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# RACE AND RAPPORT: HOMOPHILY AND RACIAL DISADVANTAGE IN LARGE LAW FIRMS

Kevin Woodson\*

## INTRODUCTION

Over the past two decades, clients and other constituencies have pushed large law firms to pursue greater racial diversity in attorney hiring and retention.<sup>1</sup> Although these firms have devoted extraordinary resources

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1. This issue has generated collective and individual action on the part of the general counsels' offices at hundreds of corporations. See INST. FOR INCLUSION IN THE LEGAL PROFESSION, THE BUSINESS CASE FOR DIVERSITY: REALITY OR WISHFUL THINKING? 15 (2011) (describing how in 1988, General Motors became the first major corporation to formally request that their law firms promote greater racial diversity); MELISSA MALESKE, DESIGNING DIVERSITY: LAW DEPARTMENTS SHARE THEIR STRATEGIES TO DRIVE INCLUSION PROGRAMS 47-48 (2009) (discussing how in-house counsel and law firms have addressed diversity); Anjali Chavan, *The "Charles Morgan Letter" and Beyond: The Impact of Diversity Initiatives on Big Law*, 23 GEO. J. LEGAL ETHICS 521, 523 (2010) (noting that in 1999, more than 500 corporations signed "Diversity in the Workplace, A Statement of Principle," vowing to "give significant weight" to law firms' diversity efforts when hiring law firms); Karen Donovan, *Pushed by Clients, Law Firms Step Up Diversity Efforts*, N.Y. TIMES, July 21, 2006, at C6 (discussing Sara Lee General Counsel Roderick A. Palmore's 2004 letter, "The Call to Action," which insisted that law firms take more proactive measures in improving diversity); Catherine Ho, *Diversity, By The Hour Lawyers Live by the Billable Hour. Now, One Law Firm Is Hoping That Mentality Will Translate into a More Diverse Workplace*, WASH. POST, Mar. 24, 2013, at A21 (discussing DuPont's practices in selecting female and minority lawyers to manage their firms' day-to-day work); Kellie Schmitt, *Corporate Diversity Demands Put Pressure on Outside Counsel*, CORPORATE COUNSEL (ONLINE) (Dec. 28, 2006), <http://www.corpcounsel.com/id=900005470357/Corporate-Diversity-Demands-Put-Pressure-on-Outside-Counsel>. But see Deborah L. Rhode, *From Platitudes to Priorities: Diversity and Gender Equity in Law Firms*, 24 GEO. J. LEGAL ETHICS 1041, 1063 (2011) (observing that Wal-Mart continues to give its legal work to firms with poor diversity records); Veronica Root, *Retaining Color*, 47 U. MICH.

toward better recruiting and retaining attorneys of color,<sup>2</sup> and despite a proliferation of “best practices” guides and diversity policy recommendations,<sup>3</sup> these considerable efforts have yielded only modest gains.<sup>4</sup> With respect to black attorneys in particular, the tide of racial progress in these firms has moved forward at a glacial pace, even ebbing and receding in recent years.<sup>5</sup>

Although large law firms now hire significant numbers of black attorneys as junior associates, these black associates report significantly worse career experiences and outcomes than their white counterparts. As a group, they receive lower quality work assignments,<sup>6</sup> are less satisfied with their experiences,<sup>7</sup> and ultimately leave these firms at faster rates.<sup>8</sup> Very few ever become partners.<sup>9</sup>

J.L. REFORM 575, 605 (2014) (questioning the commitment of corporate clients to law firm racial diversity).

2. See Douglas E. Brayley & Eric S. Nguyen, *Good Business: A Market-Based Argument for Law Firm Diversity*, 34 J. LEGAL PROF. 1, 5 (2009) (discussing a survey finding that 50 percent of participating Am Law 200 firms allocated an average of \$513,500 for their diversity managers’ offices); Root, *supra* note 1, at 598–601 (discussing diversity efforts undertaken by various law firms in response to client pressure).

3. See, e.g., ABA, DIVERSITY IN THE LEGAL PROFESSION: THE NEXT STEPS 26–30 (2010); MINORITY CORP. COUNSEL ASS’N, CREATING PATHWAYS TO DIVERSITY: A SET OF RECOMMENDED PRACTICES FOR LAW FIRMS (2001), available at <http://www.mcca.com/index.cfm?fuseaction=page.viewpage&pageid=613>; NAT’L ASS’N FOR LAW PLACEMENT, DIVERSITY BEST PRACTICES GUIDE (2014); N.Y. BAR COMM. ON MINORITIES IN THE PROFESSION, BEST PRACTICES STANDARDS FOR THE RECRUITMENT, RETENTION, DEVELOPMENT, AND ADVANCEMENT OF RACIAL/ETHNIC MINORITY ATTORNEYS 1–2 (2006); Erin Brereton, *The New Face of Law Firm Diversity*, 29 LEGAL MGMT. 1 (2010) (suggesting that law firms undertake a number of organizational reforms); see also ARIN N. REEVES, ABA COMM’N ON WOMEN IN THE PROFESSION, FROM VISIBLE INVISIBILITY TO VISIBLY SUCCESSFUL: SUCCESS STRATEGIES FOR LAW FIRMS AND WOMEN OF COLOR IN LAW FIRMS (2008); DRI, THE DRI LAW FIRM DIVERSITY RETENTION MANUAL (2005); MINORITY CORP. COUNSEL ASS’N, A STUDY OF LAW DEPARTMENT BEST PRACTICES (2005).

4. See Root, *supra* note 1, at 587–93 (discussing the incremental increases in minority representation in elite law firms since 2000).

5. Press Release, Nat’l Ass’n for Law Placement, Law Firm Diversity Among Associates Erodes in 2010 (Nov. 4, 2010), available at <http://www.nalp.org/uploads/PressReleases/10NALPWomenMinoritiesPressRel.pdf>.

6. See *infra* note 74.

7. Monique R. Payne-Pikus et al., *Experiencing Discrimination: Race and Retention in America’s Largest Law Firms*, 44 LAW & SOC’Y REV. 553, 567–569 (2010).

8. *Id.* at 560; see also EEOC, DIVERSITY IN LAW FIRMS 9 (2003) (describing minority attorneys as more likely to report that work and partnership opportunities at their firms are not “equally available to all”); GITA Z. WILDER, ARE MINORITY WOMEN LAWYERS LEAVING THEIR JOBS?: FINDINGS FROM THE FIRST WAVE OF THE AFTER THE JD STUDY 12–13 (2008) (noting that minority women are more likely to anticipate leaving their employment); Richard H. Sander, *The Racial Paradox of the Corporate Law Firm*, 84 N.C. L. REV. 1755, 1805–07 (2006) (discussing how black associates are more likely to leave their firms as associates than their white cohorts). As of 2009, minority attorneys still constituted only 1.3 percent of partners at firms of 101–250 lawyers, 1.8 percent of partners at firms of 251–500 lawyers, 2.02 percent of partners at firms of 501–700 lawyers, and 2.05 percent of partners at firms with more than 700 attorneys. Nat’l Ass’n for Law Placement Bulletin, *Women and Minorities at Law Firms by Race and Ethnicity—An Update* (Apr. 2013), available at <http://www.nalp.org/0413research> [hereinafter NALP Bulletin].

9. NALP Bulletin, *supra* note 8, at tbl.2; see also Jonathan D. Glater, *Law Firms Are Slow in Promoting Minority Lawyers to Partnerships*, N.Y. TIMES, Aug. 7, 2001, at A1; Alan

The failure of firms to achieve greater racial equity has generated extensive research and commentary from legal scholars<sup>10</sup> and other interested parties including practicing attorneys,<sup>11</sup> journalists,<sup>12</sup> and the organized bar.<sup>13</sup> The existing legal scholarship has tended to address this problem through the conceptual lens of racial bias. From this perspective, the difficulties of black law firm associates are manifestations of the racial biases of their (predominantly white) colleagues, embedded in, and enabled by, the institutional workings of their firms.<sup>14</sup>

This Article calls attention to a different, heretofore unacknowledged source of racial disadvantage in these firms, one that is neither dependent

Jenkins, *Losing the Race*, AM. LAW., Oct. 3, 2001, at 36 (discussing one prominent New York City law firm's failure to retain or promote its many black associates).

10. See, e.g., James E. Coleman, Jr. & Mitu Gulati, *A Response to Professor Sander: Is It Really All About the Grades?*, 84 N.C. L. REV. 1823 (2006); Tiffani N. Darden, *The Law Firm Caste System: Constructing a Bridge Between Workplace Equity Theory & Institutional Analyses of Bias in Corporate Law Firms*, 30 BERKELEY J. EMP. & LAB. L. 85 (2009); David B. Wilkins & G. Mitu Gulati, *Reconceiving the Tournament of Lawyers: Tracking, Seeding, and Information Control in the Internal Labor Markets of Elite Law Firms*, 84 VA. L. REV. 1581 (1998) [hereinafter Wilkins & Gulati, *Reconceiving the Tournament*]; David B. Wilkins & G. Mitu Gulati, *Why Are There So Few Black Lawyers in Corporate Law Firms? An Institutional Analysis*, 84 CALIF. L. REV. 493 (1996) [hereinafter Wilkins & Gulati, *Why Are There So Few Black Lawyers*]; David B. Wilkins, *On Being Good and Black*, 112 HARV. L. REV. 1924 (1999) (reviewing PAUL M. BARRETT, *THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA* (1999)); see also Payne-Pikus et al., *supra* note 7; Root, *supra* note 1; Sander, *supra* note 8.

11. See, e.g., Frederick H. Bates & Gregory C. Whitehead, *Do Something Different*, 76 A.B.A. J. 78 (1990); Pamela W. Carter, *Diversity on Trial: Integrating the Legal Profession*, 52 DRI FOR DEF. 55 (2010); Luis J. Diaz & Patrick C. Dunican, Jr., *Ending the Revolving Door Syndrome in Law*, 41 SETON HALL L. REV. 947 (2011); J. Cunyon Gordon, *Painting by Numbers: "And, Um, Let's Have a Black Lawyer Sit at Our Table,"* 71 FORDHAM L. REV. 1257, 1273–75 (2003); Vance Knapp & Bonnie Kae Grover, *The Corporate Law Firm—Can It Achieve Diversity?*, 13 NAT'L BLACK L.J. 298 (1994).

12. See, e.g., Ann Davis, *Big Jump in Minority Associates, But . . .*, NAT'L L.J., Apr. 29, 1996, at A1; Jenkins, *supra* note 9; Rita Jensen, *Minorities Didn't Share in Firms' Growth*, NAT'L L.J., Feb. 19, 1990, at A1; Adam Liptak, *In Students' Eyes, Look-Alike Lawyers Don't Make the Grade*, N.Y. TIMES, Oct. 29, 2007, at A10; Julie Friedman, *The Diversity Crisis: Big Firms' Continuing Failure*, AM. LAW., May 29, 2014, [http://www.behblaw.com/Hidden-Pages/The-Diversity-Crisis-Big-Firms-Continuing-Failure\\_-The-American-Lawyer.pdf](http://www.behblaw.com/Hidden-Pages/The-Diversity-Crisis-Big-Firms-Continuing-Failure_-The-American-Lawyer.pdf).

13. See, e.g., CHI. BAR ASS'N, DIVERSITY INITIATIVE (2006); THE LAW FIRM DIVERSITY REPORT, MINORITY BAR ASSOCIATIONS OF WASHINGTON JOINT COMMITTEE ON LAW FIRM DIVERSITY (2009); ABA, *supra* note 3.

14. See, e.g., Darden, *supra* note 10, at 131 (stating that “inequitable practices [that] stem from stereotypes and cognitive biases that are allowed to manifest through discretionary and informal structures”); Rhode, *supra* note 1, at 1053–55 (noting the in-group bias of white male attorneys and the status-based rejection of attorneys from marginalized groups); Root, *supra* note 1, at 607–10 (describing implicit bias and aversive racism against black attorneys); Wilkins & Gulati, *Why Are There So Few Black Lawyers*, *supra* note 10, at 507, 511 (discussing “the persistent myth of black intellectual inferiority” and emphasizing “the interplay between . . . structural factors and background assumptions about race and merit”). Even Richard Sander, who controversially has argued that the primary source of black associates' difficulties in these firms are merit-based, has inferred that stereotype discrimination also likely contributes substantially. See Sander, *supra* note 8, at 1818 (positing that law firm partners stereotype black associates as incompetent).

upon these inferences of racial bias, nor incompatible with them.<sup>15</sup> Cultural homophily,<sup>16</sup> the tendency of people to develop rapport and relationships with others on the basis of shared interests and experiences,<sup>17</sup> profoundly and often determinatively disadvantages many black attorneys in America's largest law firms.<sup>18</sup> Although not intrinsically racial,<sup>19</sup> cultural homophily has decidedly racial consequences in this context because of the profound social and cultural distance that separates black and white Americans,<sup>20</sup> evident in pronounced racial patterns in a wide variety of social and cultural behavior.<sup>21</sup> Drawing evidence from interviews of seventy-five black attorneys who have worked as associates at large law firms throughout the country,<sup>22</sup> this Article argues that homophily-based behavior deprives many

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15. This Article does not question that racial bias, both conscious and unknowing, continues to contribute to the difficulties of black associates in these firms. Rather, my purpose in this Article is to call attention to a different source of racial inequality, one that potentially carries very different implications for our efforts to understand and address this problem. The evidence uncovered in my research, however, does problematize default inferences of racial bias to explain racial disparities in employment. It suggests that in many instances, problems attributed to bias and stereotyping may, to a larger extent, reflect the workings of cultural homophily instead.

16. Homophily, the tendency of similar people to develop relationships with one another, can occur on the basis of any number of personal characteristics and attributes. See Paul F. Lazarsfeld & Robert Merton, *Friendship As a Social Process: A Substantive and Methodological Analysis*, in *FREEDOM AND CONTROL IN MODERN SOCIETY* 18, 23–24 (Morroe Berger et al. eds., 1954) (introducing the term homophily); Miller McPherson et al., *Birds of a Feather: Homophily in Social Networks*, 27 ANN. REV. OF SOC. 415, 416 (2001).

17. See, e.g., Thomas J. Berndt, *The Features and Effects of Friendship in Early Adolescence*, 53 CHILD DEV. 1447, 1454 (1982) ("Friends are similar in their orientation toward contemporary teen culture. They like the same kind of music, have similar tastes in clothes, and enjoy the same kinds of leisure time activities." (citations omitted)); Noah P. Mark, *Culture and Competition: Homophily and Distancing Explanations for Cultural Niches*, 68 AM. SOC. REV. 319, 320 (2003) ("[C]ultural similarities and differences among people provide bases for cohesion and exclusion. Empirical research shows that individuals who are culturally similar are more likely to be associates than are individuals who are culturally different." (citations omitted)); Andreas Wimmer & Kevin Lewis, *Beyond and Below Racial Homophily: ERG Models of a Friendship Network Documented on Facebook*, 116 AM. J. SOC. 583, 607 n.20 (2010) (noting that "students display a significant preference for culturally similar [others]").

18. For a more comprehensive discussion of the detrimental consequences of cultural homophily for black workers in high-status positions at elite corporate firms in several industries, see Kevin Woodson, *Beyond Bias: A Reassessment of Institutional Discrimination in the American Workplace*, WASH. & LEE J. CIVIL RTS. & SOC. JUST. (forthcoming).

19. Employment dynamics consistent with cultural homophily have been documented in several studies using predominantly non-black samples. See, e.g., ROBERT JACKALL, *MORAL MAZES: THE WORLD OF CORPORATE MANAGERS* (1988); ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* (1977); David Purcell, *Baseball, Beer, and Bulgari: Examining Cultural Capital and Gender Inequality in a Retail Fashion Corporation*, 42 J. CONTEMP. ETHNOGRAPHY 291 (2013); Catherine J. Turco, *Cultural Foundations of Tokenism: Evidence from the Leveraged Buyout Industry*, 75 AM. SOC. REV. 894 (2010).

20. See *infra* Part I.B. This discussion of cultural differences associated with race is by no means intended to essentialize racial identity or to downplay the rich intraracial cultural diversity amongst black and white Americans.

21. See *infra* notes 44–48 and accompanying text.

22. These interviews were conducted as part of my dissertation research, which consisted of interviews of a larger sample of black workers who held professional or

black attorneys of equal access to critical relationship capital in predominantly white firms,<sup>23</sup> thereby reinforcing racial inequality.<sup>24</sup>

This Article proceeds in three parts. Part I introduces the social tendency of cultural homophily and provides a brief overview of the social and cultural differences that separate many black and white Americans. Part II demonstrates the manner in which these dynamics deprive black associates of equal access to all-important relationship capital and premium opportunities, thus limiting their careers. Part III briefly considers some of the potential means by which law firms and individual attorneys might better manage the effects of this potent driver of law firm inequality.

## I. CULTURAL HOMOPHILY AND RACIAL DISTANCE

### A. Cultural Homophily

Recognized as “one of the most striking and robust empirical regularities of social life,”<sup>25</sup> homophily has been detected in a wide variety of social contexts and relationship types.<sup>26</sup> The term itself, derived from the Greek roots for love (-phily) and same (homo-), is encapsulated in the ancient truism that “birds of a feather flock together.”<sup>27</sup> The theory of homophily

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managerial positions in large corporate firms and a smaller comparison sample of white workers. See Kevin Woodson, *Fairness and Opportunity in the Twenty-First Century Corporate Workplace: The Perspectives of Young Black Professionals* (Nov. 2011) (unpublished Ph.D. dissertation, Princeton University) (on file with author).

23. As of 2012, 93.29 percent of law firm partners were white. See NALP Bulletin, *supra* note 8.

24. Other researchers have alluded to the effects of cultural differences in impeding the careers of black professionals in corporate firms. See Elijah Anderson, *The Social Situation of the Black Executive: Black and White Identities in the Corporate World*, in *THE CULTURAL TERRITORIES OF RACE: BLACK AND WHITE BOUNDARIES* 3, 27 (Michèle Lamont ed., 1999) (concluding that black professionals who did not assimilate into the cultural and social practices of their firm’s white elite were less successful than others); Ronit Dinovitzer & Bryant G. Garth, *Lawyer Satisfaction in the Process of Structuring Legal Careers*, 41 L. & SOC’Y REV. 1, 42 (2007) (sharing an anecdote of a black attorney who chose not to work at a corporate law firm because of her social discomfort and lack of familiarity with the cultural terms of conversation (“golf and similar subjects”) at a law firm informational reception).

