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BIZARRE LOVE TRIANGLE: THE TRILATERAL RESPONSES TO TAME THE UNITED STATES-MEXICO BORDER

James M. Cooper*

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I. THE VIEW FROM THE AMBASSADOR'S OFFICE

"Look at that; they are burning banks," complained the man wearing cowboy boots as he watched CNN on a television set in his office at the United States Embassy in Mexico City. Black smoke billowed out of a branch of Banco Santander in Mar del Plata, Argentina. "Why does everyone hate globalization so much?" asked Antonio Garza, Jr., United States Ambassador to Mexico in the administration of U.S. President George W. Bush, formerly Texas Secretary of State under then Governor George W. Bush.[1] The news coverage showed Argentine President Nestor Kirschner, Venezuelan President Hugo Chávez, and football legend Diego Maradona

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1. *Antonio O. Garza, Jr.*, COUNCIL AM. AMBASSADORS, https://www.americanambassadors.org/members/antonio-o-garza-jr (last visited Mar. 14, 2022).

cheering on crowds—estimated at 25,000 people—to protest *yanqui* imperialism in the form of the Free Trade Agreement of the Americas treaty under negotiation.[2] As Nikolas Kozloff wrote:

> Located 230 miles south of Buenos Aires, Mar del Plata is nominally a peaceful Argentine beach resort. But during the Fourth Summit of the Americas in November 2005, the city was burned into a riot zone as activists protested the presence of President George Bush. The protests included *piqueteros*, anarchists, and community and labor groups. At one point, demonstrators hurled a Molotov cocktail and set a bank on fire. In an effort to get the situation under control, police fired tear gas.[3]

The protests in Mar del Plata were part of the many anti-globalization demonstrations that began more than a decade before. In the south of Mexico on January 1, 1994, the first day the North American Free Trade Agreement (NAFTA)[4] went into force, the Zapatista rebellion took root.[5] Later, there were protests against the World Trade Organization (WTO) in Seattle,[6] against the International Monetary Fund (IMF) and the World Bank in Washington D.C.,[7] anti-Free Trade Agreement of the Americas (FTAA)

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2. MICHAEL REID, FORGOTTEN CONTINENT: THE BATTLE FOR LATIN AMERICA'S SOUL 309 (2006).

3. NIKOLAS KOZLOFF, HUGO CHÁVEZ: OIL, POLITICS, AND THE CHALLENGE TO THE UNITED STATES 73 (2006).

4. North American Free Trade Agreement, Can.-Mex.-U.S., Dec. 17, 1992, 32 I.L.M. 289 [hereinafter NAFTA]. Congress approved NAFTA by means of the North American Free Trade Agreement Implementation Act, Pub. L. No. 103-182, 107 Stat. 2057 (codified at 19 U.S.C. § 3311 (2006)). NAFTA went into force on January 1, 1994. Exec. Order No. 12,889, 58 Fed. Reg. 69, 681 (Dec. 27, 1993).

5. Because the EZLN [Ejército Zapatista de Liberación Nacional] uprising directly pointed at the exclusionary and exploitative practices of the Mexican socioeconomic and political systems, it contributed to the weakening of the one-party regime during the latter's years. It also contributed to the weakening of the prosperous façade that the regime had tried to create by implementing economic reforms that allowed the country to become a member of the Organisation of Economic Cooperation and Development (OECD) and of the North American Free Trade Agreement (NAFTA).

MARÍA INCLÁN, THE ZAPATISTA MOVEMENT AND MEXICO'S DEMOCRATIC TRANSITION: MOBILIZATION, SUCCESS, AND SURVIVAL 3 (2018).

6. "By the time tens of thousands of people spilled into streets of Seattle to protest against a meeting of WTO officials and member-state representatives, the organization had evolved into a powerful, secretive, and corporate-influenced overseer of government's mandate to protect citizens and the environment from corporate harms." JOEL BAKAN, THE CORPORATION: THE PATHOLOGICAL PURSUIT OF PROFIT AND POWER 22-23 (2004).

7. "Virtually every major meeting of the International Monetary Fund, the World Bank, and the World Trade Organization is now the scene of conflict and turmoil." JOSEPH E. STIGLITZ, GLOBALIZATION AND ITS DISCONTENTS 3 (2002).

protests in Québec City,[8] the anti-Group of Seven protests in Genoa,[9] and finally, the chaos in Mar del Plata.[10]

With each successive trade agreement,[11] institutional annual meeting, and global trade negotiation round that aimed to create the institutional underpinnings of the global economy, violence erupted in the streets outside the meeting forum.[12] Nobel laureate Joseph Stiglitz wrote:

> International bureaucrats—the faceless symbols of the world economic order—are under attack everywhere. Formerly uneventful meetings of obscure technocrats discussing mundane subjects such as concessional loans and trade quotas have now become the scene of raging street battles and huge demonstrations.[13]

The events unfolding on television on that day in November 2005 signaled the beginning of the end of the Washington Consensus,[14] the policy promoted by the Bretton Woods institutions (IMF and World Bank) and the United States Department of Treasury. These prescriptions encompassed,

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8. The FTAA called for "the establishment of a hemispheric free trade area that would cover the whole continent and that would be, from an economic and political, perspective, the most significant express of Pan-Americanism." MARÍA BELÉN OLMOS GIUPPONI, RETHINKING FREE TRADE, ECONOMIC INTEGRATION AND HUMAN RIGHTS IN THE AMERICA 21 (2017).

9. Alessandra Stanley & David E. Sanger, *Italian Protester Is Killed by Police at Genoa Meeting*, N.Y. TIMES, July 21, 2001, at A16. *See generally* James Gerstenzang, *Summit Opens Amid Deadly Street Protests*, L.A. TIMES, July 21, 2001; Richard Boudreaux & Marjorie Miller, *Genoa on Minds of Protestors*, L.A. TIMES (July 18, 2001, 12:00 AM), https://www.latimes.com/archives/la-xpm-2001-jul-18-mn-23619-story.html; Robert Fife, *This One Could be the Last*, NAT'L POST, July 21, 2001, at A1; Aaron Bernstein et al., *Time to Regroup*, BUS. WK., Aug. 6, 201, at 26; *see also* Michael Elliott, *Death in Genoa*, TIME (July 30, 2001), http://content.time.com/time/subscriber/article/0,33009,1000417,00.html.

10. KOZLOFF, *supra* note 3, at 73.

11. In addition to focusing on the FTAA, the U.S. Government pursued a parallel strategy of concluding other trade agreements to benefit U.S. exporters and consumers. *See* James Cooper, *Spirits in the Material World: A Post-Modern Approach to United States Trade Policy*, 14 AM. U. INT'L L. REV. 957 (1999). Pacts like the U.S.-Chile Free Trade Agreement and CAFTA have gone into force and the U.S.-Peru and U.S.-Colombia Free Trade Agreements have been successfully negotiated.

12. A study by the World Development Movement highlighted that between 1999 and 2000, protests against IMF-dictated policies occurred in 13 developing countries and included at least 15 organized strikes, 29 demonstrations, and 16 riots or other violent incidents. *See* Jessica Woodroffe & Mark Ellis-Jones, *States of Unrest: Resistance to IMF Policies in Poor Countries* (Sept. 28, 2000), http://www.hartford-hwp.com/archives/27d/053.html; *see also* Carol M. Rose, *Privatization—The Road to Democracy?*, 50 ST. LOUIS U. L. J. 691 (2006).

13. STIGLITZ, supra note 7, at 3.

14. The Washington Consensus as I originally formulated it was not written as a policy prescription for development: it was a list of policies that I claimed were widely held in Washington to be widely desirable in Latin America as of the date the list was compiled, namely the second half of 1989.

See John Williamson, The Washington Consensus as Policy Prescription for Development, Institute of International Economics, Lecture in series "Practitioners of Development" 1 (Jan. 13, 2004).

"three main elements: macroeconomic stability (smaller fiscal deficits), a diminished governmental role in the economy (privatization and deregulation), and greater openness to the outside (free trade and an 'open' approach to foreign capital)."[15] The Washington Consensus was to be achieved through fiscal discipline: the reordering public expenditure priorities, liberalizing inward foreign direct investment, liberalizing interest rates, and liberalizing financial services. It can further be achieved through tax reform, a competitive exchange rate, deregulation, privatization, and trade liberalization. These neoliberal policies had been implemented in the United Kingdom during the Thatcher government and in the United States during the Reagan administration.[16] They were also imposed on the developing world as a form of "conditionality"[17] once the Cold War was over in exchange for loans and grants.

As part of this global parade of mass protests and demonstrations against globalization, the battle in Mar del Plata was also a battle for Latin America's soul: Would there be more extraction,[18] plunder,[19] and suffering or something different? The neoliberal model of accumulation,[20] economic growth, trickle-down benefits, and extraction (of minerals, agricultural products, and raw materials, profits, license fees, royalties) was now

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15. MARIO ESTEBAN CARRANZA, SOUTH AMERICAN FREE TRADE AREA OR FREE TRADE AREA OF THE AMERICAS? OPEN REGIONALISM AND THE FUTURE OF REGIONAL ECONOMIC INTEGRATION IN SOUTH AMERICA 49 (2000).

16. In 1979, a Conservative government was elected in the UK under the leadership of Margaret Thatcher that abandoned its party's postwar commitment to Keynesianism, a mixed-ownership economy and fairly generous welfare state in favour of monetarism, privatization, low taxes for wealthier people and a reduced social state. The following year the election of Ronald Reagan as President of the USA ushered in a tougher version of the same policies.

COLIN CROUCH, THE STRANGE NON-DEATH OF NEOLIBERALISM 16 (2011).

17. WORLD BANK, REVIEW OF WORLD BANK CONDITIONALITY (2005).

18. *See* ALEXANDER DUNLOP & JOSTEIN JAKOBSEN, THE VIOLENT TECHNOLOGIES OF EXTRACTION: POLITICAL ECOLOGY, CRITICAL AGRARIAN STUDIES AND THE CAPITALIST WORLDEATER 1 (2020) ("Total extractivism denotes how the techno-capitalist world system harbors a rapacious appetite of all life—total consumption of human and non-human resources—that destructively reconfigures the earth.").

19. Plunder is defined as a noun meaning "pillaging" and "something taken by force, theft, or fraud: loot." MERRIAM-WEBSTER DICTIONARY, https://www.merriam-webster.com/dictionary/plunder (last visited Jan. 11, 2022; *see also* UGO MATTEI & LAURA NADER, PLUNDER: WHEN THE RULE OF LAW IS ILLEGAL 11 (2008) ("An overly broad definition of plunder would be the inequitable distribution of resources by the strong at the expense of the weak.").

20. DAVID HARVEY, THE NEW IMPERIALISM (2003) (exploring "accumulation by dispossession"); *see also* Victor D. Lippit, Social Structure of Accumulation Theory, Paper prepared for the Conference on Growth and Crisis: Social Structure of Accumulation Theory and Analysis, National University of Ireland, Galway (Nov. 2-4, 2006), https://economics.ucr.edu/wp-content/uploads/2019/11/VictorLippit10-20-06.pdf.

auditioning for the role of Hemispheric norm. But those who were demonstrating on the streets were not interested in the Washington Consensus, nor in what the United States' free market friendly and non-state interventionist approach proposed.[21] U.S. President George W. Bush's visit to the Fourth Summit of the Americas slowed down the globalization process and marked a diplomatic defeat for the reformist, neoliberal policies of Hemispheric integration, harmonization, and liberalization. [22] What played out of the streets of Mar del Plata was also an intra-Latin American struggle over development models.

President Hugo Chávez of Venezuela had been gunning for the FTAA and U.S. influence in the Americas for years.[23] He wanted his Bolivarian alternative—the Alianza Bolivariana para los Pueblos de Nuestra América[24] (ALBA)—to partner with Bolivia, Cuba, and eventually Ecuador, as well as with smaller Caribbean island countries—to become the region's trade organization of choice. Even if Latin American and Caribbean states did not join ALBA, Chávez could, at a minimum, slow the continued U.S.-led efforts to create an FTAA modeled after NAFTA.[25] After all, both the multilateral and bilateral free trade agreements that the United States entered into after NAFTA, such as the Dominican Republic-Central America-United States Free Trade Agreement (CAFTA),[26] the United States-Chile Free Trade

21. "Clearly, in Latin America liberalization and reform have not yielded the growth results everyone had hoped for, while they have been associated with—and, to some degree, cause—a sharp increase in inequality." Paul Krugman, *Inequality and Redistribution*, 31, 39 *in* THE WASHINGTON CONSENSUS RECONSIDERED: TOWARDS A NEW GLOBAL GOVERNANCE (Narcis Serra & Joseph E. Stiglitz eds., 2008).

22. "If there is a consensus today about what strategies are most likely to promote the development of the poorest countries in the world, it is this: there is no consensus except that the Washington Consensus did not provide the answer." Joseph E. Stiglitz, *Is There a Post-Washington Consensus Consensus? in* THE WASHINGTON CONSENSUS RECONSIDERED: TOWARDS A NEW GLOBAL GOVERNANCE 41 (Narcis Serra & Joseph E. Stiglitz eds., 2008).

23. *See* Joel D. Hirst, *A Guide to ALBA*, AMERICAS Q., https://www.americasquarterly.org/a-guide-to-alba/ (last visited Feb. 10, 2022).

24. *What is the ALBA?*, ALBA INFO (Mar. 20, 2019), https://albainfo.org/what-is-the-alba/.

25. James M. Cooper, *The North American Free Trade Agreement and Its Legacy on the Resolution of Intellectual Property Disputes*, 43 CAL. W. INT'L L. J. 157, 161-62 (2012) [hereinafter *NAFTA Legacy*]; Cooper, *supra* note 11, at 964. *Cf.* KEVIN P. GALLAGHER ET AL. BOSTON UNIVERSITY, THE FUTURE OF NORTH AMERICAN TRADE POLICY: LESSONS FROM NAFTA 5 (2009) ("NAFTA and the other trade agreements based on the NAFTA template need deep reform").

26. Dominican Republic-Central America-United States Free Trade Agreement, Central America-Dom. Rep.-U.S., Aug. 5, 2004, 43 I.L.M. 514 [hereinafter CAFTA] (implemented by the Dominican Republic-Central America-United States Free Trade Agreement Implementation Act, Pub. L. No. 109-53, 119 Stat. 462 (2005)). Robert Lutz has explained:

> The Dominican Republic-Central America Free Trade Agreement was born of controversy. From questions about the feasibility of teaming a huge developed country economy with a region of small, uneven developing country economies to those raising

Agreement,[27] and the United States-Peru Trade Promotion Agreement, were very similar to NAFTA.[28] Since Ronald Reagan, there has been a hope for a Free Trade Agreement of the Americas, a trade area that encompasses the entire Western Hemisphere with every country, save Cuba, a member.[29] On the morning of November 4, 2005, however, it was clear that no Hemispheric-wide trade agreement was in the offing—at least not a U.S.-led version. This accounts for United States Ambassador Tony Garza's displeasure as he continued to share his dismay over the mayhem on the street in Mar del Plata.

The United States eventually retreated to the North American marketplace,[30] as evidenced by the United States-Mexico-Canada Agreement (USMCA),[31] the successor agreement to the North American Free Trade Agreement. This article explores the role that multilateral (specifically among Canada, Mexico, and the United States) and bilateral (specifically between the United States and Mexico) agreements have played along the border and concludes that neither agreement make the border safer, nor make its working people more prosperous. The border remains a contested Wild West of sorts. Part I of this article explores the Washington Consensus and

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> the importance of integrating labor and environmental standards into the agreement, the debate continues about how to structure world trade to benefit all strata of society and improve the political stability and economic conditions of poor countries.

Robert E. Lutz, *CAFTA and Commercial Law Reform in the Americas: An Introduction*, 12 SW. J.L. TRADE AM. 177, 177 (2006).

27. United States-Chile Free Trade Agreement, Chile-U.S., Sept. 3, 2003, 114 Stat. 1526.

28. United States-Peru Free Trade Promotion Agreement, Peru-U.S., Apr. 12, 2006, 121 Stat. 1455 (implemented by United States-Peru Trade Promotion Agreement Implementation Act S. Rept. 110-249 (2007)).

29. Bryan Riley, *Revisiting NAFTA: Ronald Reagan on Free Trade in North America*, HERITAGE FOUND. (July 20, 2017), https://www.heritage.org/trade/commentary/revisiting-nafta-ronald-reagan-free-trade-north-america (quoting President Reagan, "Our goal . . . must be a day when the free flow of trade, from the tip of Tierra del Fuego to the Arctic Circle, unites the people of the Western Hemisphere in a bond of mutually beneficial exchange.").

30. The decoupling of the U.S. economy from that of China resulted in the reshoring of jobs back to North America during the Trade War of 2018 and 2019:

> Separating the effects of the various considerations supporting the reduction or elimination of Chinese supply chains may be difficult and will not be the same among all business sectors and individual enterprises, but it seems to me that the changes they are bringing about are both cataclysmic and irreversible. In my view, the advent of the USMCA has made this supply chain revision less difficult and complex than it might otherwise have been.

DAVID A. GANTZ, NORTH AMERICA'S SHIFTING SUPPLY CHAINS: THE USMCA, COVID-19, AND THE U.S.-CHINA TRADE WAR 25 (2020).

