>.

2. *Id.*; see Luca Powell, “It’s Starting Again”: *Why Filipino Nurses Dread the Second Wave*, N.Y. TIMES (Jan. 1, 2021), <https://www.nytimes.com/2021/01/15/nyregion/filipino-nurses-coronavirus.html>.

3. See Choy, *supra* note 1; Powell, *supra* note 2.

4. *FACT SHEET: Anti-Asian Prejudice March 2020*, CTR. FOR THE STUDY OF HATE & EXTREMISM CSUSB (Mar. 1, 2021), <https://www.csusb.edu/sites/default/files/FACT%20SHEET-%20Anti-Asian%20Hate%202020%203.2.21.pdf>.

5. See Mark Hicks, *Henry Ford Health System to Add Filipino Nurses to Fill Shortages, CEO Says*, THE DETROIT NEWS (Sept. 21, 2021), <https://www.detroitnews.com/story/news/local/wayne-county/2021/09/21/henry-ford-health-system-seeks-overseas-nurses-fill-staff-shortages/5807660001>.

6. NAT’L NURSES UNITED, *SINS OF OMISSION: HOW GOVERNMENT FAILURES TO TRACK COVID-19 DATA HAVE LED TO MORE THAN 1,700 HEALTH CARE WORKER DEATHS AND JEOPARDIZE PUBLIC HEALTH 5* (2020), https://www.nationalnursesunited.org/sites/default/files/nnu/documents/0920_Covid19_SinsOfOmission_Data_Report.pdf.

result of the U.S. exploiting their community-first work ethic. Therefore, Filipino nurses deserve a special path to citizenship for their service to the U.S. during the COVID-19 pandemic. The U.S. has recognized foreign contributions to the country and granted citizenship to soldiers who risked their lives and fought under the U.S. flag during times of war. Similarly, Filipino nurses supply the U.S. with an exceptional service, under exceptionally poor conditions, during extraordinarily dangerous times, and deserve a special path to U.S. citizenship.

From the historic exploitation of Filipinos, the colonial period⁷, and authoritarian regime of Ferdinand Marcos,⁸ to the erasure of Filipino Americans from U.S. history and the modern neocolonial era,⁹ the U.S. subjugated Filipinos by manipulating their community-first cultural values. Consequently, Filipinos became integral to the U.S. economy both because of their cultural values and work ethic, and because their subordinate status as non-white immigrants makes the exploitation of their labor and the denial of their socioeconomic opportunities easy under American hegemony.¹⁰ The exploitation of Filipino nurses during the COVID-19 pandemic is only the latest incarnation of systemic and institutional exploitation of Filipinos by the U.S.¹¹ The mutating virus, rigid individualism of American culture, and the slow immigration process create more layers of danger for Filipinos as they provide essential services to the public.¹² An expedited path to citizenship for Filipino nurses through Title 8 of the United States Code¹³ would end the fraudulent practices of healthcare recruiters and break the historical cycle of exploitation that Filipinos have endured for centuries.

II. THE HISTORIC EXPLOITATION OF FILIPINOS

The Philippines and the U.S. are tied together by American imperialism and colonialism. The Philippines endured centuries of colonial

7. Usha Lee McFarling, *Nursing Ranks are Filled With Filipino Americans. The Pandemic is Taking an Outsized Toll on Them*, STAT (Apr. 28, 2020), <https://www.statnews.com/2022/04/28/coronavirus-taking-outsized-toll-on-filipino-american-nurses/>.

8. Choy, *supra* note 1.

9. See Elizabeth H. Pisares, *Do You Mis(recognize) Me: Filipina Americans in Popular Music and the Problem of Invisibility*, in POSITIVELY NO FILIPINOS ALLOWED: BUILDING COMMUNITIES AND DISCOURSE 172, 191 (Antonio T. Tiongson, Jr. et al. eds., 2006).

10. YEN LE ESPIRITU, HOME BOUND: FILIPINO AMERICAN LIVES ACROSS CULTURES, COMMUNITIES, AND COUNTRIES 46, 47 (1st ed. 2003).

11. *See id.* at 26.

12. Powell, *supra* note 2.

13. *See* 8 U.S.C. §§ 1440(a), 1427(f).

rule by Spain¹⁴ and a Japanese occupation during World War II¹⁵, only to be most recently colonized by the U.S. The Philippines officially became an independent nation in 1946,¹⁶ but with the lingering presence of U.S. military bases, the U.S. never gave the Philippines the full effective control of a sovereign state.¹⁷ From the Mutual Defense Treaty of 1951¹⁸ to the more recent Visiting Forces Agreement,¹⁹ the U.S.'s military and political control of the Philippines is well-documented. The Philippines remains a neo-colony²⁰ of the U.S.²¹ As a result, the U.S.'s cultural and socioeconomic domination of the Philippines endures.²² The practice of Filipino nurses pursuing careers in the U.S. thrives in this hegemonic environment, as does the parallel U.S. practice of exploiting them.²³

A. Nursing in the American Colonial Period

When the U.S. claimed the Philippines as a colony in 1898 at the end of the Spanish-American War, President William McKinley issued the Benevolent Assimilation Proclamation, which outlined his mission to control the Philippines under the guise of generosity and stewardship.²⁴ The U.S. used the idea of "benevolent assimilation" as an excuse to subjugate

14. E. San Juan Jr., *Filipinas Everywhere: Colonialism, Neocolonial Domination, and Imperial Terror*, in *FILIPINAS EVERYWHERE: ESSAYS IN CRITICISM AND CULTURAL STUDIES FROM A FILIPINO PERSPECTIVE 3* (David Jonathan Y. Bayot ed., 2017).

15. Julie McCarthy, *Philippine Survivor Recounts Her Struggle As a "Comfort Woman" For Wartime Japan*, NAT'L PUB. RADIO: WEEKEND EDITION SUNDAY (Nov. 29, 2020), <https://www.npr.org/2020/11/29/939811000/philippine-survivor-recounts-her-struggle-as-a-comfort-woman-for-wartime-japan>; Carmen M. Argibay, *Sexual Slavery and the Comfort Women of World War II*, *BERKELEY J. OF INT'L L.* 375, 378 (Aug. 2003).

16. E. San Juan Jr., *supra* note 14, at 4.

17. *Id.*

18. Kim David Chanbonpin, *Holding the United States Accountable for Environmental Damages Caused by the U.S. Military in the Philippines, A Plan for the Future*, 4 *ASIAN-PAC. L. & POL'Y J.* 320, 332 (2003).

19. *See generally Visiting Forces Agreement*, Agreement Between the United States and the Philippines, U.S.-Phil., Oct. 9, 1998, T.I.A.S. 12931., <https://2009-2017.state.gov/documents/organization/107852.pdf>.

20. Chanbonpin, *supra* note 18, at 332.

21. E. San Juan Jr., *supra* note 14, at 4.

22. Chanbonpin, *supra* note 18, at 326.

23. *See* Paulina Cachero, *From AIDS to COVID-19, America's Medical System Has a Long History of Relying on Filipino Nurses to Fight on the Frontlines*, *TIME* (May 30, 2021, 7:00 AM), <https://time.com/6051754/history-filipino-nurses-us/>; *Scammers Take Advantage of Filipino Nurses Lured by Promise of Employment in the U.S.*, *PUB. BROAD. STATION NEWS HOUR* (Mar. 27, 2014, 9:09 PM), <https://www.pbs.org/newshour/show/scammers-take-advantage-filipino-nurses-lured-promise-employment-u-s>.