25. Thomas A. DiPrete et al., *Segregation in Social Networks Based on Acquaintanceship and Trust*, 116 AM. J. SOC. 1234, 1236 (2011) (“The homophily principle is so powerful that its existence is taken as a given in the social capital literature.”); Georgi Kossinets & Duncan J. Watts, *Origins of Homophily in an Evolving Social Network*, 115 AM. J. SOC. 405, 405 (2009); Lazarsfeld & Merton, *supra* note 16; McPherson et al., *supra* note 16.

26. See Denise B. Kandel, *Homophily, Selection, and Socialization in Adolescent Friendships*, 84 AM. J. SOC. 427 (1978) (finding homophily patterns in friendship according to behavior); J. Miller McPherson & Lynn Smith-Lovin, *Homophily in Voluntary Organizations: Status Distance and the Composition of Face-to-Face Groups*, 52 AM. SOC. REV. 370 (1987); McPherson et al., *supra* note 16; Lois M. Verbrugge, *The Structure of Adult Friendship Choices*, 56 SOC. FORCES 576 (1977) (finding homophily patterns in adult friendships); Aaron Retica, *Homophily*, N.Y. TIMES, Dec. 10, 2006 (Magazine), <http://www.nytimes.com/2006/12/10/magazine/10Section2a.t-4.html>.

27. In the words of Aristotle, “Some define [friendship] as a matter of similarity; they say that we love those who are like ourselves: whence the proverbs ‘Like finds his like,’ birds of a feather flock together,’ and so on.” ARISTOTLE, NICOMACHEAN ETHICS bk. VIII, i,

has been firmly established as an important tenet of social life and friendship formation through sixty years of social science research.<sup>28</sup>

Cultural homophily, attraction on the basis of shared cultural traits (including cultural preferences, knowledge, and interests),<sup>29</sup> is a particularly important source of rapport and interactional ease.<sup>30</sup> It reflects the rather unremarkable observation that people generally find it easier to develop and enjoy relationships with others who share similar interests, tastes, and life experiences.<sup>31</sup> When given the choice, we prefer to spend time around people with whom we "get along," and we tend to get along especially well with others when we share things in common (this should be apparent to anyone who has ever made new friends or sought romantic "matches" via internet dating sites).<sup>32</sup> Such common ground makes our social encounters with one another more mutually gratifying, which in turn leads us to feel more inclined to engage in future sociable interactions with each other.<sup>33</sup> These repeat encounters often eventually develop into friendships and other enduring relationships.<sup>34</sup>

at 6 (H. Rackham trans., Harvard University Press 1968) (c. 384 B.C.E.); *see also* McPherson et al., *supra* note 16.

28. *See, e.g.*, DiPrete et al., *supra* note 25, at 1236 ("The homophily principle is so powerful that its existence is taken as a given in the social capital literature."); Lazarsfeld & Merton, *supra* note 16; McPherson et al., *supra* note 16.

29. All people possess cultural repertoires and resources (often referred to as cultural capital) encompassing all of their many lifestyle-related tastes, practices, knowledge, and possessions. *See* Michèle Lamont & Annette Lareau, *Cultural Capital: Allusions, Gaps and Glissandos in Recent Theoretical Developments*, 6 SOC. THEORY 153, 156 (1988) (noting that "the forms of cultural capital enumerated by Bourdieu . . . range from attitudes to preferences, behaviors and goods"); Purcell, *supra* note 19, at 294 (discussing cultural capital as "cultural knowledge, tastes, practices, attitudes, and goods"). Our cultural repertoires include everything from the music we listen to (and how we listen to it), to the food we prepare and consume (and how we talk about it), the places we travel, the television shows and movies that we watch, the sports that we watch and play, the books and magazines that we read, and the alcoholic beverages that we drink (and the venues where we choose to drink them). *See, e.g.*, Douglas B. Holt, *Distinction in America? Recovering Bourdieu's Theory of Tastes from Its Critics*, 25 POETICS 93, 101 (1997) (identifying sports, pop culture, dining, and travel as important culture-related activities).

30. *See, e.g.*, Berndt, *supra* note 17, at 1454 (noting "friends are similar in their orientation toward contemporary teen culture. They like the same kind of music, have similar tastes in clothes, and enjoy the same kinds of leisure-time activities" (citations omitted)); Mark, *supra* note 17, at 320 ("[C]ultural similarities and differences among people provide bases for cohesion and exclusion. Empirical research shows that individuals who are culturally similar are more likely to be associates than are individuals who are culturally different" (citations omitted)); Wimmer & Lewis, *supra* note 17, at 607 n.20 (finding that "students display a significant preference for culturally similar [others]").

31. *See, e.g.*, Daniel J. Brass et al., *Taking Stock of Networks and Organizations: A Multilevel Perspective*, 47 ACAD. MGMT. J. 795, 796 (2004) ("Similar people tend to interact with each other. Similarity is thought to ease communication, increase the predictability of behavior, and foster trust and reciprocity."); Marshall Prisbell & Janis F. Andersen, *The Importance of Perceived Homophily, Level of Uncertainty, Feeling Good, Safety, and Self-Disclosure in Interpersonal Relationships*, 28 COMMUN. Q. 22, 24-25 (1980) (listing "feeling good" as a benefit of homophily-based interactions).

32. *See* Prisbell & Andersen, *supra* note 31, at 23; Lazarsfeld & Merton, *supra* note 16; McPherson & Smith-Lovin, *supra* note 26.

33. Paul DiMaggio, *Classification in Art*, 52 AM. SOC. REV. 440, 443 (1987).

34. *Id.*

Thus, within a given work setting, some cultural traits are more easily leveraged than others to forge relationships with colleagues, depending upon the number and status of the workers who share them.<sup>35</sup> Those that are widely embraced, for example interest in a popular television program or a local sports team,<sup>36</sup> can provide valuable “ins” for an associate seeking to fit in and develop career-enhancing rapport with her colleagues.<sup>37</sup>

### B. Racial Distance

Though not as morally invidious or legally suspect as discrimination driven by racial stereotypes and bias, cultural homophily nonetheless functions as a critical source of institutional bias that imposes burdens and barriers upon many black law firm associates because of the considerable social and cultural distance that exists between them and their colleagues. Centuries of racial stratification have produced profound social separation between black and white Americans.<sup>38</sup> Even today, black and white Americans largely live in different neighborhoods<sup>39</sup> and attend different schools.<sup>40</sup> As children, they develop same-race friendship circles during their formative adolescent years,<sup>41</sup> a pattern that persists into adulthood,

35. The values of specific forms of cultural capital vary considerably according to the cultural preferences predominant within particular social and organizational settings. See Prudence Carter, “Black” Cultural Capital, Status Positioning, and Schooling Conflicts for Low-Income African American Youth, 50 SOC. PROBS. 136 (2003) (discussing the different returns to dominant and nondominant forms of cultural capital in different institutional settings); Bonnie H. Erickson, *Culture, Class, and Connections*, 102 AM. J. SOC. 217, 249 (1996) (explaining that “more than one kind of culture is useful” within a given institutional context).

36. Several interviewees alluded to the value of sports-related cultural capital, particularly its impact on gender inequality. See also Turco, *supra* note 19, at 899–901 (discussing sports knowledge as a source of social closure in the leveraged buyout industry).

37. *Id.*

38. For general overviews of this history, see JOHN HOPE FRANKLIN & ALFRED A. MOSS, JR., *FROM SLAVERY TO FREEDOM: A HISTORY OF AFRICAN AMERICANS* (8th ed. 2000); and AUGUST MEIER & ELLIOT RUDWICK, *FROM PLANTATION TO GHETTO* (3d ed. 1976).

39. See JOHN R. LOGAN, *SEPARATE AND UNEQUAL: THE NEIGHBORHOOD GAP FOR BLACKS, HISPANICS AND ASIANS IN METROPOLITAN AMERICA* (2011), available at <http://www.s4.brown.edu/us2010/Data/Report/report0727.pdf> (finding considerable residential segregation for black Americans at all income levels); see also Camille Zubrinsky Charles, *The Dynamics of Racial Residential Segregation*, 29 ANN. REV. SOC. 167, 169 (2003) (“Despite declines in black-white segregation [since 1980], blacks remain severely segregated in the majority of U.S. cities.”).

40. The magnitude of the continued racial separateness of American schools is staggering.

Forty percent of white students attend high schools that are 90 percent or more white, and close to 30 percent of African American and Latino students attend high schools that are 90 percent or more minority. Nearly three-quarters of Latino and African American students attend high schools where most students are minority.

Robert Balfanz, *Can the American High School Become an Avenue of Advancement for All?*, 19 FUTURE OF CHILDREN 17, 20 (2009).

41. See Maureen T. Hallinan & Richard A. Williams, *Interracial Friendship Choices in Secondary-Schools*, 54 AM. SOC. REV. 67, 76 (1989) (discussing the rarity of interracial friendships); Kara Joyner & Grace Kao, *School Racial Composition and Adolescent Racial Homophily*, 81 SOC. SCI. Q. 810 (2000); James Moody, *Race, School Integration, and*



where they maintain racially defined social networks.<sup>42</sup> Black and white people rarely enjoy close friendships with each other.<sup>43</sup>

In light of these longstanding, ongoing patterns of social separateness, it is not surprising that black and white Americans have developed racially distinct cultural milieus.<sup>44</sup> Racial patterns are evident across a spectrum of cultural traits, including preferences and consumption practices relating to music,<sup>45</sup> television,<sup>46</sup> games,<sup>47</sup> humor, fashion, and art.<sup>48</sup>

The plain fact of this stark racial separateness was evident in interviewees' discussions of their college and law school careers. Although most had attended predominantly white universities, few had enjoyed close social relationships with their white classmates. Instead, many had led racially isolated social lives. One such interviewee described her time as an undergraduate at an elite public university:

[I]f you looked at my photo albums from school, you would have thought that I went to Howard or Hampton or Spelman because all my friends were black. And we just had the community . . . [A]ll your friends were black, you were going to the black mixers, the Kappa parties<sup>49</sup> . . . you were in the black organizations . . . . My [college] experience—it was an HBCU<sup>50</sup> experience, essentially.<sup>51</sup>

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*Friendship Segregation in America*, 107 AM. J. SOC. 679, 698 (2001) (noting that adolescent students' friendships are "highly segregated by race").

42. See generally SHERYLL CASHIN, *THE FAILURES OF INTEGRATION: HOW RACE AND CLASS ARE UNDERMINING THE AMERICAN DREAM* 127–66 (2004) (finding that many middle-class black families seek out suburban black middle-class enclaves). See also LAWRENCE OTIS GRAHAM, *OUR KIND OF PEOPLE: INSIDE AMERICA'S BLACK UPPER CLASS* (1999); Kathryn M. Neckerman et al., *Segmented Assimilation and Minority Cultures of Mobility*, 22 ETHNIC & RACIAL STUD. 945, 952 (1999) ("Few in the black middle class socialize with white colleagues outside of the workplace."). For a characterization of this social separateness as "discrimination in contact," see generally GLENN C. LOURY, *THE ANATOMY OF RACIAL INEQUALITY* 95–104 (2002).

43. Elizabeth Flock, *Poll: White Americans Far Less Likely to Have Friends of Another Race*, U.S. NEWS & WORLD REP. (Aug. 8, 2013), available at <http://www.usnews.com/news/articles/2013/08/08/poll-white-americans-far-less-likely-to-have-friends-of-another-race> (discussing results of Reuters/Ipsos poll finding that 40 percent of white Americans had no nonwhite friends).

44. See LAWRENCE W. LEVINE, *BLACK CULTURE AND CONSCIOUSNESS: AFRO-AMERICAN FOLK THOUGHT FROM SLAVERY TO FREEDOM* (1977) (providing a detailed overview of the evolution of various black American cultural traditions).

45. See MARK ANTHONY NEAL, *WHAT THE MUSIC SAID: BLACK POPULAR MUSIC AND BLACK PUBLIC CULTURE* (1999).

46. See Jane D. Brown & Carol J. Pardun, *Little in Common: Racial and Gender Differences in Adolescents' Television Diets*, 48 J. BROAD. & ELEC. MEDIA 266 (2004).

47. See Alex Johnson, Jr., *Bid Whist, Tonk, and United States v. Fordice: Why Integrationism Fails African-Americans Again*, 81 CAL. L. REV. 1401 (1993) (discussing black cultural and social traditions involving the card games of bid whist and tonk).

48. Paul DiMaggio & Francie Ostrower, *Participation in the Arts by Black and White Americans*, 68 SOC. FORCES 753 (1990) (finding differences in black and white Americans' consumption of art).

49. "Kappa" here refers to Kappa Alpha Psi, one of the most prominent African American Greek-letter organizations. See LAWRENCE C. ROSS, JR., *THE DIVINE NINE: THE HISTORY OF AFRICAN-AMERICAN FRATERNITIES AND SORORITIES* 46–48 (2000). These organizations were founded to provide social and civic outlets for black students in an era when blacks were widely excluded from white fraternities and sororities. Their continuing

Another interviewee explained that even the fairly small black student population at his Ivy League college provided enough of a critical mass for black students to maintain their own “black environment” with “black Greek organizations [and] . . . different social organizations.”<sup>52</sup>

Stories like these were common and consistent with research on racial patterns in campus social life at American universities.<sup>53</sup> But while black students can thrive academically and socially without engaging in in-depth interracial interactions, doing so causes them to miss out on opportunities for interracial acclimation and acculturation that might prove to be valuable later on, during their careers in predominantly white firms.

Though this race-based distance potentially impedes black and white attorneys alike from developing rapport with attorneys of other racial backgrounds, given the skewed racial demographics of large law firms, black associates bear the brunt of this problem. As a practical matter, they suffer more from their difficulties establishing relationships with white attorneys than those white attorneys suffer from their inability to develop rapport with them. The following part explains the importance of relationship capital in large law firms, and presents interviewees’ firsthand accounts to further illuminate the effects of these subtle disadvantages in undermining the careers of many black attorneys.<sup>54</sup>

## II. RACE-BASED DISTANCE AND HOMOPHILY DISADVANTAGE IN LARGE LAW FIRMS

“[T]he biggest thing is that ultimately what you want is for one person with clout here to like you.”<sup>55</sup>

These social and cultural dynamics can carry considerable professional consequences in large law firms, where careers are contingent upon rapport

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role in shaping the social lives and networks of many black college students and graduates exemplify the complex manner through which social and cultural distance between black and white Americans that originate in racial stratification become self-sustaining over time.

50. Woodson, *supra* note 22, at 184.

51. Interview with Attorney (Jan. 28, 2010).

52. Interview with Attorney (Nov. 11, 2009).

53. See, e.g., MAYA A. BEASLEY, *OPTING OUT: LOSING THE POTENTIAL OF AMERICA’S YOUNG BLACK ELITE* 57–82 (2011) (noting that many black college students at majority white colleges immerse themselves in their school’s black communities and have limited contact with white students); Elizabeth R. Cole & Kimberly R. Jacob Arriola, *Black Students on White Campuses: Toward a Two-Dimensional Model of Black Acculturation*, 33 J. OF BLACK PSYCHOL. 379 (2007); Rachel F. Moran, *Diversity and Its Discontents: The End of Affirmative Action at Boalt Hall*, 88 CAL. L. REV. 2241, 2270 (2000) (finding that white students wanted friendships with black students while black students “preferred same-race friendships”); Sandra S. Smith & Mignon R. Moore, *Intraracial Diversity and Relations Among African-Americans: Closeness Among Black Students at a Predominantly White University*, 106 AM. J. SOC. 1 (2000). This social separateness has several causes, including both homophily and racial alienation. See generally WENDY LEO MOORE, *REPRODUCING RACISM: WHITE SPACE, ELITE LAW SCHOOLS, AND RACIAL INEQUALITY* 99–100 (2008); Meera E. Deo, *Separate, Unequal, and Seeking Support*, 28 HARV. J. ON RACIAL & ETHNIC JUST. 9, 29–31 (2012).

54. *Infra* Part II.

55. Interview with Attorney (Feb. 10, 2010).

and relationships with colleagues.<sup>56</sup> For associates in these firms, relationship capital can be every bit as important as work performance. The mutual affinity, trust, and empathy that some attorneys develop through sociable interactions with each other renders them more likely to help and bestow preferential treatment on one another.<sup>57</sup> Regardless of race or gender, law firm associates who manage to develop the right relationships enjoy greater access to high quality work opportunities, advice, advocacy, and generous performance reviews.<sup>58</sup> Conversely, those who are less able to develop rapport with colleagues face longer odds of success.<sup>59</sup>

To understand the power of relationship capital in these firms, one need only consider the process through which associates receive work assignments and other opportunities. As senior attorneys generally enjoy considerable autonomy in allocating work assignments,<sup>60</sup> associates are not guaranteed equal access to the scarce,<sup>61</sup> high quality "training work" vital for their careers.<sup>62</sup> Instead, junior attorneys who have the strongest relationships and rapport with senior colleagues tend to receive greater

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56. See, e.g., Wilkins, *supra* note 10, at 1943–44 ("[T]hose who make it must have . . . 'relationship capital,' consisting of strong bonds with powerful partners who will give the associate good work and, equally important, report the associate's good deeds to other partners."). These observations about the importance of relationships in large law firms is consistent with the extensive, multidisciplinary body of social science research on social capital, the goodwill and access to preferential treatment that is available to people based on their membership in groups and relationships. See James S. Coleman, *Social Capital in the Creation of Human Capital*, 94 AM. J. SOC. SUPPLEMENT S95, S100–05 (1988).

57. See Herminia Ibarra, *Race, Opportunity, and Diversity of Social Circles in Managerial Networks*, 38 ACAD. MGMT. J. 673 (1995) (investigating the informal networks of white and minority managers); Paul Ingram & Xi Zou, *Business Friendships*, 28 RES. ORG. BEHAV. 167 (2008) (finding that friendships with colleagues offer numerous career enhancing benefits).

58. Wilkins & Gulati, *Reconceiving the Tournament*, *supra* note 10, at 1609.

59. See Wilkins, *supra* note 10 (discussing how highly credentialed black attorney Lawrence Mungin's seemingly promising career at a large law firm interested in racial diversity was nonetheless doomed by his lack of relationship capital). See generally PAUL M. BARRETT, *THE GOOD BLACK: A TRUE STORY OF RACE IN AMERICA* (1999) (discussing Mungin's failed career and subsequent employment discrimination lawsuit against Katten Munchin Rosenman LLP).

60. See Diaz & Dunican, *supra* note 11, at 974–76. Though many firms have developed centralized assignment systems in recognition of the potential inefficiency and unfairness of "free market" assignment practices, these rules are frequently ignored as partners and senior associates often staff their own cases and allocate assignments outside of the formally prescribed procedures. *Id.* at 974–78. Furthermore, these formal systems do little to curb the discretion of partners in allocating follow-up assignments amongst the multiple associates who are already working for them on a given matter. *Id.* at 975–76.