31. United States-Mexico-Canada Agreement Preamble, Nov. 30, 2018 [hereinafter USMCA], https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement.

the culture of accumulation, plunder, and extractivism[32] that it has engendered. Part II delves into various economic integration pacts that are part of the Washington Consensus starting with the NAFTA, then the Security and Prosperity Partnership (SPP), and finally, the United States-Mexico-Canada Agreement.

Robert Lutz has reminded us that "harmonization of legal rules, procedure and even legal culture is a general goal, and inevitably a by-product of such institutions as the North American Free Trade Agreement."[33] This convergence lays the framework for the Border Industrial Complex (BIC) and the complex, often for-profit relations of private, non-state actors as they navigate among, and at times act on behalf of, sovereign states.[34] Part III explores how the trilateral mechanisms that partner countries used to make the U.S.-Mexico border less contested have not made the border any safer.[35] These trade regimes and regional arrangements have, however, increased corporate welfare.[36]

In short, the policies associated with NAFTA's free market, the neoliberal economics, and the Washington Consensus favor multinational corporations,[37] for-profit, non-state actors who lower labor and environmental standards, facilitate foreign direct investment and repatriate corporate profits through the elimination of capital flow controls. Together, adherent countries harmonize government procurement practices, standardize customs procedures, reduce security paperwork, and protect property rights—all with the goal of increasing profits. It is no surprise that the resulting democracy deficit,[38] challenge to national sovereignty, and lack of regard for Indigenous Peoples, labor rights, and environmental concerns,

32. *See* MARISTELLA SVAMPA, NEO-EXTRACTIVISM IN LATIN AMERICA (2019); *see also* EDUARDO GUDYNAS, EXTRACTIVISMS: POLITICS, ECONOMY AND ECOLOGY at ix (2021) (exploring the negative local impacts including ecological and health degradation and violence, and the attendant spillover consequences that redefines democracy and justice).

33. Robert E. Lutz, *Law, Procedure and Culture in Mexico under the NAFTA: The Perspective of a NAFTA Panelist*, 3 SW. J.L. TRADE AM. 391, 392 (1996).

34. *See* James M. Cooper, *Same As It Ever Was: The Tijuana River Sewage Crisis, Non-State Actors, and the State*, 5 CARDOZO INT'L & COMP. L. REV. 175 (2022).

35. Measuring illegal entries into the United States is highly inaccurate by the U.S. government. NAT'L RSCH. COUNCIL, OPTIONS FOR ESTIMATING ILLEGAL ENTRIES AT THE U.S.–MEXICO BORDER 1-2 (Alicia Carriquiry & Malay Majmundar, eds. 2013).

36. Doug Bandow, *Corporate Welfare Lives On and On*, CATO INST. (Aug. 29, 2018), https://www.cato.org/commentary/corporate-welfare-lives.

37. MICHAEL J. TREBILCOCK, NAVIGATING THE FREE TRADE-FAIR TRADE FAULT-LINES 4 (2021).

38. *See* SARAH JOSEPH, BLAME IT ON THE WTO? A HUMAN RIGHTS CRITIQUE 56 (2011).

have angered the working class in Latin America and other developed countries.[39]

A similar process of marginalization, non-representation, and frustration with the free trade negotiating process has also come to typify protests against globalization in developed and developing countries alike.[40] The trade regimes, as evidenced by the results in the aftermath of the trade agreements that the United States has signed with its Hemispheric partners, have not lived up to their promises.[41] When U.S. President Bill Clinton signed NAFTA, he claimed the deal "promote[d] more growth, more equality, better preservation of the environment and a greater possibility of world peace."[42] Neither jobs nor prosperity through the trickle-down benefits of this regime of globalization have resulted.[43] For the AFL-CIO, "the enduring result of NAFTA has been just the opposite: stagnant wages, increasing inequality, and weakened social protections in all three countries."[44]

For Saskia Sassen, this is "a regime associated with increased levels of concentrated wealth, poverty, and inequality worldwide."[45] Pollution and other environmental degradation also continued as the United States

39. *See* Adam Warner, *A Brief History of The Anti-Globalization Movement*, 12 U. MIAMI INT'L & COMP. L. Rev. 237, 238 (2005). *See also* Nick Carbone, *Fight for Your Right: Antiglobalization*, TIME (Oct. 12, 2011), http://content.time.com/time/specials/packages/article/0,28804,2096654_2096653_2096684,00.html; *Environment: A Brief History of the Anti-globalization Movement*, DEUTSCHE WELLE (June 7, 2017), https://www.dw.com/en/a-brief-history-of-the-anti-globalization-movement/g-39573255.

40. "If the wave of rebellions and social movements spreading unevenly across the South American continent draws on long-standing insurrectionary traditions there, it can also be directly attributed to the economic dislocations created by the Washington Consensus." TARIQ ALI, PIRATES OF THE CARIBBEAN: AXIS OF HOPE 32 (2006).

41. "In the countries that followed Washington Consensus policies, economic growth was limited at best, and disproportionately benefited those at the top." Narcis Serra et al., *Introduction: From the Washington Consensus Towards a New Global Governance, in* THE WASHINGTON CONSENSUS RECONSIDERED: TOWARDS A NEW GLOBAL GOVERNANCE 2 (Narcis Serra & Joseph E. Stiglitz eds., 2008).

42. Conor Lynch, *America is About to Make a Horrible Mistake All Over Again*, SALON (May 8, 2015, 12:00 PM), https://www.salon.com/2015/05/08/america_is_about_to_make_a_horrible_mistake_all_over_again/#:~:text=On%20the%20signing%20of%20NAFTA%2C%20President%20Clinton%20said,environment%20and%20a%20greater%20possibility%20of%20world%20peace.

43. *See* Gordon H. Hanson, *Can Trade Work for Workers? The Right Way to Redress Harms and Redistribute Gains*, FOREIGN AFFS. (May/June 2021), https://www.foreignaffairs.com/articles/united-states/2021-04-20/can-trade-work-workers.

44. Am. Fed'n of Labor and Cong. of Indus. Org., *NAFTA at 20*, AFL-CIO (Mar. 27, 2014), https://aflcio.org/reports/nafta-20.

45. SASKIA SASSEN, GLOBALIZATION AND ITS DISCONTENTS xxviii (1998).

outsourced its manufacturing work[46] and dumpsites[47] abroad. There has been an attendant "Disneyfication"[48] of sorts in which Indigenous cultures die out to allow a global brand to extract rents, license fees, and other royalties.[49] For Indigenous farmers in Chiapas and other parts of Mexico, NAFTA was "a death sentence" according to Zapatista revolutionary leader *Subcomandante* Marcos.[50]

However, that was not what the purveyors of the Washington Consensus intended. Instead, free trade was pitched as a panacea, a cure-all for underdevelopment and an engine for economic growth for all through trickle-down benefits.[51] With the trilateral attempts, all boats would rise with better jobs for workers, efficiencies enjoyed from comparative advantage, and bigger profits for corporations and their shareholders.[52] It is no surprise that free trade at the U.S.-Mexico border was pursued on both sides with vigor. That enthusiasm had started before 1989 when the Canada-United States Free Trade Agreement went into force.[53]

NAFTA was created to integrate and unite all of North America, building on the U.S.-Canada FTA to provide for harmonization, trade liberalization, and institutional reforms.[54] It was not going to be easy to achieve: "On the whole, NAFTA can be qualified as an asymmetric

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46. JOHN R. MACARTHUR, THE SELLING OF "FREE TRADE": NAFTA, WASHINGTON, AND THE SUBVERSION OF AMERICAN DEMOCRACY ch. 3 (2000).

47. *Cf.* KEVIN P. GALLAGHER, FREE TRADE AND THE ENVIRONMENT: MEXICO, NAFTA, AND BEYOND 25 (2004)

48. *See A Reader's Guide to Disneyfication*, NEW INTERNATIONALIST (Dec. 5, 1998), https://newint.org/features/1998/12/05/guide/.

49. Don Wallace, *"Moana" Is Turning Culture into Cash-Here's Why it Matters for Hawai'i*, HONOLULU MAG. (Dec. 2, 2016), https://www.honolulumagazine.com/moana-is-turning-culture-into-cash-heres-why-it-matters-for-hawaii/.

50. Medea Benjamin, *Interview: Subcomandante Marcos*, *in* FIRST WORLD: HA! HA! HA! THE ZAPATISTA CHALLENGE 57, 67 (Elaine Katzenberger ed., 1995).

51. Brian C. Albrecht, *Freer Trade and Economic Growth: Evidence of the Relationship*, AM. INST. FOR ECON. RSCH. (July 3, 2019); *The Benefits of Free Trade: Addressing Key Myths*, MERCATUS CENTER, GEORGE MASON UNI., https://www.mercatus.org/system/files/Benefits-of-Free-Trade_EP_110513.pdf (last visited Jan. 5, 2022); Denise Froning, *The Benefits of Free Trade: A Guide for Policymakers*, HERITAGE FOUND. (Aug. 25, 2000), https://www.heritage.org/trade/report/the-benefits-free-trade-guide-policymakers.

52. "Businesses—multinational corporations (MNCs), banks, and small and medium-sized firms—have been the main agents for economic integration." ROBERT A. PASTOR, THE NORTH AMERICAN IDEA: A VISION OF A CONTINENTAL FUTURE 97 (2011).

53. Canada-United States Free Trade Agreement, Can.-U.S., Dec. 22, 1987- Jan. 2, 1988, 27 I.L.M. 281 [hereinafter Canada-U.S. FTA]; United States-Canada Free Trade Agreement Implementation Act of 1988, Pub. L. No. 100-449 (codified at 19 U.S.C § 2112 (1988)).

54. "The vision of a North American Community goes beyond the rhetoric of good relations that every leader deploys. Rather it means consigning a widening circle of domestic issues to trilateral consultation, which over time, could lead to coordinate, and perhaps even unified policies." PASTOR, *supra* note 52, at 147.

agreement since it comprises two developed member states and a 'developing nation' . . . ."[55] This was particularly true with a developing country that is Roman Catholic, Spanish-speaking, of the civil law tradition, and has weak institutions and corrupt officials which brings the administration of justice into disrepute.[56] Under the U.S.-Canada FTA, Canada was easy to integrate with because there is rule of law, a common law legal system and English speaking (but for Quebec) population. Mexico, as a party to a trade pact, was a different story.[57]

Trilateralism[58] was stronger than two sets of bilateral relationships for each of the countries. The three countries were aligning their economies to better scale for global competition. Much of the world was hiving off into regional trading pacts as the negotiations to end the Uruguay Round of General Agreement on Tariffs and Trade negotiations were stalling, imperiling the global trading regime. "The original rationale for the North American Free Trade Agreement was to further regional integration and to go beyond what was attainable multilaterally."[59]

The European Community was transforming into the European Union as fifteen countries became one, only to expand to twenty-eight countries years later (and now twenty-seven due to Brexit).[60] The Mercado Común del Sur (MERCOSUR),[61] the Southern Cone Customs Union, features even more harmonization beyond the reduction of tariffs. The partner countries

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55. OLMOS GIUPPONI, *supra* note 8, at 125.

> During the review period, almost all Mexican corruption cases (especially cases involving governors, businessmen, functionaries and union leaders) have gone unpunished. Of the numerous cases of corruption by governors, members of Congress, judges, lawyers, functionaries and corporate executives, only a handful have gone to trial and most of those tried have been released. Although increased levels of political democratization and transparency have contributed to the mass media's autonomy and an increasing number of civic organizations that scrutinize politicians—resulting in increasing numbers of denunciations against corrupt or inefficient politicians—the fact that most go unpunished, merely increases public frustration, demeaning both democracy and the rule of law.

Mexico Country Report 2020, BERTELSMANN TRANSPARENCY INDEX, https://bti-project.org/en/reports/country-report/MEX (last visited Jan. 11, 2022).

57. James M. Cooper, *The Complicated Relationship: A Snapshot of the U.S.-Mexico Border*, Konrad Adenauer Foundation Washington Office (2010), *reprinted in* Konrad Adenauer Stiftung, INTERNATIONAL REPORTS, at 37, 41, http://www.kas.de/wf/en/33.20667/.

58. Richard H. Ullman, *Trilateralism: "Partnership" for What?,* FOREIGN AFFS. (Oct. 1976), https://www.foreignaffairs.com/articles/japan/1976-10-01/trilateralism-partnership-what.

59. Luis de la Calle Pardo, *NAFTA Looking Forward*, *in* CANADA AND MEXICO'S UNFINISHED AGENDA 111, 111 (Alex Bugailiskis & Andrés Rozental eds., 2012).

60. European Commission, The European Union: What it is and What it Does, https://op.europa.eu/webpub/com/eu-what-it-is/en/ (2021).

61. *See, e.g.*, Treaty Establishing a Common Market Between the Argentine Republic, the Federal Republic of Brazil, the Republic of Paraguay and the Eastern Republic of Uruguay, Mar. 26, 1991, 30 I.L.M. 1041.

have harmonized their respective customs policies to present a common front to countries outside their pact.[62] ASEAN countries were also discussing plans for regional trade deals to better coordinate their economies. The Asia-Pacific Economic Cooperation group was also discussing more harmonization as these regional trading blocs proliferated.

> Competitiveness in a global context is the common driver behind forms and rationales of regionalisation, yet it is in the conclusions drawn for responding action that cause implementations to vary between each example, as well as between intra-national, international and EU-defined cases. There is thus not just one recognisable from of 'new regionalism,' but there are several. Its very nature is its diverse, almost post-modern, character, reflecting varying experiences with, and strategic responses to, a globalising economy.[63]

The North American Free Trade Agreement brought the three countries together to create the foundational international trade architecture—structures that undergird towards a globalization economy at that regional level. Trilateralism, a form of multilateralism restricted to three parties, has been only one of many strategies pursued by states in their international relations. As Atsushi Tago explained, "Multilateralism requires states to follow international norms and pay more respect to international institutions; this is contrasted with unilateralism, where a single state can influence how international relations can be conducted."[64] But with some relationships and issues, bilateralism may be the preferred method of making international relations and the rules in the relationship between states.[65] Indeed, the United States is not the only country to follow this pragmatism in its trade policy.[66] Yet, the United States too has long pursued such a multipronged approach to its international trade policy.[67]

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62. Anne O. Krueger, Free Trade Agreements Versus Customs Unions (Nat'l Bureau of Econ. Research, Working Paper No. 5084), https://www.nber.org/papers/w5084.

63. TASSILO HERRSCHEL, BORDERS IN POST-SOCIALIST EUROPE: TERRITORY, SCALE, AND SOCIETY 60 (2011).

64. Atsushi Tago, *Multilateralism, Bilateralism, and Unilateralism in Foreign Policy*, OXFORD RES. ENCYCLOPEDIAS (2017), https://oxfordre.com/politics/view/10.1093/acrefore/9780190228637.001.0001/acrefore-9780190228637-e-449.

65. JAMES M. ACTON ET AL., REIMAGING NUCLEAR ARMS CONTROL 48 (2021).

66. *See* Peter C.Y. Chow, Dep't of Econs., City Coll. & Graduate Ctr., City Univ. of N.Y., Bilateralism vs. Trilateralism in East Asian Economic Integration: Krugman-Baldwin's Hub-Spoke Thesis Revisited (2009), https://aacs.ccny.cuny.edu/2009conference/Peter_Chow.pdf.

67. *See* Cooper, *supra* note 11, at 978.

In the context of NAFTA, it had to be trilateral because there are only three sovereign States on the North American continent. The pact was designed to expand the supply chain to enjoy economies of scale. North America was a safe place in which to operate[68] and was competitive for the global marketplace in manufacturing.[69] Folding Canada with the U.S.-Mexico trade relationship was a triple win. The Parties could use the economic strength of the pact in other international institutions.[70]

II. TRILATERAL ATTEMPTS TO TAME THE UNITED STATES-MEXICO BORDER

Proximity to the U.S. marketplace has long been important to the profitability of legitimate businesses.[71] For over a century and a half, to foment trade, the Mexican government created free zones—tax-free and duty-free environments—along the U.S.-Mexico border. In the mid-1800s, the Mexican government officially recognized the border region as a special duty-free area.[72] By 1965, the Mexican government initiated the Border Industrial Complex by providing tax and other incentives to factories at the north of Mexico.[73] By the 1980s, many of these maquiladoras (factories) were owned by and did the work of major Korean, Japanese, and Taiwanese companies; these "foreign-owned plants that use cheap Mexican labor to assemble imported materials then send the finished product back to countries

68. "The North American region has enjoyed peace for many decades and likely will continue to do so for years to come." Enrique Berruga-Filoy, *Making the Case for Multilateral Co-operation Between Canada and Mexico, in* CANADA AMONG NATIONS 2011-2012: CANADA AND MEXICO'S UNFINISHED AGENDA 235, 235 (Alex Bugailiskis & Andrés Rozental, eds., 2012).

69. "We need to think carefully about North America in a challenging neighborhood of the globe. We need to reinforce the role NAFTA can play in making our businesses more competitive." John M. Weekes, *Reinforcing North American Co-operation through NAFTA, in* CANADA AMONG NATIONS 2011-2012: CANADA AND MEXICO'S UNFINISHED AGENDA 124, 127 (Alex Bugailiskis & Andrés Rozental, eds., 2012).

