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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.¹

INTRODUCTION

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

* Chancellor’s Chair, University of California, Irvine School of Law. This Article builds from participation in the International Bar Association’s Rule of Law Symposium organized by Professor Robert Stein and Justice Richard Goldstone. I would like to thank Bob and Richard for their interest in my research on women and the rule of law. This Article was also presented as a part of a larger colloquium entitled *The Challenge of Equity and Inclusion in the Legal Profession: An International and Comparative Perspective* held at Fordham University School of Law. For an overview of the colloquium, see Deborah L. Rhode, *Foreword: Diversity in the Legal Profession: A Comparative Perspective*, 83 *FORDHAM L. REV.* 2241 (2015). © Michele Goodwin and Allison Whelan.

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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.⁴ In the United States, federal legislation such as the Civil Rights Act of 1964,⁵ the Voting Rights Act,⁶ and more recently the Americans with Disabilities Act⁷ and the Lilly Ledbetter Fair Pay Act⁸ powerfully buttress this claim. Similarly, other industrial nations and developing countries adopt this approach to addressing social inequalities.⁹ 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.¹⁰

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 (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 (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.¹¹ 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?¹² 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.¹³ Prominent examples might be drawn from the civil

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. 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 gender¹⁴ or sex¹⁵ equality. Nor does the rule of law necessarily spawn the enactment of laws addressing women’s concerns, particularly those related to reproductive rights.¹⁶ 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.¹⁷ For

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*.¹⁸

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 office¹⁹ while Chile has not;²⁰ 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.”²¹ In fact, as the authors point out, although various empirical studies indicate a positive

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.

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.²²

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.²³ 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,”²⁴ whereas they praise Uruguay’s political leadership for crafting one of “the most liberal abortion laws” in South America.²⁵ 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.²⁶ 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 (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.²⁷ 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.²⁸

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.²⁹ 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.³⁰ Five of these countries are located in Central or South America.³¹ 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.³²

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.³³ 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.³⁴ 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.³⁵ 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-harshest-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 Freyhaut, *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-freyhaut/>; 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.³⁶

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.³⁷ Furthermore, the concept of "therapeutic abortion" was expanded in 1971 to include abortions for pregnancies resulting from "contraceptive failures."³⁸ Commentators point to the Chilean government as ushering in harsh abortion bans in the 1970s to further consolidate the conservative political agenda.³⁹

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,⁴⁰ Chile amended its abortion law to take its current form, which essentially prohibits and criminalizes all abortions.⁴¹ Notably, even in fairly conservative nations, an exception is often carved out for cases involving rape, incest, or health risks to the mother.⁴²

Chile's current abortion law, however, prohibits all abortions, even to save a woman's life or in the case of rape or incest.⁴³ Moreover, Chile's law authorizes punishment of health care practitioners (or other persons) who perform abortions⁴⁴ as well as punishment of the women who "cause[] [their] abortion[s] or consent[] to another person causing it."⁴⁵ An unclear and vague interpretation of the law leaves room for women to make novel arguments of "necessity"⁴⁶ and "honor" as defenses in criminal proceedings against them for obtaining abortions.⁴⁷

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?idNorma=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.⁴⁸ Many of these prosecutions are adjudicated in court. In 2001, approximately fifty women were convicted for violating the federal law that prohibits abortions.⁴⁹ 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.⁵⁰ The maximum penalty is five years in prison.⁵¹

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.⁵² 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 2004.⁵³ 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 1000.⁵⁴

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.⁵⁵ 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.⁵⁶ Another survey found that 25 percent of Chileans believe abortion should be legal under *all* circumstances.⁵⁷ As a comparison, 28 percent of

48. Jen Ross, *Illegal Abortions Rampant in Latin America*, WOMEN'S E-NEWS (Nov. 28, 2004), http://womensenews.org/story/the-world/041128/illegal-abortions-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.

55. Marianela 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.⁵⁸ 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."⁵⁹

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."⁶⁰ 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 1980.⁶¹ 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."⁶² The laws developed in 1980 also created incentives for a de facto two-party system.⁶³

Arguably, Pinochet's legacy significantly impedes the advancement of other gender and sex equality issues, and abortion in particular.⁶⁴ 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.⁶⁵ 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

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.⁶⁶

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").⁶⁷ 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.⁶⁸ It did *not*, however, strike down the portion providing free access to other forms of birth control such as intrauterine devices (IUDs).⁶⁹

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."⁷⁰ 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!⁷¹

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."⁷² The law recognizes every

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 (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."⁷³ The legislation aims to (1) reduce teen pregnancy, (2) reduce sexually transmitted diseases, and (3) reduce sexual violence and its consequences.⁷⁴ 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."⁷⁵ The definition of contraception specifically excludes any method with the "direct objective" to induce an abortion.⁷⁶

Access to emergency contraception, however, may be limited⁷⁷ 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.⁷⁸ Such mandatory reporting laws also require all accredited secondary schools to provide sexuality programs including information on approved and available family planning methods.⁷⁹ 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."⁸⁰ 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.