61. Wilkins, *supra* note 10, at 1944 (noting that premium work is "inherently in short supply").

62. See Wilkins & Gulati, *Reconceiving the Tournament*, *supra* note 10, at 1644–51 (explaining that some associates have more or less access to high quality assignments than others); Wilkins & Gulati, *Why Are There So Few Black Lawyers*, *supra* note 10, at 541–42 (referring to "training" assignments as the "royal jelly" of corporate law firms, in that a steady diet of this work allows a select few associates to rise from worker bees to queen bees); see also Diaz & Dunican, *supra* note 11, at 974–76.

access to the scarce supply of training work.<sup>63</sup> As one interviewee explained:

Though law firms have formal ways to distribute assignments, the way that you're really going to get the assignment that you want to get is to know senior associates, to know partners . . . by being someone that they want to have a conversation with, being somebody that they wouldn't mind talking to outside of the [office].<sup>64</sup>

In the path-dependent realm of law firm careers,<sup>65</sup> even modest advantages in access to premium assignments can cumulatively result in attorneys ending up on very different career paths.<sup>66</sup>

This relational dimension of law firm careers works to the disadvantage of black attorneys. On average, black associates have less relationship capital with colleagues than their white peers: they have less social contact with colleagues<sup>67</sup> and are less likely to receive sufficient mentorship support.<sup>68</sup> Although these disparities frequently have been attributed to racial bias,<sup>69</sup> they are just as consistent with the workings of homophily. The logic of homophily dictates that black associates, who share fewer social and cultural characteristics with their colleagues, will receive less preferential treatment from them, not as a covert form of invidious group-

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63. See Diaz & Dunican, *supra* note 11, at 975–76 (observing that assignments in some firms are “socially constructed” and occur “based on existing relationships”).

64. Interview with Attorney (Feb. 17, 2010). Other interviewees concurred with this assessment. Some viewed the inability to find work outside of their firms’ formal assignment processes as an indicator that an associate was not held in particularly high regard and lacked adequate relationship capital. Rapport with partners and senior associates also enables some associates to avoid the less desirable, and more abundant, “paperwork” assignments. See Wilkins & Gulati, *Reconceiving the Tournament*, *supra* note 10, at 1609; Wilkins & Gulati, *Why Are There So Few Black Lawyers*, *supra* note 10, at 565.

65. See Wilkins & Gulati, *Reconceiving the Tournament*, *supra* note 10, at 1646 (observing that “[a]ssociates who do well on their initial training assignments are given preferential access to additional training opportunities”).

66. *Id.* at 1646–47.

67. Payne-Pikus et al., *supra* note 7, at 566 (finding black attorneys were less likely to report joining partners for meals and more likely to report desiring more mentoring). Most large firms have attempted to mitigate the disparities produced by informal mentorship by instituting formal mentorship programs. See, e.g., *Attorney Development and Retention*, SKADDEN, <http://www.skadden.com/diversity/development> (last visited Mar. 25, 2015) (“Skadden’s formal mentoring program pairs junior associates with a partner and an associate or counsel.”). Though well-intentioned, these types of formally imposed mentorship relationships tend to be less useful than those that develop organically, through interpersonal rapport. See Belle Rose Ragins & John L. Cotton, *Mentor Functions and Outcomes: A Comparison of Men and Women in Formal and Informal Mentoring Relationships*, 84 J. APPLIED PSYCHOL. 529 (1999) (demonstrating that workers perceive organic mentorship to be more effective than formal mentoring relationships).

68. Payne-Pikus et al., *supra* note 7; Sander, *supra* note 8, at 1798 (“Nonwhites—especially blacks—exhibit a striking concern over the absence of mentoring and training in their jobs, relative to white men.”).

69. Payne-Pikus et al., *supra* note 7.

based discrimination,<sup>70</sup> but quite simply because they have less rapport with them.<sup>71</sup>

Nearly half of the attorneys (thirty-five of seventy-five) interviewed for this project reported that issues of racial distance—racially-influenced differences in attorneys' personal backgrounds and cultural repertoires—hindered some, if not all, of the black associates working in their firms from developing relationship capital with colleagues.<sup>72</sup>

For example, one interviewee, a former associate at a Washington, D.C. firm, explained how social and cultural differences rendered informal firm-related social events and gatherings problematic for some of his black colleagues.

[T]here's another layer of complication, stress, and almost like another layer of the job that you have to go through if you're not comfortable. So for example, if you don't like to go out and drink beer. . . . [T]here's small annoyances. If you go to a firm event you know there's gonna be shitty music. That's just the way it is. [Y]ou almost ignore it but why should you? Why is it that there are only certain genres . . . what it meant to go out and have a good time was very monolithic. I'm sure there are certain people who have a very difficult time adapting to that or have no desire to adapt and don't think it's worth the price.<sup>73</sup>

As this interviewee's reflection suggests, some black associates who are not acclimated to the cultural preferences that are predominant in their firms eventually disengage socially and forego potential opportunities to develop relationship capital with colleagues, thereby reinforcing their isolation.

This lack of relationship capital reduces their access to premium work opportunities.<sup>74</sup> One interviewee, a senior associate at a West Coast firm who spoke of the "undeniable" affinity between associates and partners at

70. But see Devon W. Carbado & Mitu Gulati, *The Fifth Black Woman*, 11 J. CONTEMP. LEGAL ISSUES 701, 719–28 (2000) (discussing this process as a form of racial discrimination driven by racial stereotyping).

71. Researchers have found a great deal of evidence consistent with this. Several of the classic qualitative studies of corporate careers found that sharing cultural traits and common leisure-time activities with one's employers was critical for career advancement. See JACKALL, *supra* note 19; KANTER, *supra* note 19. More recently, sociologists including Rivera concluded that "employers prioritized cultural similarity because they saw it as a meaningful quality that fostered cohesion, signaled merit, and simply felt good." Lauren Rivera, *Hiring As Cultural Matching: The Case of Elite Professional Service Firms*, 77 AM. SOC. REV. 999, 1016 (2012). Sociologists Catherine Turco and David Purcell each found that workers who lacked cultural common ground with their senior colleagues suffered greater marginalization and alienation. Purcell, *supra* note 19; Turco, *supra* note 19.

72. To provide context for this finding, only twenty-three interviewees, including four of the thirty-five who reported disadvantages relating to their dissimilar cultural repertoires and personal backgrounds, reported observing acts of discrimination rooted in anti-black racial biases or stereotypes.

73. Interview with Attorney (Feb. 19, 2010).

74. See Sander, *supra* note 8, at 1801 tbl.19. Compared to the white attorneys in the AJD sample, a lower percentage of black attorneys reported handling an entire matter on their own, being involved in formulating strategy on half or more of their matters, or being responsible for keeping their clients updated on matters. They were more likely to report spending "100+ Hours Reviewing Discovered Documents/Performing Due Diligence on Prepared Materials." *Id.*

his firm with “similar backgrounds,” explained how this dynamic left many black associates on the outside looking in while some of their white counterparts bonded with influential partners.

I don’t have the same experiences [as the white partners]. I didn’t play golf growing up. I didn’t have much to offer to a conversation that was talking about how [golfer Arnold] Palmer was doing. . . . It also goes to where people vacation, stuff like that. The chit chat varies according to whose experiences are being discussed. . . . If African Americans don’t have those experiences, then often times we won’t get as close to the partners. It’s not racial but the appearance is that the white attorneys will get a lot of the more posh assignments that can lead to greater things.<sup>75</sup>

Although this particular interviewee ultimately was able to forge relationships based on his superlative work product, eventually being promoted to partner, these dynamics made his upward trajectory more difficult.<sup>76</sup>

Another interviewee, a junior associate in the southern office of a large national firm, discussed her difficulties in developing rapport with colleagues with dissimilar backgrounds and interests as the primary cause of her inability to secure enough work assignments.<sup>77</sup> She described her difficulties, which she sensed were related to race but not a matter of racial bias.

[T]here’s just nothing that goes on that feels race related; I just don’t feel plugged in . . . that would be the only thing that I could say would be race but then it’s not racism, it’s just that I’m different and I have no idea how to fit in here. I have no idea how to be the person that you want to drink with.<sup>78</sup>

At the time of our interview, she was chronically unable to meet her firm’s billable hour expectations and feared that she would be amongst the first attorneys let go if the firm conducted layoffs.<sup>79</sup> As her account reveals, the disadvantages of racial distance can be just as frustrating and just as impactful as those caused by racial bias.

Another interviewee, a former associate in an East Coast office of a large West Coast firm, explained that one of his black classmates from law school had a far more successful law firm career because her cosmopolitan background better enabled her to build rapport with partners.

[W]hereas we were doing the same in law school, and I even had an easier time getting a job . . . she excelled and just did really, really well [at her firm] . . . . I always attribute the difference to being [that] she knows how to get along better with those sort of people who are decision makers . . . and it had huge differences in how she was perceived and how

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75. Interview with Attorney (Aug. 12, 2009) (partner).

76. This interviewee explained that many black associates were also disadvantaged by their own homophily preferences, which led them to gravitate toward each other and forego networking with more influential white partners. *Id.*

77. Interview with Attorney (Sept. 27, 2009) (associate).

78. *Id.*

79. *Id.*

work went for her . . . that's something that comes a little easier for [her], she'll go out to drink with a partner from her law firm . . .<sup>80</sup>

While his friend excelled at her firm and ultimately made partner, he bounced between multiple law firms before landing in an in-house position at a small company.<sup>81</sup> This stark contrast between the careers of these two similarly situated attorneys—both black and both possessing comparable educational credentials—underscores the role of obstacles other than colleagues' stereotypes and biases in shaping the careers of black attorneys. The fact that those black associates who, like this interviewee's friend, are equipped to navigate the social and cultural terrain of their firms, may tend to enjoy more satisfying and successful careers suggests that difficulties arising from race-related social and cultural differences may be every bit as determinative as racial bias in shaping the fates of many black attorneys.

Whether or not the attorneys discussed in this part were also subjected to the types of racial stereotypes and biases contemplated in the previous scholarship,<sup>82</sup> many were undoubtedly handicapped by their inability to develop rapport with colleagues. The recognition of homophily as a formidable, independent source of institutional discrimination capable of perpetuating racial inequality in predominantly white firms should inform all future efforts to promote racial diversity. The following part will briefly discuss some proposed policies and strategies that might promote better career experiences and outcomes for black attorneys in these firms, in light of racial distance and cultural homophily.

### III. ADDRESSING THE RACIAL DISTANCE PROBLEM

Scholars and practitioners concerned about law firm diversity already have proposed a wide-ranging assortment of sensible organizational reforms that might help improve the career prospects of black attorneys.<sup>83</sup> Rather than attempting to reinvent the wheel, this part focuses on how firms might enhance some of these proposals to better address the racial disadvantage that arises from homophily and racial distance. Though these strategies certainly will not eradicate this problem—the tendency of homophily is simply too pervasive and the reality of racial distance too deeply entrenched—they should help ensure greater access to critical opportunities and support for many black associates who would otherwise be deprived of these career-defining resources.

#### A. Organizational Reforms

There are several organizational tools that could be implemented to better address the effects of homophily and racial distance: (1) universal management practices, (2) diversity staff and infrastructure, (3) training

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80. Interview with Attorney (Nov. 11, 2009) (former associate).

81. *Id.*

82. See *supra* note 14 and accompanying text.

83. See *infra* notes 84–100 and accompanying text.

programs, (4) enhanced mentorship programs, and (5) affirmative assignment action.

### 1. Universal Management Practices

Several observers have posited that law firms may be able to improve the careers of minority associates by implementing management practices that facilitate more equitable outcomes for all associates.<sup>84</sup> These proposed measures include formal assignment systems,<sup>85</sup> efforts to provide greater transparency with respect to performance standards and expectations,<sup>86</sup> and enhanced professional development training.<sup>87</sup> Though these measures have the potential to help all associates, they may prove particularly valuable for the many black associates who would otherwise “fall through the cracks” and miss out on opportunities and information because cultural and social dissimilarities have impeded them from securing sufficient relationship capital with the partners in their practice groups.

### 2. Diversity Staff and Infrastructure

Other proposals have emphasized the importance of retaining diversity professionals,<sup>88</sup> and creating robust diversity infrastructures, including diversity committees<sup>89</sup> and affinity groups.<sup>90</sup> Although experience has demonstrated that these steps are far from sufficient as means of achieving racial diversity, they seem indispensable as foundational measures that

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84. See generally Wilkins, *supra* note 10, at 1955–62 (discussing the role of poor management practices in exacerbating the problems of minority associates). But see Fiona M. Kay & Elizabeth H. Gorman, *Developmental Practices, Organizational Culture, and Minority Representation in Organizational Leadership: The Case of Partners in Large U.S. Law Firms*, 639 ANNALS AM. ACAD. POL. & SOC. SCI. 91, 108 (2009) (finding that “an organizational culture of fostering and taking responsibility for employees’ professional development works to decrease the proportions of minorities in management”).

85. See N.Y. BAR COMM. ON MINORITIES IN THE PROFESSION, *supra* note 3, at 2. But see Wilkins & Gulati, *Why Are There So Few Black Lawyers*, *supra* note 10, at 591–92 (positing that formal assignment procedures do not work because powerful partners are free to bypass them).

86. See, e.g., N.Y. BAR COMM. ON MINORITIES IN THE PROFESSION, *supra* note 3, at 2; REEVES, *supra* note 3, at 13.

87. See N.Y. BAR COMM. ON MINORITIES IN THE PROFESSION, *supra* note 3, at 2.

88. See ABA, *supra* note 3, at 27–28 (firms should retain diversity experts); Brereton, *supra* note 3, at 4 (hire full-time diversity professionals); N.Y. BAR COMM. ON MINORITIES IN THE PROFESSION, *supra* note 3, at 1 (same).

89. There appears to be a consensus that firms should form diversity committees with representation, commitment, and support from firm leaders. See, e.g., ABA, *supra* note 3, at 28; REEVES, *supra* note 3, at 14; N.Y. BAR COMM. ON MINORITIES IN THE PROFESSION, *supra* note 3, at 1. Some observers have emphasized the importance of incentivizing white male attorneys to prioritize diversity and champion its virtues, for example, by tying diversity measures to compensation. See Root, *supra* note 1, at 623–28 (advocating that firms provide billable credit for time spent participating in firms’ diversity programming); see also ABA, *supra* note 3, at 29; Brereton, *supra* note 3, at 4; N.Y. BAR COMM. ON MINORITIES IN THE PROFESSION, *supra* note 3, at 1.

90. See ABA, *supra* note 3, at 27–28; REEVES, *supra* note 3, at 12. But see Deborah L. Rhode, *Women and the Path to Leadership*, 2012 MICH. ST. L. REV. 1439, 1469 (noting that affinity programs have yielded mixed results).



enable issues of racial disadvantage to be articulated, monitored, evaluated, and addressed.

### 3. Training Programs

One common diversity management strategy targets the presumed racial biases of partners through mandatory diversity education and training programs.<sup>91</sup> Though well intended, the existing data suggests that diversity training efforts have not been particularly successful thus far.<sup>92</sup> Law firms should enhance these efforts by incorporating information about the tendencies toward homophily and their systemic racial consequences. This improved training would, at the very least, help expand and refine partners' understanding of their firms' diversity problems. This training regarding homophily, a universal human tendency, may especially resonate with partners who react defensively or skeptically to bias-centered training programs, which many may interpret as all but accusing them of being closet racists.

### 4. Enhanced Mentorship Programs

The need for firms to provide better mentoring for black associates has also been a central emphasis of the existing commentary.<sup>93</sup> Employers might be able to ameliorate some of the racial effects of cultural homophily through greater commitment to formal mentorship and sponsorship programs aimed at providing minority workers greater access to relational capital and its professional benefits.<sup>94</sup> These programs should work to ensure that black associates have access to a constellation of mentors within their firms,<sup>95</sup> including some who will be responsible for providing these protégés substantive work opportunities. Although formal mentorship programs have thus far yielded mixed results,<sup>96</sup> there is evidence that they

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91. See ABA, *supra* note 3, at 27–28; N.Y. BAR COMM. ON MINORITIES IN THE PROFESSION, *supra* note 3, at 2.

92. Several scholars have questioned the effectiveness of training programs. See Rhode, *supra* note 90, at 1469 (noting the limited effectiveness of such programs); Wilkins & Gulati, *Why Are There So Few Black Lawyers*, *supra* note 10, at 592–94 (questioning the value of diversity training efforts).

93. See, e.g., REEVES, *supra* note 3, at 11–14; N.Y. BAR COMM. ON MINORITIES IN THE PROFESSION, *supra* note 3; Brereton, *supra* note 3; Payne-Pikus et al., *supra* note 7, at 577 (“Affirmative action mandates with regard to partner contact and mentoring of minority associates may be essential to achieve an effective racial integration of the upper reaches of the legal profession.”).

94. Kay & Gorman, *supra* note 84, at 95 (discussing potential value of formal mentorship program for racial minorities).

95. *Id.*; see Monica C. Higgins & David A. Thomas, *Constellations and Careers: Toward Understanding the Effects of Multiple Developmental Relationships*, 22 J. ORGANIZATIONAL BEHAV. 223, 236–38 (2001) (emphasizing the value of a protégé’s having multiple mentors).

96. See *supra* note 67 and accompanying text.

enhance the careers of minority professionals.<sup>97</sup> Given the laxity of many existing programs,<sup>98</sup> firms have considerable room for improvement on this front by imposing greater expectations and requirements concerning the partners who serve as mentors. Where feasible, in designing mentorship programs, firms should seek to take advantage of homophily by pairing black associates with mentors who have similar interests or backgrounds.<sup>99</sup> Identifying and calling attention to such cultural and experiential common ground may better enable these attorneys to develop rapport with each other across racial lines.

### 5. Affirmative Assignment Action

Recognizing that many black associates will not receive equal access to premium assignments without active, sustained interventions, some observers have suggested that firms should essentially develop affirmative action assignment procedures to ensure that all minority associates receive access to premium work opportunities.<sup>100</sup> There is much to commend in such policies. Given the pervasiveness of homophily and its power in ordering relationships in the workplace, such proactive, affirmative efforts will be necessary to ensure equitable treatment for black associates.