70. "Eventually, without any threat to individual sovereignty, it is easy to envision a 'North American stance' at future meetings of COP (Conference of Partners on Climate Change)." Joseph M. Dukert, *Energy*: *The Continental Bridge, in* CANADA AMONG NATIONS 2011-2012: CANADA AND MEXICO'S UNFINISHED AGENDA 160, 171 (Alex Bugailiskis & Andrés Rozental eds., 2012).

71. "The strong presence of manufacturing on the border indicates that the proximity of firms to a major market like the United States must also play a key role [in the geographic concentration of industry]." JOAN B. ANDERSON & JAMES GERBER, FIFTY YEARS OF CHANGE ON THE U.S.-MEXICO BORDER: GROWTH, DEVELOPMENT, AND QUALITY OF LIFE 94 (2008).

72. PAUL GANSTER & DAVID E. LOREY, THE U.S.-MEXICAN BORDER INTO THE TWENTY-FIRST CENTURY 32-33 (2d ed., 2008).

73. Lawrence Douglas & Taylor Hansen, *The Origins of the Maquila Industry in Mexico*, 53 COMERCIO EXTERIOR 1, 9 (2003); *see also* Anna-Stina Ericson, *An Analysis of Mexico's Border Industrialization Program*, 93 MONTHLY LAB. REV. 33, 34 (1970).

such as the United States, paying tax only on value added by the cheap labor."[74]

After the implementation of NAFTA, U.S. and Canadian companies continued to enjoy the benefits from importing and exporting products through the maquiladora system in Mexico, such as the ability to avoid paying value-added taxes, avoid some non-tariff restrictions and temporary importation (duty-free).[75] NAFTA also provided extra duty drawbacks for importing products that contained components from other NAFTA partner countries.[76] However, Mexico went through a series of tax changes in January 2014, which posed challenges to those who benefitted from maquiladoras' tax breaks.[77] To placate factory owners, Mexican President Enrique Peña Nieto granted other temporary and permanent tax benefits in early 2014.[78] Other incentives were provided at different times to corporations under the Security and Prosperity Partnership, the Mérida Initiative, and the United States-Mexico-Canada Agreement.

It is no wonder that major corporations have long done well in Mexico due to the country's long history of rewarding friends of the government with

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74. Debbie Nathan, *Work, Sex and Danger in Ciudad Juarez*, 33 NACLA REP. ON AMERICAS, Nov.-Dec. 1999, at 24.

75. Alejandro Garcia Seimandi, *Maquiladora and Pitex Programs: Trying to Improve the Obsolete*, 12 U.S.-MEX. L.J. 121, 126 (2004).

76. ROBERT E. SCOTT ET AL., ECON. POL'Y INST., BRIEFING PAPER #173, REVISITING NAFTA: STILL NOT WORKING FOR NORTH AMERICA'S WORKERS 1, 9 (2006) ("Significant and growing shares of U.S. exports to Mexico are apparently parts and components that are assembled into final products that are then returned to the United States."); *see* NAFTA, *supra* note 4, art. 303.

77. *See* Leonie Barrie, *Mexico: Tax Law Poses Challenges to Maquilas*, JUST-STYLE.COM (Jan. 31, 2014), https://go.gale.com/ps/i.do?id=GALE%7CA357248133&sid=sitemap&v=2.1&it=r&p=AONE&s w=w&userGroupName=anon%7E23479809 (maquiladoras were then required to pay VAT on their imports under the Mexican tax reform); *see also New Mexican Law Poses Significant Challenges to Maquiladora Operations*, STRTRADE.COM (Jan. 30, 2014), http://www.strtrade.com/news-news-New-Mexican-Tax-Law-Significant-Challenges-Maquila-Operations.html (under the tax reform, "temporary imports were going to be subject to a 16 [%] VAT, which generally is fully creditable but only for one month after such VAT is paid," which typically results in the right to a tax refund); *See* Eugenio Grageda Nuñez, *Value Added Tax (VAT): Impacts In The Maquiladora Industry Began Jan. 1, 2015*, 5 NAT'L L. REV. 27 (2015).

78. Maquiladoras could apply a tax benefit that provides an additional deduction relating to tax-exempt employee benefits payments, taxpayers that complied with certain formalities were given a "two-year period to fulfill a requirement of a 30% foreign ownership machinery and equipment (M&E) used in the maquiladora operations," and reduced income tax rates in place from 2003 and 2013. *Mexico: Presidential Decree Published Providing Tax Benefits for Maquiladoras*, PWC (Jan. 17, 2014), http://www.pwc.com/gx/en/tax/newsletters/pricing-knowledge-network/tp-mexico-tax-incentives-maquiladoras.jhtml.

protections for their respective industries[79] such as removing barriers to trade so they could be free from competition from foreign corporations.[80] For years, Mexico had been a protectionist, nationalist economy, with huge tariffs on goods from foreign competitors.[81] Mexico only joined the General Agreements on Tariffs and Trade in 1986 as the Uruguay Round of negotiations commenced.[82]

Notwithstanding the resulting obligations to provide legal regimes for neoliberal trade, reduce barriers to trade, and allow foreign competition, Mexico has been described as a "captured state,"[83] meaning:

> [t]he Mexican state is confronted with very strong private interests in sectors such as telecommunications, banking, cement, and others, which the state is incapable of controlling. To a large extent, these companies or groups force the state to define regulatory conditions in their sectors so as to be favorable to their private interests rather than to the public at large.[84]

Hence, the regulatory institutions created to control these companies remain weak and unable to do their work or are even controlled by the powerful corporations.[85] This is known as "regulatory capture."[86] When it

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79. "In the mid-1980s, barriers to imports in Mexico and Central America were greater than anywhere else in the world, while those in South America were surpassed elsewhere only in Africa." REID, *supra* note 2, at 137.

80. *See* Andrew Bast, *Crony Capitalism in Emerging Markets*, NEWSWEEK (Aug. 16, 2010, 1:00 AM), http://www.newsweek.com/crony-capitalism-emerging-markets-71795; *see also* Eric Martin & Brendan Case, *Mexico's President Can't Shake Cronyism Doubts After Probe*, BLOOMBERG (Aug. 23, 2015, 3:51 PM), http://www.bloomberg.com/news/articles/2015-08-23/mexico-s-president-can-t-shake-cronyism-doubts-after-probe.

81. M. ANGELES VILLARREAL, CONG. RSCH. SERV., RL34733, NAFTA AND THE MEXICAN ECONOMY 2 (2010) ("From the 1930s through part of the 1980s, Mexico maintained a strong protectionist trade policy in an effort to be independent of any foreign power and as a means to industrialization.").

82. *Members and Observers*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm; *see also* General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.

83. *See* WORLD BANK MEXICO, DEMOCRATIC GOVERNANCE IN MEXICO: BEYOND STATE CAPTURE AND SOCIAL POLARIZATION 100-01 (2007).

84. BERTELSMANN STIFTUNG, BTI 2014 MEXICO COUNTRY REPORT 9 (2014), http://www.bti-project.de/uploads/tx_itao_download/BTI_2014_Mexico.pdf.

85. Regulation is needed to overcome and minimize the negative externalities that corporate activity produces because corporations cannot be expected to minimize their own negative externalities. It also stands to reason that to the extent that the negative externalities of corporate activity are global in nature, then the laws aimed at minimizing them need to be global in nature as well.

ALICE DE JONGE, TRANSNATIONAL CORPORATIONS AND INTERNATIONAL LAW: ACCOUNTABILITY IN THE GLOBAL BUSINESS ENVIRONMENT 27 (2011).

86. George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. MGMT. SCI. 3 (1971).

scales, there are big profits to be enjoyed. And when the corporations are transnational in nature, it is increasingly difficult for governments and international institutions to regulate them. Robert Lutz explained that "[t]he transnational corporation is neither subjected to the degree of the single state jurisdiction sufficient to control its activities, nor does its status in the international legal system make it easily susceptible to international law."[87]

Saskia Sassen described "the ascendance of this new legal regime that negotiates between national sovereignty and the transnational practices of corporate economic actors."[88] NAFTA was meant to usher in an era of free trade.[89] The Harvard-trained Mexican President, Carlos Salinas de Gortari, was determined:

> to challenge some of Mexico's age-old ideological hang-ups. He was somebody U.S. officials and foreign investors could talk to—in their own language. Shrugging off a century of troubled U.S.-Mexican relations—and recent economic fiascoes such as Mexico's 1982 nationalization of the banking industry—Wall Street firms had finally found a Mexican leader they could trust.[90]

Through NAFTA, legitimate trade could occur more fluidly through the United States' northern and southern borders, with reduced customs duties and paperwork kept at a minimum. At the same time, illicit goods would be interdicted.[91] Peter Andreas wrote:

> [By the mid-1990s] smugglers were increasingly hiding their cocaine shipments within the rising tide of commercial trucks, railcars, and passenger vehicles crossing the border. The boom in cross-border traffic encouraged by the North American Free Trade Agreement had the side effect of creating a much more challenging job for those border agents charged with the task of weeding out illegitimate flows from legitimate ones—a challenge that in turn provided the rationale

87. Robert E. Lutz, *The Export of Danger: A View from the Developed World*, 20 N.Y.U. J. OF INT'L L. & POL., 629, 633 (1988).

88. SASSEN, supra note 45, at xxvii.

89. MARK JICKLING, CONG. RSCH. SERV., RL32718, BARRIERS TO CORPORATE FRAUD: HOW THEY WORK, WHY THEY FAIL 32 (2004) (explaining that "'regulatory capture' may occur over the course of many years, as a regulatory agency receives less and less funding to perform the duties maintained by the law. As the regulatory body lost enforcement power, industry gains more control over the regulatory agenda").

90. ANDRES OPPENHEIMER, BORDERING ON CHAOS: MEXICO'S ROLLERCOASTER JOURNEY TOWARD PROSPERITY 8 (1996).

91. Indeed, criminality increases exponentially in border regions. "Corruption may be present wherever money is to be made from moving valuable people or things across borders." Richard Jones, *Checkpoint Security Gateways, Airports and the Architecture of Security*, *in* TECHNOLOGIES OF INSECURITY: THE SURVEILLANCE OF EVERYDAY LIFE 81-97 (Katja Franko Aas et al. eds., 2009).

> for a further infusion of enforcement resources at official ports of entry.[92]

Not surprisingly, freight forwarding, warehousing, and distribution networks at the U.S.-Mexico border all did well in this new neoliberal regime. Passing through U.S. Customs and Border Protection inspection and transporting the goods across the border became paramount, especially in a commercial world of just in time inventory management.[93]

The mechanisms to do this provided the legal underpinnings of the Border Industrial Complex.[94] The corporate contracting that was designed to fight the war on drugs affected this too, as we shall see when this Article next examines the Mérida Initiative. Companies like Boeing, Lockheed Martin, Raytheon, and Northrop Grumman all got U.S. government contracts to beef up security with high-technology tools.[95] By 2005, Boeing's Predator-B drone, developed for military use, was deployed at the border to interdict illegal shipments of narcotics attempting to cross the U.S.-Mexico border.[96]

A. The North American Free Trade Agreement

The North American Free Trade Agreement was, above all, designed to foment the growth of the economies of all three member countries. Unsurprisingly, NAFTA was a boon for many corporations, particularly large, multinational ones.[97] NAFTA provided the legal foundation for the creation of a fully integrated North American economy, allowing for free trade,[98] and reaping greater profits through comparative advantage.

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92. PETER ANDREAS, KILLER HIGH: A HISTORY OF WAR IN SIX DRUGS 237 (2020).

93. *See* Courtenay Stevens, *What is Just-In-Time (JIT) Inventory Management?*, BUS. ORG. (Apr. 23, 2020), https://www.business.org/finance/inventory-management/what-is-just-in-time-inventory-management/; *see generally* Leander Quiring, Multidisciplinary Design Optimization of NAFTA Supply Chains (2008) (M.A. thesis, University of Waterloo), https://uwspace.uwaterloo.ca/bitstream/handle/10012/3944/thesis.pdf?sequence=1.

94. *See* James M. Cooper, *The Rise of Private Actors at the United States-Mexico Border*, 33 WISC. INT'L L.J. 104 (2015).

95. *See The Top 10 Defense Contractors*, BLOOMBERG GOV'T (June 10, 2021), https://about.bgov.com/top-defense-contractors/.

96. *See* William Booth, *More Predator Drones Fly U.S.-Mexico Border*, WASH. POST (Dec. 21, 2011).

97. William Mauldin, *Pacific Trade Deal Likely to Have Narrow Reach*, WALL ST. J. (Mar. 15, 2015, 8:25 PM), https://www.wsj.com/articles/what-the-trans-pacific-partnership-wouldand-wouldntdo-1426441618 ("Sweeping trade deals of the past—with Canada and Mexico in 1993, for instance, or China in 2000—presented big upsides and big risks for a broad swath of U.S. companies").

98. *See* Allen Norrie, *William Twining, General Jurisprudence: Understanding Law from a Global Perspective*, 28 WINDSOR Y.B. ACCESS JUST. 233 (2010).

> American multinationals, with managerial and production techniques more advanced than their European and other competitors, both led and profited from the liberalization of international trade—while they also operated to transfer managerial skills and technology through the demonstration effect of their overseas operations.[99]

NAFTA was designed to eliminate economic boundaries between Mexico, Canada, and the United States. This was not a political agreement. The territorial integrity, political independence and overall sovereignty would remain. Nor would there be a combining of currencies, despite the populist concerns among right-wing media pundits.[100] Although this was just a trade deal, NAFTA was important for Mexico as it joined with the United States, long its adversary,[101] at times occupier and at other times partner, to form an economically integrated region. After the U.S. Congress ratified NAFTA, the late Mexican poet and essayist Octavio Paz commented:

> NAFTA will be important for Mexicans because it is a chance finally for us to be modern . . . .We have failed to be modern for centuries. We only started trying to the modern at the end of the eighteenth century, and our conscious model of modernity has tended to be the United States. This is the first time in the histories of our two nations that we are going to be in some way partners with each other.[102]

When the United States joined its economy with those of Canada and Mexico, it was to rival the European Union as a trade pact.[103] The results, at face value, have been good. Every day, an estimated $1.4 billion worth of goods cross the U.S.-Mexico border.[104] By 2012, NAFTA created an annual

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99. Daphné Josselin & William Wallace, *Non-state Actors in World Politics: A Framework, in* NON-STATE ACTORS IN WORLD POLITICS 6-7 (Daphné Josselin & William Wallace eds., 2001) (*citing* ROBERT GILPIN, U.S. POWER AND THE MULTINATIONAL CORPORATION: THE POLITICAL ECONOMY OF FOREIGN DIRECT INVESTMENT (1975); S. STRANGE, STATES AND MARKETS: AN INTRODUCTION TO INTERNATIONAL POLITICAL ECONOMY (1988)).

100. *See* Drake Bennett, *The Amero Conspiracy*, N.Y. TIMES (Nov. 25, 2007), https://www.nytimes.com/2007/11/25/world/americas/25iht-25Amero.8473833.html.

101. Robert Lutz explained that "the roots of enduring problems in the United States' relationship with Mexican can be traced in part to the legacy of legal relations emanating from this Treaty [the Treaty of Guadalupe Hidalgo]." Robert E. Lutz, *The Mexican War and the Treaty of Guadalupe Hidalgo: What's Best and Worst About Us*, 5 SW. J.L. & TRADE AM. 27, 27 (1998).

102. Frank Goldman, *The World After NAFTA According to Paz*, NEW YORKER (Dec. 19, 1993), https://www.newyorker.com/magazine/1993/12/27/the-world-after-nafta-according-to-paz.

103. According to Richard Rosecrance, writing two years after NAFTA went into force, "[d]eveloped states are putting aside military, political, and territorial ambitions as they struggle not for cultural dominance but for a greater share of world output." Richard Rosecrance, *The Rise of the Virtual State*, 75 FOREIGN AFFS. 45, 45 (1996).

104. Patrick Gillispie, *NAFTA: What Is It, and Why Trump Hates It*, CNN (Nov. 15, 2016, 5:17 PM), http://money.cnn.com/2016/11/15/news/economy/trump-what-is-nafta/index.html; *see*

$19 trillion regional market.[105] By 2016, bilateral trade under NAFTA expanded by 556%.[106] María Belén Olmos Giupponi applauded these results: "This trade agreement [NAFTA] represents a remarkable accomplishment taking into consideration the differences between the two major members states and Mexico. Contrary to what some analysts contended at the time, NAFTA has successfully dealt with all the different challenges."[107]

NAFTA facilitated trade by converging rules and reducing transaction costs among its three Parties. Harmonization brought decreased transaction costs, less delays, and a more integrated North American supply chain. Soon after NAFTA went into effect, Mexico's trade increased 17.5% with the United States and 33.3% with Canada.[108] Additionally, exports, imports, and foreign investment increased in the country.[109] Mexican President Carlos Salinas de Gortari negotiated NAFTA and trumpeted his administration's neoliberal policies to foment development in Mexico.[110] Salinas' successor, President Vicente Fox, also considered NAFTA as a success while he was in office from 2000 to 2006.[111] So did Presidents Felipe Calderón[112] and Enrique Pena-Nieto.[113] Nobel laureate Paul Krugman noted:

> [i]n the case of Mexico, it is natural to suppose that NAFTA has played an important role, although much of the growth in Mexican

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Carla A. Hills, *NAFTA's Economic Upsides: The View from the United States*, 93 FOREIGN AFFS. 122 (2014).