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?newsLIId=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 (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?).⁸¹

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 workspace.⁸² 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."⁸³ 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."⁸⁴

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

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.”⁸⁶

This Article pursues a different, although not unrelated track: How effective are women presidents in advocating for women’s rights?⁸⁷ 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.⁸⁸ 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 2010.⁸⁹ Bachelet’s successor was not another woman, although Evelyn Matthei ran a strong presidential campaign despite Sebastian

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. 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.⁹⁰ In 2013, Bachelet returned to the presidency and regained leadership of the nation.⁹¹ Bachelet promises—and reproductive rights advocates hope—that she will push forward urgently desired reforms, including legislation to advance gender equality and reproductive rights.⁹² 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.⁹³

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).⁹⁴ In 2014, women held 16 percent of seats in Chile's national parliament.⁹⁵ 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.⁹⁶ 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,⁹⁷ lists the proportion of seats held by women in national parliaments in South American countries in 2014.

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_notas/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.

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

92. Dan Collyns & 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."⁹⁸ In the context of female political representation, scholars predict the percentage to be 30 percent.⁹⁹ 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.¹⁰⁰ 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.¹⁰¹ 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.¹⁰² 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.¹⁰³ 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).¹⁰⁴

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.¹⁰⁵ 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.¹⁰⁶

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

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.¹⁰⁷ 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.¹⁰⁸ 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-2013.¹⁰⁹ Under Law No. 18.987¹¹⁰:

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.

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; 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.

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."¹¹¹ Uruguay's Criminal Code of 1933 prohibited abortion and criminalized a woman causing or consenting to an abortion.¹¹² 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.¹¹³ 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."¹¹⁴

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*,¹¹⁵ women obtained illegal, underground abortions that frequently risked their health and well-being.¹¹⁶ 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."¹¹⁷ 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."¹¹⁸

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.¹¹⁹

A 2002 United Nations study found that Uruguay experienced a relatively high abortion rate, most of which were illegally performed.¹²⁰ 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.¹²¹ 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.¹²² 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.”¹²³

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.¹²⁴ 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”¹²⁵ Specific objectives include¹²⁶:

- 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.

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.

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."¹²⁷ 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.¹²⁸ In other words, law on the books does not necessarily translate into a law in action or impact the laws at home.¹²⁹ Importantly, the recently enacted Uruguayan abortion law is not without its constraints to women's reproductive liberty.¹³⁰

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.¹³¹ 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.¹³² This panel may refuse to provide abortion services.¹³³ Third, access to abortions is not guaranteed in Uruguay because many clinics cannot comply with formal, structural restrictions, such as "panel" requirements.¹³⁴ 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.¹³⁵ Finally, many women are simply unaware of their rights under the new law and many continue to resort to clandestine, unsafe abortions.¹³⁶

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,¹³⁷ 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.”¹³⁸ 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.”¹³⁹ 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.¹⁴⁰

B. Women’s Political Representation and Participation in Uruguay

Similar to Chile, women make up 52.4 percent of Uruguay’s electorate.¹⁴¹ Yet, women hold only 13 percent of national parliament seats¹⁴² and Uruguay places 104 out of 190 countries in terms of women’s representation in the General Assembly.¹⁴³ 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.¹⁴⁴ 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).¹⁴⁵ In 2007, women accounted for 15 percent of seats in unicameral or lower houses of Congress; in Uruguay women made up 11.1 percent.¹⁴⁶ Indeed, 36.4 percent of ministers in Chile were women compared to 30.8 percent in Uruguay.¹⁴⁷ Additionally, Uruguay ranked lower (104) than Chile (95) on the IPU study on female representation in parliament.¹⁴⁸ 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.¹⁴⁹ As of October 2012, however, this

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.¹⁵⁰ Notwithstanding these differences, both countries' female political representation lags behind that of other Latin American countries.¹⁵¹

In the years since the data above were collected, however, Uruguay, unlike Chile, has adopted gender quotas.¹⁵² 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.¹⁵³ 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.¹⁵⁴ Ballots that do not comply with the requirements are rejected by departmental election boards.¹⁵⁵ The quotas were largely supported by the public and responded to women's historically low levels of political representation in the country.¹⁵⁶

Empirical studies demonstrate that gender quotas can, if effectively designed and implemented, increase women's political representation.¹⁵⁷ 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.¹⁵⁸ 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).¹⁵⁹ Schwindt-Bayer's research emphasizes that quota systems in Latin American countries have yet to meaningfully decrease gender gaps.¹⁶⁰

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.

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.¹⁶¹ For example, oral contraceptives (the

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 (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.¹⁶² 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.¹⁶³

Further, contraceptive devices such as IUDs can be implanted by someone other than a physician in both countries.¹⁶⁴ 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.¹⁶⁵ Effective contraceptive use is critical to reducing dangerous, clandestine abortions.¹⁶⁶

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.¹⁶⁷

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.¹⁶⁸

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.¹⁶⁹ 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."¹⁷⁰ 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.¹⁷¹

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."¹⁷² 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.¹⁷³

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

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.

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."¹⁷⁴

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?¹⁷⁵

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.¹⁷⁶ For example, hard-fought transformations in marriage have elevated the rights of women and girls in the context of marriage.¹⁷⁷ Nevertheless, husbands continue to rule the inner sanctum of the home in many nations.¹⁷⁸

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.¹⁷⁹ 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.¹⁸⁰ 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.”¹⁸¹ 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.”¹⁸² In the context of reproductive health, participation in the electoral process and rulemaking matter as much, if not more, than mere political representation.

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; 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>.