#### B. Strategic Acculturation

Though these organizational reforms may be able to manage and ameliorate some of the potential harms of homophily, they do nothing to disrupt the root causes of the problem—the race-related social and cultural distance that exists between black and white attorneys. To address this dimension of the problem, attorneys of all races must strive to develop greater interracial acclimation and acculturation.

As a normative matter, all attorneys, particularly partners, should shoulder the considerable burden of crossing the social and cultural disconnects that often divide black and white attorneys. Though law firms have limited institutional capacity to effect change on this front, firms could promote greater cosmopolitanism by emphasizing the value of all attorneys

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97. Alexandra Kalev et al., *Best Practices or Best Guesses? Assessing the Efficacy of Corporate Affirmative Action and Diversity Policies*, 71 AM. SOC. REV. 589, 590, 604 (2006).

98. See Rhode, *supra* note 1, at 1072 (explaining that most law firm mentorship programs fail to “specify the frequency of meetings, set goals for the relationship, or require evaluation”).

99. See generally Stacy Blake-Beard et al., *Matching by Race and Gender in Mentoring Relationships: Keeping Our Eyes on the Prize*, 67 J. SOC. ISSUES 622, 638 (2011) (suggesting that shared background experiences between mentors and protégés may be more important than demographic similarities); Connie R. Wanberg et al., *Mentor and Protégé Predictors and Outcomes of Mentoring in a Formal Mentoring Program*, 26 J. VOCATIONAL BEHAV. 410, 420–21 (2006) (protégés’ perceptions of similarity with mentors may contribute to higher quality mentorship relationships).

100. See, e.g., ABA, *supra* note 3, at 29; REEVES, *supra* note 3, at 12; Wilkins & Gulati, *Why Are There So Few Black Lawyers*, *supra* note 10, at 605 (arguing that firms must extend affirmative action to assignments and other personnel decisions).

taking deliberate, self-conscious efforts to expose themselves to the interests and experiences of other groups during their diversity training programs.

As a practical matter though, the burden of interracial acclimation will in all likelihood continue to fall disproportionately upon black associates. As members of an underrepresented, marginalized group, black attorneys have far greater personal incentives to seek out opportunities to develop common ground with their white colleagues, and face far greater costs for failing to do so. Rather than waiting—quite possibly futilely—for firms to stamp out homophily-based behavior and for white attorneys to more fully embrace the moral imperative of greater interracial acclimation, black attorneys (and aspiring attorneys) can work to equip themselves with the social and cultural resources that might better enable them to develop relationship capital in their firms. By strategically working to gain greater experience and comfort in predominantly white social settings and familiarity with the cultural capital that holds currency in their offices, some black associates may be able to improve their career prospects within their firms.

The potential value of this approach was evident in the accounts of several of the interviewees who had arrived at their firms with extensive prior acclimation to their white counterparts through high quality interracial social relationships and interactions. A few of these interviewees explained that their background experiences had provided them the comfort and acclimation necessary to develop relationship capital in their firms. For example, one interviewee who had attended several elite, predominantly white schools and who counted several white men amongst his closest friends, described the difficulties of his black peers while distinguishing his own experience. He explained:

From the day you walk in the door, it's based on who you know, who you can create relationships with, so it's a very tricky place to navigate . . . . For me, to be clear, this wasn't really a problem because I've pretty much been operating in these environments . . . for most of my life. . . . [i]t didn't feel any different than anywhere else I've ever been.<sup>101</sup>

Similarly, another interviewee noted, "I've just been in a lot of different social environments, and I have a lot of different types of friends so for me fitting in is not something that's that difficult . . . but I think for other [black attorneys] it is a lot more difficult."<sup>102</sup>

Another interviewee who had held close interracial friendships throughout her life provided a vivid account of the benefits of her interracial acculturation. She explained that her interactional ease in all white social settings and cultural interests in the fine and performing arts enabled her to bond with a number of colleagues, including one of the most powerful partners at the firm, an older white man.

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101. Interview, *supra* note 73.

102. Interview with Attorney (Feb. 12, 2010).

I knew he liked art . . . [s]o I sat down with him at a big dinner . . . sort of a black tie event, and I said, "I really want to tell you about this exhibit that I saw recently when I was in New York." And all the other partners are looking around . . . [a]nd finally someone said, "I thought you were talking about a *trial* exhibit" and he says, "Oh no—she knows where my heart is really at; she's talking about an exhibit at the Metropolitan Museum of Art."<sup>103</sup>

This partner eventually became a valuable sponsor who greatly enhanced her experience at her firm.<sup>104</sup> Although her success in strategically availing herself of her cultural resources was particularly striking, a number of other interviewees also spoke of leveraging their prior interracial exposure more subtly.

Developing this type of acclimation will not be easy going for law firm associates, as the acculturation that helps some workers develop and sustain positive interracial relationships often reflects the embodied learning of many years of prior life experiences. Many of those associates who reach these law firms without such background exposure will find that it is too late for them to make up for lost time.

Therefore, efforts to promote this acclimation should begin before attorneys start their legal careers. "Pipeline" diversity efforts should seek to raise black students' awareness of the importance of developing relationship capital in predominantly white settings and the value of interracial acculturation in equipping them with resources that may enable them to do so. This information may induce aspiring black attorneys to more purposefully take advantage of the opportunities to develop greater interracial interactional comfort while still in college and law school.<sup>105</sup>

To be clear, this approach raises important normative problems and is not without its costs.<sup>106</sup> Even some of the interviewees whose backgrounds enabled them to develop rapport with white colleagues spoke with evident frustration of the psychological and dignitary costs of feeling perpetually forced to accommodate the cultural and social sensibilities of others while suppressing some of their own. Notwithstanding these legitimate concerns, given the magnitude of the stakes involved—the very careers of thousands of black attorneys—and the lack of viable alternatives, this strategy demands serious consideration.

103. Interview with Attorney (Jan. 27, 2010) (emphasis added).

104. *Id.* She also explained that because this partner shared and respected her cultural tastes and interests, he in some instances even spared her from certain unpleasant assignments that would have prevented her from attending particular performances. *Id.*

105. Parents might also make more concerted efforts to ensure that their children develop acclimation to their white counterparts and the interactional comfort useful for navigating these predominantly white organizational settings.

106. See Devon W. Carbado & Mitu Gulati, *Working Identity*, 85 CORNELL L. REV. 1259, 1288–90 (2000) (discussing the potential dignitary and expressive harms of identity work); Tristin K. Green, *Discomfort at Work: Workplace Assimilation Demands and the Contact Hypothesis*, 86 N.C. L. REV. 379, 397–99 (2008). The strategic acculturation that I advocate in this part does not call for the type of assimilationist conformity criticized in these works, but rather a cosmopolitanism in which associates of all races develop greater cross-racial acclimation.

## CONCLUSION

The challenges of racial inclusion and diversity in America's largest, most prestigious law firms have produced a substantial and important body of legal scholarship. This Article contributes to this research by introducing an additional source of racial disadvantage that heretofore has been overlooked in commentary on this topic. This insight underscores that black associates face a number of subtle, complex difficulties in these firms, including some that are distinct from the more widely understood processes of racial bias and stereotyping. Acknowledging and addressing the detrimental impact of racial distance and cultural homophily on the careers of many black attorneys represents an important step toward facilitating greater racial diversity in the legal profession.

# REPRODUCTION AND THE RULE OF LAW IN LATIN AMERICA

Michele Goodwin\* & Allison M. Whelan\*\*

*When Carmen Guadalupe Vasquez was rushed to [the] hospital after giving birth to a stillborn baby boy, the doctors first treated her life-threatening bleeding and then called the police, who handcuffed her to the bed. In El Salvador, where all abortion is illegal and emergency wards are turned into crime scenes, the confused, weak, and desperately ill 18-year-old maid was placed under investigation for terminating her pregnancy and driven away in a police van.<sup>1</sup>*

## INTRODUCTION

If race and the “color line” were the pivotal problems of the twentieth century,<sup>2</sup> sex discrimination and reproductive justice are their companions in the twenty-first century. Scholars, activists, and lawmakers frequently perceive the “rule of law”<sup>3</sup> as essential to eliminating discrimination and

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1. Philip Sherwell, *El Salvador’s Las 17: The Women Jailed for 30 Years for Losing Their Babies by Miscarriage*, TELEGRAPH (Feb. 1, 2015, 10:25 AM), <http://www.telegraph.co.uk/news/worldnews/centralamericaandthecaribbean/elsalvador/11412928/El-Salvadors-Las-17-the-women-jailed-for-30-years-for-losing-their-babies-by-miscarriage.html>.

2. See W.E.B. DU BOIS, *THE SOULS OF BLACK FOLKS* 5, 135 (W. W. Norton & Co. 1999) (1903) (describing Jim Crow laws and racial intolerance as defining and consuming democracy in the United States and yet hurting it as a nation).

3. For such a widely used term, there is no concrete agreement as to its definition. One scholar argues that the rule of law should be focused on three clear matters: protecting against anarchy; allowing individuals to plan with confidence because they know in advance the consequences of their actions; and ensuring that law should not be arbitrary. Richard H. Fallon, “The Rule of Law” As a Concept in Constitutional Discourse, 97 COLUM. L. REV. 1, 7–8 (1997).

promoting various forms of egalitarianism, including gender equality.<sup>4</sup> In the United States, federal legislation such as the Civil Rights Act of 1964,<sup>5</sup> the Voting Rights Act,<sup>6</sup> and more recently the Americans with Disabilities Act<sup>7</sup> and the Lilly Ledbetter Fair Pay Act<sup>8</sup> powerfully buttress this claim. Similarly, other industrial nations and developing countries adopt this approach to addressing social inequalities.<sup>9</sup> That is to say, hard legal rules in the form of legislation presumptively serve a fundamental role in effectively addressing and eliminating social inequalities, because legal rules are thought to be transparently written and enacted, equally enforced, and independently adjudicated.<sup>10</sup>

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4. See, e.g., Universal Declaration of Human Rights, G.A. Res. 217 Preamble, U.N. Doc. A/RES/217(CCC) (Dec. 10, 1948), available at <http://www.un.org/en/documents/udhr/> ("It is essential . . . that human rights should be protected by the rule of law."); Sandra Day O'Connor & Kim K. Azzarelli, *Sustainable Development, Rule of Law, and the Impact of Women Judges*, 44 CORNELL INT'L L.J. 3, 9 (2011) (describing how the "rule of law . . . particularly as [it] relate[s] to gender equality" is "essential" in the endeavor to ensure women and girls have access to justice and basic human rights); *Gender Equality*, UNITED NATIONS RULE OF LAW, [http://www.unrol.org/article.aspx?article\\_id=28](http://www.unrol.org/article.aspx?article_id=28) (last visited Mar. 25, 2015) (explaining that the United Nations' "efforts to help establish the rule of law for all on the basis of equality are essential" to the United Nations' goal of promoting and protecting general equality and women's empowerment); see also BRIAN Z. TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 86 (2004) (suggesting that those critical of the rule of law attack "liberalism and the rule of law without proposing what should supplant them").

5. Pub. L. No. 88-352, 78 Stat. 241 (codified as amended in scattered sections of 5, 28, 42 U.S.C. (2012)).

6. 52 U.S.C. §§ 10101–30146 (2012).

7. 42 U.S.C. §§ 12101–12213.

8. Pub. L. No. 111-2, 123 Stat. 5 (codified as amended in scattered sections of 29, 42 U.S.C.).

9. Globally, the rule of law has become synonymous with addressing social discrimination across many spheres and nations. See *Democracy and Human Rights*, UNITED NATIONS, [http://www.un.org/en/globalissues/democracy/human\\_rights.shtml](http://www.un.org/en/globalissues/democracy/human_rights.shtml) (last visited Mar. 25, 2015) (discussing the rule of law's role in addressing unequal access to justice, poverty, human rights violations, and other challenges to establishing democracies). For example, in the wake of dismantled apartheid in South Africa, the South African government enacted the Promotion of Equality and Prevention of Unfair Discrimination Act (2000). Promotion of Equality and Prevention of Unfair Discrimination Act 4 of 2000 (S. Afr.), available at <http://www.ilo.org/dyn/natlex/docs/WEBTEXT/56231/65195/E00ZAF01.htm>. In the United Kingdom, various antidiscrimination laws promote social egalitarianism, including the Disability Discrimination Act (1995 and 2005), the Race Relations Act (1995), the Equal Pay Act (1970), and the Sex Discrimination Act of 1975 (and its revised version in 2002—the Sex Discrimination Election Candidates Act). See *Summary of Anti-Discrimination and Other Equality Legislation*, EAST SUSSEX COUNTY COUNCIL 3–5 (June 2013), <http://www.eastsussex.gov.uk/NR/rdonlyres/80A40B84-F50A-488D-B8C2-90365466E3AD/0/antidiscriminationandequalitylegislation.pdf>. Australia passed the Sex Discrimination Act of 1984 and Racial Discrimination Act of 1975 and Belgium enacted the Belgian Anti-Racism Law in 1981. See *Legislation*, AUSTRALIAN HUM. RTS. COMM'N, <https://www.humanrights.gov.au/our-work/legal/legislation> (last visited Mar. 25, 2015); *The Anti-Racism Law of 30 July 1981*, FED. MIGRATION CENTRE, <http://www.diversitybelgium.be/anti-racism-law-30-july-1981> (last visited Mar. 25, 2015).

10. We define the rule of law as a doctrine of governance to which public and private entities, all persons, and the state are accountable. According to Rachel Kleinfeld, the capacity of legal rules to bring about efficacy, stability, and equality is tied to several key goals: (1) ensuring equality before the law; (2) making states abide by the law; (3) upholding human rights; (4) providing impartial justice; and (5) providing law and order.

Legislation prohibiting discrimination against women and laws establishing formal equality among the sexes, such as affirmative action in education, business, and accommodations, advance the perception that the rule of law is critical to social equality. Yet, a growing concern among human rights advocates suggests that the rule of law must be rigorously implemented and enforced for it to be effective.<sup>11</sup> They persuasively argue that changes in the law are simply insufficient to change deeply entrenched discriminatory social norms. Simply put, some activists and scholars perceive the rule of law as broken or lacking the capacity to address systemic, persistent discrimination in societies.

This raises an important question: If the law does not command it, can there be equality? In this Article, we offer an examination and critique of the rule of law as a method for advancing women's rights. We take up two points of inquiry in the broader political and social discourses: reproductive rights and political capacity building. These issues intersect to raise other compelling questions: Is minority-group political representation essential to achieving equality? More specifically, is the representation of women in political leadership essential to achieving sex equality? Substantively, does the representation of women in political office correlate to reproductive justice?<sup>12</sup> Normatively, are women more reliable than men in promoting sex equality and advancing reproductive liberty? Will broader representation of women in political office translate into the reproductive rights improvements that the majority of women favor?

Rule of law proponents remind us that even if legislation fails to change societal attitudes, antidiscrimination laws at least mandate formal or procedural equality.<sup>13</sup> Prominent examples might be drawn from the civil

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Rachel Kleinfeld, *Competing Definitions of the Rule of Law*, in PROMOTING THE RULE OF LAW ABROAD: IN SEARCH OF KNOWLEDGE 31, 34–35 (Thomas Carothers ed., 2006).

11. See Katharina Pistor et al., *Social Norms, Rule of Law, and Gender Reality: An Essay on the Limits of the Dominant Rule of Law Paradigm*, in GLOBAL PERSPECTIVES ON THE RULE OF LAW 244 (James J. Heckman et al. eds., 2010) (arguing “there is little evidence . . . to show that legal change has indeed brought about greater gender equality”).

12. Loretta Ross defines reproductive justice as “the complete physical, mental, spiritual, political, social, and economic well-being of women and girls, based on the full achievement and protection of women’s human rights.” Loretta Ross, *What Is Reproductive Justice?*, PRO-CHOICE PUB. EDU. PROJ., <http://www.protectchoice.org/section.php?id=28> (last visited Mar. 25, 2015).

13. “Formal equality” requires that “likes be treated alike,” an inherent concept in the rule of law. Shannon Fentiman, *Discrimination, Work and Family: Recent Regulatory Responses to Promote Equality* 6 (Ctr. for Emp’t & Labour Relations Law, Univ. of Melbourne, Working Paper No. 8, 2011), available at [http://www.law.unimelb.edu.au/files/dmfile/Student\\_WP\\_No3.pdf](http://www.law.unimelb.edu.au/files/dmfile/Student_WP_No3.pdf). Formal equality, however, does not necessarily translate into “substantive” equality, which is concerned with equality in results not merely in procedure. *Id.* Formal equality versus substantive equality is frequently discussed, for example, in the context of race-based segregation, with some believing that mere desegregation is enough, even if it does nothing to change individuals’ “hearts and minds.” See *Brown v. Bd. of Educ.* 347 U.S. 483, 494 (1954); Kristina Brittenham, *Equal Protection Theory and the Harvey Milk High School: Why Anti-Subordination Alone Is Not Enough*, 45 B.C. L. REV. 869, 870 (2004) (“Some . . . argue that the formal equal treatment sought in integration cases can be an empty ideal rather than the key to equality. These advocates are less concerned with different treatment on the basis of classifications like race or sex than



rights movements in the United States, which advanced legislative equality resulting in landmark laws addressing voting rights, housing, health care, employment, and education. Indisputably, the rule of law provides minority groups and the marginalized the right to enforce laws intended to guard against inequality. For these reasons, rule of law proponents might also argue that formal law accords women the opportunity to demand sex equality and justice. This type of equality, which we refer to as formal equality or colloquially, equality “on the books,” however, does not necessarily lead to equality in action.

Evidence suggests that merely enacting laws or increasing women’s political representation does not necessarily result in gender<sup>14</sup> or sex<sup>15</sup> equality. Nor does the rule of law necessarily spawn the enactment of laws addressing women’s concerns, particularly those related to reproductive rights.<sup>16</sup> In this Article we push back against the notion that law is enough. In particular, we assert that while legislative action may promote equality and shift gender norms, the rule of law sacrifices legitimacy and fails to achieve efficiency and impact without attention to enforcement.<sup>17</sup> For

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with the *disadvantages resulting from such classifications.*” (emphasis added)); Ruth Colker, *Reflections on Race: The Limits of Formal Equality*, 69 OHIO ST. L.J. 1089, 1113 (2008) (arguing that although notions of formal equality allowed the Supreme Court to reject segregation in *Brown*, “it has outlived its usefulness as a vehicle to attain substantive equality”).