105. Hills, *supra* note 104, at 122.

106. Sergio M. Alcocer, *Managing the Mexico-U.S. Border: Working for a More Integrated and Competitive North America*, *in* THE ANATOMY OF A RELATIONSHIP: A COLLECTION OF ESSAYS ON THE EVOLUTION OF U.S.-MEXICO COOPERATION ON BORDER MANAGEMENT 19 (Christopher Wilson ed., 2016).

107. OLMOS GIUPPONI, *supra* note 8, at 125.

108. Chris Olive, *Member States Development: Mexico*, 1 NAFTA LAW & BUS. REV. AM. 122 (1995).

109. *Id.*

110. Laura Carlsen, *Armoring NAFTA: The Battleground for Mexico's Future*, 41 NACLA REP. ON AMERICAS 17 (2008).

111. Carlos Salas, *Mexico's Haves and Have-Nots: NAFTA Sharpens the Divide*, 35 NACLA REP. ON AMERICAS 32, 33 (2002); *see also* EDUARDO BOLIO ET AL., A TALE OF TWO MEXICOS: GROWTH AND PROSPERITY IN A TWO-SPEED ECON. (2014).

112. Remarks Following a Meeting with President of Mexico Felipe de Jesus Calderon Hinojosa, 2008 PUB. PAPERS 1565 (Jan. 13, 2009); *see also* Michael Abramowitz, *White House Defends NAFTA As Bush Meets with Heads of Mexico, Canada*, WASH. POST, Apr. 22, 2008, at A03.

113. The President's News Conf. With President Enrique Pena Nieto of Mexico and Prime Minister Stephen J. Harper of Canada in Toluca, Mexico, DAILY COMP. PRES. DOCS. 1 (Feb 19, 2014); Patricia Rey Mallén, *20 Years of NAFTA: Enrique Peña Nieto, Barack Obama and Stephen Harper Talk the Economic Future of North America*, INT'L. BUS. TIMES (Feb. 20, 2014, 6:25 AM), http://www.ibtimes.com/20-years-nafta-enrique-pena-nieto-barack-obama-stephen-harper-talk-economic-future-north-america.

> exports may also reflect two other factors: the delayed effects of Mexico's dramatic unilateral liberalization of trade between 1985 and 1988, and the weak peso that followed the 1994-95 financial crisis.[114]

As they sought political support to pass legislation to enable the trade pacts rules within the laws of the United States, the U.S. political leaders billed NAFTA as the future for prosperity, not only in the United States, but eventually all over the Americas.[115] "NAFTA was promoted by presidents George H.W. Bush and Bill Clinton as something that would buoy up the Mexican economy and reduce or end illegal immigration—two claims that now are clearly refuted by facts."[116]

Labor rights and environmental protection were not part of NAFTA's main agreement; they were left as a side agreement (with no real meaningful enforcement mechanisms), a contribution by newly elected U.S. President Bill Clinton to the North American Free Trade Agreement, which had been negotiated by his predecessor.[117] The side agreements, the North American Agreement on Environmental Cooperation[118] and the North American Agreement on Labor Cooperation,[119] were paper tigers, allowing for citizen submissions without any real ability to collect damages or change governmental or corporate behavior. As a result, non-governmental organizations, labor activists, and environmental advocates could not hold the NAFTA Parties accountable for failing to live up to their respective treaty commitments, within both the NAFTA framework and in international law.

During the 1992 Presidential election, then Arkansas Governor, Bill Clinton made it a great deal that NAFTA should not hurt labor rights.[120] This appealed to the trade unions in the U.S., which at the time, were rightfully scared of what would happen if lower cost labor was available and there were

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114. Paul R. Krugman, *Trade and Wages, Reconsidered*, BROOKINGS PAPERS ON ECON. ACTIVITY 103, 111 (2008).

115. Matthew Rooney, *What's Next: Making NAFTA into a Tool for National Prosperity*, GEORGE. W. BUSH INST. (2017).

116. Charles Bowden, *Chuck Bowden's Border War*, HIGH COUNTRY NEWS (Mar. 1, 2010), http://www.hcn.org/issues/42.4/the-war-next-door.

117. *See* Leonard Bierman & Rafael Gely, *The North American Agreement on Labor Cooperation: A New Frontier in North American Labor Relations*, 10 CONN. J. INT'L L. 533 (1995); *see also* Sarah Richardson, *Sovereignty, Trade, and the Environment—The North American Agreement on Environmental Cooperation*, 24 CAN.-U.S. L.J. 183 (1998).

118. North American Agreement on Environmental Cooperation, Sept. 8-14, 1993, 32 I.L.M. 1480.

119. North American Agreement on Labor Cooperation, Sept. 8-14, 1993, 32 I.L.M. 1499.

120. President Clinton had risked the wrath of the Democratic Party's trade union base by endorsing NAFTA, working closely with Republicans to help push the controversial trade pact through Congress in 1993 despite opposition from a majority of Democrats. EDWARD ALDEN, THE CLOSING THE AMERICAN BORDER: TERRORISM, IMMIGRATION AND SECURITY SINCE 9/11, 50 (2008).

no tariffs on the trade of these goods. While President Clinton said the trade pact would create one million jobs in the United States in its first five years,[121] economists warned that NAFTA threatened U.S. jobs.[122]

With membership in the trade pact, Mexico opened its traditionally protected industries, lowering trade tariffs between the three participatory countries and providing much needed confidence to foreign capital to invest in Mexico.[123] With the liberalization of government procurement, U.S. and Canadian corporations were finally allowed to bid on Mexico's public works projects, profit from their capital markets, and invest without limitation. (and Mexican companies could do the same in Canada and the United States).

NAFTA has brought increased benefits among some corporations.[124] Large firms benefited more than small and medium-size ones, a result that seems related to the unavailability of domestic credit after the financial crisis of 1995 (large firms were able to increase their access to international financial markets, but this option was not available for smaller ones), indicating the needs to strengthen efforts in deepening domestic financial markets to reach underserved sectors. This has been a boon for multinational corporations and their shareholders. Ricardo Grinspun and Robert Kreklewich note:

> the regime on intellectual property rights to show that large corporations have imposed a set of rules that serve their interests rather than the public's. The rules limit the free flow of information,

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121. Glenn Kessler, *The Strange Tale About why Bill Clinton Said NAFTA Would Create 1 Million Jobs*, WASH. POST (Sept. 21, 2018), https://www.washingtonpost.com/politics/2018/09/21/strange-tale-about-why-bill-clinton-said-nafta-would-create-million-jobs/; Economic Impact of Trade Agreements Implemented Under Trade Auth. Procedures, Inv. No. 332-555, USITC Pub. 4614 (June 2016).

122. Robert E. Scott, *The High Price of 'Free' Trade*, ECON. POL'Y INST., 1 (Nov. 17, 2003) ("Since the North American Free Trade Agreement (NAFTA) was signed in 1993, the rise in the U.S. trade deficit with Canada and Mexico through 2002 has caused the displacement of production that supported 879,280 U.S. jobs.").

123. Roberto Rosas, *Trademarks under the North American Free Trade Agreement (NAFTA), With References to the Current Mexican Law*, 18 INTELL. PROP. L. REV. 167, 173 (2014).

124. While conceding that many U.S. high-wage manufacturing jobs were relocated to Mexico, China and other foreign locations as a result of NAFTA, Cohen argues that NAFTA has, on balance, been a good thing for the U.S. economy and U.S. corporations. "The sucking sound that Ross Perot predicted did not occur; many jobs were created in Canada and Mexico, and [the resulting] economic activity N/A created a somewhat seamless supply chain—a North American supply chain that allowed North American auto companies to be more profitable and more competitive."

Knowledge@Wharton, *Public Policy: NAFTA, 20 Years Later: Do the Benefits Outweigh the Costs?*, WHARTON/UNIV. OF PENN. (Feb. 19, 2014), https://knowledge.wharton.upenn.edu/article/nafta-20-years-later-benefits-outweigh-costs/.

> technology, and trademarks to the detriment, in their view, of poor people and countries.[125]

Size can matter. Joan B. Anderson and James Gerber explained that "[l]arge firms usually have greater access to capital and to the legal and administrative resources they need to navigate the legal system and the bureaucracy."[126] The reduction of bureaucracy at the border between the United States and Mexico better aligned the two countries' commerce.[127] By using U.S. technology, millions of goods could be produced by less expensive labor in Mexico for export to and consumption in the United States.[128] All of the North American continent would become part of the same supply chain, enjoying just in time production and the comparative advantage that comes with such liberalized trade regime.[129] Duty drawbacks allow for a fully integrated supply chain in the three partner countries and a truly regionally integrated inventory management, just in time, system.[130] The trade pact increased trade through tariff reduction and the integration of the production process.[131] The rules and procedures were to be harmonized to align with those from the United States. Ronald Wolf has suggested that the globalization of law has met the primacy of international business law and American approaches to business law.[132]

Nowhere is this dynamic more evident than in the rise of Investor-State Dispute Settlement provisions in the free trade treaties which the United States has entered. NAFTA facilitated foreign direct investment (FDI) and institutionalized rules regime with meaningful enforcement mechanisms—

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125. ROBERT A. PASTOR, TOWARD A NORTH AMERICAN COMMUNITY: LESSONS FROM THE OLD WORLD FOR THE NEW 12 (2001).

126. ANDERSON & GERBER, *supra* note 71, at 101.

127. "NAFTA was a brave new world for the three governments." David A. Gantz, *The Evolution of U.S. Views on FTA Investment Protection: From NAFTA to the United States-Chile Free Trade Agreement*, 19 AM. UNIV. INT'L L. REV. 679, 685 (2004).

128. ANDERSON & GERBER, *supra* note 71, at 89-90.

129. *See* Macleans Mzumara, et al., *An Analysis of Comparative Advantage and Intra-North American Free Trade Agreement (NAFTA) Trade Performance*, 5 J. SUSTAINABLE DEV. 103, 110 (2012).

130. "[G]oods produced in Mexico for export to the United States typically contain about 40% U.S. content (25% from Canada)." GANTZ, *supra* note 30, at 126 (*citing* Pia Orrenius, *Economic Outlook Deteriorates Due to COVID-19: Short and Long Run Implications for North American Supply Chains*, FED. RES. BANK OF DALLAS (May 13, 2020), https://www.bakerinstitute.org/media/files/files/00d93381/orrenius-baker-inst.pdf).

131. *See generally* David A. Gantz, *The United States-Mexico-Canada Agreement: Overview and Analysis*, BAKER INSTITUTE REPORT (2018), https://www.bakerinstitute.org/media/files/files/1f9f406a/bi-report-121118-mex-usmca.pdf

132. *See generally* RONALD CHARLES WOLF, TRADE, AID AND ARBITRATE: THE GLOBALIZATION OF WESTERN LAW (2004) (maintaining that the philosophies of present international institutional organizations, coupled with the fundamentals of international arbitration, has weakened national sovereignty over international trade issues).

independent, binding, and neutral arbitral panels comprised of trade experts from the pact's Parties to deal with disputes. Chapter 11 of NAFTA provides for an Investor-State-Dispute Settlement (ISDS) mechanism to adjudicate cases of takings, expropriation, and nationalization investments. This is the venue for deciding what is fair, just, and equitable compensation.[133] "NAFTA was a particular tipping point" for Haley Sweetland Edwards.

> It marked the first time ever that an international treaty between two close investment partners—two of them well-developed, complex democracies—included all the provisions of a BIT as well as ISDS. The move not only allowed American and Canadian investors to challenge Mexico outside of its shaky judicial system, but it also allowed investors from all three signatory countries to challenge the U.S. and Canada outside of their robust and reliable courts. That was unprecedented—a watershed in the history of investors' rights.[134]

This area of law by its very nature brings to bear a long history of private actor involvement.

> *Lex mercatoria* is an area that is marked in particular by private actors that are creating the 'rules of the game' as well as—in the form of arbitration tribunals—by the institutional framework for the administration of these rules.[135]

It is indeed a rarified world that is created by free trade agreements and other forms of harmonization—the very policy prescriptions of the Washington Consensus.

> International trade law continues to concentrate wealth in artificial corporations that exist without territorial borders. This is deliberately encouraged by nation-states. International trade law and especially the arbitral systems that enforce international investment agreements have created a commercial empire that operates similar to colonialism and imperialism.[136]

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133. Manuel Pérez-Rocha, *Free Trade's Chilling Effects*, 48 NACLA REP. ON AMERICAS 223 (2016), https://doi.org/10.1080/10714839.2016.1228169. *Cf.* Simon Lester, *The ISDS Controversy: How We Got Here and Where Next*, CATO INST. (July 1, 2016), https://www.cato.org/commentary/isds-controversy-how-we-got-here-where-next.

134. HALEY SWEETLAND EDWARDS, SHADOW COURTS: THE TRIBUNALS THAT RULE GLOBAL TRADE 45 (2016).

135. GRALF-PETER CALLIESS & PEER ZUMBANSEN, ROUGH CONSENSUS AND RUNNING CODE: A THEORY OF TRANSNATIONAL PRIVATE LAW 31 (2010).

136. James (Sa'kej) Youngblood Henderson, *Foreword* to INDIGENOUS PEOPLES AND INTERNATIONAL TRADE: BUILDING EQUITABLE AND INCLUSIVE INTERNATIONAL TRADE AND INVESTMENT AGREEMENTS xvi (John Borrows & Risa Schwartz, eds, 2020). *Cf.* Karen J. Alter, *From Colonial to Multilateral International Law: A Global Capitalism and Law Investigation*, 19 INT'L J. CONST. L. 798, abstract, (2021) ("[T]he shift from European colonial domination to a law-based multilateralism, [has] enabled a more equal and inclusive international law.").

NAFTA was not like the U.S.-Canada FTA—an agreement between both developed, Anglo-Saxon, common law, capitalist, and advanced countries. Mexico remains a civil law country.[137] The Parties wanted investment disputes to be arbitrated by outside experts, not Mexican judiciary members who may be open to corruption or influence.[138]

These investor-state dispute provisions were indeed the most controversial part of NAFTA.

> [Chapter 11] establishes a mechanism for the settlement of investment disputes that assures both equal treatment among investors of the Parties to the Agreement in accordance with the principle of international reciprocity and due process before an impartial tribunal.[139]

A NAFTA investor, an individual or corporation that is a non-state actors rather than one of the signatory countries, who alleges that a host government has breached its investment obligations under Chapter 11, may choose one of three arbitral mechanisms: the World Bank's International Centre for the Settlement of Investment Disputes (ICSID), ICSID's Additional Facility Rules, or the rules of the United Nations Commission for International Trade Law (UNCITRAL Rules).[140] Alternatively, the investor may choose the remedies available in the host country's domestic courts.[141] An important feature of the Chapter 11 arbitral provisions is the enforceability in domestic courts of final awards by arbitration tribunals.[142]

This mechanism has been very costly and thus only accessible to the largest of corporations. Some critics have called these provisions from Chapter 11, "corporate welfare," as they create a series of nuisance lawsuits to force foreign governments to capitulate for fear of incurring hundreds of millions of dollars of potential monetary damages and expensive legal fees.[143] The long-standing doctrine of sovereign immunity has been turned

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137. Although the NAFTA is one of an increasing number of efforts to harmonize, merge, and even unify international trade law involving different legal systems, the comprehensive efforts to do so between the United States and Mexico under the cloak of NAFTA face stark contrasts between the traditions of the civil law and common law systems.

Lutz, *supra* note 33, at 394-95.

138. TRANSPARENCY INT'L, CORRUPTION PERCEPTIONS INDEX (2020) (indicating that Mexico ranked 124/180 and scored 31/100); *see also* LATINOBAROMETRO, INFORME 2021 (2021).

139. NAFTA, *supra* note 4, art. 1115.

140. *Id*. art. 1120.

141. *Id*. art. 1135(2)(c).

142. *Id*. art. 1136(4).