24. E. San Juan, Jr., *supra* note 14, at 3; Cachero, *supra* note 23.

and force American culture on Filipinos.²⁵ During this period of colonization, the U.S. Army trained Filipinos to care for American soldiers.²⁶ The trainings evolved and expanded until the U.S. government implemented a comprehensive American nursing curriculum for all future nurses, with lessons and testing conducted in English.²⁷ These colonial policies, which still exist today, effectively ensured that Filipino nurses were trained and groomed to fit American healthcare standards.²⁸ In 1946, after World War II, the U.S. granted the Philippines independence.²⁹ But the war left the U.S. with a dire nursing shortage, which in turn opened the door for overseas, American-trained Filipinos to migrate to the U.S. and fill the gap.³⁰

For Filipinos in the Philippines, nursing became a reliable path to financial stability for themselves and their extended families.³¹ Accordingly, a Filipino cultural practice was born. Filipino families pool their resources to send their children to nursing school with the promise that they will become registered nurses, land jobs in the U.S., and be able to support their families in the Philippines.³² This practice led to the first mass migration of Filipino nurses to the U.S.³³ Subsequently, Filipino nurses brought their distinctive cultural values to the U.S.³⁴

B. The Group-Centric Values and Work Ethic of Filipino Nurses

The exploitation of overseas Filipino workers by American institutions is anchored in the U.S. manipulation of perhaps the most distinguishable Filipino cultural trait: an overwhelming sense of community, with the welfare of the group always outweighing the individual.³⁵ This quality is

25. Cachero, *supra* note 23.

26. McFarling, *supra* note 7.

27. Jhemmylrut Teng, *The History of Filipino Nurses in the United States of America*, MEDIUM (Jan. 6, 2021), <https://medium.com/frame-of-reference/the-history-of-filipino-nurses-in-the-united-states-of-america-e29889d910bb>.

28. *Id.*; Powell, *supra* note 2.

29. *See generally* Convention for The Philippine Independence Act (Tydings-McDuffie Act), 48 Stat. 456 (1934), <https://loveman.sdsu.edu/docs/1934PhilippineIndep.pdf>.

30. Fruhleln Chrys Econar, *For Generations, Filipino Nurses Have Been on America's Front Lines*, CABLE NEWS NETWORK (Oct. 8, 2021), <https://www.cnn.com/interactive/2021/10/health/filipino-nurses-cnnphotos/>.

31. McFarling, *supra* note 7.

32. PUB. BROAD. STATION NEWS HOUR, *supra* note 23.

33. *Id.*

34. Econar, *supra* note 30.

35. *See* Yen Le Espiritu & Diane L. Wolf, *The Paradox of Assimilation: Children of Filipino Immigrants in San Diego*, in *ETHNICITIES: CHILDREN OF IMMIGRANTS IN AMERICA* 169, 176, 179, 180 (Rubén G. Rumbaut & Alejandro Portes eds., 2001).

inherent in the practice of young Filipino nurses uprooting their lives for the financial well-being of their families and treating their U.S. patients as if they were family. It is encapsulated in many Tagalog words and phrases: *kapwa* describes a feeling of interconnectedness to all people; *bayanihan* captures the spirit of community and working towards the shared goals of the group; *utang ng loob* is the belief that people owe a debt to each other and to their ancestors. The most prominent and powerful is *isang bagsak*. Translated to “one down,” the phrase carries the message: *if one falls, we all fall*. The Filipino nurse’s work ethic is marked by this spirit: *isang bagsak*.

C. The Erasure of Filipinos in American History

While most Americans are unfamiliar with the expression *isang bagsak*, the words are woven into American culture, dating back to the 1960s farmworker movement and broader Civil Rights Movement.³⁶ History remembers César Chávez as the leader of the Delano Grape Strike and subsequent labor movement.³⁷ But it was a Filipino migrant worker named Larry Itliong who initiated and led the strike, recruited Chávez, and catalyzed the merging of the primarily Filipino farmworkers union Agricultural Workers Organizing Committee (AWOC) with the primarily Latino group the National Farm Workers Association (NFWA) to create the United Farm Workers of America (UFW).³⁸ The erasure of Itliong from history is closely tied to the American utilization and manipulation of *isang bagsak* values.

Itliong migrated from Pangasinan, Philippines, to California in 1929,³⁹ and spent the decades leading up to the 1965 Delano Grape Strike fighting for better working conditions for farmworkers.⁴⁰ Like the tens of thousands of young Filipino men known as Manongs,⁴¹ or “older brothers,” who

36. See Katrina Vanden Heuvel, This Crisis Has Created a New and Profound Sense of Solidarity, WASH. POST (Apr. 14, 2020, 8:00 AM), <https://www.washingtonpost.com/opinions/2020/04/14/this-crisis-has-created-new-profound-sense-solidarity/>.

37. See Emil Guillermo, *Eclipsed by Cesar Chavez, Larry Itliong’s Story Now Emerges*, NAT’L BROAD. CO. NEWS (Sept. 8, 2015), <https://www.nbcnews.com/news/asian-america/eclipsed-cesar-chavez-larry-itliongs-story-now-emerges-n423336>.

38. *Id.*

39. MARIEL BARBADILLO, ‘A MINORITY WITHIN A MINORITY’: FILIPINOS IN THE UNITED FARMWORKERS MOVEMENT 58 (2017).

40. See Scott Simon, *Grapes Of Wrath: The Forgotten Filipinos Who Led A Farmworker Revolution*, NAT’L PUB. RADIO: WEEKEND EDITION SATURDAY (Sept. 19, 2015), <https://www.npr.org/sections/thesalt/2015/09/16/440861458/grapes-of-wrath-the-forgotten-filipinos-who-led-a-farmworker-revolution>.

41. *Id.*

migrated to the U.S. in the 1920s and 1930s, Itliong faced severe racial discrimination and commodification as a cheap laborer.⁴² In the face of growing anti-Filipino sentiment and exploitation,⁴³ he established himself as a charismatic and effective leader in the Filipino farmworker community.⁴⁴ By 1965, the year of the Delano Grape Strike, Itliong rose as a leader of the AWOC,⁴⁵ and his aggressive advocacy for fair wages sparked a movement during a tumultuous period for agricultural workers.⁴⁶

As California growers threatened to cut the already minuscule pay of their immigrant workforce,⁴⁷ Itliong and the AWOC successfully negotiated a 15-cent raise for grape farmers in Coachella Valley.⁴⁸ Recognizing Itliong's power for community building, the AWOC asked him to go to Delano, California,⁴⁹ and organize with farmworkers in the Central Valley.⁵⁰ When the growers refused to meet demands for fair wages equivalent to the federal minimum wage,⁵¹ workers gathered in Delano's Filipino Hall on September 7, 1965, for what should be marked as an essential historical event in labor rights history.⁵² Here, Itliong called for a vote to strike for \$1.40 an hour, 25 cents per box of grapes, and the right to form a union.⁵³ The workers met his idea with unanimous support.⁵⁴ The next day, on September 8, 1965, over 2,000 Filipino farmworkers and

42. Ruby C. Tapia, "Just Ten Years Removed from a Bolo and a Breech-cloth": *The Sexualization of the Filipino "Menace,"* in POSITIVELY NO FILIPINOS ALLOWED: BUILDING COMMUNITIES AND DISCOURSE 61, 63 (Antonio T. Tiongson et al. eds., 2006).