14. “Gender” generally refers to “the socially constructed roles, behaviours, activities, and attributes that a given society considers appropriate for men and women.” *What Do We Mean by “Sex” and “Gender”?*, WORLD HEALTH ORG., <http://www.who.int/gender/whatisgender/en/> (last visited Mar. 25, 2015) [hereinafter WORLD HEALTH ORG.]. Gerda Lerner described gender as “the cultural definition of behavior defined as appropriate to the sexes in a given society at a given time. Gender is a set of cultural roles. It is a costume, a mask, a straightjacket in which men and women dance their unequal dance.” GERDA LERNER, *THE CREATION OF PATRIARCHY* 238 (1986).

15. “Sex refers to the biological and physiological characteristics that define men and women.” WORLD HEALTH ORG., *supra* note 14. The terms gender and sex are often used interchangeably in academic and public discourse as well as in the law, despite their different definitions. LERNER, *supra* note 14, at 238.

16. See, e.g., Drude Dahlerup, *Increasing Women’s Political Representation: New Trends in Gender Quotas*, in *WOMEN IN PARLIAMENT: BEYOND NUMBERS* 141, 150 (Julie Ballington & Azza Kara eds., 2005) (“Quota[] rules are not enough. Whether a quota system meets its objective depends largely on the process and method of implementation and enforcement.”). Although supporting the use of law to secure equal access to justice for women, Chile’s President-Elect Michelle Bachelet acknowledges that “even with strong laws in place, women face obstacles,” such as fear of violence of retribution for standing up for their rights, inability to access the courts and/or afford legal recourse, and other laws that continue to deprive them of property and inheritance rights. Michele Bachelet, Under-Sec’y-Gen. & Exec. Dir., U.N. Women, Remarks at the General Assembly Interactive Thematic Debate on the Rule of Law and Global Challenges (Apr. 11, 2011), *available at* <http://www.unwomen.org/en/news/stories/2011/4/rule-of-law-and-development-remarks-by-michelle-bachelet-at-the-general-assembly-interactive-th>.

17. From the outset, we acknowledge possible misinterpretation of our views as doubtful about the capacity of rules of law to bring about social change. For example, we note that many factors influence law beyond the law itself; sometimes law is truly incidental to social action.

instance, the rule of law can just as easily *subvert*, *suppress*, and *oppress* as it can *uplift* and *empower*.<sup>18</sup>

This Article focuses on the current status of reproductive health laws in two Latin American countries: Uruguay and Chile. A case study of these two nations' approaches to reproductive healthcare shifts the United States from the epicenter of the reproductive justice debate and expands the scope of concern about such issues to the international context. Both nations offer useful case studies: Uruguay enacted formal legislation to increase the representation of women in political office<sup>19</sup> while Chile has not;<sup>20</sup> yet, in both nations female politicians campaign on reproductive platforms that are of urgent concern to their female populations.

This Article proceeds in four parts. Parts I and II begin by analyzing reproductive health laws in Chile and Uruguay. These parts ask whether any correlation exists between sex-based representation in political office and reproductive health rights. Part III urges that while some scholars and commentators might assume that female representation alone achieves gender equality or liberalizes women's rights, such conclusions would be misleading and inaccurate or at best incomplete. This Article pushes back against the concept that marginal political power and representation by women better addresses sex equality than none—or that it affirmatively advances the rights and interests of women. This Article concludes that although women serve as important agents of change and female political representation is important—if not essential—to promote change, in the context of reproductive health, *participation* in the electoral process and rulemaking matter as much, if not more, than mere political representation.

## I. WOMEN AND THE RULE OF LAW: CHILE

In an important work on gender and the rule of law, Pistor, Haldar, and Amirapu argue that “reliance on the rule of law as the harbinger of greater gender equality might be over-optimistic, if not misleading.”<sup>21</sup> In fact, as the authors point out, although various empirical studies indicate a positive

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18. See generally TAMANAHA, *supra* note 4, at 1–5 (arguing that discrete rule of law reform initiatives tend to ignore or downplay the pervasive relationships and interconnections between formal and informal institutions and the broader social context).

19. Article 2 of Uruguay's electoral law, for example, stipulates that for elections held in 2014, candidates of both sex must be represented in every third place on electoral lists, either throughout the entire list or in the first fifteen places. Where only two seats are contested, at least one of the candidates must be female. See *Uruguay*, QUOTA PROJECT, <http://www.quotaproject.org/uid/countryview.cfm?country=232> (last updated Feb. 5, 2015); see also BEATRIZ LLANOS & KRISTEN SAMPLE, 30 YEARS OF DEMOCRACY: RIDING THE WAVE?: WOMEN'S POLITICAL PARTICIPATION IN LATIN AMERICAN 35–36 (2008) (discussing quotas implemented in several South American countries that require women “to represent at least 30 percent of candidates on party lists”).

20. Some political parties, however, have adopted *voluntary* gender quotas. See *Chile*, QUOTA PROJECT, <http://www.quotaproject.org/uid/countryview.cfm?country=45#party> (last updated Feb. 3, 2014).

21. Katharina Pistor et al., *Social Norms, Rule of Law, and Gender Reality* 24 (2008) (unpublished paper), available at [http://www.lexisnexis.com/documents/pdf/20080806040428\\_large.pdf](http://www.lexisnexis.com/documents/pdf/20080806040428_large.pdf).

correlation between the “rule of law” and “desirable outcome variables,” such as the growth in financial markets, the increase in gross domestic product levels, the increased volume of trade, and even some human rights, what remains puzzling is why the benefits do not trickle down to women as they flow to men and institutions in certain societies.<sup>22</sup>

Part I takes up sex equality and the rule of law in Chile. As a case study, Chile and Uruguay offer provocative points of comparison because both nations embrace the rule of law in a region considered religiously conservative and perhaps even hostile to women’s reproductive liberty.<sup>23</sup> Within Latin America, these nations’ abortion laws exist on opposite ends of the spectrum. For example, women’s rights activists describe Chile’s abortion laws as “draconian,”<sup>24</sup> whereas they praise Uruguay’s political leadership for crafting one of “the most liberal abortion laws” in South America.<sup>25</sup> Somewhat surprisingly, however, despite Chile’s strict stance on abortion, its government enacted fairly progressive contraception and family planning laws, policies, and reproductive health initiatives in the last decade.<sup>26</sup> What accounts for these differences and similarities, and how might they inform a political discourse on the rule of law and women in politics?

In Part I.A, we describe how legal success in one aspect or domain of reproductive rights—contraception—does not necessarily translate to greater access in other reproductive health spheres, such as abortion.

22. *Id.*

23. See Andrezej Kulcycki, *Abortion in Latin America: Changes in Practice, Growing Conflict, and Recent Policy Developments*, 42 *STUD. FAM. PLAN.* 199, 199–200 (2011) (discussing how, despite recent changes, there is a history of strict abortion laws and policies in Latin America); Bonnie Shepard, *The “Double Discourse” on Sexual and Reproductive Rights in Latin America: The Chasm Between Public Policy and Private Actions*, 4 *HEALTH & HUM. RTS.* 110, 113 (2000) (noting the Roman Catholic Church’s influence over reproductive rights issues, preventing the “full recognition of sexual and reproductive rights”); LAW STUDENTS FOR REPROD. JUSTICE, *ACCESS TO ABORTION AROUND THE WORLD* (2013), available at [http://lsrj.org/documents/factsheets/13\\_Abortion\\_Around\\_World.pdf](http://lsrj.org/documents/factsheets/13_Abortion_Around_World.pdf) (noting South America’s “especially strict abortion laws”).

24. See, e.g., Tara Culp-Ressler, *Chile’s New President Could Signal a Shift in One of the Countries That Still Bans All Abortions*, *THINK PROGRESS* (Dec. 17, 2013, 11:53 AM), <http://thinkprogress.org/health/2013/12/17/3074611/chiles-president-abortion/>; Estrella Gutiérrez, *Latin America: Abortion—Still Illegal, Still Killing, Despite Growing Awareness*, *INTER PRESS SERV. NEWS AGENCY* (Mar. 10, 2010), <http://www.ipsnews.net/2010/03/latin-america-abortion-still-illegal-still-killing-despite-growing-awareness/>; Annie Kelly, *Latin America Still a Bastion of Draconian Anti-Abortion Laws*, *GUARDIAN* (Feb. 13, 2013, 10:21 AM), <http://www.theguardian.com/global-development/2013/feb/13/latin-america-anti-abortion-laws>; Alex Uriarte, *Belen: Why Won’t Chile Let 11-Year-Old Rape Victim Get an Abortion?*, *MIC* (July 11, 2013), <http://www.policymic.com/articles/53937/belen-why-won-t-chile-let-an-11-year-old-rape-victim-get-an-abortion>.

25. Patricia Rey Mallén, *Uruguay, with the Most Liberal Abortion Laws in Latin America, Will Not Hold a Referendum Against It*, *INT’L BUS. TIMES* (June 26, 2013, 5:52 AM), <http://www.ibtimes.com/uruguay-most-liberal-abortion-laws-latin-america-will-not-hold-referendum-against-it-1322617>.

26. Beatriz Sotomayor, *Brief Historic Overview of the Movement for the Defence of Contraception in Chile (2008 to 2009)*, *WOMEN’S GLOBAL NETWORK FOR REPROD. RTS. BLOG* (Feb. 15, 2012, 11:29 AM), <http://archive.wgnrr.org/blog/11/brief-historic-overview-movement-defence-contraception-chile-2008-2009>.

## A. Reproductive Health Laws

Reproductive rights advocates regard Chile as one of the most restrictive nations with regard to abortion rights in the world.<sup>27</sup> We would agree. Indeed, apart from reproductive rights, critics charge that Chile's entire legal system and the laws enacted by its legislative bodies, including its National Congress, are "more inegalitarian" than laws in other Latin American countries.<sup>28</sup>

For example, while many other countries liberalized their abortion laws and policies over the last two decades, Chile *reversed* course by crafting and enacting stricter "zero tolerance" laws.<sup>29</sup> According to the Center for Reproductive Rights, Chile is one of only twenty-nine countries *in the world* that bans abortion without any explicit exceptions, even to save a woman's life.<sup>30</sup> Five of these countries are located in Central or South America.<sup>31</sup> In 2013, such restrictive abortion prohibitions were brought into stark relief by human rights advocates worldwide when an eleven-year-old Chilean rape victim was denied an abortion.<sup>32</sup>

In that case, the victim's abuser, her mother's boyfriend, sexually assaulted the young girl for two years, resulting in the much publicized pregnancy.<sup>33</sup> Despite the abuser's confession and subsequent national uproar, including women's rights activists rallying and lobbying for legalized abortion, the girl could not access an abortion in Chile because the country bans the procedure.<sup>34</sup> Former Chilean President, Sabastian Piñera, lauded the victim as brave and mature for keeping the baby and emphatically promised that every health resource in Chile would be at her disposal.<sup>35</sup> However, even if every health resource were deployed to assist

27. Erica Hellerstein, *Is This the End of One of the World's Harshes Abortion Laws?*, ATLANTIC (Nov. 16, 2013, 10:15 AM), <http://www.theatlantic.com/international/archive/2013/11/is-this-the-end-of-one-of-the-world-s-harshes-abortion-laws/281565/>.

28. MALA HTUN, SEX AND THE STATE: ABORTION, DIVORCE, AND THE FAMILY UNDER LATIN AMERICAN DICTATORSHIPS AND DEMOCRACIES 27 (2003).

29. See, e.g., Michele Stopera Freyhauf, *Criminalizing Miscarriages: Latin America's Zero Tolerance Policy on Abortion*, FEMINISM & REL. (Oct. 6, 2011), <http://feminismandreligion.com/2011/10/06/criminalizing-miscarriages-latin-america%E2%80%99s-zero-tolerance-policy-on-abortion-by-michele-stopera-freyhauf/>; see also Hellerstein, *supra* note 27.

30. *World Abortion Laws*, CENTER FOR REPROD. RTS., <http://worldabortionlaws.com/map/> (providing an interactive map summarizing abortion laws throughout the world).

31. *Id.* The four other Central and South American countries are the Dominican Republic, Honduras, Nicaragua, and El Salvador. *Id.*; see also Hellerstein, *supra* note 27.

32. Amelia Josephson, *Chile: Advocates Call for Decriminalization of Therapeutic Abortion*, AMNESTY INT'L (July 15, 2013), <http://www.pulsamerica.co.uk/2013/07/15/chile-advocates-call-for-decriminalization-of-therapeutic-abortion/>; Elwyn Lopez, *Raped 11-Year-Old Stirs an Abortion Debate in Chile*, CNN (July 11, 2013, 2:33 PM), <http://www.cnn.com/2013/07/11/world/americas/chile-abortion-debate/>.

33. Josephson, *supra* note 32.

34. See James Hider, *Chilean Girl Is Refused Abortion After Stepfather Rape*, TIMES (London) (July 13, 2013, 12:01 AM), <http://www.thetimes.co.uk/tto/news/world/americas/article3815544.ece>; Lopez, *supra* note 32.

35. See Lopez, *supra* note 32.

the victim's pregnancy, the emotional, educational, and professional prospects for an adolescent mother remain grim.<sup>36</sup>

Interestingly, Chile's anti-abortion legislative platform is fairly recent; the country has not always tolerated such severe restrictions on abortion procedures. A 1967 decree expressly *permitted* a therapeutic abortion to save a woman's life, provided that the performing physician obtained the written consent of two other physicians.<sup>37</sup> Furthermore, the concept of "therapeutic abortion" was expanded in 1971 to include abortions for pregnancies resulting from "contraceptive failures."<sup>38</sup> Commentators point to the Chilean government as ushering in harsh abortion bans in the 1970s to further consolidate the conservative political agenda.<sup>39</sup>

Yet, what accounts for Chile's continued ban on abortion despite the toppling of General Augusto Pinochet's regime and vocal outcry from women's groups demanding legal change? Ironically, in 1989, at a time when other nations responded to women's equality movements and actively liberalized reproductive rights,<sup>40</sup> Chile amended its abortion law to take its current form, which essentially prohibits and criminalizes all abortions.<sup>41</sup> Notably, even in fairly conservative nations, an exception is often carved out for cases involving rape, incest, or health risks to the mother.<sup>42</sup>

Chile's current abortion law, however, prohibits all abortions, even to save a woman's life or in the case of rape or incest.<sup>43</sup> Moreover, Chile's law authorizes punishment of health care practitioners (or other persons) who perform abortions<sup>44</sup> as well as punishment of the women who "cause[] [their] abortion[s] or consent[] to another person causing it."<sup>45</sup> An unclear and vague interpretation of the law leaves room for women to make novel arguments of "necessity"<sup>46</sup> and "honor" as defenses in criminal proceedings against them for obtaining abortions.<sup>47</sup>

36. See Matias Berthelon & Diana I. Kruger, *The Impact of Adolescent Motherhood on Education in Chile*, INST. STUDY OF LABOR 22 (2014), <http://ftp.iza.org/dp8072.pdf>; Cristina Herdman, *The Impact of Early Pregnancy and Childbearing on Adolescent Mothers and Their Children*, ADVOCATES FOR YOUTH (July 1997), <http://www.advocatesforyouth.org/publications/publications-a-z/432-the-impact-of-early-pregnancy-and-childbearing-on-adolescent-mothers-and-their-children>.

37. UNITED NATIONS, ABORTION POLICIES: A GLOBAL REVIEW VOLUME I, AFGHANISTAN TO FRANCE 92–93 (2001), available at <http://www.un.org/esa/population/publications/abortion/profiles.htm> (scroll to and follow "Chile" hyperlink).

38. ANÍBAL FAÚNDES & JOSÉ S. BARZELATTO, *THE HUMAN DRAMA OF ABORTION: A GLOBAL SEARCH FOR CONSENSUS* 145 (2006).

39. *Id.* at 147.

40. See generally Anika Rahman et al., *A Global Review of Laws on Induced Abortion, 1985–1997*, 56 INT'L FAM. PLAN. PERSP. 56 (1998) (discussing the continuing global trend toward liberalization of abortion laws between 1985 and 1997).

41. UNITED NATIONS, *supra* note 37, at 93.

42. Rahman et al., *supra* note 40, at 57.

43. CÓD PROC. PEN. art. 342–45 (Chile), available at <http://www.leychile.cl/Navegar?id Norma=1984>.

44. *Id.* art. 342.

45. *Id.* art. 344.

46. UNITED NATIONS, *supra* note 37, at 93.

47. CÓD PROC. PEN. art. 344.

According to Lidia Casas, a lawyer and professor at Chile's Diego Portales University, between 250 and 300 cases arise each year attempting to prosecute women who obtain abortions.<sup>48</sup> Many of these prosecutions are adjudicated in court. In 2001, approximately fifty women were convicted for violating the federal law that prohibits abortions.<sup>49</sup> Most of those convicted for violating anti-abortion laws are "poor women who end up going to the hospitals for their complications of an illegal backstreet abortion and some of the doctors or the midwives working in the maternity wards" report the women to the police.<sup>50</sup> The maximum penalty is five years in prison.<sup>51</sup>

Despite active prosecutions to enforce anti-abortion legislation, it should be noted that Chile's attempts to prohibit and prevent abortions through the rule of law and threats of legal punishment are not necessarily successful. Instead, women frequently resort to clandestine, underground, and often unsafe abortions.<sup>52</sup> An estimated 200,000 illegal abortions take place each year in Chile, with approximately one woman in twenty (200 per 1000) having an abortion each year as of 2004.<sup>53</sup> In comparison, the 2011 U.S. abortion rate was 16.9 per 1000; at its peak, the U.S. abortion rate was 29.3 per 1000.<sup>54</sup>

In the period since 1990 and the country's transition to democracy, more than twenty draft laws attempting to decriminalize therapeutic abortions failed in the legislature.<sup>55</sup> One could argue that this failure does not result from a lack of *societal* will or opposition; instead, it largely results from a lack of *political* interest or commitment. In fact, the majority of Chileans express more progressive views than their political representatives on reproductive health matters. According to population-based surveys conducted among Chilean women from 2006 to 2011 and in 2013, over 70 percent of women supported abortion rights when the mother's life is at risk, when there is a fetal malformation, or when the woman was raped.<sup>56</sup> Another survey found that 25 percent of Chileans believe abortion should be legal under *all* circumstances.<sup>57</sup> As a comparison, 28 percent of

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48. Jen Ross, *Illegal Abortions Rampant in Latin America*, WOMEN'S E-NEWS (Nov. 28, 2004), [http://womensenews.org/story/the-world/041128/illegal-abortion-rampant-latin-america#.Uv47i\\_ldW4I](http://womensenews.org/story/the-world/041128/illegal-abortion-rampant-latin-america#.Uv47i_ldW4I).

49. *Id.*

50. *Id.*

51. *Id.*

52. Susheela Singh & Deirdre Wulf, *Estimated Levels of Induced Abortion in Six Latin American Countries*, 20 INT'L FAM. PLAN. PERSP. 4, 4 (2013).