143. *See* PUBLIC CITIZEN, NAFTA CHAPTER 11 INVESTOR-TO-STATE CASES: BANKRUPTING DEMOCRACY 1 (Sept. 2001); Ethyl Corp. v. Canada, 38 I.L.M. 708 (1999) (a Virginia-based corporation, developed a gasoline additive known as methylcyclopentadienyl manganese tricarbonyl (MMT) and then exported it Canada). *Id*. at 710. After scientific studies brought light

on its head, as foreign investors sue sovereign states before independent and binding tribunals.[144] While the claim for the $970 million in damages that the Canadian company Methanex made against the United States was dismissed in full in August 2005, *Methanex v. United States* showed how investors could stop environmental regulations. Keystone XL lawsuit is another example of corporations claiming outrageous damages in Chapter 11 proceedings.[145]

And while Chapter 11 has been a boon for some corporations and their inventors,[146] NAFTA did very little for labor for environmental protections. These issues were relegated to "side agreements" that had no real, meaningful enforcement procedures, nor sanctions.[147] One report concluded, that "[r]ather than triggering a convergence across the three nations, NAFTA has accentuated the economic and regulatory asymmetries that had existed among the three countries."[148]

While Mexico experienced economic growth, several sectors within the country experienced a decline.[149] Critics have pointed out that real income

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to the public health risks posed by MMT, in 1997 the Canadian Parliament banned MMT. *Id*. In response, Ethyl filed a NAFTA Chapter 11 investor-state claim against Canada and further argued that the ban was a violation of Article 1102 and 1106. *Id*. at 711. After a NAFTA panel overruled Canada's objection to the suit claiming that MMT was not a measure covered under Chapter 11, Canada settled the claim, resulting in Canada's reversal of the MMT ban and paid $13 million to Ethyl for legal fees and damages. *Id*. at 731. In *Pope & Talbot, Inc. v. Canada*, the tribunal ordered Canada to pay investors $120,200. Pope & Talbot Inc. v. Canada, para. 18 UNCITRAL (NAFTA), Final Award, Award in Respect of Costs (Nov. 26, 2002). In *S.D. Meyers, Inc. v. Canada*, the Tribunal ordered Canada to pay a total amount of $850,000 to S.D. Meyers, Inc. with respect to arbitration fees and legal representation. S.D. Myers, Inc. v. Canada, paras. 53-54 UNCITRAL (NAFTA), Final Award (Dec. 30, 2002).

144. Since time immemorial people have travelled abroad to invest and to engage in business. When European traders began to sail to Asia, Africa, and Latin America to trade with the people in local communities, it was held that the local law could not be applied to traders since they were already subject to the law of their respective home countries.

Surya P. Subedi, *International Investment Law*, *in* INTERNATIONAL LAW 727, 728 (Malcolm D. Evans, ed., 4th ed., 2014).

145. Tracy Johnson & Kyle Bakx, *Transcanada an Underdog, but has Strong Case Against Washington*, CBC (Jan. 7, 2016, 5:00 AM) https://www.cbc.ca/news/business/transcanada-kxl-keystone-nafta-lawsuit-damages-pipeline-1.3392720; *see also* Cory Adkins & David Grewal, *Democracy and Legitimacy in Investor-State Arbitration*, 126 YALE L.J.F. 65 (2016).

146. OLMOS GIUPPONI, *supra* note 8, at 130.

147. Cooper, *supra* note 57, at 50.

148. GALLAGHER ET AL., *supra* note 25, at 3.

149. MARK WEISBROT ET AL., DID NAFTA HELP MEXICO? AN UPDATE AFTER 23 YEARS, CENTER FOR ECONOMIC & POLICY RESEARCH (March 2017) (arguing that "Mexico did not do as well as the region as a whole, averaging 1 percent in per capita GDP growth for those years." Additionally, Mexico's national poverty rate was 55.1% in 2014 compared to 52.4% in 1994 when NAFTA was enacted).

per capita, real wages, and income poverty have not improved much since NAFTA was signed. Indeed, NAFTA was designed to provide jobs for workers in Mexico.[150] Mexicans required a reason to stay in Mexico instead of emigrating to the United States. But the data demonstrates that the boom in Mexican jobs was not long-term.[151] In the border factories that are owned by Mexicans in addition to Koreans, Taiwanese, and Chinese nationals, low skilled wages all supply the U.S. marketplace. However, this drew populations from southern Mexico towards the northern border in cities like Tijuana and Ciudad Juárez.[152]

Labor conditions seldom improved where there are jobs forcing migrants to other countries to seek work. Saskia Sassen reflects on "the particular content of this new regime, which strengthens the advantage of certain types of economic actors and weakens those of others."[153] In the latter category, with the commodification of Mexican and Central American migrants placed into incarceration, there has also been a commodification of labor in the North American marketplace. The architects of NAFTA even claimed that it would resolve the post-Cold War identity crisis of the United States.[154] Lower-skilled wages would flow to Mexico, as the low cost of labor in Mexico would become a comparative advantage for that country.[155] Additionally, as mentioned before, NAFTA relegated labor issues and environmental issues to side agreements, out of range of the NAFTA dispute resolution mechanisms and left the goals in those areas unenforceable and

150. *See* Lori Wallach, *NAFTA at 20: One Million U.S. Jobs Lost, Higher Income Inequality*, HUFF. POST (Jan. 6, 2014, 3:19 PM), https://www.huffpost.com/entry/nafta-at-20-one-million-u_b_4550207; *see also* Andrew Chatzky et al., *NAFTA and the USMCA: Weighing the Impact of North American Trade*, COUNCIL FOREIGN REL., https://www.cfr.org/backgrounder/naftas-economic-impact (last updated July 1, 2020).

151. In Mexico, real wages have fallen sharply and there has been a steep decline in the number of people holding regular jobs in paid positions. Many workers have been shifted into subsistence-level work in the "informal sector," frequently unpaid work in family retail trade or restaurant businesses. Additionally, a flood of subsidized, low-priced corn from the United States has decimated farmers and rural economics.

Scott, *supra* note 122, at 10.

152. "One consequence of such rapid growth, however, is that, beginning in the late 1980s, the existing labor force in many Mexican border communities became inadequate to fill the available positions . . . Workers migrate from the interior of the country because jobs are relatively plentiful . . . ." ANDERSON & GERBER, *supra* note 71, at 93, 95.

153. SASSEN, *supra* note 45 at xxvii.

154. Judith H. Bello & Alan F. Holmer, *The NAFTA: Its Overarching Implications*, 27 INT'L LAW 589, 601 (1993).

155. Joan B. Anderson & James Gerber explain "Mexico's comparative advantage due to the availability of low-wage, unskilled or semi-skilled labor" and "the situation of low wages with relatively high levels of productivity." ANDERSON & GERBER, *supra* note 71, at 94.

aspirational.[156] This has provided for a devaluation of labor as an abundant, cheap, and unprotected commodity.[157] Lynn Stephen wrote:

> Americans face a dilemma. While in our post-9/11 culture many are calling for stricter border controls and ever more stringent immigration legislation to prevent the entrance of terrorists to the United States, we have a good economy that is highly dependent on recent immigrant labor—much of it Mexican and much of it undocumented.[158]

Migrant workers, who by definition have fewer freedoms, are often more vulnerable than the laborers legally permitted to work earning average wages.[159] Too often, immigrants who work in low skilled jobs are seen "as an expendable resource, a resource whose social protection and continued reproduction is of little or no concern."[160] Migrant workers have become more vulnerable after NAFTA, which has increased the free flow of trade between the participatory countries.[161] For Ronald Wolf, economic liberalism has pushed a new world commercial legal order which has also affected civil rights.[162] Labor laws (like environmental laws) are relegated to side agreements, out of range of the dispute resolution mechanisms for which the main guts of NAFTA provided.[163] The extremely low wages and long hours at maquiladoras "fosters the sense that workers are cheap, disposable commodities."[164] Labor falls into the markets as if it were mainly a commodity, "subordinating the social to the 'laws of the market.'"[165] Labor

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156. *See* Ruben J. Garcia, *Labor as Property: Guestworkers, International Trade, and the Democracy Deficit*, 10 J. GENDER, RACE & JUST. 29 (2006).

157. Access to cheaper inputs is, therefore, just as important as access to widening markets in keeping profitable opportunities open. The implication is that non-capitalist territories should be forced open not only to trade (which could be helpful) but also to permit capital to invest in profitable ventures using cheaper labour power, raw materials, low-cost land, and the like. The general thrust of any capitalist logic of power is not that territories should be held back from capitalist development, but that they should be continuously opened up.

HARVEY, *supra* note 20, at 139.

158. LYNN STEPHEN, TRANSBORDER LIVES: INDIGENOUS OAXACANS IN MEXICO, CALIFORNIA, AND OREGON 143 (2007).

159. Stuart Rosewarne, *Globalization and the Commodities of Labour: Temporary Labour Migrants*, 20 ECON. & LAB. REL. REV. 99, 107 (2010)

160. *Id.* at 105.

161. Jeff Faux, *How NAFTA Failed Mexico*, 14 AM. PROSPECT 35 (2003); Garcia, *supra* note 156, at 33.

162. RONALD CHARLES WOLF, TRADE, AID AND ARBITRATE: THE GLOBALIZATION OF WESTERN LAW (2003).

163. Garcia, *supra* note 156, at 29.

164. Nathan, *supra* note 74.

165. Rosewarne, *supra* note 159, at 104.

is increasingly being commoditized in global markets, where international corporations are free to roam the world and hire the most vulnerable workers.[166]

> The colonial premises of international trade law have remained resilient, taking their sources and authorities from the colonial archive. This commercial empire promulgates a lie: that humanity reaps the benefits of a more meaningful life when nations specialize in developing natural resource and labour within their territory, based on comparative advantages, through a combination of national politics and private enterprise.[167]

Some studies have shown that free trade has also exacerbated income inequality in the United States.[168] A report from Boston University concluded that "NAFTA has fallen short of achieving many of its own objectives. Rather than promoting convergence of incomes, wages, and standards, NAFTA has tended to accentuate pre-existing economic and regulatory asymmetries in North America."[169] Since 1994, NAFTA has benefited the rich,[170] harmed the poor by displacing Mexican workers,[171] devastated local communities with *maquiladora* factories, and decreased wages for the working class.[172] "In Mexico, NAFTA is blamed for creating few new jobs while decimating many existing sources of livelihood, particularly in agriculture."[173] In addition to a dearth in jobs, the basic ability to grow one's own food was seriously diminished as agribusiness entered the market and began accumulating productive land, with better yields through

166. Garcia, *supra* note 156, at 28.

167. Henderson, *supra* note 136, at xvi.

168. Lori Wallach & Melanie Foley, *Studies Reveal Consensus: Trade Flows during "Free Trade" Era Have Exacerbated U.S. Income Inequality*, PUB. CITIZEN's GLOB. TRADE WATCH (Jan. 28, 2014), http://citizen.typepad.com/eyesontrade/2014/01/studies-reveal-consensus-trade-flows-during-free-trade-era-have-exacerbated-us-income-inequality.html.

169. GALLAGHER ET AL., *supra* note 25, at 2.

170. *See generally* Carrie Kahn, *How NAFTA Helped the Mexican Billionaires' Club*, NPR (Dec. 31, 2013), http://www.npr.org/2014/01/01/258668414/how-nafta-helped-the-mexican-billionaires-club.

171. Knowledge@Wharton, *supra* note 124 ("[W]orkers in Mexico have not seen wage growth. Job losses and wage stagnation are NAFTA's real legacy.") (*citing* Robert Scott, Chief Economist at the Economic Policy Institute).

172. Faux, *supra* note 161, at 36; *see also* Christopher Wilson, *Working Together: Economic Ties Between The United States And Mexico*, WILSON CENTER (2011), http://wilsoncenter.org/publication/working-together-economic-ties-between-the-united-states-and-mexico; Dustin Ensinger, *NAFTA Job Losses Continue to Mount*, ECONOMY IN CRISIS (May 3, 2011), http://economyincrisis.org/content/nafta-jobs-losses-continue-mount; Yves Smith, *NAFTA Successfully Undermined Regulations*, N.Y. TIMES (Nov 27, 2013), http://www.nytimes.com/roomfordebate/2013/11/24/what-weve-learned-from-nafta/nafta-successfully-undermined-regulations.

173. GALLAGHER ET AL., *supra* note 25, at 3.

mechanization.[174] Likewise, with the advent of genetically modified corn, tortillas became cheaper than the real thing made locally.[175]

The attacks of September 11, 2001 changed not just the United States, but also Mexico.[176] For a year and a half prior to the terror attacks, Mexican President Vicente Fox developed a relationship with U.S. President George W. Bush to regularize the millions of Mexicans living without legal status (an initiative termed "the Whole Enchilada").[177] The two knew each other as governors, had visited each other's ranches, and were both businessmen in their previous professional lives. Prior to the terrorist attacks on the World Trade Center and Pentagon, the Fox administration had made some headway in lobbying for comprehensive immigration reform. The 9/11 attacks changed the United States to focus on border security. Robert Pastor explained:

> If NAFTA had created institutions and a new relationship among the three governments, then the day after 9/11, the Mexican President and the Canadian prime minister would have joined President Bush to announce that the attack was against all three countries, and they would respond together. This did not happen, and indeed, 9/11 contributed to an escalation of fears and a downturn in trade and commerce.[178]

Corporations could make profits that emerged in the War on Terror after the 9/11 attacks. The Border Industrial Complex was just getting started.

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174. *See generally* Flavia Echanove, *Agribusiness and Farmers in Mexico: The Importance of Contractual Relations*, 171 GEOGRAPHICAL J. 166, https://www.researchgate.net/publication/227710386_Agribusiness_and_farmers_in_Mexico_The_importance_of_contractual_relations. Keith Sealing, *Indigenous Peoples, Indigenous Farmers: NAFTA's Threat to Mexican Teosinte Farmers and What Can be Done About It*, 18 AM. U. INT'L L. REV. 1383 (2003), https://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1204&context=auilr.

175. *See* Andrew Pollack, *Kraft Recalls Taco Shells with Bioengineered Corn*, N.Y. TIMES (Sept. 22, 2000), https://www.nytimes.com/2000/09/23/business/kraft-recalls-taco-shells-with-bioengineered-corn.html; Renee Alexander and Simran Sethi, *Mexico Is Phasing out Imports of Glyphosate and GMO Corn. Supporters Say That Could Reverse Years of Damage from U.S. Trade Policy*, THE COUNTER (July 19, 2021), https://thecounter.org/mexico-phaseout-glyphosate-genetically-engineered-corn-united-states/ ("The pact (NAFTA) devastated rural economies in Mexico, flooding the market with cheap, government-subsidized U.S. corn and gutting domestic corn prices by nearly 70 percent. This shift led an estimated 2 million farmworkers to abandon the countryside to seek work in big cities or across the border in the United States").

176. ALDEN, *supra* note 120, at 261.

177. Duncan Campbell, *Mexico Goes for the Whole Enchilada*, GUARDIAN (Sept. 5, 2001, 11:52 EDT), https://www.theguardian.com/world/2001/sep/05/immigration.usa.

178. PASTOR, *supra* note 52, at 28.

B. The Security and Prosperity Partnership

There was a proliferation of security initiatives among the NAFTA countries, as the United States sought to further lockdown its borders and more diligently regulate its trade with its trading partners after the September 11, 2001 attacks. The Security and Property Partnership was the culmination of these security initiatives and common defense policies.[179] "In a post-9/11 world, it also aimed to make the United States' 'war on terror' into a regional security issue."[180] This was the era of the Container Security Initiative[181] and other programs of Department of Homeland Security to harmonize the customs process, increase the rigor of inspection processes, and transfer some of the inspection operations offshore to foreign ports.[182]

Building on the North American Free Trade Agreement, the Security and Property Partnership (SPP),[183] agreed to by Canadian Prime Minister Paul Martin, Mexican President Vicente Fox, and U.S. President George W. Bush in March 2005, was a culmination of security initiatives and common defense policies. But it was not a treaty with legal obligations.[184] There was no actual agreement, nor any binding obligations to supplement NAFTA. By the time the three government leaders met in March 2006 at the second summit of the SPP in Cancun, Mexico, they turned to corporate leaders and trade associations to work together to create a more integrated trade area.[185] The North American Competitiveness Council, with thirty corporate representatives from some of North America's largest corporations, which reported to the executive branches in the three NAFTA partner countries, and were directed to improve trade and commerce by liberalizing rules of origin, exchanging information on health and safety, and harmonizing the use of symbols on textiles and apparel. The SPP wanted to do business more

179. *See North American Leaders Show Unity*, BBC (Mar. 23, 2005, 5:42 PM), http://news.bbc.co.uk/2/hi/americas/4376431.stm.

180. Stephen Zamora, *Rethinking North America: Why NAFTA's Laissez Faire Approach to Integration Is Flawed, and What to Do About It*, 56 VILL. L. REV. 631, 642 (2011).

181. *See CSI: Container Security Initiative*, U.S. CUSTOMS & BORDER PROTECTION, https://www.cbp.gov/border-security/ports-entry/cargo-security/csi/csi-brief (last modified on May 31, 2019).

182. For other security initiatives post-9/11 among the three NAFTA Parties, *see Border Security*, U.S. CUSTOMS & BORDER PROTECTION, https://www.cbp.gov/border-security (last modified on Jan. 4, 2022).

183. Joint Statement by President Bush, President Fox, and Prime Minister Martin, *Security and Prosperity Partnership of North America*, (Mar. 23, 2005), https://georgewbush-whitehouse.archives.gov/news/releases/2005/03/20050323-2.html.

184. *See North American Leaders Show Unity*, *supra* note 179.