43. *Id.* at 61-65. Anti-Filipino sentiments in California, bolstered by the economic tension of the Great Depression and media hysteria over the "deterioration of the white race," escalated into the Watsonville Riots in January 1930. The Watsonville Riots began on January 19, 1930, when a group of white men protested the socialization of Filipino Manongs with white women. The riots lasted for four days until January 23, 1930, when Filipino Manong Fermin Tobera was shot and killed. In addition to the media framing Filipinos as usurpers of jobs and a threat to white labor, Filipino Manongs were also framed as hypersexual deviants. On this basis, California law makers introduced a bill to the House Committee of Immigration and Naturalization that would restrict Filipino immigration, despite the U.S. still holding the Philippines as a colony.

44. Simon, *supra* note 40.

45. Guillermo, *supra* note 37.

46. Simon, *supra* note 40.

47. *Id.*

48. BARBADILLO, *supra* note 39, at 58.

49. See Gayle Romasanta, *Why It Is Important to Know the Story of Filipino-American Larry Itliong*, SMITHSONIAN MAG. (July 14, 2019), <https://www.smithsonianmag.com/smithsonian-institution/why-it-is-important-know-story-filipino-american-larry-itliong-180972696/>.

50. BARBADILLO, *supra* note 39, at 58-59.

51. *Id.*

52. Romasanta, *supra* note 49.

53. *Id.*

54. Guillermo, *supra* note 37.

members of the AWOC walked off the vineyards and launched the Delano Grape Strike of 1965.⁵⁵

Growers in Central California took this opportunity to sow discord between migrant farmworkers by hiring Mexican Americans to replace the striking Filipinos.⁵⁶ Dividing immigrant workers on racial lines was a common and effective tactic that growers used to break picket lines.⁵⁷ Understanding that the strike would fail if Latino farmworkers continued to cross the picket line, Itliong recruited Chávez, the leader of the National Farm Workers Association (NFWA), and convinced him to join the strike.⁵⁸ The NFWA officially joined the Delano Grape Strike on September 16, 1965, and together, Filipino and Latino farmworkers catapulted their labor movement onto the national stage.⁵⁹ Less than a year later, in 1966, Itliong's AWOC and Chávez's NFWA merged into one multi-racial and multi-cultural union known as the United Farm Workers of America (UFW).⁶⁰ This strategic move merged the farmworkers' movement with the broader civil rights movement in America.⁶¹

During the early stages of the Delano Grape Strike, Itliong introduced the phrase *isang bagsak* to Chávez.⁶² Leveraging the spirit of the phrase—*if one falls, we all fall*—they created the “unity clap,” a rallying tool to bridge cultural divides and language barriers between Filipino and Latino workers.⁶³ The clap begins with a single person clapping out a slow, measured beat.⁶⁴ It gradually picks up speed and volume as more and more people join in.⁶⁵ When the clap reaches its quickest and strongest point, someone shouts “Isang Bagsak!,” and it crescendoes with one final collective, resounding clap.⁶⁶ The unity clap became a ritual at the end of long workdays on the fields, a call to arms at union meetings, and a rallying cry at workers' rights demonstrations across the country.⁶⁷

55. *Id.*

56. BARBADILLO, *supra* note 39, at 59.

57. See Andy Imutan, *When Mexicans and Filipinos Joined Together*, UNITED FARM WORKERS (Sept. 2005), <https://ufw.org/research/history/mexicans-filipinos-joined-together/>.

58. BARBADILLO, *supra* note 39, at 59.

59. *Id.*

60. *Id.*

61. Guillermo, *supra* note 37.

62. Abby Pasion, *From “Isang Bagsak” to #FilipinxForBlackLives, the Filipino Identity Has Always Been Political*, MEDIUM (Nov. 3, 2020), <https://medium.com/@apasion96/from-isang-bagsak-to-filipinxforblacklives-the-filipino-identity-has-always-been-political-eddc928658fa>.

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

Despite Itliong's essential role in the farmworkers' movement, his legacy as a revolutionary has been forgotten.⁶⁸ The unity clap and *isang bagsak* are not immortalized in history books, even though they have been utilized by other American social justice movements and multiracial coalitions.⁶⁹ These pillars of civil rights have been erased from history. Filipino thought leaders call this a condition of perpetual absence.⁷⁰ This idea goes further than the broader "perpetual foreigner" label thrust onto Asian Americans as a whole.⁷¹ Perpetual absence describes the Filipino American experience of chronic misrecognition in the U.S.⁷² Filipino Americans are marginalized by white people for being non-white.⁷³ They are also estranged by other minorities for their lack of categorical identity.⁷⁴ That is, Filipino Americans are rejected by other Asian Americans for not being Asian enough, and alienated from other non-Asian minority groups for being Asian.⁷⁵

A devastating example of the latter phenomenon is the erasure of Itliong from the farmworkers' movement. As the movement picked up national and international attention, the media latched onto the growing, non-violent image of Chávez and Itliong was pushed out of the UFW.⁷⁶ In a letter he wrote to Reynaldo Pascua, President of the Filipino American Community of Yakima Valley from 2000 to 2019, Itliong addressed the unrecognized role of Filipinos in the American civil rights movement and attributed the erasure to the silencing of the Filipino minority by the Latino majority in the UFW, as well as the "inability among the Pinoy [Filipino] leadership to submerge their personal identity to the broader sphere of leadership."⁷⁷ Itliong's story and lack of historical recognition illustrates how the powerful *isang bagsak* spirit of interconnectedness, of valuing the collective over the individual, has been exploited and used against Filipinos to their detriment.

68. Guillermo, *supra* note 37.

69. Karen Grisby Bates & Shereen Marisol Meraji, *The Student Strike that Changed Higher Ed Forever*, NAT'L PUB. RADIO: CODE SWITCH (Mar. 21, 2019), <https://www.npr.org/sections/codeswitch/2019/03/21/704930088/the-student-strike-that-changed-higher-ed-forever>.

70. Pisares, *supra* note 9, at 191.

71. ESPIRITU, *supra* note 10, at 14.

72. Pisares, *supra* note 9, at 191.

73. *Id.*

74. *Id.*

75. *Id.*

76. Guillermo, *supra* note 37.

77. *Id.*

The erasure of Filipino Americans feeds their condition of perpetual absence, making the systemic and institutional exploitation of nurses during the COVID-19 pandemic seem like a stand-alone occurrence rather than the continuation of a cycle of colonial control. As the first wave of Filipino nurses migrated to the U.S. post-World War II, the authoritarian Philippines government capitalized on their reputation by institutionalizing their exportation with the help of the U.S. government.⁷⁸

D. Compliance and Exploitation by The Philippines Government

By the 1970s, the Philippine President and dictator Ferdinand Marcos noticed the high demand for Filipino nurses in the U.S. and pushed the country towards a labor export economy.⁷⁹ The government founded what is now known as the Philippines Overseas Employment Administration (POEA) to institutionalize and facilitate the hiring and recruitment of Filipino workers, including nurses, to overseas employers.⁸⁰ The emigration of Filipinos rose exponentially after 1972, when Marcos declared martial law.⁸¹ For the next fourteen years, the Marcos regime plagued the Philippines with countless human rights violations, including extra-judicial killings.⁸² The military's infamous torture units would capture anyone they suspected of supporting the opposition against Marcos, brutally mutilate them, and then display their bodies on roadsides to instill public fear and obedience.⁸³ This bolstered the labor export economy as Filipinos began fleeing the country.⁸⁴ Filipinos took advantage of the POEA and the U.S.'s recent Immigration and Nationality Act of 1965 to escape the oppressive political landscape of the Philippines.⁸⁵

Covertly, the U.S. was expediting this mass exodus by subsidizing the Marcos regime.⁸⁶ The U.S. government provided generous sums of money and military aid to Marcos in exchange for the continued control of military bases in the Philippines, effectively maintaining its stronghold in the Pacific

78. Chanbonpin, *supra* note 18, at 333.

79. Choy, *supra* note 1.

80. Cachero, *supra* note 23.

81. *Id.*

82. Alfred W. McCoy, *Dark Legacy: Human Rights Under the Marcos Regime*, in MEMORY, TRUTH TELLING, AND THE PURSUIT OF JUSTICE: A CONFERENCE ON THE LEGACIES OF THE MARCOS DICTATORSHIP 129, 131 (2001).