53. Ross, *supra* note 48.

54. *Fact Sheet: Induced Abortion in the United States*, GUTTMACHER INST. (July 2014), [http://www.guttmacher.org/pubs/fb\\_induced\\_abortion.html](http://www.guttmacher.org/pubs/fb_induced_abortion.html).

55. Mariana Jarroud, *Therapeutic Abortion Faces Political Resistance in Chile*, INTER PRESS SERV. (Aug. 5, 2013), available at <http://www.ipsnews.net/2013/08/therapeutic-abortion-faces-political-veto-in-chile/>.

56. Tia Palermo et al., *Attitudes on Abortion Among Women in Chile: Evidence from Population-Based Data 2006–2013*, APHA (Nov. 18, 2014), available at <https://apha.confex.com/apha/142am/webprogram/Paper298104.html>.

57. Jarroud, *supra* note 55.

Americans hold this same view.<sup>58</sup> Despite a compelling public consensus for at least some access to abortion, Claudia Dides, spokeswoman for the country's largest pro-choice group "Miles Chile" (Thousands Chile), states that "political leaders do not want to tackle the issue."<sup>59</sup>

When compared to other Latin or South American countries that share similar transitions from dictatorships to democracies (such as Argentina and Brazil), Chile's democratic political institutions are "far more affected by an authoritarian legacy."<sup>60</sup> In other words, contemporary norms continue to be shaped by past practices. For example, democrats agreed to retain and respect the constitution created by military rulers in 1980.<sup>61</sup> This constitution established the role of eight "institutional senators" appointed by Pinochet ("designados"), whose presence increased the power of a socially conservative voting bloc in the Senate. This conservative voting bloc frustrated and successfully stymied reforms "on even mildly controversial gender issues."<sup>62</sup> The laws developed in 1980 also created incentives for a de facto two-party system.<sup>63</sup>

Arguably, Pinochet's legacy significantly impedes the advancement of other gender and sex equality issues, and abortion in particular.<sup>64</sup> Surprisingly, however, these regressive abortion laws have not translated into similarly restrictive contraception laws and policies. Indeed, we wish to point out that Chile has fairly progressive contraception laws in light of its "zero tolerance" abortion law.

Despite, or perhaps because of, Chile's strict abortion laws and unwillingness to respond to public support for liberalizing abortion laws, Chilean women and reproductive rights advocates focus their efforts on other issues, such as general "reproductive health and family planning legislation," in which they are likely to have greater success.<sup>65</sup> The fight for access to contraception and information about family planning, however, has not been easy. According to the Women's Global Network for Reproductive Rights:

From 2001–2009 Chilean conservative and religious opposition tried to ban most of the contraceptive methods used in the country, this measure

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58. *Abortion*, GALLUP, <http://www.gallup.com/poll/1576/abortion.aspx> (last visited Mar. 25, 2015) (data from May 2014).

59. Jarroud, *supra* note 55.

60. HTUN, *supra* note 28, at 22.

61. *Id.*

62. *Id.*

63. According to Professor Mala Htun, "to maintain unity and their hold on power against opposition from the right-wing coalition, members of the governing coalition, comprised of Christian Democratic, Socialist, and Democratic (PPD) parties, have sought to avoid potentially divisive issues such as divorce and abortion." *Id.* She notes that coalition politics in Chile have generally impeded policy changes favored by feminists. *Id.*

64. See Valerie Dekimpe, *Gender Equality Poor in Chile Despite Improvement*, SANTIAGO TIMES (Oct. 29, 2014), <http://santiagotimes.cl/gender-equality-poor-in-chile-despite-improvement/> (quoting Dr. Bernadita Escobar from the Universidad Diego Portales, who stated that "[d]espite having a female President, the low level of women participating in the labor market in Chile, particularly in positions of power, is notorious").

65. HTUN, *supra* note 28, at 9.

would have affected . . . 21% of the population who would then be[] unable to decide on their maternity (and paternity) and the spacing of their children. This measure would have skyrocket[ed] the numbers of unsafe abortion in this country and would have horrible consequences for maternal health in this country.<sup>66</sup>

In 2008, however, thirty-six deputies requested that Chile's Constitutional Court declare the Supreme Decree unconstitutional, thereby preventing free distribution of emergency contraception ("the morning-after pill").<sup>67</sup> Despite President Bachelet's urging that the Court reject the deputies' requests, the Court held the portion of the Decree providing free emergency contraception unconstitutional.<sup>68</sup> It did *not*, however, strike down the portion providing free access to other forms of birth control such as intrauterine devices (IUDs).<sup>69</sup>

In response to the Constitutional Court's ruling, reproductive rights advocates and Chilean women mobilized and campaigned against the ruling. The Movement for the Defence of Contraception (the "Movement") called for a national rally "to defend the right to decide about our sexuality."<sup>70</sup> At a national rally, the Movement's leaders pronounced that it was

calling to . . . everyone to mobilise . . . . We are calling all people to address this issue and to join in the actions of condemnation from the civil society. As citizens we cannot accept actions that violate our sexual and reproductive rights. We demand the state guarantee the means to enable us to have safe and pleasurable sex without running the risk of unwanted pregnancy. We must demand a democratic society that respects the right of people to decide about their sexuality. Let us demand safe sex without the risk of unwanted pregnancies, equity in access to contraception and a true democracy!<sup>71</sup>

More than 35,000 people protested the Court's ruling nationwide. The Movement's persistent advocacy and campaigning succeeded. In 2010, Law No. 20.418 was adopted, reinstating access to emergency contraception and "establishing norms on information, orientation, and the provision of methods to regulate fertility."<sup>72</sup> The law recognizes every

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66. Sotomayor, *supra* note 26.

67. *Id.*; see also Marisol Peña Torres, *Public Hearings in Proceedings Unconstitutionality of the Law: The Experience of the Court Chile's Constitutional*, 2ND CONG. WORLD CONF. ON CONST. JUSTICE 16–17, available at [http://www.venice.coe.int/wccj/Rio/Papers/CHI\\_Penna%20Torres\\_autotrans\\_E.pdf](http://www.venice.coe.int/wccj/Rio/Papers/CHI_Penna%20Torres_autotrans_E.pdf) (discussing the process leading up to the Constitutional Court's conclusion that the free distribution of the morning-after pill was unconstitutional).

68. Sotomayor, *supra* note 26; Torres, *supra* note 67.

69. Sotomayor, *supra* note 26.

70. *Id.*

71. *Id.*

72. Law No. 20.418, Enero 18, 2010, art. 1, para. 1 DIARIO OFICIAL [D.O.] (Chile), available at <http://www.leychile.cl/Navegar?idLey=20418&idVersion=2010-01-28>; CTR. FOR REPROD. RIGHTS & U.N.F.P.A., BRIEFING PAPER: THE RIGHT TO CONTRACEPTIVE INFORMATION AND SERVICES FOR WOMEN AND ADOLESCENTS 19 (2010), available at <http://www.unfpa.org/sites/default/files/resource-pdf/Contraception.pdf>.



individual's "right to decide freely and responsibly on the family planning method of their choice."<sup>73</sup> The legislation aims to (1) reduce teen pregnancy, (2) reduce sexually transmitted diseases, and (3) reduce sexual violence and its consequences.<sup>74</sup> It codifies the right to receive comprehensive and unbiased information, education, and orientation on family planning methods and requires the state to "ensure access to all modern family planning methods, including hormonal and nonhormonal contraception and hormonal emergency contraceptive pills."<sup>75</sup> The definition of contraception specifically excludes any method with the "direct objective" to induce an abortion.<sup>76</sup>

Access to emergency contraception, however, may be limited<sup>77</sup> and further constrained by potential costs to a woman's privacy. When a woman seeks emergency contraception, if the healthcare worker suspects the patient was sexually assaulted, the healthcare worker must inform the public prosecutor.<sup>78</sup> Such mandatory reporting laws also require all accredited secondary schools to provide sexuality programs including information on approved and available family planning methods.<sup>79</sup> Nevertheless, the law does not establish standards or perimeters for these programs and the curricula are developed "according to the convictions and beliefs of each educational institution."<sup>80</sup> On the one hand, that type of discretion and flexibility could be perceived as progressive and reflective of local democratic values. On the other hand, if the institution disapproves of premarital sex or other sexual or intimate activity, it appears this law permits the school to teach abstinence-only sexual education.

Despite the barriers to timely and adequate access to contraception, the movement to secure access and use of contraception evidences significant success when compared to Chile's restrictive abortion laws. Nevertheless, Chile's reproductive rights regime remains stratified and incoherent.

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73. *UNFPA Global Population Policy Update: Laws and Policies in Brazil, Chile, Peru, Mexico and Nicaragua*, 92 UNFPA NEWSLETTER (Aug. 12, 2010), <http://africa.unfpa.org/public/cache/bypass/home/parliamentarians/pid/3615;jsessionid=BD98811336EDE9C22FB727E61879B66B.jahia01?newsLid=12570> [hereinafter UNFPA NEWSLETTER].

74. *Id.*

75. *Id.*

76. *Id.*

77. COMM. ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, CHILE: COMMENTS AND CONTRIBUTIONS FROM CIVIL SOCIETY FOR THE LIST OF ISSUES AND QUESTIONS RELATED TO THE FIFTH AND SIXTH PERIODIC REPORT OF THE STATE OF CHILE TO THE COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN 8 (2012), available at [http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/OSC\\_forPSWG\\_en.pdf](http://www2.ohchr.org/english/bodies/cedaw/docs/ngos/OSC_forPSWG_en.pdf) (noting that "[c]ivil society organizations have detected that health services, in the practice, do not deliver contraceptives methods, in particular the PAE or morning after pill, without restrictions. Despite the passing of [Law 20.418] . . . there are numerous obstacles to a free and timely drug access").

78. UNFPA NEWSLETTER, *supra* note 73, at 19.

79. *Id.*

80. *Id.*

*B. Women's Political Representation and Participation in Chile*

In considering the saliency of the rule of law, and particularly the advancement of women's rights, important questions emerge, including the scale and scope of women's access to political power; whether women in power make a difference to political outcomes important to women's lives; and whether critical masses make a difference (i.e., without broad representation and power, do elected women lack political authority?).<sup>81</sup>

Rosabeth Moss Kanter's seminal research in the 1970s unpacked early, parallel questions as applied to the burgeoning growth of middle class women in the workplace.<sup>82</sup> According to Kanter, prior to her research on proportional representation, "[m]ost analyses . . . locate[d] male-female interaction issues either in broad cultural traditions and the sexual division of labor in society or in the psychology of men and women . . . based on biology [and] socialization."<sup>83</sup> These approaches, while valuable to sociological discourse, failed to account for shifting, complex group interactions between men and women in the workplace, as well as dynamics between marginalized women that Kanter might describe as "solos."<sup>84</sup>

In the four decades since the publication of Kanter's groundbreaking research, proportional representational theory continues to resonate, despite pushback.<sup>85</sup> As she explained in 1977:

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81. ROSABETH MOSS KANTER, *MEN AND WOMEN OF THE CORPORATION* 186 (1977) ("People who have authority without system power are powerless."); Sara Childs & Mona Lena Krook, *Critical Mass Theory and Women's Political Representation*, 56 *POL. STUD.* 725, 725 (2008) ("A central concept in research on women's political representation is the notion of 'critical mass.' It is frequently invoked to explain why women do not always appear to represent women once they are in political office. Gender and politics scholars and activists suggest that this pattern is due not to the inclinations of female office holders, but rather to the fact that there are fewer women than men in almost all elected assemblies."); Rosabeth Moss Kanter, *Some Effects of Proportions on Group Life: Skewed Sex Ratios and Responses to Token Women*, 82 *AM. J. SOC.* 965, 965–66 (1977) (arguing that "groups with varying proportions of people of different social types differ qualitatively in dynamics and process. This difference . . . reflects the effects of contact across categories as a function of their proportional representation in the system").

82. Kanter, *supra* note 81. In the period since Kanter's iconic publications produced in the 1970s, scholars have drawn from her research, expounding upon her framework, critiquing some of its finer points and expanding upon others. See Pamela Braboy Jackson et al., *Composition of the Workplace and Psychological Well-Being: The Effects of Tokenism on America's Black Elite*, 74 *SOC. FORCES* 543, 553 (1995) (finding that racial tokenism results in increased symptoms of anxiety and depression). But see Michelle J. Budig, *Male Advantage and the Gender Composition of Jobs: Who Rides the Glass Escalator*, 49 *SOC. PROBLEMS* 258, 258 (2002) (testing "Kanter's theory of tokenism" and arguing "contrary to predictions generated from Kanter's [research], men do not suffer when they are tokens, in terms of pay"); Paul M. Collins Jr. et al., *Gender, Critical Mass, and Judicial Decision Making*, 32 *L. & POL'Y* 260, 260 (2010) (writing that research on gender in legal decision making suggests that critical mass by sex—i.e., women on the federal bench—might correlate to female judges' decision making in criminal cases, which "could have substantial policy ramifications in the American polity").

83. Kanter, *supra* note 81, at 967.

84. *Id.* at 966.

85. For example, recent trends in critical mass theory take up whether corporate boards experience greater "success" by the representation of women. Empirical data from Fortune 500 companies suggests the accuracy of this intuition, although correlation does not prove

In both macroscopic and microscopic analysis, sex and gender components are sometimes confounded by situational and structural effects. For example, successful women executives are almost always numerically rare in their organizations, whereas working women are disproportionately concentrated in low-opportunity occupations. Conclusions about “women’s behavior” or “male attitudes” drawn from such situations may sometimes confuse the effect of situation with the effect of sex roles; indeed such variables as position in opportunity and power structures account for a large number of phenomena related to work behavior that have been labeled “sex differences.”<sup>86</sup>

This Article pursues a different, although not unrelated track: How effective are women presidents in advocating for women’s rights?<sup>87</sup> Does the presence of women in the most senior governmental positions effect changes such that the rule of law advances women’s rights? Does female representation in legislative branches of government advance women’s rights? Again, Chile offers an interesting illustration in Latin America.

Women comprise 52.4 percent of Chile’s electorate.<sup>88</sup> Women’s political representation, however, dramatically pales in comparison. Nevertheless, it is worth noting that Chile twice elected a woman as president in the last ten years. Michelle Bachelet served as Chile’s first female President, from 2006 to 2010.<sup>89</sup> Bachelet’s successor was not another woman, although Evelyn Matthei ran a strong presidential campaign despite Sebastian

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causation. According to a 2007 study, “companies with more [women on the board of directors] outperform those with the least by 53%.” Lois Joy et al., *The Bottom Line, Corporate Performance and Women’s Representation on Boards*, CATALYST (2007), available at [http://catalyst.org/system/files/The\\_Bottom\\_Line\\_Corporate\\_Performance\\_and\\_Womens\\_Representation\\_on\\_Boards.pdf](http://catalyst.org/system/files/The_Bottom_Line_Corporate_Performance_and_Womens_Representation_on_Boards.pdf). Nevertheless, recent scholarship on critical mass represents a shift from the direct questions pursued by Kanter, which observed the subjective concerns of minorities or “tokens” and their ascendancy to leadership and equitable pay. Much of the contemporary scholarship subtly, if not explicitly, directs its focus to whether firms benefit economically from women’s representation. See David A. Carter et al., *Corporate Governance, Board Diversity, and Firm Value*, *the Financial Review*, 38 FIN. REV. 33, 51 (2003) (finding a significant positive relationship between the fraction of women or minorities on a firm’s board and firm value); Jyoti D. Mahadeo et al., *Board Composition and Financial Performance: Uncovering the Effects of Diversity in an Emerging Economy*, 105 J. BUS. ETHICS 375, 384–85 (2012) (finding a positive correlation between women’s board service and firm performance). But see Øyvind Bøhren & R. Øystein Strøm, *Governance and Politics: Regulating Independence and Diversity in the Board Room*, 37 J. BUS. FIN. & ACCT. 1281, 1281 (2010) (finding that a firm creates more value for its owners when gender diversity is low); Lissa Lamkin Broome et al., *Does Critical Mass Matter? Views from the Boardroom*, 34 SEATTLE U. L. REV. 1049, 1050 (2011) (noting that critical mass “is hot,” but questioning “is it real?”).

86. Kanter, *supra* note 81, at 967.

87. In this project, we think beyond isolated, high-office representation or what decades of scholarship frame as “tokenism” to explore the complexities of sex-based representation. *Id.* at 966 (defining “tokens” as those who “are often treated as representatives of their category, as symbols rather than individuals . . . tokens can be solitary individuals or ‘solos,’ the only one of their kind present”); see also Janice D. Yoder, *Rethinking Tokenism: Looking Beyond Numbers*, 5 GENDER & SOC’Y 178 (1991) (arguing that Kanter’s theory of tokenism “did not reflect the complexities of gender discrimination in the workplace”).

88. LLANOS & SAMPLE, *supra* note 19, at 15 tbl.2.

89. *Michelle Bachelet Wins Presidential Election in Chile*, CNN (Dec. 15, 2013, 10:25 PM), <http://www.cnn.com/2013/12/15/world/americas/chile-presidential-election/>.

Piñera's eventual victory and election to the presidency.<sup>90</sup> In 2013, Bachelet returned to the presidency and regained leadership of the nation.<sup>91</sup> Bachelet promises—and reproductive rights advocates hope—that she will push forward urgently desired reforms, including legislation to advance gender equality and reproductive rights.<sup>92</sup> A cautionary tale emerges just on this point. Despite Bachelet's political success at the highest level of political office, real gender gaps in political representation remain, particularly with women's representation in the country's national legislature below the Latin American region's average.<sup>93</sup>

According to a study conducted by the Inter-Parliamentary Union (IPU), Chile ranks 95 out of 190 countries in terms of women's representation in parliament (or other equivalent governmental body).<sup>94</sup> In 2014, women held 16 percent of seats in Chile's national parliament.<sup>95</sup> An examination of data from 2008 reveals that women hold an average 18.5 percent of seats in lower houses of congress (analogous to Chile's National Congress) in Latin American countries.<sup>96</sup> These statistics suggest that compared to its regional counterparts, Chile elects and appoints fewer women to political office. The following chart, which we created applying data from the World Bank,<sup>97</sup> lists the proportion of seats held by women in national parliaments in South American countries in 2014.