185. *See generally* Katherine Sciacchitano, *From NAFTA to the SPP: Here Comes the Security and Prosperity Partnership, But-What Security? Whose Prosperity?*, DOLLARS & SENSE (2008), http://www.dollarsandsense.org/archives/2008/0108sciacchitano.html

efficiently, competing with other trade blocs, and benefiting from the comparative advantage[186] But without a multilateral treaty and a budget, not much came to pass in the end, and all talk of these initiatives came to a quiet end.[187]

> It can, at best, be characterized as an endeavor by the three countries to facilitate communication and cooperation across several key policy areas of mutual interest. Although the SPP builds upon the existing trade and economic relationship of the three countries, it is not a trade agreement and is distinct from the existing North American Free Trade Agreement (NAFTA). Some key issues for Congress regarding the SPP concern possible implications related to private sector priorities, national sovereignty, transportation corridors, cargo security, and border security.[188]

Regional economic integration can provide some serious security challenges. There were unproven rumors that Al Qaeda and other terrorists could cross the U.S.-Mexico border,[189] that the *narcotraficantes* and other transnational criminal organizations were joining forces with Islamic extremist groups, and that Central American *maras*[190] were using beheadings

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186. *See generally* Neil Craik & Joseph DiMento, *Environmental Cooperation in the (Partially) Disaggregated State: Lessons from the Security and Prosperity Partnership of North America*, 8 CHI. J. INT'L L. 479, 484-92 (2008).

187. While the spp.gov website has been taken down, there are still archived materials available online, primarily those posted by the Canadian government. *See generally Evaluation of the Security and Prosperity Partnership of North America (SPP) Pilot Project on Reducing Emissions from Vehicles and Engines (PPRE)*, GOV'T CANADA (July 2011) [hereinafter *Evaluation of the SPP*], https://www.ec.gc.ca/doc/ae-ve/2011-2012/1405/ec-com1405-en-s2.htm.

188. M. ANGELES VILLARREAL & JENNIFER E. LAKE, CONG. RSCH. SERV., RS22701, SECURITY AND PROSPERITY PARTNERSHIP OF NORTH AMERICA: AN OVERVIEW AND SELECTED ISSUES (2009).

189. *See* Ellen Weiss, *Opinion: Drug Cartels Across the Border Are Just As Brutal As ISIS*, ABC 10 NEWS SAN DIEGO (Oct. 23, 2014), http://www.10news.com/decodedc/drug-cartels-across-the-border-just-as-brutal-as-isis. *Cf.* John Parkinson, *DHS Rebuffs Congressman's Claim ISIS Infiltrating Southern Border*, ABC NEWS (Oct. 8, 2014, 10:39 AM), http://abcnews.go.com/Politics/dhs-rebuffs-congressmans-claim-isis-infiltrating-southern-border/story?id=26043280. This myth has been propagated for years:

> In December 2005, the Department of Homeland Security sent word that authorities had arrested dozens of terrorist operatives who were already inside the country. While the total number of suspects was unknown, officials reported at least fifty-one people from countries known to support terrorist activities or harbor terrorist sympathies—Egypt, Iran, Iraq, Lebanon, Pakistan, and Syria—had been intercepted by the Border Patrol and other members of the Joint Terrorism Task Force (JTTF) since the unit began tracking such arrests a little more than a year before.

TOM TANCREDO, IN MORTAL DANGER: THE BATTLE FOR AMERICA'S BORDER AND SECURITY 86 (2006).

190. Maras are the plural for the members of Mara Salvatrucha, or MS-13, a transnational drug trafficking organization. *See generally*, ALBERT DEAMICIS, OFFICE OF JUST. PROGRAMS, MARA SALVATRUCHA: THE DEADLIEST STREET GANG IN AMERICA, NCJ NO. 251138 (2017),

and other public displays of violence similar to those employed by extremists in the Middle East.[191] The SPP was aimed to counter threats posed directly by international terrorists. Thomas Shannon, the U.S. Assistant Secretary of State for Western Hemisphere Affairs, provided that "[t]o a certain extent, we're armoring NAFTA."[192]

Some politicians viewed the SPP as a threat to the sovereignty of the United States. In the second session of the 109th Congress of the United States on September 28, 2006, Representatives Virgil Goode Jr., Ron Paul, Walter Jones, and Tom Tancredo submitted a resolution to the Committee on Transportation and Infrastructure that made some noise, but no resolution or law emerged.[193]

In Canada, National Chairperson of the Council of Canadians, described it as anti-democratic and a threat to Canada's water and energy.[194] Critics took to the media to lambaste the SPP and corporate control. For then-CNN anchor Lou Dobbs, the SPP was the gateway to a new common currency.[195] Stephen Zamora used a more academic term by referring to the SPP as an example of "NAFTA-related 'quasi-supranationalism.'"[196]

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https://www.ojp.gov/ncjrs/virtual-library/abstracts/mara-salvatrucha-deadliest-street-gang-america.

191. *Cf.* CELINDA FRANCO, CONG. RSCH, SERV., RL34233, THE MS-13 AND 18TH STREET GANGS: EMERGING TRANSNATIONAL GANG THREATS? 1 (2010) ("[P]erhaps most disturbingly for policy makers in a post- 9/11 world, alarms have been sounded in some circles that international terrorist organizations like al-Qaeda could exploit alien and narcotics smuggling networks controlled by these gangs to infiltrate the United States. To date, however, no evidence suggests that these gangs and international terrorist groups are cooperating with one another."); Joseph Rogers, *Gangs and Terrorists in the Americas: An Unlikely Nexus*, 14 J. GANG RES. 19 (2007).

192. Thomas A. Shannon, Jr., Asst. Sec'y of State, U.S. Dept. of State, Remarks at a AS/COA Hosted Conversation (Apr. 2, 2008), https://www.as-coa.org/articles/us-asst-secretary-state-western-hemisphere-affairs-thomas-shannon.

193. *H.Con.Res. 40 (110th): Expressing the Sense of Congress that the United States Should Not Engage in the Construction of a North American Free Trade Agreement (NAFTA) Superhighway System or Enter into a North American Union with Mexico and Canada*, GOVTRACK (Jan. 22, 2007), https://www.govtrack.us/congress/bills/110/hconres40; H.R. Con. Res. 40, 110th Cong. (2007).

194. Brent Patterson, *Maude Barlow Addresses 'Peace with Water' Conference,* COUNCIL OF CANADIANS, https://canadians.org/analysis/maude-barlow-addresses-peace-water-conference (last visited Feb. 21, 2022).

195. *Lou Dobbs Tonight*, CNN (June 21, 2006), https://transcripts.cnn.com/show/ldt/date/2006-06-21/segment/01 ("The Bush administration's open-borders policy and its decision to ignore the enforcement of this country's immigration laws is part of a broader agenda. President Bush signed a formal agreement that will end the United States as we know it, and he took the step without approval from either the U.S. Congress or the people of the United States.").

196. Zamora, *supra* note 180, at 642.

According to a United States Congressional Research Service report on the SPP:

> The primary purpose of the initiative was to improve cooperative efforts among the three countries in areas related to economic prosperity and the protection of the environment, the food supply, and public health. The initial plan included the establishment of a number of security and prosperity working groups in each of the two categories. [For the U.S. government,] [t]he security working groups were chaired by the Secretary of Homeland Security and the prosperity working groups were chaired by the Secretary of Commerce.[197]

While the spp.gov website has been taken down, archived materials are still available online, they are posted primarily by the Canadian government.[198] According to the Canadian government website, the SPP was about more than just a common defense policy:

> The SPP . . . provides a flexible means for a dialogue, priority setting, collaboration and action on issues affecting the security, prosperity and quality of life of Canadians, Americans and Mexicans. It addresses diverse issues, such as border facilitation, the environment, food and product safety, and includes measures to improve overall North American competitiveness.[199]

It is of little surprise that the SPP scared a great many economic nationalists, union leaders, conspiracy theorists, and media pundits. Critics painted the SPP as the blueprint for a takeover by the corporations.[200] Elected representatives in the United States saw the lack of democratic oversight as troublesome. A congressional research report noted, "[s]ome key issues for Congress regarding the SPP concern possible implications related to *private sector priorities*, national sovereignty, transportation corridors, cargo security, and border security."[201]

Not much happened. Various representatives from Canada, Mexico, and the United States met in February 2007 to discuss the Security and Prosperity Partnership. When they later met at Montebello, Quebec in August 2007, the

197. VILLARREAL & LAKE, *supra* note 188, at 1.

198. *See Evaluation of the SPP*, *supra* note 187.

199. *Id.*

200. Lou Dobbs opined that the SPP was the gateway to a new common currency. *See also Lou Dobbs Tonight*, *supra* note 195 ("The Bush administration's open-borders policy and its decision to ignore the enforcement of this country's immigration laws is part of a broader agenda. President Bush signed a formal agreement that will end the United States as we know it, and he took the step without approval from either the U.S. Congress or the people of the United States."). Zamora, *supra* note 180, at 642 (Professor Stephen Zamora gave the SPP a bit more academic respectability by referring to it as an example of "NAFTA-related 'quasi-supranationalism'").

201. VILLARREAL & LAKE, *supra* note 188 (emphasis added).

leaders of the three countries even referred to the SPP discussions as "NAFTA trade talks."[202] Eventually, the blogosphere nationalist groups particularly in Canada and the United States, made enough noise to have the SPP die a quiet death by August 2009. The three governments abandoned the project by simply taking down the website and starting new projects, on bilateral and ad hoc bases, rather than through trilateral mechanisms.

> North America's governments follow a general laissez faire approach to integration of the economies and societies of the NAFTA countries. Trilateralism is eschewed in favor of ad hoc attempts at bilateral, generally short-term solutions to issues of common concern to North Americans. Canada, Mexico, and the United States (especially the last) prefer to conduct affairs unilaterally, with occasional resort to bilateral initiatives to smooth over economic or diplomatic problems.[203]

Perhaps trilateralism had run its course.

> [I]n the absence of a compelling vision to define a modern regional entity, and lacking institutions to translate that vision into policies, the old patterns of behavior among the three governments remained. This meant that the U.S. penchant for unilateralism and the Canadian and Mexican preference for bilateralism have trumped NAFTA's promise of a novel trilateral partnership.[204]

A dozen years later, Robert A. Pastor noted again that, "[i]nstead of tackling new transnational problems such as regulatory harmonization together, the United States and its neighbors reverted to old habits of bilateral, ad hoc negotiations."[205] And that was even before the Presidency of Donald J. Trump.

C. The United States-Mexico-Canada Agreement

Repeatedly during the 2016 Presidential election in the United States, candidate Trump promised to withdraw from the NAFTA.[206] Trump

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202. Steve Schifferes, *NAFTA Trade Talks Likely to Stall*, BBC (Aug. 18, 2007), http://news.bbc.co.uk/2/hi/business/6940189.stm.

203. Zamora, *supra* note 180, at 644.

204. PASTOR, *supra* note 125, at 2.

205. Memorandum from Robert A. Pastor on Shortcut to U.S. Econ. Competitiveness (Mar. 5, 2013), https://cdn.cfr.org/sites/default/files/pdf/2013/03/Policy_Innovation_Memo29_Pastor.pdf

206. Jared Bernstein, *Trump Promises to Tear Up Trade Deals. Here's What He Should Do*, WASH. POST (Nov. 14, 2016), https://www.washingtonpost.com/posteverything/wp/2016/11/14/trump-promises-to-tear-up-trade-deals-heres-what-he-should-do/?utm_term=.39161b8f69a5. *See generally* Time Staff, *Here's Donald Trump's Presidential Announcement Speech*, TIME (June 16, 2015), http://time.com/3923128/donald-trump-announcement-speech/ (However, Mr. Trump also

repeatedly pointed to the U.S. trade deficit with Mexico as emblematic of "unfair trade deals" which the United States entered.[207] His campaign stated, that as President, he would tell NAFTA partners:

> that we intend to immediately renegotiate the terms of that agreement to get a better deal for our workers. If they don't agree to a renegotiation, we will submit notice that the U.S. intends to withdraw from the deal. Eliminate Mexico's one-side backdoor tariff through the VAT and end sweatshops in Mexico that undercut U.S. workers.[208]

In his inaugural address, President Donald J. Trump fed into the anger of the trade.[209] On January 26, 2017, President Trump tweeted, that "[the United States] has a 60-billion-dollar trade deficit with Mexico. It has been a one-sided deal from the beginning of NAFTA with massive numbers . . . ."[210] Maintaining that NAFTA was "a horrible deal," President Trump opted to renegotiate NAFTA only a day after announcing that he was ready to trigger the article in the trade agreement to withdraw from it: "I think we'll be successful in the renegotiation, which, frankly, would be good because it would be simpler."[211]

It is important to note that the renegotiation of NAFTA was not the brainchild of President Trump. As candidates for the Democratic Party's Presidential nomination, then Senators Barack Obama and Hillary Clinton also both called for a new NAFTA deal.[212] Seeking delegates during the Ohio primary, both candidates criticized the deal for job losses in the state's

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promised to withdraw from the Trans-Pacific Partnership, a twelve-country trade agreement the U.S. had recently signed. Trump also said, "I'll bring back our jobs from China, from Mexico, from Japan, from so many places. I'll bring back our jobs, and I'll bring back our money").

207. Rex Nutting, *Opinion: How Donald Trump Hijacked the Democrats' Best Issue*, MARKETWATCH (Sept. 30, 2016, 11:23 A.M.), http://www.marketwatch.com/story/how-hillary-clinton-could-beat-donald-trump-on-his-strongest-issue-2016-09-30.

208. *Looking Back–Trump and Trade*, THOMPSON HINE (Jan. 9, 2017), https://www.thompsonhine.com/publications/looking-back-trump-and-trade.

209. *Donald Trump's Inaugural Address: Full Text as Prepared for Delivery,* WASH. POST (Jan. 20, 2017), https://www.washingtonpost.com/news/post-politics/wp/2017/01/20/donald-trumps-inaugural-address-full-text-as-prepared-for-delivery/?utm_term=.cda4ee831b81.

210. Nikita Vladimirov, *Trump Ripped Mexico in Tweet While Kushner Was Meeting with Mexican Officials: Report*, THE HILL (Feb. 11, 2017, 11:47 AM) https://thehill.com/homenews/administration/319080-trump-ripped-mexico-in-tweet-while-kushner-was-meeting-with-mexican.; *see* Ioan Grillo, *Trumps' Mexican Shakedown*, N.Y. TIMES (Feb. 2, 2017), https://www.nytimes.com/2017/02/02/opinion/trumps-mexican-shakedown.html.

211. Scott Horsely, *With Billions at Stake, Trump Agrees to Mend NAFTA—Not End It*, NPR (Apr. 27, 2017, 5:38 PM), http://www.npr.org/2017/04/27/525920241/with-billions-at-stake-trump-agrees-to-mend-nafta-not-end-it.

212. Adam Davidson, *Clinton, Obama and NAFTA: A Non-Issue?*, NPR (Feb. 26, 2008, 4:00 PM), https://www.npr.org/templates/story/story.php?storyId=38185288 ("The two candidates seem to really hate NAFTA.").

rustbelt.[213] When the Democrats took the White House in 2008, the promises to renegotiate NAFTA went unfulfilled. That was not so with the new Trump administration.

In a letter to Congressional leadership, U.S. Trade Representative Robert Lighthizer notified the U.S. Congress that through improvements to NAFTA, the Trump administration looked to spark economic growth and create better-paying jobs.[214] Those improvements were not detailed.[215] In August 2017, trade negotiations commenced.[216]

On August 22, 2017, President Trump told a campaign–like rally audience in Phoenix that he doubted that the United States could reach a deal to renegotiate the NAFTA and that his administration would end up just terminating the trade pact with Canada and the United States. "So I think we'll end up probably terminating NAFTA at some point, OK? Probably."[217] This occurred only five days before the first set of renegotiations had just ended.[218] And just five days before the start of a second round of talks, President Trump announced via Twitter that he planned to withdraw from NAFTA altogether.[219] This threat lit a fire for the trade officials crafting the

213. Associated Press, *Clinton, Obama Slug It Out in Ohio*, CBS NEWS (Feb. 28, 2008, 4:13 PM), https://www.cbsnews.com/news/clinton-obama-slug-it-out-in-ohio/.

214. Letter from Robert E. Lighthizer, U.S. Trade Rep., to Charles E. Schumer, Democratic Leader, Orrin Hatch, President Pro Tempore, Paul Ryan, Speaker of the House & Nancy Pelosi, Democratic Leader (May 18, 2017) (on file with Congress).

215. Julie Hirschfeld Davis, *Trump Sends NAFTA Renegotiation Notice to Congress*, N.Y. TIMES (May 18, 2017), https://www.nytimes.com/2017/05/18/us/politics/nafta-renegotiation-trump.html?_r=0.

216. Jorge Valencia, *NAFTA Talks Could Begin as Early as August; 'We Are Ready,' Mexican Official Says*, FRONTERAS DESK (May 18, 2017), http://www.fronterasdesk.org/content/10679/nafta-talks-could-begin-early-august-'we-are-ready'-mexican-official-says.