83. *Id.*

84. Cachero, *supra* note 23.

85. *Id.*

86. Chanbonpin, *supra* note 18, at 333.

and filling the nursing shortage in the U.S. to the detriment of Filipinos.⁸⁷ The U.S. leveraged its influence over Marcos for the entire twenty-two years of his reign, so that two different U.S. administrations, the Johnson administration and Nixon administration, maintained the relationship.⁸⁸

Even after the people of the Philippines exiled President Marcos with the People Power Revolution in 1986,⁸⁹ the global exportation of Filipino workers expanded and remains central to the Philippines' economy.⁹⁰ The Philippines is now the world's leading exporter of professionally-trained nurses.⁹¹ In 2019, overseas Filipino workers sent a record high of \$33.5 billion in personal remittances back to the Philippines.⁹² In the U.S., about one-third of all foreign-born nurses are Filipino.⁹³ Dominating the foreign nurse market, Filipino nurses earned a global reputation for their cultural values and the high quality of their care. Along with this reputation came the predatory practices of countries and recruiters seeking to capitalize on the Filipino nursing practice.

E. Modern U.S. Exploitation of Filipino Nurses

The U.S. developed its own cultural practice of abusing Filipino nurses by taking advantage of their community-first values in times of crisis.⁹⁴ In the 1980s, during the HIV/AIDS epidemic in the U.S., many domestic health care workers refused to treat HIV/AIDS patients.⁹⁵ Homophobia and propaganda about the virus gripped the American psyche, and hospitals were left understaffed.⁹⁶ In response to the crisis, tens of thousands of Filipino nurses migrated to fill the gaps left by domestic nurses.⁹⁷ They took jobs providing critical bedside care to patients with HIV/AIDS and

87. *Id.* at 333 n.55.

88. *Id.* at 332-33 nn.55-56.

89. *Ayer Productions v. Ignacio Capulong et al.*, G.R. No. L-82380 (Apr. 29, 1988) (Phil.).

90. McFarling, *supra* note 7.

91. *Id.*

92. Ralf Rivas, *OFW Remittances Hit Record High of \$33.5 Billion in 2019*, RAPPLER (Feb. 17, 2020, 7:30 AM), <https://www.rappler.com/business/overseas-filipino-workers-remittances-2019>.

93. Anne Brice, *Why Are There So Many Filipino Nurses in the U.S.?*, UNIV. CAL. BERKELEY: BERKELEY NEWS (May 28, 2019), <https://news.berkeley.edu/2019/05/28/filipino-nurses-in-the-us-podcast/>.

94. PUB. BROAD. SERVICE NEWS HOUR, *supra* note 23; Cachero, *supra* note 23; Julian Glover, *"None of us signed up to die": Filipino American nurses disproportionately impacted by Covid-19*, ABC 7 NEWS (May 10, 2021), <https://abc7news.com/filipino-americans-nurses-covid-deaths-nurse-sacrifices-registered-dead-from/10557478/>.

95. Cachero, *supra* note 23.

96. *Id.*

97. *Id.*

comforted terminally-ill patients in their final hours.⁹⁸ Filipino nurses established themselves as essential components of the U.S. healthcare system, but U.S. employers continue to treat them as disposable.

The U.S. exploitation of Filipino nurses is a legacy of American imperialism and colonialism. As Filipinos developed the cultural practice of immigrating to the U.S. for nursing, the U.S. established a practice of manipulating and exploiting the community-centric values of Filipinos. The authoritarian regime of President Marcos encouraged and capitalized on these practices. Today, in the context of the COVID-19 pandemic, Filipino nurses continue to put their lives at risk for the U.S. in extraordinary ways and under dangerous conditions.

III. THE HAZARDOUS WORKING CONDITIONS OF FILIPINO NURSES DURING THE COVID-19 ERA

As the COVID-19 pandemic continues to ravage the U.S. and leave healthcare professionals in a constant state of burn out, Filipino nurses are holding down the front lines of the American healthcare response.⁹⁹ Like the healthcare response during the HIV/AIDS epidemic, U.S. nurses are resigning from their posts due to vaccine mandates, demanding hours, and dangerous conditions, leaving gaps in the U.S. healthcare system.¹⁰⁰ Once again, Filipino nurses are filling the cracks that other nurses have left behind.¹⁰¹ Unlike domestic nurses, Filipino nurses rely on their employers to maintain their immigration status in the U.S. This reliant worker-employee relationship, coupled with the slow and laborious immigration process, allows fraudulent recruiters to abuse Filipino nurses and exploit their cultural values. While all healthcare workers have faced heightened danger in the face of COVID-19, the pandemic has been exceptionally deadly for Filipino nurses.

98. Powell, *supra* note 2.

99. Econar, *supra* note 30.

100. Powell, *supra* note 2; Jaelyn Diaz, *A N.Y. Hospital Will Stop Delivering Babies As Workers Quit Over a Vaccine Mandate*, NAT'L PUB. RADIO (Sept. 13, 2021, 8:06 AM), <https://www.npr.org/2021/09/13/1036521499/covid-workers-resign-new-york-hospital-stops-baby-delivery>; James T. Mulder, *NY May Recruit Filipinos to Replace Health Care Workers Who Refuse COVID Shots*, SYRACUSE (Sept. 23, 2021, 2:04 PM), <https://www.syracuse.com/coronavirus/2021/09/ny-may-recruit-filipinos-to-replace-health-care-workers-who-refuse-covid-shots.html>.

101. Hicks, *supra* note 5; Diaz, *supra* note 100; Mulder, *supra* note 100.

National Nurses United (NNU), the largest union of registered nurses in the U.S.,¹⁰² released a report in September 2020 concerning COVID-19 deaths among healthcare workers.¹⁰³ The report revealed a dire statistic: while Filipino nurses account for only 4% of the nurses in the U.S., they comprise 31.5% of COVID-19 deaths among registered nurses.¹⁰⁴ This is the price of the historic and modern-day exploitation of Filipino nurses by the U.S.

In COVID-era America, Filipinos nurses are at the front lines of the healthcare system. They fill the healthcare roles that U.S.-born healthcare workers refuse to do.¹⁰⁵ They are overrepresented in the types of healthcare jobs that necessitate close contact with patients.¹⁰⁶ This includes positions in COVID-19 breeding grounds such as emergency rooms and nursing homes, as well as hard-to-fill positions in rural, under-resourced hospitals with hazardous working conditions.¹⁰⁷ At the same time, hate crimes against Asian Americans are at historic highs as racist propaganda about the virus continues to permeate the American psyche.¹⁰⁸ In many ways, this is a typical U.S. story. Immigrants do the dirty work that Americans do not want to do, all while being villainized or labeled as “heroes” with no meaningful recognition.¹⁰⁹ The root of this story lies in an immigration process that opens the door for human trafficking and abusive contracts.