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90. Alexei Barrionuevo, *Right-Wing Businessman Wins Chile's Presidency*, N.Y. TIMES, Jan. 18, 2010, at A4. Matthei was a pre-candidate in competition with Sebastian Piñera, and the Independent Democratic Union (UDI) officially proclaimed Piñera, rather than Matthei, as its candidate for the 2010 election. See *Coloma: Piñera es el candidato presidencial de la UDI para dirigir Chile*, COOPERATIVA (Aug. 22, 2009), [http://www.cooperativa.cl/prontus\\_not/site/artic/20090822/pags/20090822190033.html](http://www.cooperativa.cl/prontus_not/site/artic/20090822/pags/20090822190033.html); Evelyn Matthei se reconoció precandidata presidencial, LA TERCERA (Oct. 14, 2008), [http://www.latercera.com/contenido/23\\_62451\\_9.shtml](http://www.latercera.com/contenido/23_62451_9.shtml).

91. Simon Romero, *On Election Day, Latin America Willingly Trades Machismo for Female Clout*, N.Y. TIMES, Dec. 15, 2013, at A10.

92. Dan Collins & Jonathan Watts, *Bachelet Pledges Radical Constitutional Reforms After Winning Chilean Election*, GUARDIAN (Dec. 16, 2013, 12:52 PM), <http://www.theguardian.com/world/2013/dec/16/chile-president-elect-michelle-bachelet-election-reforms>.

93. Magda Hinojosa, *Increasing Women's Representation in Politics*, AM. Q., Summer 2012, at 96–97.

94. *Women in National Parliaments*, INTER-PARLIAMENTARY UNION, <http://www.ipu.org/wmn-e/arc/classif311012.htm> (last updated Oct. 31, 2012).

95. *Proportion of Seats Held by Women in National Parliaments*, WORLD BANK, <http://data.worldbank.org/indicator/SG.GEN.PARL.ZS> (last visited Mar. 25, 2015) [hereinafter WORLD BANK].

96. LLANOS & SAMPLE, *supra* note 19, at 22.

97. WORLD BANK, *supra* note 95.

Percentage of Women in National Parliaments by Country	
Country	Percentage of seats held by women in national parliament (%) (2014)
Argentina	37%
Bolivia	25%
Brazil	9%
Chile	16%
Columbia	12%
Ecuador	42%
Guyana	31%
Paraguay	15%
Peru	22%
Suriname	12%
Trinidad & Tobago	29%
Uruguay	13%
Venezuela	17%

Notice that Chile does not rank as the nation with the *lowest* rate of female representation in South America. Brazil, for example, reports that women comprise only 9 percent of its legislative bodies. Thus, while Chile lags behind other nations on women in political representation, it does not rank at the absolute bottom of all Latin American nations. Nevertheless, Chile's current status is quite far from achieving "critical mass," a term used to indicate the level or percentage of representation a minority group must reach to "bring about certain changes in culture and in institutional norms in their legislatures."<sup>98</sup> In the context of female political representation, scholars predict the percentage to be 30 percent.<sup>99</sup> In other words, even a nation that elects women presidents (in Chile's case, twice in ten years) may not successfully advance the rule of law without broader women's representation in legislative bodies and the political will and support of male colleagues. Furthermore, not all elected female representatives will prioritize or be invested in sex equality.<sup>100</sup> Nor will all female politicians understand women's equality along the same spectrum; race, class, religion, and other social statuses further shape women's political views.<sup>101</sup> In other words, it is important to account for the differences among women in their views on equality and subordination.

98. LLANOS & SAMPLE, *supra* note 19, at 22.

99. *Id.*; see also Mariateresa Torchia et al., *Women Directors on Corporate Boards: From Tokenism to Critical Mass*, 102 J. BUS. ETHICS 299, 299 (2011) (noting that "attaining critical mass . . . makes it possible to enhance the level of firm innovation").

100. Indeed, not all women will share similar political views or experiences, nor should they.

101. There have been increasing calls among feminists to "avoid essentialist generalizations about 'women's problems.'" Uma Narayan, *Essence of Culture and a Sense of History: A Feminist Critique of Cultural Essentialism*, 13 HYPATIA 86, 86 (1998); see also DIANA FUSS, *ESSENTIALLY SPEAKING: FEMINISM, NATURE AND DIFFERENCE* (1989); Janet

However, given that Chile twice elected a woman president, what accounts for Chile's below average representation of women in government as a whole? Insights may be found by examining executive bodies of the country's political parties, particularly because these bodies are responsible for, define, and propagate political candidate lists.<sup>102</sup> Women's influence at this level, therefore, is vital if women are to run for—and ultimately be elected to—political office. The lack of women in leadership roles and on party leadership committees is problematic because it limits their influence in “decision-making spheres” and their ability to change party organization.<sup>103</sup> Nevertheless, in other political positions, Chilean women fare better. Chile distinguishes itself as a nation with one of the highest rates of women mayors and ministers among Latin American countries (although not on par with male representation).<sup>104</sup>

Chilean women's mixed success in political representation suggests that the mere presence (or absence) of women in executive or legislative branch positions does not necessarily correlate with laws and policies that promote women's rights, particularly those related to liberalized reproductive legislation. Thus, the question arises whether a “critical mass” of women in political office is necessary and/or sufficient to bring about changes in reproductive health laws and policies, particularly abortion. In many cases, “the presence of female candidates does not guarantee an embrace of feminist issues,” even if the candidate herself personally *supports* the issues.<sup>105</sup> Consider presidential candidate Ms. Matthei who, despite supporting exceptions to Chile's total ban on abortion to save a woman's life, stated she would not push for changes in abortion law if elected after facing resistance from other members within her party.<sup>106</sup>

## II. URUGUAY

In Part II, we expand our examination of the rule of law to include Uruguay. Similar to Chile, it ranks low among Latin American nations for female representation in elected political office. According to data from the

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Catherina Wesselius, *Gender Identity Without Gender Prescriptions: Dealing with Essentialism and Constructionism in Feminist Politics*, 2 J. CAN. SOC'Y CONTINENTAL PHIL. 223, 224 (1998) (discussing feminist arguments that differences of race, class, age, sexual orientation, ethnicity, and others among women “matter just as much to one's identity as one's sex”).

102. LLANOS & SAMPLE, *supra* note 19, at 35; *see also* Alexandre Bachet, *Chile: Evelyn Matthei Named Alianza Candidate*, ARG. IND. (Aug. 12, 2013), <http://www.argentinaindependent.com/currentaffairs/chile-evelyn-matthei-named-alianza-candidate/> (reporting various coalitions' decisions to elect Matthei as their chosen candidate for the November 2013 election).

103. LLANOS & SAMPLE, *supra* note 19, at 34, 36; *see also* UNITED NATIONS, WOMEN & ELECTIONS 33 (2005), *available at* <http://www.un.org/womenwatch/osagi/wps/publication/WomenAndElections.pdf> (stating that because political parties often determine which candidates are nominated, women's involvement in political parties “is . . . a key determinant of their prospects for political empowerment”).

104. LLANOS & SAMPLE, *supra* note 19, at 12, 19.

105. Romero, *supra* note 91.

106. *Id.*

World Bank, which analyzes data from national parliaments, women hold only 13 percent of Uruguay's elected offices.<sup>107</sup> Does women's lack of representation in Uruguay's legislature have negative consequences for women's equality?

Part II.A and II.B explore whether equality norms, produced through the rule of law, result from female representation in political office. Surprisingly, achieving reproductive rights may not depend upon women's representation in political office. We wish to be careful with the conclusions that might be drawn from our analysis and explain more in the second half of this Article.

### A. Reproductive Health Laws

In contrast to Chile, Uruguay's abortion laws fall on the other end of the spectrum—the country is described as having established “the most liberal abortion law” in South America.<sup>108</sup> This “liberal” law was enacted in October 2012 with the support of President José Mujica and successfully avoided a referendum aimed at its repeal in mid-2013.<sup>109</sup> Under Law No. 18.987<sup>110</sup>:

Abortions are generally allowed for any reason in the first twelve weeks of pregnancy, provided that certain procedural requirements are followed;

Abortions are allowed in the first fourteen weeks of pregnancy if the pregnancy is the result of rape;

Abortion is allowed at any time if continuing the pregnancy poses a grave risk to the woman's health or if the fetus suffers from a condition that is “incompatible with life;”

Parental consent is required when an abortion is sought by a woman under eighteen, but provides a procedure if a parent refuses or otherwise cannot give consent whereby the adolescent can go before a judge who may authorize the abortion if s/he finds that the adolescent's consent is “spontaneous, voluntary, and conscious;”

Allows healthcare providers with conscientious objections to abortions to refuse to participate in the procedures if they notify their institutions. Objections are considered revoked if they participate in a procedure unless it is necessary to prevent grave risk to a woman's health. Professionals who do not express a conscientious objection may not refuse to provide abortions.

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107. WORLD BANK, *supra* note 95.

108. Mallén, *supra* note 25.

109. Simon Romero, *Uruguay Senate Approves First-Trimester Abortion for Any Reason*, N.Y. TIMES, Oct. 18, 2012, at A6; see Pablo Fernandez, *Uruguay Abortion Vote: Uruguayans Decide If Pregnancy Termination Law Goes to Referendum*, HUFFINGTON POST (June 23, 2013, 11:23 PM), [http://www.huffingtonpost.com/2013/06/23/uruguay-abortion-vote\\_n\\_3487055.html](http://www.huffingtonpost.com/2013/06/23/uruguay-abortion-vote_n_3487055.html); Mallén, *supra* note 25.

110. Law No. 18.987, Voluntary Interruption of Pregnancy, Establishing Rules (2012) (Uru.), available at [http://reproductiverights.org/en/node/3933/map\\_popup](http://reproductiverights.org/en/node/3933/map_popup).

Uruguay's abortion laws provide insight into rule of law norms in that nation and serve as a platform for problematizing how scholars understand and think about tipping points in achieving women's equality. How does a nation with such limited representation of women in its legislature promulgate and implement rules that liberalize reproductive laws?

First, it must be understood that Uruguay's abortion laws were not always "liberal."<sup>111</sup> Uruguay's Criminal Code of 1933 prohibited abortion and criminalized a woman causing or consenting to an abortion.<sup>112</sup> In such cases, a woman faced up to nine months imprisonment, and any person participating in an abortion with the woman's consent faced up to eight years imprisonment.<sup>113</sup> The law carved out exceptions: it exempted physicians from punishment if the abortion was necessary to save the patient's life or protect her health, if the pregnancy was the result of rape, or if performed within the first three months of the pregnancy "to save the honour of the woman or in cases of economic hardship."<sup>114</sup>

These restrictive abortion policies, however, did not eradicate the practice. Similar to the United States in the period prior to the U.S. Supreme Court's landmark ruling in *Roe v. Wade*,<sup>115</sup> women obtained illegal, underground abortions that frequently risked their health and well-being.<sup>116</sup> The World Health Organization's (WHO) 2000 study on abortion reports that 19 million women obtain illegal abortions each year, "performed by unskilled providers or under unhygienic conditions or both."<sup>117</sup> The WHO further states that "unsafe abortion is one of the neglected problems of health care in developing countries. It is characterized by inadequacy of skills on the part of the provider and use of hazardous techniques and unsanitary facilities."<sup>118</sup>

One woman's chilling account portrays the gruesome reality of "back alley" abortions, and although the procedure was performed in the United States, the conditions are no better in Uruguay:

Someone gave me the phone number of a person who did abortions and I made the arrangements. I borrowed about \$300 from my roommate and went alone to a dirty, run-down bungalow in a dangerous neighborhood in

111. Mallén, *supra* note 25.

112. See UNITED NATIONS, ABORTION POLICIES: A GLOBAL REVIEW VOL. III, OMAN TO ZIMBABWE 168–69 (2002), available at <http://www.un.org/esa/population/publications/abortion/profiles.htm> (scroll to and follow "Uruguay" hyperlink).

113. *Id.*

114. *Id.*

115. 410 U.S. 113 (1973).

116. *Id.* at 150. Polly Bergan's reflections on her abortion in the 1940s portray the humiliation and risk involved in "back alley" abortions. See NARAL, THE SAFETY OF LEGAL ABORTION AND THE HAZARDS OF ILLEGAL ABORTION 1, 7 (Jan. 1, 2015) [hereinafter NARAL], available at <http://www.prochoiceamerica.org/media/fact-sheets/abortion-distorting-science-safety-legal-abortion.pdf>.

117. WORLD HEALTH ORG., UNSAFE ABORTION: GLOBAL AND REGIONAL ESTIMATES OF THE INCIDENCE OF UNSAFE ABORTION AND ASSOCIATED MORTALITY IN 2000, at 9 (4th ed. 2004) (estimating that 19 million "unsafe" or "back alley" abortions are performed globally each year, based on statistics from 2000).

118. *Id.* at 1.



east Los Angeles. A greasy looking man came to the door and asked for the money as soon as I walked in. He told me to take off all my clothes except my blouse; there was a towel to wrap around myself. I got up on a cold metal kitchen table. He performed a procedure, using something sharp. He didn't give me anything for the pain—he just did it. He said that he had packed me with some gauze, that I should expect some cramping, and that I would be fine. I left.<sup>119</sup>

A 2002 United Nations study found that Uruguay experienced a relatively high abortion rate, most of which were illegally performed.<sup>120</sup> In the wake of constraints on access to legal contraceptives and poor reproductive health education, abortions served as a primary method of birth control and a major cause of maternal mortality.<sup>121</sup> Precise data is unavailable, but the United Nations reports that the most conservative estimates suggest there were “at least as many abortions as live births” in Uruguay.<sup>122</sup> High abortion rates were likely caused, in part, by unmet needs for family planning and sex education, which contributed to significantly “high rates of unwanted pregnancies, adolescent pregnancies, induced [and often illegal] abortions, and infertility due to sexually transmitted diseases.”<sup>123</sup>

In response to the soaring numbers of unintended pregnancies and abortions, the Uruguayan government established a National Programme on Reproductive Health, which provides family planning information and access to contraception.<sup>124</sup> In December 2008, then-president Tabare Vazquez signed Law No. 18.426, requiring the state to “guarantee conditions for the full exercise of the sexual and reproductive rights of the entire population[.] . . . promote national policies of sexual and reproductive health, develop new programs, and organize services to implement them . . . .”<sup>125</sup> Specific objectives include<sup>126</sup>:

- Publicizing and protecting rights of children, adolescents, and adults related to reproductive health information and services;
- Promoting responsible paternity and maternity;
- Promoting and improving access to family planning services;
- Preventing the spread of sexually transmitted infections;
- Reducing harms caused by sexually transmitted infections; and
- Preventing and reducing damage from substance abuse.

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119. NARAL, *supra* note 116, at 1.

120. UNITED NATIONS, *supra* note 112, at 168–69.

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

125. Dario Ferreira, *Uruguay: President Signs Sexual and Reproductive Health Law*, LIB. OF CONG. (Feb. 3, 2009), [http://www.loc.gov/lawweb/servlet/lloc\\_news?disp3\\_120540975\\_text](http://www.loc.gov/lawweb/servlet/lloc_news?disp3_120540975_text).

126. *Id.*

Despite Uruguay's progress and liberalization of reproductive health laws, the success of *any* law requires more than its technical establishment or "law on the books."<sup>127</sup> Laws must be adhered to *on the ground* and noncompliance must be addressed. Sally Engle Merry, in her pivotal 2006 work *Human Rights & Gender Violence: Translating International Law into Local Justice*, reminds us that because much of the violence and repression that occurs against women happens in the inner sanctum of the home, the rule of law has been slow to have an impact.<sup>128</sup> In other words, law on the books does not necessarily translate into a law in action or impact the laws at home.<sup>129</sup> Importantly, the recently enacted Uruguayan abortion law is not without its constraints to women's reproductive liberty.<sup>130</sup>

As we analyzed the law in comparison to other abortion laws in Latin America, important distinctions emerge that must be flagged. First, the law does not necessarily destigmatize abortion—the medical procedure is still technically a crime—the law simply broadens *exceptions* to the general prohibition.<sup>131</sup> Second, the law imposes various conditions and requirements prior to an elective abortion procedure, such as consultation with a three-person panel comprised of a gynecologist, psychologist, and social worker.<sup>132</sup> This panel may refuse to provide abortion services.<sup>133</sup> Third, access to abortions is not guaranteed in Uruguay because many clinics cannot comply with formal, structural restrictions, such as "panel" requirements.<sup>134</sup> Furthermore, at least thirty percent of gynecologists in the country have exercised a "conscientious objection" to the law; in the city of Salto, for example, *every gynecologist* has objected to the law.<sup>135</sup> Finally, many women are simply unaware of their rights under the new law and many continue to resort to clandestine, unsafe abortions.<sup>136</sup>

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127. "The effect of a law in action often fails to mirror the law as stated on the books." Ann M. Eisenberg, *Law on the Books vs. Law in Action: Under-Enforcement of Morocco's Reformed 2004 Family Law*, the Moudawana, 44 CORNELL INT'L L.J. 693, 707 (2011).

128. SALLY ENGLE MERRY, *HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE* 21–22 (2006).

129. According to Mujer y Salud-Uruguay (MYSU), much more needs to be done to ensure that Uruguay's laws "translate[] into high quality, equitable abortion services throughout the country." Shena Cavallo, *After Victory in Uruguay: Addressing Gaps Between the Right to Abortion and Access to Services*, INT'L WOMEN'S HEALTH COAL. (Feb. 7, 2014), <http://iwhc.org/2014/02/victory-uruguay-addressing-gaps-right-abortion-access-services/>.

130. Further, the proclamation that it is a "liberal" law must be tempered by the recognition that it is "liberal" by Latin American standards, "home to some of the world's most restrictive abortion laws." Marianne Mollmann, *Fatal Consequences: Women, Abortion, and Power in Latin America*, in *THE UNFINISHED REVOLUTION: VOICES FROM THE GLOBAL FIGHT FOR WOMEN'S RIGHTS* 260 (Minky Worden ed., 2012).

131. Cavallo, *supra* note 129.

132. *Id.*

133. *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

Because Uruguay enacted its abortion law relatively recently, it remains unclear whether and how the challenges outlined in this Article, as well as those concerns articulated by activists,<sup>137</sup> will be addressed by its national legislature or president. As one commentator observes, “the struggle to ensure access to safe, legal abortion does not end with legislation.”<sup>138</sup> The International Women’s Health Coalition explains that “this struggle includes defending the law from reactionary, anti-choice movements, as well as ensuring that geography and lack of information do not determine the services women receive.”<sup>139</sup> Moreover, the practical implementation of Uruguay’s abortion law, particularly the three-professional panel requirement, raises doubts about the law’s impact on access to abortion, because the intrusive procedural requirements may actually *hinder* rather than promote women’s rights.<sup>140</sup>

*B. Women’s Political Representation and Participation in Uruguay*

Similar to Chile, women make up 52.4 percent of Uruguay’s electorate.<sup>141</sup> Yet, women hold only 13 percent of national parliament seats<sup>142</sup> and Uruguay places 104 out of 190 countries in terms of women’s representation in the General Assembly.<sup>143</sup> Where comparable data is available, in many areas of political representation Uruguay does not surpass—and often fares worse—than Chile.