217. Chris Cillizza, *Donald Trump's 57 Most Outrageous Quotes From His Arizona Speech*, CNN (Aug. 22, 2017, 10:16 AM), http://www.cnn.com/2017/08/23/politics/donald-trump-arizona/index.html. *See also* Jethro Mullen, *Trump: We'll probably End Up Killing NAFTA 'at Some Point,'* CNN (Aug. 23, 2017, 3:47 PM), http://money.cnn.com/2017/08/22/investing/trump-nafta-termination/index.html; Reuters Staff, *Trump Warns May Terminate NAFTA Treaty*, REUTERS (Aug. 22, 2017, 10:39 PM), https://www.reuters.com/article/us-usa-trump-nafta-idUSKCN1B30F2; Jacob Pramuk, *Trump: We'll 'Probably' End Up Terminating NAFTA*, CNBC (Aug. 22, 2017, 3:47 PM), https://www.cnbc.com/2017/08/22/trump-well-probably-end-up-terminating-nafta.html; *President Trump Ranted For 77 Minutes in Phoenix. Here's What He Said*, TIME (Aug. 23, 2017, 9:30 AM), http://time.com/4912055/donald-trump-phoenix-arizona-transcript/.

218. Rodrigo Cervantes, *As NAFTA Talks Start, Trade Deficit Arguments Prevail*, FRONTERAS (Aug. 16, 2017), http://www.fronterasdesk.org/content/10772/nafta-talks-start-trade-deficit-arguments-prevail.

219. Reuters Staff, *Trump Renews Threat to Scrap NAFTA Going into Next Round of Talks*, REUTERS (Aug. 27, 2017, 8:09 AM), https://www.reuters.com/article/us-trade-nafta-idUSKCN1B70NA.

deal. More lightning speed rounds of negotiations were undertaken, some through separate tracks—beyond the parties' initial deadline of December 2017[220] and into Spring 2018 with both Canada[221] and Mexico.[222] A bilateral deal with Mexico—the United States-Mexico Trade Agreement—was announced in late August 2018, leaving out Canada.[223]

After the back and forth of the lightning speed negotiations during 2018 and 2019, the parties finally reached a deal.[224] The USMCA was initially signed and agreed upon in December 2019. However, President Trump did not sign the agreement until January 29, 2020.[225] Canada agreed to the final terms on April 3, 2020.[226] Referred to in Canada as the Canada-United States-Mexico-Agreement (CUSMA) (and in French Canada as the Accord Canada–États-Unis–Mexique (ACEUM)),[227] and Tratado entre México, Estados Unidos y Canadá (T-MEC) in Mexico, the USMCA went into force on July 1, 2020.[228]

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220. Ana Swanson, *Nafta Talks' Extension May Make for Slow, Painful Demise*, N.Y. TIMES (Oct. 17, 2017), https://www.nytimes.com/2017/10/17/us/politics/nafta-negotiators-extend-talks-delaying-its-expected-demise.html?rref=collection%2Fsectioncollection%2Fpolitics&action=click&contentCollection=politics&region=stream&module=stream_unit&version=latest&contentPlacement=3&pgtype=sectionfront.

221. Rodrigo Cervantes, *Canadian Prime Minister Visits Mexico Amidst NAFTA Discussions*, FRONTERAS (Oct. 13, 2017), http://www.fronterasdesk.org/content/10848/canadian-prime-minister-visits-mexico-amidst-nafta-discussions.

222. Elisabeth Malkin, *Mexico Braces for the Possible Collapse of NAFTA*, N.Y. TIMES (Oct. 16, 2017), https://www.nytimes.com/2017/10/16/world/americas/mexico-nafta.html?rref=collection%2Fsectioncollection%2Fworld&action=click&contentCollection=world&region=stream&module=stream_unit&version=latest&contentPlacement=6&pgtype=sectionfront&_r=0.

223. Damian Paletta, Erica Werner & David J. Lynch, *Trump Announces Separate U.S.-Mexico Trade Agreement, Says Canada May Join Later*, WASH. POST (Aug. 27, 2018), https://www.washingtonpost.com/business/2018/08/27/us-mexico-reach-partial-agreement-resolve-trade-conflict-step-towards-nafta-deal/?utm_term=.5b8c3d156642. *See also* Matthew Rooney, *Don't Split NAFTA,* NAT'L REV. (June 9, 2018), https://www.nationalreview.com/2018/06/nafta-treaty-trilateral-better-than-bilateral/.

224. Ana Swanson, *Canada on the Sidelines as U.S. and Mexico Near an Agreement on NAFTA*, N.Y. TIMES (Aug. 17, 2018), https://www.nytimes.com/2018/08/17/us/politics/nafta-canada-mexico.html?rref=collection%2Fsectioncollection%2Fpolitics&action=click&contentCollection=politics&region=stream&module=stream_unit&version=latest&contentPlacement=4&pgtype=sectionfront.

225. Eugene Beaulieu & Dylan Klemen, *You Say USMCA or T-MEC and I Say CUSMA: The New NAFTA - Let's Call the Whole Thing On*, 13:7 SCH. PUB. POL'Y PUBL'N. 1, 2 (Apr. 2020).

226. *Id.* at 1.

227. *Id.* at 2, n. 1.

228. Press Release, Robert Lighthizer, U.S. Trade Rep, USMCA To Enter into Force July 1, After United States Takes Final Procedural Steps for Implementation (Apr. 24, 2020),

The new agreement is not exactly an earth-shattering change for the parties. David A. Gantz wrote that "much of NAFTA has been carried over into the USMCA."[229] The Investor-State Dispute Resolution mechanisms of Chapter 11—the impugned procedures that allow foreign corporations to sue sovereign countries for the expropriation, nationalization or other "taking" of their investment—did not change much under the new agreement.[230] Arbitrators are now empowered to throw out nuisance lawsuits—blatant attempts at seeking unjust enrichment by arguing for expectation of profits as part of the damages they claim.[231] This perversion of mechanisms to ensure fair and just compensation for foreign corporations has been part of all trade agreements the United States has entered into since the North American Free Trade Agreement. Chapter 11 has been the target of U.S. politicians on both sides of the political spectrum even though the United States has never lost a case under the provision.[232] New rules to prevent corporations from extracting hundreds of millions of dollars for "losing an investment" must be renegotiated, at least that is what Canada and Mexico—both of which have paid U.S. corporations dearly over the years—will seek. Investor-State arbitration procedures under the USMCA will continue to work outside of domestic court systems, remain anti-democratic, and function as a corporate welfare scheme.

NAFTA's environmental and labor side provisions, contained in so-called "side agreements" were scrapped for the United States-Mexico-Canada Agreement.[233] Those issues were placed inside the agreement, with more enforcement measures.[234] The new agreement provided for more deals

https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/april/usmca-enter-force-july-1-after-united-states-takes-final-procedural-steps-implementation.

229. David A. Gantz, *North America's Shifting Supply Chains: The USMCA, COVID-19, and the U.S.-China Trade War*, CTR. FOR THE U.S. & MEX. 1, 3 (2020).

230. USMCA, *supra* note 31, ch. 2, art. 14.D.3(1)(a)(i)(A), n. 22.

231. *See id.*, ch. 4.

232. Elizabeth Warren, *The Trans-Pacific Partnership Clause Everyone Should Oppose*, WASH. POST (Feb. 25, 2015), https://www.washingtonpost.com/opinions/kill-the-dispute-settlement-language-in-the-trans-pacific-partnership/2015/02/25/ec7705a2-bd1e-11e4-b274-e5209a3bc9a9_story.html.

233. Mario Andrew Torrico et al., *New Labor Obligations Contained in USMCA Present Risks for Covered Employers*, NAT'L L. REV. (Apr. 28, 2021), https://www.natlawreview.com/article/new-labor-obligations-contained-usmca-present-risks-covered-employers.

234. *See* USMCA *supra* note 31, chs. 23-24.

for corporations under the guise of "America First,"[235] creating boons for multinational capital and global financial institutions.[236]

The USMCA provides for changes in regional content value concerning automobiles and automobile parts.[237] The focus on regional content value rules to truly make cars in North America. The USMCA provided a requirement that 75% of the automobiles manufacturing, must have occurred in North America to qualify for zero tariffs (in comparison to 63.5% under NAFTA).[238] Additionally, 45% of automobile components must be made by workers making at least $16 per hour by the year 2023.[239] USMCA sections 19, 20, 23, and 24 also provide changes to digital, intellectual property (IP), labor, and environmental standards. Investors no longer have the ability to sue governments which policy changes damage business in the United States and Canada; Mexico imposed restrictions on the ability to sue. [240]

One of the highlights of the USMCA is the novel chapter on trade in digital goods.[241] The USMCA addresses the use and inclusion of algorithms in trade, recognizing interactive computer services, and addresses the liability of intermediaries regarding IP infringement. Radically, Article 19.18 addresses the availability of having public government data to promote innovation, competition, and social development. [242] The chapter dedicated to digital goods is visionary, making the USMCA a truly innovating regime among modern free trade agreements.[243]

But the USMCA is not in *ad infinitum*; it provides for a five-year sunset clause on any new agreement.[244] In the end, the USMCA is likely not a

235. Lily Rothman, *History/Politics: The Long History Behind Donald Trump's 'America First' Foreign Policy*, TIME (Mar. 28, 2016), https://time.com/4273812/america-first-donald-trump-history/; *see also White House: 'America First': Read Trump's Full United Nations Speech*, NBC NEWS (Sept. 19, 2017), https://www.nbcnews.com/politics/white-house/america-first-read-trump-s-full-united-nations-speech-n802676.

236. Alan Rappeport, *As NAFTA Talks Resume, U.S. and Canada Aren't Budging on Key Priorities*, N.Y. TIMES (Sept. 5, 2018), https://www.nytimes.com/2018/09/05/us/politics/nafta-talks-us-canada.html.

237. Eric van Eyken, *Is America First the End of FET?*, KLUWER ARB. BLOG (Aug. 3, 2017), http://arbitrationblog.kluwerarbitration.com/2017/08/03/america-first-end-fet/.

238. David A. Gantz, *The United States-Mexico-Canada Agreement: Tariffs, Customs, and Rules of Origin*, RICE U. BAKER INST. PUB. POL'Y RPT. 3 (2019).

239. Beaulieu & Klemen, *supra* note 225, at 5.

240. *Id.*

241. *See generally* USMCA, *supra* note 31, ch. 19.

242. Mira Burri, *Towards a New Treaty on Digital Trade*, 5 J. WORLD TRADE, 77, 90 (2021).

243. Eleanor Wragg, *USMCA: A High-Water Mark for Digital Trade?*, GLOBAL TRADE REV. (July 14, 2020), https://www.gtreview.com/magazine/volume-18-issue-3/usmca-high-water-mark-digital-trade/.

244. Swanson, *supra* note 224.

panacea for all of the United States' trade challenges.[245] Experts, stakeholders, academicians, as well as dairy farmer organizations predict that results of the USMCA will not be so great.[246]

One area of focus is the impact of the USMCA on the United States labor market. The total average wage across all education levels is expected to increase by an average of only 0.27%.[247] In comparison to baseline changes in 2017, employment among workers with ten to twelve years of education and thirteen to fifteen years of education is expected to increase a paltry 0.12%.[248] It was no surprise that the International Union of Machinists and Aerospace Workers (IAM) opposed the USMCA. "U.S. workers have been waiting over 25 years for a responsible trade deal that puts their interests ahead of corporations who are fleeing our shores. They are still waiting. The IAM will oppose NAFTA 2.0."[249]

Corporations, however, will likely prosper as they did under the previous trilateral trade agreement. "Powerful multinational corporations have used and controlled the negotiation of trade and investment deals to facilitate offshoring and the deregulation of the U.S. and global economy."[250] U.S trade with Canada is expected to grow 5.9% in exports (19.1 billion), 4.8% in imports (19.1) billion.[251] U.S trade with Mexico is expected to grow 6.7% in exports (14.2 billion) and 3.8% (12.4 billion) in imports.[252]

The United States International Trade Commission (USTIC) prepared a report on the likely impact of the implementation of the USMCA. The report was created in compliance with the Bipartisan Congressional Trade Priorities and Accountability Act of 2015.[253]

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245. *North American Business Associations Issue Joint Statement on USMCA: "USMCA is Here, But the Work is Just Beginning*," U.S. CHAMBER COM. (July 1, 2020), https://www.uschamber.com/international/trade-agreements/north-american-business-associations-issue-joint-statement-usmca-usmca-here-the-work.

246. *USMCA: A Bad Deal for Farmers*, NAT'L FAM. FARM COALITION (Mar. 18, 2020), https://nffc.net/usmca-a-bad-deal-for-farmers/#:~:text=In%20another%20disappointment%20for%20farmers%2C%20the%20USMCA%20does,revoked%20following%20a%202015%20WTO%20complaint%20from%20Canada.

247. U.S.- Mexico-Canada Trade Agreement: Likely Impact on the U.S. Economy and on Specific Industry Sectors, Inv. No. TPA 105-003, USITC Pub. 4889 (April 2019) [hereinafter USMCA Impact].

248. *Id.* at 47.

249. International Union of Machinists and Aerospace Workers, *Machinists Union Opposes USMCA* (Dec. 10, 2019), https://www.goiam.org/news/imail/machinists-union-opposes-usmca/.

250. *See* Thea M. Lee & Robert E. Scott, *News from EPI: U.S.-Mexico-Canada Agreement–Weak Tea, at Best*, ECON. POL'Y INST. (Dec. 10, 2019), https://www.epi.org/press/u-s-mexico-canada-agreement-weak-tea-at-best/.

251. USMCA Impact, *supra* note 247, at 14.

252. *Id.*

253. *Id.* at 27.

> The statute requires the Commission to assess the likely impact of USMCA on the U.S. economy as a whole and on specific industry sectors, including its impact on the U.S. gross domestic product (GDP); exports and imports; aggregate employment and employment opportunities; the production, employment, and competitive position of industries likely to be significantly affected by the agreement; and the interests of U.S. consumers.[254]

The USTIC estimates that the USMCA would raise the United States, "real GDP by $68.2 billion (0.35%) and U.S. employment by 176,000 jobs (0.12%)."[255] Additionally, U.S. exports to Canada and Mexico would increase by $19.1 billion (5.9%) and $14.2 billion (6.7%), respectively. U.S. imports from Canada and Mexico would increase by $19.1 billion (4.8%) and $12.4 billion (3.8%), respectively. [256]

The report noted the United States economy in comparison to Mexico and Canada, as well as the prior reduction in tariffs within NAFTA, will likely cause a minimal impact overall to the United States economy, with the real GDP staying at baseline.[257] The most significant impacts are, "reduc[ing] policy uncertainty regarding cross-border data flows and data localization and certain automotive rules of origin (ROOs) have the most significant impact on the estimated results." [258] In addition, trade disputes with the parties in the USMCA continue into the Biden administration.[259]

In the end though, trilateral initiatives did not do much to tame the border, and there has been a mixed set of results from NAFTA and SPP; similar results are likely with the newest trade agreement—the United States-Mexico-Canada Agreement. As noted above, corporations did well under NAFTA and the SPP and they are poised to do well again under the United States-Mexico-Canada Agreement, particularly in the provision of digital goods.[260]

Corruption reigns in Mexico, as reports from Transparency International confirm.[261] Even the USMCA negotiations were not without their own scandal. Mexican prosecutors from the federal Attorney General's Office

254. *Id.*

255. *Id.* at 14.

256. *Id.*

257. *Id.* at 15.

258. *Id.* at 15-16.

259. Gavin Bade & Andy Blatchford, *Biden's Made-in-America Push Raises Trade Tensions at Meeting with Canada, Mexico*, POLITICO (Nov. 18, 2021, 5:01 AM), https://www.politico.com/news/2021/11/18/joe-biden-made-in-america-tensions-canada-mexico-522868.

260. USMCA Impact, *supra* note 247, at 171.

261. TRANSPARENCY INT'L *supra* note 138.

charged former economy minister Ildefonso Guajardo, the lead negotiator for Mexico in the USMCA negotiations, with corruption in July 2021.[262] This charge alleged that blurring of public and private dealings is not dissimilar to that what occurred in the U.S. fundraising and personal enrichment criminal prosecutions of the border vigilantes and in We Build the Wall, implicating former Trump advisor Steve Bannon, nor to the fleecing of donations by various border vigilante groups a few years ago.[263] It is not unlike the behavior exhibited by Pancho Villa when he was both a bandit and Governor of the State of Chihuahua in the aftermath of the Mexican Revolution.[264]

III. THE TRILATERAL RESPONSES HAVE NOT TAMED THE BORDER

In the view of the United States' trade policymakers in the late 1980s and early 1990s, NAFTA was necessary for economic[265] and national security reasons.[266] The three countries in the trade pact promised to increase economies of scale by lowering trade barriers to facilitate a continent-wide supply chain to allow for greater efficiency and creation of competitive firms ready for the global marketplace. With the attacks of 9/11, most U.S. policies and international agreements revolved around national security.[267] After a decade of NAFTA, the security measures that emerged after the 9/11 attacks included principally another trilateral agreement that harmonizes rules for

262. *Mexico Accuses Former USMCA Negotiator of Illicit Enrichment*, BLOOMBERG TAX (July 9, 2021, 1:48 PM), https://news.bloombergtax.com/daily-tax-report-international/mexico-accuses-former-usmca-negotiator-of-illicit-enrichment.

263. David Holthouse, *Jim Gilchrist Fired by Minuteman Project*, S. POVERTY L. CTR. (July 1, 2007), https://www.splcenter.org/fighting-hate/intelligence-report/2007/jim-gilchrist-fired-minuteman-project. *See generally*, Sonya Geis, *Minuteman Project in Turmoil Over Financial Allegations*, WASH. POST (Mar. 13, 2007), http://www.washingtonpost.com/wp-dyn/content/article/2007/03/12/AR2007031201297.html.