A. *The Immigration Process*

The slow and rigorous process of U.S. immigration creates a foundation for the exploitation of Filipino nurses. For a Filipino nurse to work as a registered nurse in the U.S., they must obtain an H-1B visa or an EB-2 visa.¹¹⁰ H-1Bs are temporary visas that allow foreign nationals to

102. *About International Nurses United*, NAT'L NURSES UNITED <https://www.nationalnursesunited.org/about> (last visited Oct. 10, 2022).

103. NAT'L NURSES UNITED, *supra* note 6.

104. *Id.* at 12.

105. *Id.*; Hicks, *supra* note 5; Diaz, *supra* note 100; Mulder, *supra* note 100; Madeline Holcombe, *Facing the Recent Rise in COVID-19 Cases is Like Being Told You Have to Walk Back to War, Nurse Says*, CABLE NEWS NETWORK (Aug. 3, 2021, 3:46 AM), <https://www.cnn.com/2021/08/03/us/tennessee-nurse-coronavirus-war/index.html>.

106. Powell, *supra* note 2.

107. *Id.*; McFarling, *supra* note 7; Nina Martin & Bernice Yeung, “*Similar to Times of War*”: *The Staggering Toll of COVID-19 on Filipino Health Care Workers*, PROPUBLICA (May 3, 2020, 5:00 AM), <https://www.propublica.org/article/similar-to-times-of-war-the-staggering-toll-of-covid-19-on-filipino-health-care-workers>.

108. Martin & Yeung, *supra* note 107.

109. Mulder, *supra* note 100.

110. 8 U.S.C. § 1153(b)(2)(A); 20 C.F.R. § 656.2(c)(3); 8 U.S.C. § 1101(a)(15)(H)(i)(b).

work a “specialty occupation” in the U.S.¹¹¹ To secure an H-1B, a nurse’s U.S. employer must file an I-129 petition with United States Citizenship and Immigration Services (USCIS) and demonstrate that the nursing job is a specialty occupation by showing that: 1) a bachelor’s degree or its equivalent is the minimum entry requirement for the position; 2) the degree requirement is common across the industry or the job is so distinctive that it can only be done by someone with a degree; 3) the employer normally requires a degree or its equivalent for the position; or 4) the nature of the job duties is so specialized that the knowledge required to perform the duties is usually associated with the attainment of a bachelor’s degree or higher degree.¹¹² Critically, an H-1B visa makes a nurse’s residence in the country dependent on their employer.¹¹³ This process leaves young overseas Filipino nurses, who often leave their families and uproot their lives, fully reliant on their employers.¹¹⁴

To qualify for an EB-2 visa, a foreign nurse must first receive a full-time, permanent job offer from a U.S. employer.¹¹⁵ The employer must then sponsor the nurse for their green card by completing the labor certification process, also known as PERM.¹¹⁶ Because nursing positions are classified as “Schedule A” occupations—meaning jobs that the U.S. government has determined cannot be filled by U.S. workers and thus may be filled by overseas workers—the PERM process is abbreviated but still substantial.¹¹⁷ To file the PERM, the employer must complete the ETA Form 9089 and I-140 petition and submit it to USCIS.¹¹⁸ Once USCIS approves the petition and the nurse’s visa number has become available, the nurse can apply for the U.S. green card by filing an I-485 adjustment of status application with USCIS.¹¹⁹

In addition to employment requirements and immigration paperwork, foreign nurses, regardless of whether they are coming to the U.S. with an H-1B visa or with a green card, must prove to USCIS that they are certified

111. 20 C.F.R. § 656.2(c)(3).

112. 8 C.F.R. § 214.2(h)(4)(iii)(A)(1-4).

113. PUB. BROAD. SERVICE NEWS HOUR, *supra* note 23.

114. *Id.*

115. 20 C.F.R. § 656.3.

116. PUB. BROAD. SERV., *supra* note 23; 20 C.F.R. § 656.1; *Chapter 6- Permanent Labor Certification*, U.S. CITIZENSHIP AND IMMIGR. SERV. (Oct. 19, 2022), <https://www.google.com/search?client=safari&rls=en&q=chapter+6+permanent+labor+certification&ie=UTF-8&oe=UTF-8>.

117. 20 C.F.R. § 656.5.

118. 20 C.F.R. §§ 656.17 (a)(1), 656.30(b).

119. 8 C.F.R. § 245.1(a); *I-485, Application to Register for Permanent Residence or Adjust Status*, U.S. CITIZENSHIP AND IMMIGR. SERVICES (Oct. 27, 2022), <https://www.uscis.gov/i-485>.

by the Commission on Graduates of Foreign Nursing Schools (CGFNS) to work in the medical field in the U.S.¹²⁰ To do this, the foreign nurse must: 1) obtain a valid and unrestricted license in the U.S. state in which they will work; 2) pass the NCLEX, the U.S. licensing examination for nurses; 3) graduate from an English-language nursing program that was located in a country designated by the U.S. as acceptable for medical training; and 5) show that the nursing program was in operation on or before November 12, 1999.¹²¹ Between the education requirements and the visa process, which may be delayed by a variety of outside factors such as the backlogging of available visas, the immigration process for foreign nurses takes years of patience and dedication.¹²²

B. Human Trafficking and Abusive Contracts

The expensive, years-long immigration process puts nurses in a position where they are vulnerable to fraudulent recruiters, human traffickers, and exploitative healthcare institutions. These enterprises place Filipino nurses in hazardous working conditions knowing that they will endure workplace abuse because their status in the U.S. is contingent on their nursing jobs and because their families back home rely on their U.S. income.¹²³ Fraudulent recruiters lure Filipino nurses with false promises of sponsorship and high wages, only to entrap them into unsustainable hours and dangerous conditions.¹²⁴ Some scammers have gone as far as withholding wages from Filipino nurses and threatening to revoke their visas if they break their contract, effectively holding them hostage under threat of deportation and financial devastation.¹²⁵ Several human-trafficking lawsuits have been filed against such agencies.¹²⁶

In *Paguirigan v. Prompt Nursing Employment Agency LLC*, a federal court held that several nursing home and rehabilitation facilities violated anti-human trafficking laws by using threats of financial ruin to coerce two hundred nurses into remaining at their posts for long hours and little pay.¹²⁷ Every plaintiff in the class action lawsuit was a Filipino nurse who was recruited to the U.S. through SentosaCare, a New Jersey-based nursing

120. 20 C.F.R. §§ 656.5(a)(2)(i), 656.15(c)(2), 656.5(a)(3)(ii).

121. 20 C.F.R. § 656.15(c)(2); 8 C.F.R. § 212.15(h)(2)(iii-v).

122. PUB. BROAD. SERV. NEWS HOUR, *supra* note 23.

123. *Id.*

124. Cachero, *supra* note 23.

125. *Paguirigan v. Prompt Nursing Emp. Agency*, 17-cv-1302, 2019 U.S. Dist. LEXIS 165587, at *4 (E.D.N.Y., Sept. 23, 2019).