For example, women make up 20.1 percent of executive bodies in Chile’s political parties whereas they only make up 12.5 percent in Uruguay.<sup>144</sup> The World Bank data also indicates that Uruguayan women hold a slightly lower percentage of seats in the country’s national government compared to Chile (13 percent versus 16 percent in 2014).<sup>145</sup> In 2007, women accounted for 15 percent of seats in unicameral or lower houses of Congress; in Uruguay women made up 11.1 percent.<sup>146</sup> Indeed, 36.4 percent of ministers in Chile were women compared to 30.8 percent in Uruguay.<sup>147</sup> Additionally, Uruguay ranked lower (104) than Chile (95) on the IPU study on female representation in parliament.<sup>148</sup> One area where Uruguay fared slightly better was the number of women in upper houses of congress. In 2007, women held 9.7 percent of seats in Uruguay’s upper houses compared to 5.3 percent in Chile.<sup>149</sup> As of October 2012, however, this

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137. *Id.*

138. *Id.*

139. *Id.*

140. Carlos Garcia, *Uruguay’s New Abortion Law May Hinder Women’s Rights*, HUM. RTS. BRIEF (Dec. 10, 2012), <http://hrbrief.org/2012/12/uruguay%E2%80%99s-new-abortion-law-may-hinder-women%E2%80%99s-rights/>.

141. LLANOS & SAMPLE, *supra* note 19, at 15.

142. WORLD BANK, *supra* note 95.

143. *Women in National Parliaments*, *supra* note 94; WORLD BANK, *supra* note 95.

144. LLANOS & SAMPLE, *supra* note 19, at 36.

145. WORLD BANK, *supra* note 95.

146. LLANOS & SAMPLE, *supra* note 19, at 23 tbl.4.

147. *Id.* at 19 tbl.3.

148. *Women in National Parliaments*, *supra* note 94.

149. LLANOS & SAMPLE, *supra* note 19, at 24 tbl.5.

situation had reversed, with women holding 12.9 percent of seats in Uruguay's upper houses compared to 13.2 percent in Chile.<sup>150</sup> Notwithstanding these differences, both countries' female political representation lags behind that of other Latin American countries.<sup>151</sup>

In the years since the data above were collected, however, Uruguay, unlike Chile, has adopted gender quotas.<sup>152</sup> On April 3, 2009, Uruguay passed Law No. 18.476, which requires political parties to include women on ballots for primary candidates, primary candidate substitutes, members of both chambers of the national legislature, departmental assemblies, local assemblies, mayoral posts, election boards, and within political party leadership.<sup>153</sup> The law mandates that "people of both sexes" must be included in "every three positions" on a party ballot" and if a ballot has only two candidates, there must be one male and one female.<sup>154</sup> Ballots that do not comply with the requirements are rejected by departmental election boards.<sup>155</sup> The quotas were largely supported by the public and responded to women's historically low levels of political representation in the country.<sup>156</sup>

Empirical studies demonstrate that gender quotas can, if effectively designed and implemented, increase women's political representation.<sup>157</sup> In a recent study surveying data from twenty-four countries using the Americas Barometer 2010, Professor Leslie A. Schwindt-Bayer explains that gender quotas "may offer a partial solution to women's marginalization in mass political participation" and symbolize more inclusive political systems.<sup>158</sup> Whether such representation necessarily and/or sufficiently improves or enhances women's rights and access to reproductive healthcare is less clear. According to Professor Schwindt-Bayer, Uruguay's gender quotas have yet to mitigate gender gaps in men's and women's political participation (such as voting, working on campaigns, and attending local government meetings).<sup>159</sup> Schwindt-Bayer's research emphasizes that quota systems in Latin American countries have yet to meaningfully decrease gender gaps.<sup>160</sup>

150. *Women in National Parliaments*, *supra* note 94.

151. For example, women hold 47.2 percent of seats in Bolivia's upper houses, 38.9 percent in Argentina, 38.5 percent in Belize, 32.8 percent in Mexico, 25.8 percent in Trinidad and Tobago, 16.0 percent in Columbia, and 16.0 percent in Brazil. *Id.*

152. Leslie Schwindt-Bayer, *Gender Quotas and Women's Political Participation in Latin America* 3 (AmericasBarometer of the Latin American Public Opinion Project, Vanderbilt University 2011) (unpublished paper), available at [http://www.vanderbilt.edu/lapop/pdfs/Schwindt-Bayer\\_SmallGrant\\_Publish.pdf](http://www.vanderbilt.edu/lapop/pdfs/Schwindt-Bayer_SmallGrant_Publish.pdf).

153. *Id.* at 16.

154. *Id.* (quoting Law No. 18.476 (2009) (Uru.)).

155. *Id.*

156. *Id.* at 16–18.

157. Mark P. Jones, *Gender Quotas, Electoral Laws, and the Election of Women: Evidence from the Latin American Vanguard*, 42 COMP. POL. STUD. 56 (2009); Leslie A. Schwindt-Bayer, *Making Quotas Work: The Effect of Gender Quota Laws on the Election of Women*, 34 LEGIS. STUD. Q. 5 (2009).

158. Schwindt-Bayer, *supra* note 152, at 1.

159. *Id.* at 22–23.

160. *Id.* at 20–21.

So, do gender or sex quotas positively correlate to women's reproductive health rights? Does the political representation of women correlate to progressive reproductive health policies? In Latin America, Chile's reproductive health law policies related to abortion are considered draconian and out of step with its populace. Yet Chile has elected more women to legislative positions than Uruguay and some other Latin American nations.

Thus, is political *participation* rather than *representation* more important to establishing gender equality and shifting rule of law norms? As evidenced by the impact of national rallies in Chile to regain access to emergency contraception, participation matters. Equally, the relatively high rates of women's political participation in Uruguay, which likely plays a role in the election of officials such as President Jose Mujica, who supported and approved Uruguay's liberalized abortion law, demonstrates the importance of the democratic process to achieving the rule of law.

### III. RECONCILING REPRODUCTIVE RIGHTS AND THE RULE OF LAW

As this Article demonstrates, understanding the rule of law and gender equality requires engaging in nuanced analysis; while scholars and commentators might presume that female representation alone achieves gender equality or liberalizes women's rights, such conclusions would be misleading and inaccurate or at best incomplete. Women's political representation without a critical mass does offer scant access to power, but may not effectively achieve the types of norm-shifting regulations anticipated by the public. On the other hand, perceiving women's equality as achievable only through female representation in politics overlooks the responsibility of male legislators to their female (and male) constituents who advocate for sex equality and greater liberalization of reproductive laws. In other words, the domain of equality is neither gender- nor sex-specific.

We make the case that women can and should play a vital role in their representation and the fact that they are underrepresented in political office in Latin America (as well as the United States) ought to cause concern. We continue to be interested in what accounts for fractional representation of women and the implications for reproductive health. For this task we turned to Latin America—though these issues deserve greater consideration globally.

In Latin America we find interesting insights regarding reproductive health laws and the rule of law.<sup>161</sup> For example, oral contraceptives (the

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161. Chris Kirk and his colleagues used data from the United Nations, the Guttmacher Institute, the Population Reference Bureau, the National Conference of State Legislatures, and Harvard University's Center for Population and Development Studies to create maps of abortion and contraception policies of countries throughout the world. Chris Kirk et al., *Reproductive Rights Around the World: The Complete Global Map of Laws Governing Abortion and Birth Control*, SLATE, [http://www.slate.com/articles/news\\_and\\_politics/map\\_of\\_the\\_week/2013/05/abortion\\_and\\_birth\\_control\\_a\\_global\\_map.html](http://www.slate.com/articles/news_and_politics/map_of_the_week/2013/05/abortion_and_birth_control_a_global_map.html) (last updated June 4, 2013).

pill) are legal in all Latin American countries, IUDs are legal in all countries except Guyana, and in many countries, including Uruguay, condoms are free.<sup>162</sup> In both Uruguay and Chile, a prescription is *not required* for oral contraceptives and in Uruguay a partial subsidy is available to help women pay for the pill.<sup>163</sup>

Further, contraceptive devices such as IUDs can be implanted by someone other than a physician in both countries.<sup>164</sup> In many regions, contraception laws and policies are less strict in Uruguay and Chile than they are in the United States where, for example, a prescription is required for oral contraception and IUDs must be implanted by a physician.<sup>165</sup> Effective contraceptive use is critical to reducing dangerous, clandestine abortions.<sup>166</sup>

That said, simply enacting laws and adopting policies that allow and appear to promote contraceptive use may not translate into access, affordability, and use. And although unmet needs for modern contraceptives drastically decreased throughout Latin America in recent years, access and use continue to be low among vulnerable groups: rural populations, adolescents, the low income, the less educated, and certain ethnic groups.<sup>167</sup>

Indeed, when contraceptive needs are not met, unintended and unwanted pregnancies increase, thus increasing the rate of abortions. These abortions are sometimes legal (i.e., in limited circumstances in Uruguay), but are more often illegal, “back alley” abortions which put women at great risk: these “back alley” abortions account for approximately twelve percent of all maternal deaths in the Latin American region.<sup>168</sup>

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162. *Id.* Ironically, the use of IUDs in the United States has been made less accessible and far more legally complicated in light of the U.S. Supreme Court decision in *Burwell v. Hobby Lobby*, 134 S. Ct. 2751 (2014). News reports note that the *Hobby Lobby* ruling “may depress use of IUDs at some privately held corporations that deem it a form of emergency contraception” because an IUD without insurance coverage can cost up to a month’s pay for a minimum wage worker. Eliana Dockterman, *5 Things Women Need to Know About the Hobby Lobby Ruling*, TIME (July 1, 2014), available at <http://time.com/2941323/supreme-court-contraception-ruling-hobby-lobby/>; see also Aaron E. Carroll, *How Hobby Lobby Ruling Could Limit Access to Birth Control*, N.Y. TIMES (June 30, 2014), <http://www.nytimes.com/2014/07/02/upshot/how-hobby-lobby-ruling-could-limit-access-to-birth-control.html?abt=0002&abg=0> (“Without insurance coverage, it’s likely that many women will be unable to use [IUDs].”).

163. Kirk et al., *supra* note 161.

164. *Id.*

165. *Id.*

166. Thais Aguilar Z., *Safeguarding the Contraceptive Supply in Latin America in an Era of Donor Phase-Out*, POPULATION REFERENCE BUREAU (June 2006), <http://www.prb.org/Publications/Articles/2006/SafeguardingtheContraceptiveSupplyinLatinAmericainanEraofDonorPhaseOut.aspx>; Farah Mohammed, *Latin America’s Contraception Crisis*, GIRLS’ GLOBE (Nov. 13, 2013), <http://girlsglobe.org/2013/11/13/latin-americas-contraception-crisis>.

167. Aguilar Z., *supra* note 166.

168. Jennifer M. Piscopo, *Ending Unwanted Pregnancies in Latin America*, GATES CAMBRIDGE (Oct. 9, 2012), <http://gatescambridge.wordpress.com/2012/10/09/ending-unwanted-pregnancies-in-latin-america/>.

Scholars argue and data suggests that women's increasing political representation and participation in Latin America results in the adoption of important laws and policies to protect and empower women.<sup>169</sup> The fact that policy change remains "elusive" on abortion indicates a level of entrenchment on this issue that is inconsistent with the public's view according to national surveys. This has resulted in scholars claiming that maintaining restrictive abortion laws is "out of sync with social practices and global trends."<sup>170</sup> In fact, in the entire region, abortion laws have changed the least among policies related to women's issues, such as violence against women and gender quotas.

At the core of this Article is an important question regarding the conditions that are necessary to advance women's reproductive rights. At first glance, the rule of law would seem to answer the question, but it does not. The political experiences and social movements galvanized around women's rights in Chile, Uruguay, and other Latin American countries suggest that women's rights reforms do not occur in isolation or merely by virtue of women elected to a nation's presidency. Women's rights advocates warn that those interested in advancing women's equality and liberalizing reproductive rights would be ill advised to wait for legislatures to initiate legal change, which then paves the way for *social, on-the-ground* change. In Uruguay, for example, a referendum was avoided on the liberalized abortion law by successful mobilization and campaigning by reproductive rights advocates.<sup>171</sup>

Thus, despite some continual political and religious opposition, the fact that the referendum was defeated "shows that the Uruguayan *society* is willing to continue moving forward."<sup>172</sup> Effective campaigning proved similarly successful for Chilean women when the Constitutional Court reinstated access to emergency contraception after the Movement for the Defence of Contraception mobilized thousands of women and advocates to protest the Court's previous ruling, which held the law providing access to emergency contraception unconstitutional.<sup>173</sup>

We conclude that women's equality in society is not achieved exclusively by the rule of law. The rule of law provides a technical basis to challenge discrimination and it potentially frames women as equal citizens; but without enforcement, representation, and participation in the political process, advancements in women's equality may be marginal at best even in nation-states that claim and do promulgate laws that appear to advance women's rights. Reproductive equality provides an important lens through

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169. Mala Htun & Jennifer Piscopo, *Presence Without Empowerment? Women in Latin America and the Caribbean* (Dec. 2010) (unpublished paper), available at [http://webarchive.ssrc.org/pdfs/Mala\\_Htun\\_and\\_Jennifer\\_M.\\_Piscopo-Presence\\_without\\_Empowerment\\_CPPF\\_Briefing\\_Paper\\_Dec\\_2010\\_f.pdf](http://webarchive.ssrc.org/pdfs/Mala_Htun_and_Jennifer_M._Piscopo-Presence_without_Empowerment_CPPF_Briefing_Paper_Dec_2010_f.pdf).

170. *Id.*

171. See Mallén, *supra* note 25.

172. *Uruguay Abortion Law Avoids Repeal Referendum*, FOX NEWS (June 24, 2013), <http://www.foxnews.com/world/2013/06/24/uruguay-abortion-law-avoids-repeal-referendum/> (emphasis added).

173. Sotomayor, *supra* note 26.

which to study these issues; even in nations where contraceptive use is broadly liberalized, if the poor lack information and access, the right to use contraception is illusory at best. Our research demonstrates that women (and men who support women's rights and equality) must be active *participants*, both as political representatives and members of society, because law alone is not enough.

### CONCLUSION

This Article analyzes women's health, specifically reproductive rights as a lens to assess equity, inclusion, and the saliency of the rule of law. We evaluate the history of Uruguay's and Chile's reproductive health laws, women's political representation and participation, and whether greater numbers of women in high-level government positions necessarily and/or sufficiently advance or improve women's conditions. Specifically, we target this inquiry at access to reproductive health services because contraceptive usage and abortion remain deeply contested in some parts of the world even when the life of the mother is at stake. According to one commentator, "an estimated 47,000 women die each year because they lack access to safe, legal abortion care."<sup>174</sup>

Whether the rule of law functions effectively as a tool for achieving equality and responding to deeply entrenched oppression, violence against women, and reproductive justice remains an important point of inquiry and we urge continued study in this domain. Without attention to social contexts and enforcement, what can the rule of law achieve, particularly with regard to sex equality?<sup>175</sup>

The rule of law can mask inequality or even undermine equality for women by presenting formal rules as gender neutral when the opposite may be true. In her renowned work, Professor Sally Engle Merry urges a more probing examination of the rule of law as a tool for normalizing equality.<sup>176</sup> For example, hard-fought transformations in marriage have elevated the rights of women and girls in the context of marriage.<sup>177</sup> Nevertheless, husbands continue to rule the inner sanctum of the home in many nations.<sup>178</sup>

And as Goodwin's prior work explains, the rule of law may serve as political and diplomatic cover for local adherence to traditional law or customs, which continue to be practiced in the shadows of federal legislation.<sup>179</sup> India's child marriage laws serve as a compelling example.

174. Tara Culp-Ressler, *11-Year-Old Chilean Rape Victim's Health Is in Danger Because She Can't Get an Abortion*, THINK PROGRESS (July 7, 2013), <http://thinkprogress.org/health/2013/07/07/2261731/chile-rape-victim-abortion/>.

175. See, e.g., Michele Goodwin, *When Institutions Fail: The Case of Underage Marriage in India*, 62 DEPAUL L. REV. 357 (2013) (evaluating the impact of the rule of law on young women in India).

176. See generally SALLY ENGLE MERRY, *HUMAN RIGHTS AND GENDER VIOLENCE: TRANSLATING INTERNATIONAL LAW INTO LOCAL JUSTICE* (2006).

177. *Id.* at 25.

178. *Id.*

179. Goodwin, *supra* note 175, at 357–58.



Despite laws prohibiting underage marriage, which legislators in Delhi eagerly point out, child-bride trafficking and underage marriage frequently occur throughout India.<sup>180</sup> In this latter context, how can the rule of law pierce the wall of privacy to expand protections to the most vulnerable women and girls?

In other contexts too, critics suggest that “Western policymakers and commentators have seized on the rule of law as an elixir for countries in transition.”<sup>181</sup> As we note from the outset, the goals of the rule of law are universally lauded, but on inspection may be differently defined and unclear, perhaps even more so with relation to women’s rights and reproductive healthcare. Thus, is the rule of law a prerequisite to a successful political transition or the consequence of it?

In this Article, we do not deny that women can be agents of change. In fact, women may at times be the best advocates for women’s reproductive health concerns and beyond. However, we cast doubt on how those agendas are made real. According to a recent United Nations report, “Despite being a cornerstone of democratic governance, the rule of law still ‘rules women out’ in too many countries around the world.”<sup>182</sup> In the context of reproductive health, participation in the electoral process and rulemaking matter as much, if not more, than mere political representation.

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180. *Id.* at 359–60.

181. Thomas Carothers, *The Rule of Law Revival*, 77 FOREIGN AFF. 95, 99 (1998).

182. Press Conference, United Nations, Press Conference to Launch “Report Progress of the World’s Women: In Pursuit of Justice” (July 6, 2011), available at [http://www.un.org/press/en/2011/110706\\_Women.doc.htm](http://www.un.org/press/en/2011/110706_Women.doc.htm); see also UNITED NATIONS WOMEN, 2011–2012 PROGRESS OF THE WORLD’S WOMEN: IN PURSUIT OF JUSTICE (2011), available at <http://progress.unwomen.org/pdfs/EN-Report-Progress.pdf>.