126. PUB. BROAD. SERV. NEWS HOUR, *supra* note 23.

127. *Paguirigan*, 2019 U.S. Dist. LEXIS 165587, at *35-36.

home company.¹²⁸ SentosaCare, Prompt Nursing Employment Agency, and other defendants failed to pay the nurses the prevailing wage and base salary promised in their contracts and threatened them with tens of thousands of dollars in penalty fees for quitting early.¹²⁹ One defendant, Prompt Nursing, threatened a penalty of \$25,000 if a nurse quit during their first year of employment.¹³⁰

Human trafficking and worker abuse cases like *Paguirigan* may seem like extreme examples, but they are shockingly common. However, even in cases where recruiters are not human traffickers, many health facilities recruiters bind Filipino nurses to iron-clad contracts with similar coercive measures that wield the same results.

Fraudulent recruiters use employee contracts to tie Filipino nurses to their agencies for up to four years, and will threaten the nurses with penalties of up to \$60,000 for breaking the contracts early.¹³¹ A common clause in these contracts prevents Filipino nurses from showing the contract to anyone else and waives their right to seek legal action.¹³² These types of provisions are never required of Canadian or European nurses who come to work in the U.S.¹³³ Because Filipino nurses are known for their nursing abilities and deep community care, and because they need nursing positions in the U.S. to care for their families back home, the institutional and systemic exploitation of nurses is a uniquely Filipino problem.

Every day, healthcare workers across the world risk their lives to battle a mutating virus and the bolstering effect of anti-vaxxers and COVID-denier propaganda. But in the U.S., the risk is greater for Filipino nurses. The slow immigration process and demanding educational requirements create space for fraudulent recruiters and human traffickers to exploit Filipino nurses and their cultural values. Unlike domestic nurses, who have the freedom to leave dangerous work environments without threat of deportation, and other foreign nurses whose contracts are free of oppressive and punitive clauses, Filipino nurses are especially vulnerable to workplace abuse because their status in the U.S. is contingent on their nursing jobs. Moreover, they rely on their U.S. income from those jobs to support their families back home. Without a solution to this systemic and institutional

128. Yancey Roy, *Court: LI Nursing Home Firm Violated Anti-Human Trafficking Laws*, NEWSDAY (Oct. 2, 2019, 7:55 PM), <https://www.newsday.com/long-island/suffolk/sentosa-nursing-home-nurses-1.37091421>.

129. *Paguirigan*, 2019 U.S. Dist. LEXIS 165587, at *4, 14.

130. Roy, *supra* note 128.

131. Cachero, *supra* note 23.

132. *Id.*

133. *Id.*

exploitation, Filipino nurses will continue to die at disproportionate rates as the COVID-19 pandemic rages on.

IV. A SPECIAL PATH TO CITIZENSHIP FOR FILIPINO NURSES

To combat exploitation and to begin to pay back an immeasurable debt, the U.S. government must grant Filipino nurses a special path to citizenship. The U.S. has recognized and rewarded foreign contributions to the country in the context of military service in times of war. During World War II, over 260,000 Filipino soldiers served under the American flag at the request of President Franklin D. Roosevelt.¹³⁴ President Roosevelt promised Filipino soldiers U.S. citizenship and full military benefits in exchange for their service and invaluable hand in recapturing the Pacific.¹³⁵

The U.S. did not honor this promise.¹³⁶ Only a year after the end of World War II, President Harry Truman signed the 1946 Rescission Act into law, stripping the vast majority of Filipino army soldiers of their rights and privileges as U.S. veterans.¹³⁷ The law declared that soldiers of the Commonwealth Army of the Philippines did not meet the standard of service to warrant such benefits.¹³⁸ However, all European allied soldiers who served under the U.S. flag in a similar capacity were granted, and never stripped of, full veteran status and benefits.¹³⁹ Again, under the hegemony of white America, the exploitation of Filipino labor and denial of their socioeconomic opportunities was second nature, an exception to the promises made to foreign contributors. The targeted betrayal of the Rescission Act is a bitter example of U.S. exploitation of Filipinos, the effects of which are still felt by many Filipinos today who spent decades and sometimes their entire lifetimes waiting for citizenship or to be reunited with their families.¹⁴⁰ The U.S. understands the value of Filipino labor yet actively disregards the value of Filipino people. The abuse of Filipino nurses during the COVID-19 pandemic is the latest incarnation of systemic

134. *America's Broken Promise to the Philippines*, FILIPINO VETERANS RECOGNITION AND EDUC. PROJECT, <https://filvetrep.org> (last visited Nov. 9, 2022).

135. *Id.*

136. Michelle Malkin, *FDR's Forgotten Promise to Filipino War Veterans*, THE SEATTLE TIMES (Apr. 22, 1997), <https://archive.seattletimes.com/archive/?date=19970422&slug=2535098>.

137. *Id.*

138. *Id.*; The Rescission Act of 1946, Pub. L. No. 70-301, 60 Stat. 6, 14 (1946).

139. Malkin, *supra* note 136.

140. Christopher Klein, *Filipino Americans Fought with U.S. in WWII, Then Had to Fight for Veteran' Benefits*, HISTORY (Nov. 11, 2019), <https://www.history.com/news/filipino-americans-veterans-day>.

exploitation, and it is time for the U.S. to rectify its legacy of colonial violence against Filipinos.

Filipino nurses are once again providing the U.S. with services that only they can provide. Like the Filipino soldiers during World War II, Filipino nurses are supplying the U.S. with an exceptional service, under exceptionally poor conditions, during extraordinarily dangerous times, and deserve a special path to U.S. citizenship.

While President Roosevelt was able to offer citizenship and veteran's benefits to foreign soldiers under Title 10 of the Second War Powers Act,¹⁴¹ President Joe Biden does not have the power to sign an executive order granting citizenship to Filipino nurses who have served in the U.S. during the COVID-19 pandemic.¹⁴² The authority to naturalize foreigners as U.S. citizens belongs solely to the Attorney General.¹⁴³

However, there is room to grant Filipino nurses an expedited route to naturalization under Title 8 of the United States Code, which codifies the Immigration and Nationality Act and governs U.S. immigration and naturalization policy.¹⁴⁴ The strongest claims for offering Filipino nurses an expedited path to naturalization are under Title 8, section 1427, sub-section (f) of the United States Code, which provides for the naturalization of persons making extraordinary contributions to national security,¹⁴⁵ and section 1440, which provides for naturalization as a reward for military service to the U.S.¹⁴⁶

A. Naturalization under 8 U.S.C. §1427(f): Persons Making Extraordinary Contributions to National Security

Title 8, section 1427, sub-section (f) of the United States Code offers a special path to naturalization for “persons making extraordinary contributions to national security,”¹⁴⁷ and Filipino nurses have made such extraordinary contributions to national security during COVID-19. To qualify for naturalization under sub-section 1427(f), a person must establish

141. *America's Broken Promise to the Philippines*, *supra* note 134; The Second War Powers Act, 50a U.S.C. §§ 633-664 (1942)..

142. U.S. CONST. art. I, § 8 (“The Congress shall have power to lay and collect taxes, duties, imposts and excises, to pay the debts and provide for the common defense and general welfare of the United States... To establish a uniform rule of naturalization... throughout the United States.”); *see* *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

143. 8 U.S.C. § 1421.

144. 8 U.S.C. §§ 1421-1459.

145. 8 U.S.C. § 1427(f).

146. 8 U.S.C. § 1440.

147. 8 U.S.C. § 1427(f).

five years of continuous residence as a lawful permanent resident in the U.S, or three years if he or she is a spouse of a U.S. citizen.¹⁴⁸ Additionally, a person must be physically present in the U.S. for at least half of the time of their lawful permanent residence, and must live at least three months within the state or district that he or she files the naturalization application in.¹⁴⁹ Sub-section 1427(f) offers an expedited process for people who make extraordinary contributions to the U.S.'s national security.

Under this sub-section, the U.S. Director of Central Intelligence, the Attorney General, and the Commissioner of Immigration may determine that a person who has made an "extraordinary contribution" to the "national security of the United States" or "the conduct of United States intelligence activities" may be naturalized without meeting the standard residence and physical presence requirements.¹⁵⁰ If the deciding powers determine that a person has made extraordinary contributions to national security, and the candidate is otherwise eligible for naturalization per sub-sections 1427(a)-(e), he or she may be naturalized after only one year of continuous residence in the U.S.¹⁵¹ Filipino nurses working during COVID-19 should fall under the category of persons making extraordinary contributions to national security.

The Federal Government's response to COVID-19 demonstrates how national security extends to national public health. The United Nations describes national security as "the ability of a state to cater for the protection and defense (sic) of its citizenry."¹⁵² Since the White House declared a state of emergency over COVID-19 on March 13, 2020,¹⁵³ the

148. CONG. RSCH. SERV., U.S. NATURALIZATION POLICY 4 (2021), <https://crsreports.congress.gov/product/pdf/R/R43366>.

149. *Id.*

150. 8 U.S.C. § 1427(f)(1): "Whenever the Director of Central Intelligence, the Attorney General and the Commissioner of Immigration determine that an applicant otherwise eligible for naturalization has made an extraordinary contribution to the national security of the United States or to the conduct of United States intelligence activities, the applicant may be naturalized without regard to the residence and physical presence requirements of this section, or to the prohibitions of section 1424 of this title, and no residence within a particular State or district of the Service in the United States shall be required: Provided, That the applicant has continuously resided in the United States for at least one year prior to naturalization: Provided further, That the provisions of this subsection shall not apply to any alien described in clauses (i) through (v) of section 1158(b)(2)(A) of this title."

151. 8 U.S.C. § 1427(a)-(f).

152. *National Security Versus Global Security*, UNITED NATIONS: UN CHRON., <https://www.un.org/en/chronicle/article/national-security-versus-global-security> (last visited Nov. 9, 2022).

153. Donald J. Trump, *Proclamation on Declaring a National Emergency Concerning the Novel Coronavirus Disease (COVID-19) Outbreak*, THE WHITE HOUSE (Mar. 13, 2020), <https://trumpwhitehouse.archives.gov/presidential-actions/proclamation-declaring-national->

tracking and management of the virus, as well as the mass distribution of COVID-19 vaccinations, have served as defenses against the virus. The Department of Homeland Security (DHS) continues to implement various precautions and emergency mandates in response to COVID-19.¹⁵⁴ For example, the USCIS, a department of the DHS, responded to COVID-19 by implementing a list of precautions to prevent the spread of the coronavirus disease.¹⁵⁵ This list includes a mask mandate inside federal buildings in areas of high or substantial transmission, according to a CDC COVID-19 Data Tracker, that supersedes all local, state, tribal, or territorial rules and regulations regarding face masks.¹⁵⁶ COVID-19 safety precautions are a matter of national security, and the people holding the front line of the American healthcare system should be treated as people making extraordinary contributions to national security.

Under section 1427, sub-section (f)(3) limits the number of non-citizens naturalized under the “extraordinary contributions” category to five people every fiscal year.¹⁵⁷ But much like the mask mandate implemented by the DHS during COVID-19, the limit on the number of people naturalized under this category should be expanded as an emergency COVID-19 precaution. Furthermore, the “extraordinary contributions” category should be expanded to include Filipino nurses working during the pandemic. This expansion of section 1427 would ensure the continued health and well-being of the nation. Filipino nurses provide an essential and special service to the people of the U.S, the *isang bagsak* level of care, and they deserve a special path to naturalization via the extraordinary contributions category of sub-section 1427(f) of the United States Code.

emergency-concerning-novel-coronavirus-disease-covid-19-outbreak/; *COVID-19 Disaster Declarations*, FED. EMERGENCY MGMT. AGENCY, <https://www.fema.gov/disaster/coronavirus/disaster-declarations> (last visited Nov. 9, 2022).

154. *DHS Responds: Coronavirus (COVID-19)*, DEP’T OF HOMELAND SEC. (Oct. 26, 2022), <https://www.dhs.gov/coronavirus>.

155. *USCIS Response to COVID-19*, U.S. CITIZENSHIP AND IMMIGR. SERVICES (Oct. 24, 2022), <https://www.uscis.gov/about-us/uscis-response-to-covid-19>.

156. *Id.*

157. 8 U.S.C. § 1427(f)(3): “The number of aliens naturalized pursuant to this subsection in any fiscal year shall not exceed five. The Director of Central Intelligence shall inform the Select Committee on Intelligence and the Committee on the Judiciary of the Senate and the Permanent Select Committee on Intelligence and the Committee on the Judiciary of the House of Representatives within a reasonable time prior to the filing of each application under the provisions of this subsection.”

B. COVID-Time Service of Filipino Nurses: A New Path, Parallel to Naturalization Through Military Service

Title 8, section 1440 of the United States Code offers a special provision for the naturalization of U.S. veterans and active members of the U.S. armed forces who served during military hostilities.¹⁵⁸ COVID times have often been compared to times of war for healthcare workers,¹⁵⁹ and Filipino nurses serving during COVID-19 deserve access to a similar pathway.

President Biden himself equated the vaccine rollout to a “wartime effort.”¹⁶⁰ However, when assessing the number of deaths, COVID times are much worse than times of war. Between World War I, World War II, the Vietnam War, and 9/11, 583,112 Americans were killed.¹⁶¹ As of August 17, 2022, the COVID-19 death toll in the U.S. is 1,034,234 people.¹⁶² COVID-era America is a much deadlier place than wartime America. While others have abandoned healthcare positions due to overwhelmed hospitals and dire work conditions, Filipino nurses have held the front lines of this war against COVID-19.¹⁶³

COVID-19 times should be considered a period of hostility. Section 1440, named “Naturalization through active-duty service in the Armed Forces during World War I, World War II, Korean hostilities, Vietnam hostilities, or other periods of military hostilities,” offers a special path of naturalization for veterans and active military personnel who served or are actively serving during a period of hostilities.¹⁶⁴ As the section title suggests, periods of hostilities include times of war but they should also include COVID times, as the U.S. and the world continue to experience unprecedented levels of death that vastly overshadow wartime losses. The U.S. has been in an active period of hostility since September 11, 2001.¹⁶⁵ Since the U.S. declared its global War on Terror, over 900,000 people were

158. 8 U.S.C. § 1440.

159. Martin & Yeung, *supra* note 107; Holcombe, *supra* note 105.

160. Jason Murdock, *How Many Americans Died in World Wars, Vietnam, 9/11 After Joe Biden's Covid Death Claim*, NEWSWEEK (Mar. 12, 2021, 7:04 AM), <https://www.newsweek.com/joe-biden-covid-death-comparison-world-wars-vietnam-9-11-1575650h-comparison-world-wars-vietnam-9-11-1575650>.

161. *Id.*

162. *Coronavirus in the U.S.: Latest Map and Case Count*, N.Y. TIMES, <https://www.nytimes.com/interactive/2021/us/covid-cases.html> (last visited Nov. 18, 2022).

163. *Id.*

164. *Naturalization Through Military Service*, U.S. CITIZENSHIP AND IMMIGR. SERVICES (Sept. 22, 2022), <https://www.uscis.gov/military/naturalization-through-military-service>.

165. *Id.*

killed in twenty years of “counter-terror” activity.¹⁶⁶ From February 2020 to November 2021, over 5,000,000 people globally have died from COVID-19.¹⁶⁷ That is less than two years of COVID. COVID-19 presents a much more urgent hostility to human life than war, and COVID times, spanning from February 2020 to the present, should be treated as a period of hostility.

Correspondingly, like foreign members of the U.S. armed forces during war, Filipino nurses deserve a special path to citizenship for serving during COVID-19. Like war veterans, Filipino nurses working during the pandemic risk their lives to serve the U.S. In addition to risking their lives, Filipino nurses also take on a heightened risk of infection and long COVID. Although long COVID is still being researched as more symptoms are recognized, the precarious and lasting nature of it can be likened to Post Traumatic Stress Disorder (PTSD) suffered by many war veterans. Both afflictions come with cognitive dysfunction symptoms that can be debilitating and lead to loss of quality of life. Also, like Filipino veterans who fought under the U.S. flag and played a crucial role in the recapture of the Pacific during World War II, Filipino nurses are offering services only they can provide. They are stepping up and into roles that other nurses are not willing to do. Crucially, Filipino nurses are providing exceptional services under heightened risk of infection and death while anti-Asian sentiments are on the rise.¹⁶⁸ Finally, like foreign veterans, Filipino nurses are national heroes, and they deserve a special path to citizenship fit for national heroes. Section 1440 of the United States Code offers a blueprint for what this special path could look like.

Mirroring the requirements of military personnel who qualify for naturalization,¹⁶⁹ Filipino nurses should qualify for naturalization for

166. Jill Kimball, *Costs of the 20-Year War on Terror: \$8 Trillion and 900,000 Deaths*, BROWN UNIV.: NEWS FROM BROWN (Sept. 1, 2021), <https://www.brown.edu/news/2021-09-01/costsofwar>.

167. *Coronavirus in the U.S.: Latest Map and Case Count*, *supra* note 162.

168. Martin & Yeung, *supra* note 107.

169. *Naturalization Through Military Service*, *supra* note 164. Requirements to apply for naturalization through military service during periods of hostility: “1) Have served honorably in the U.S. armed forces during a designated period of hostility, and if separated, have been separated under honorable conditions from your qualifying period of service; 2) Have submitted a completed Form N-426, Request for Certification of Military or Naval Service at the time of filing your N-400; 3) Be a lawful permanent resident or have been physically present at the time of enlistment, reenlistment, or extension of service or induction into the U.S. armed forces: (a) In the United States, the Canal Zone, American Samoa, or Swains Island; or (b) On board a public vessel owned or operated by the United States for noncommercial service; 4) Demonstrate the ability to read, write and speak English, unless qualified for a waiver or exception; 5) Demonstrate knowledge of U.S. history and government, unless excepted; 6) Demonstrate good moral character for at least 1 year prior to filing your N-400 through the day you naturalize; and 7) Demonstrate an attachment to the principles of the U.S. Constitution and be well disposed to the

serving as a registered nurse in the U.S. during COVID-19 and fulfilling the following requirements: (1) be a lawful permanent resident or physically present at the time of service as a registered nurse in the U.S. and U.S. territories; (2) demonstrate the ability to read, write and speak English; (3) demonstrate knowledge of U.S. history and government, unless excepted; (4) demonstrate good moral character for at least one year prior to applying for naturalization; and (5) demonstrate an attachment to the principles of the U.S. Constitution and be well disposed to the good order and happiness of the United States. Like the section 1440 special provision for service members contained in sub-section (b)(2), registered nurses filing for naturalization during COVID-19 should be exempt from the continuous residence and physical presence requirements of naturalization.

While critics, seeking to neutralize the parallel to wartime service, may argue that not all Filipino nurses work the type of health care jobs that necessitate close contact with patients in high-risk environments,¹⁷⁰ this argument only highlights the complete disregard for human life that the U.S. has maintained toward Filipinos since the colonial era. The idea of setting a near-death standard for foreigners' citizenship is cruel and impossible to measure. How close must one come to death to earn citizenship? And what other stipulations must they meet in addition to their service to the U.S. during a global pandemic? Do they need to catch COVID, pass it onto a family member, and show signs of long COVID? Requiring close proximity to death creates a dangerous precedent and bleak path to citizenship, particularly when set against the history of colonial violence that the U.S. has waged on Filipinos. Moreover, there is no stipulation in section 1440 that foreign soldiers must have fought in the deadliest battles and come within arm's length of death to earn citizenship. The basis for section 1440 is military service during periods of hostilities, as it should be for Filipinos serving during COVID.

The U.S. has amended and added special pathways to citizenship for foreigners who provide special services to the country. During the COVID-19 pandemic, Filipino nurses are providing the most essential service. The U.S. should carve out a special path to citizenship in Title 8 of the United States Code for Filipino nurses working during the pandemic. This path can be created in an expansion of section 1427(f),¹⁷¹ the provision for persons making extraordinary contributions to national security, because public health is a national security issue. The path could also be created within

good order and happiness of the United States during all relevant periods under the law, unless waived.”

170. 8 U.S.C. § 1440; McFarling, *supra* note 7.

171. 8 U.S.C. § 1427(f).

section 1440,¹⁷² which offers naturalization as a reward for military service to the U.S., because history shows that COVID times are far deadlier than war times and both foreign-born U.S. veterans and Filipino nurses serving in the U.S. during COVID have, and continue to take on, similar risks of death and long-term effects of service.¹⁷³ Either path to citizenship would combat not only the systemic and institutional exploitation of Filipino nurses at the hands of U.S. employers, but also the community's tragic and disproportionate COVID-19 death rates.

V. CONCLUSION

Filipino nurses are entitled to a special path to citizenship because they provide something essential and special to the people of the U.S.—the *isang bagsak* level of care. A special pathway would allow Filipino nurses greater autonomy over what jobs they take without risking their status in the country. It would debilitate the exploitative practices of human traffickers and fraudulent recruiters and lead to a safer and more empowered Filipino nursing community.

Since the late 1800s, Filipino nurses have been serving the U.S. During times of crisis, from World War II to the AIDS epidemic, the U.S. turned to Filipino nurses to fill the ranks when U.S.-born nurses would not. Filipino nurses take the nursing jobs that no one else will take, and they do so for their families back home and for their patients, living up to the cultural pull of community care. Human traffickers and duplicitous recruiters and facilities continue to take advantage of Filipino nurses, using deportation and financial ruin as leverage for entrapping them in hazardous work conditions, long hours, and little pay.

Now, during the COVID-19 pandemic, they are dying at disproportionate rates, accounting for 31.5% of all COVID-19 nurse deaths while only making up 4% of the U.S. registered nurse population. This staggering statistic holds the weight of American colonialism and imperialism, as well as the ongoing exploitation of Filipino community care. The U.S. owes a debt to Filipino nurses. The country can begin to repay that debt by granting Filipino nurses the expedited path to citizenship that they have earned many times over.

172. 8 U.S.C. § 1440.

173. Martin & Yeung, *supra* note 107; Holcombe, *supra* note 105; Murdock, *supra* note 160.