264. When Villa entered the governor's palace in Chihuahua he took personal command of the relief work among the residents of the town. His first act was to reduce prices so as to permit the poor to obtain the necessary supplies. Any merchant found guilty of charging famine prices was to be shot and his stores and property confiscated.

I. THORD-GRAY, GRINGO REBEL: MEXICO 1913-1914, 257-58 (1960).

265. MAXWELL A. CAMERON & BRIAN W. TOMLIN, THE MAKING OF NAFTA: HOW THE DEAL WAS DONE 182 (2000).

266. "The United States has long understood that instability in Mexico could not be contained at the border. That is the national security rationale that underlies NAFTA." PASTOR, *supra* note 125, at 189.

267. Historical and national security concerns have always driven U.S. policy towards Central America. Since the early days of the United States, American business played a significant role in the region . . . . And despite the relatively small size of the market offered by Central American countries, U.S. policymakers saw the promise of stable economies and political conditions offered by greater trade and investment in the region.

Robert E. Lutz, *CAFTA and Commercial Law Reform in the Americas: An Introduction*, 12 SW. J. L. TRADE AMS. 177, 177 (2006).

transportation, travel, and other communications among the three partner countries. The Security and Prosperity Partnership arrived in 2005, building a security narrative into the free trade area. The USMCA added on the harmonization and provided, among other features, the pioneer architecture for an integrated digital goods marketplace, free of duties and administrative challenges. This Article has focused on these trilateral initiatives to tame the border areas, while further augmenting the regional integration and making the borders, specifically the U.S.-Mexico border, less contested and safer.[268] However, that has not happened.

Instead, these trade regimes laid the framework for a culture of extraction of agricultural products, minerals, oil, and eventually people. Eduardo Galeano in *Open Veins of Latin America* wrote:

> The division of labor among nations is that some specialize in winning and others in losing. Our part of the world, known today as Latin America, was precocious: it has specialized in losing ever since those remote times when Renaissance Europeans ventures across the ocean and buried their teeth into the throats of the Indian civilizations. Centuries passed and Latin America perfected its role. We are no longer in the era of marvels when fact surpassed fable and imagination was shamed by the trophies of conquest—the lodes of gold, the mountains of silver. But our region still works as a menial. It continues to exist at the service of others' needs, as a source and reserve of oil and iron, of copper and meat, of fruit and coffee, the raw materials and foods destined for rich countries which profit more from consuming them than Latin America does from producing them.[269]

Indeed, the monocultural economies of Latin America continue while the secondary and tertiary production processes—wherein much of the surplus value is extracted—provide profits for the developed world. The legal frameworks under the Washington Consensus, contained in the free trade agreements, and a whole host of other neoliberal policies, allow for legitimated extraction of natural resources and, in turn, profit. In *Plunder: When the Rule of Law is Illegal*, Ugo Mattei and Laura Nader explored:

> the mechanisms through which the transnational rule of law, as a deeply Western idea, has led incrementally to patterns of global plunder, a process initiated by the expansion of Euro-American society worldwide, and now continued by nations, in particularly the

268. *Cf.* "Globalization is a process that generates contradictory spaces, characterized by contestation, internal differentiation, continuous border crossings." SASSEN, *supra* note 45, at xxxiv.

269. EDUARDO GALEANO, OPEN VEINS OF LATIN AMERICA: FIVE CENTURIES OF THE PILLAGE OF A CONTINENT 1 (Monthly Rev. Press 1997) (1973).

> USA, and multinational corporate entities independent of explicit political or military colonialism.[270]

More plunder has come with the protection of big tech's data harvesting business model that Chapter 19 allows.[271] Extraction is present also in agricultural exchange, mining, cattle ranching, which became the subsequent priorities for economic growth, and in railroad construction, which was designed to connect the natural resources of the Mexican North to the marketplaces in the United States.[272] These industries had a ready-made workforce—the Mexican and Mexican-American population were ready to work in those industries for wages necessary to survive after being dispossessed of their lands.

Extraction is also baked into the ISDS system of the USMCA, created to assist corporations in dealing with lost investments or dashed expectations of profits. There is indeed profit in that space. It is not just human traffickers, drugs traffickers, and other nefarious groups plying their trades along the border, but also other individuals who can access the international system that can hook into the food trough of transnational trade. It is multinational enterprises, transnational corporations, international capital markets, and individuals who profit from this system.

The Washington Consensus forced broad structural changes in developing countries like Mexico, transforming the state to be less an engine of economic growth and order and instead allowing for the private sector to instigate economic growth and wealth.[273] The resulting market-friendly policy prescriptions, however, did not produce economic benefits for the working class, Indigenous Peoples, and marginalized groups around Latin America.[274] Privatization, market liberalization, and free trade have, for the

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270. MATTEI & NADER, *supra* note 19, at 2.

271. Gary Clyde Hufbauer & Megan Hogan, *Digital Agreements: What's Covered, What's Possible*, PETERSON INST. FOR INT'L ECON. (Oct. 2021), https://www.piie.com/reader/publications/policy-briefs/digital-agreements-whats-covered-whats-possible.

272. GANSTER & LOREY, *supra* note 72, at 36 ("Often the railroad tied Mexican communities more closely to the United States than to the Mexican interior").

273. "Given Latin America's long history of protectionism, the trade reform was dramatic." MICHAEL REID, FORGOTTEN CONTINENT: THE BATTLE FOR LATIN AMERICA'S SOUL 137 (2010).

274. Foreign investment is, of course, a very good thing. The more of it, the better.

> Stable currencies are good, too, as are free trade and transparent banking practices and the privatization of state-owned industries and every other remedy in the Western pharmacopoeia. Yet we continually forget that global capitalism has been tried before. In Latin America, for example, reforms directed at creating capitalist systems have been tried at least four times since independence from Spain in the 1820s. Each time, after the initial euphoria, Latin Americans swung back from capitalist and market economy policies.

HERNANDO DE SOTO, THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE 3 (2000).

large part, benefited corporations but did not bring any noticeable trickle down economic effects.[275]

The trade treaties provided some of the underpinnings of a regime of plunder. The resulting democracy deficit, challenge to national sovereignty, disregard for Indigenous Peoples, labor movements, and environmental concerns has angered the lower socio-economic class in Latin America and ignited a new kind of civil society direct action being asserted contemporaneously with the trade negotiations themselves. This reaction to the negative aspects of globalization was exacerbated by the world financial crisis. Ntina Tzouvala explained:

> Ours is a time of crises. A decade after the global financial crash the edifice known as the "liberal international order" is under profound pressure. Worryingly, some of the alternative competing for hegemony offer an even more violent, exploitative and environmentally destructive future than the current configuration.[276]

IV. CONCLUSION

The illicit drug industry has grown exponentially.[277] It is the economic space in which there is still job growth. After all, with few well-paying, legitimate jobs available, people turn to illegal activities.[278] Worldwide the illicit drug industry is estimated to be worth $300 billion annually.[279] Mexican drug cartels annually supply billions of dollars' worth of cocaine, marijuana, methamphetamines, and MDMA to the United States.[280] Over

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275. *See* Teddy Chestnut & Anita Joseph, *The IMF and the Washington Consensus: A Misunderstood and Poorly Implemented Development Strategy*, COUNCIL HEMISPHERIC AFFS. (July 17, 2005), https://www.coha.org/the-imf-and-the-washington-consensus-a-misunderstood-and-poorly-implemented-development-strategy/. *See generally*, Joseph Stiglitz, *Broadening Our Thinking on Vulnerability*, Human Development Reports, UN DEV. PROGRAMME (Oct. 02, 2017).

276. NTINA TZOUVALA, CAPITALISM AS CIVILISATION: A HISTORY OF INTERNATIONAL LAW 19 (2020).

277. JUNE S. BEITTEL, CONG. RSCH. SERV., R41576, MEXICO: ORGANIZED CRIME AND DRUG TRAFFICKING ORGANIZATIONS 15 (2020).

278. Briseida Valencia Soto, *Controversial Alternative for a Trapped Labor Force: Mexico's Formal Employment and Illicit Drug Production*, COUNCIL HEMISPHERIC AFFS. (July 5, 2016), https://www.coha.org/controversial-alternative-for-a-trapped-labor-force-mexicos-formal-employment-and-illicit-drug-production/.

279. TOM WAINWRIGHT, NARCONOMICS: HOW TO RUN A DRUG CARTEL 3 (2016) ("[The narcotics industry's] products are designed, manufactured, transported, marketed, and sold to a quarter of a billion consumers around the world").

280. DEP'T OF JUST., DRUG ENF'T AGENCY, 2020 NATIONAL DRUG THREAT ASSESSMENT 69 (2021), https://www.dea.gov/sites/default/files/2021-02/dir-008-21%202020%20national%20drug%20threat%20assessment_web.pdf.

twelve years some $3.3 billion has been spent to fight it through the Mérida Initiative.[281]

As Tom Wainwright explained more than half a decade ago (and nothing has changed since), "[n]ew bulletins feature little else: every week brought new stories of corrupted cops, assassinated officials, and massacre and bloody massacre of *narcotraficantes*, by the army or each other. This was the war on drugs, and the drugs were winning."[282] The war on drugs and criminal procedure reform are indeed linked to regional trade: the enforcement of contracts, transparent legal rules, and judicial independence are all components and all lead to a culture of the rule of law. However, after 9/11 the U.S. government has been looking at the U.S.-Mexico border through the national security lens first, and then it thinks about it through an international trade lens.

Back at the United States Embassy in Mexico City in November 2005, we briefed the U.S. Ambassador on our work in training prosecutors and judges in new oral trials that were being instituted and began in different states throughout Mexico[283] as Mexico moved away from the closed, written trials of its past inquisitorial system. We even talked to Los Pinos, Mexico's Executive Branch, about assisting the transitioning of the Superior Court of Mexico City, part of the Federal District's jurisdiction, from an adversarial criminal procedure to an inquisitorial one. This laid the groundwork for what would eventually be the Mérida Initiative a few years later, a program that provided human capacity building and other training contracts to the law school at which I was on faculty.

One of the pillars of the Mérida Initiative, which was furthered under the Obama administration, was the reform of the justice system.[284] This effort to reform the laws in Mexico also runs counterintuitive to the Mexican culture which leads to inefficient law making and inconsistent law enforcement.[285] With its emphasis on jury trials in the reformed criminal justice system, Mexico has also seen plea bargains. This approach seems indifferent to context in Mexico and undermines the foundation for improved outcomes in the criminal justice system.[286] The federal government, too, was looking at

281. CLAIRE RIBANDO SEELKE, CONG. RSCH. SERV., IF10578, MEXICO: EVOLUTION OF THE MERIDA INITIATIVE, FY 2008-2022 1 (2021).

282. WAINWRIGHT, *supra* note 279, at 2.

283. James Cooper, *Slow Road to Legal Reforms in Mexico,* SAN DIEGO UNION-TRIB., Nov. 27, 2006, at B7 (on file with author).

284. CLAIRE RIBANDO STEELE & KRISTIN FINKLEA, CONG. RSCH. SERV., R41349, U.S.-MEXICAN SECURITY COOPERATION: THE MERIDA INITIATIVE AND BEYOND 15 (June 29, 2017).

285. Deborah M. Weissman, *Remaking Mexico: Law Reform as Foreign Policy*, 35 CARDOZO L. REV. 1471, 1504 (2013).

286. *Id.*

this transition work as Mexico modernized its judiciary, prosecution, and public defense institutions.

When we first came into the Ambassador's office, I thought I had introduced my colleague—a Chilean prosecutor working on the rule of law reform as a consultant in all the Americas—formally to the man sporting the Texas cowboy boots, as he watched the images unfold on television. We were in Mexico to promote efforts of the Mexico White House—Los Pinos—and to provide some regional context for all the stakeholders in the legal sector—law schools, bar associations, law enforcement institutions, and regulatory agencies.[287] We briefed the transplanted Texan about burgeoning rule of law reforms in Mexico and encouraged the Embassy's collaboration in legal education programs that we were rolling out in support of many of the thirty-one Mexican states taking on these reforms.

Over half a decade before Chile had implemented oral trials in its country, it successfully transitioned various regions' criminal procedure from the inquisitorial model to a more adversarial model.[288] Mexico had an additional burden of reforming its procedures on a number of matters under the Security and Prosperity Partnership and a harmonization program post-9/11 and in the context of national security and customs bureaucracy liberalization. We did not get very far in our briefing when the Chilean prosecutor colleague and I looked over and saw the live TV images of protests in Argentina raging on. More smoke billowed out of another bank—this time, a branch of BankBoston. Tony Garza pointed away from the television to a Chuck Close painting that hung on his office wall. He showed us a catalog from a celebrated Mexican art collection that featured the painting. A few minutes later, after we walked out of the office, my Chilean colleague looked at me and asked, "so when do we get to meet the Ambassador?"

287. *See* PROYECTO ACCESO, www.proyectoacceso.com (last visited Jan. 24, 2022).

288. James M. Cooper, *Competing Legal Culture and Legal Reform: The Battle of Chile*, 29 MICH. J. INT'L L. 501, 520 (2008).

THE MATANZA-RIACHUELO BASIN CASE: LESSONS IN ENVIRONMENTAL ACTIVISM FROM THE ARGENTINE SUPREME COURT AND CIVIL SOCIETY ORGANIZATIONS

Sabrina Frydman*

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I. INTRODUCTION

The Matanza-Riachuelo Basin case presents the most important environmental judicial precedent in Argentina's history. This landmark decision by the Argentinean Supreme Court of Justice (hereinafter "Court" or "Supreme Court") commands government authorities to carry out a sanitation plan to improve the living conditions in the basin, recover the environment, and prevent further damage.[1]

The history behind the decision can be traced back to the year 2000, when Beatriz Mendoza, a forty-seven-year-old social psychologist, started to work at a health center located in "Villa Inflamable,"[2] in the municipality of Avellaneda, Province of Buenos Aires. Beatriz Mendoza explained that she chose a job in that location because everything "was yet to be done."[3] She was on point: studies confirmed that the neighboring industrial hub was one of the most polluted areas of the province, with severe health consequences for the families living there.[4] Beatriz personally experienced how the toxic air and soil affect her nervous system.[5] She filed, with seventeen neighbors and professionals, a collective damages claim before the Supreme Court of Justice, demanding judicial intervention in a complex case of human rights violations. The decision rendered by the Supreme Court on July 8, 2008, carries her name: *Mendoza, Beatriz Silvia y otros c/ Estado Nacional y otros*

1. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 8/7/2008, "Mendoza, Beatriz c. Estado Nacional," Fallos (2008-331-1622).

2. "Villa" is a slum, an irregularly developed neighborhood that lacks basic public services and infrastructure; the name "Inflamable" which means "flammable," named after the neighboring chemical and industrial hub "Polo Petroquímico Dock Sud."

3. Javier Drovetto, *Beatriz Mendoza: "Demandamos al Estado para Convertir lo Dramático de Cuenca del Riachuelo en Política Publica"* [*Beatriz Mendoza: "We Sue the State to Convert the Drama of the Riachuelo Basin into Public Policy"*], REDACCIÓN (June 8, 2018), https://www.redaccion.com.ar/beatriz-mendoza/.

4. DEFENSOR DEL PUEBLO DE LA NACIÓN ET AL., INFORME ESPECIAL SOBRE LA CUENCA MATANZA RIACHUELO [SPECIAL REPORT ON THE MATANZA RIACHUELO BASIN] 210-12 (2003) [hereinafter 2003 OMBUDSMAN REPORT ON MATANZA-RIACHUELO BASIN], http://www.farn.org.ar/wp-content/uploads/2020/06/Informe-especial-sobre-la-Cuenca-Matanza-Riachuelo-2003-1.pdf.

5. Drovetto, *supra* note 3.

s/ daños y perjuicios (damages due to the environmental contamination of the Matanza-Riachuelo River), commonly referred to as the *Mendoza* case.[6]

The *Mendoza* case judgment served as a turning point not only for the sanitation of the basin, but also a decisive step in the development of a transformative public policy.[7] However, the decision alone did not build public policy. This article argues that the stakeholders, authorities, and civil society organizations (or CSOs), should continue to foster institutional participation mechanisms for activists that set human rights standards and keep authorities accountable. The Matanza-Riachuelo Basin case illustrates how, when civil society actors have mechanisms to contribute and coordinate efforts that assist continuously in the improvement of authorities' plans, a holistic and transformative environmental policy is possible. CSOs successfully formulated the basin cleanup demand as a human rights issue, employing expert knowledge and diagnosis reports, and harnessed the political and public opinion on environmental issues. They also helped create an interjurisdictional basin authority and attained an institutional monitoring role for public policy implementation. The activism by the Supreme Court and CSOs was crucial in turning a collective damage claim into the most important environmental judicial decision in the court's history.

This article focuses on Argentina's multiple element approach to translating the legal duty established in the Constitution and ratified by the *Mendoza* case into a set of intertwined activism strategies for the protection of human rights. Lessons in environmental activism from the Matanza-Riachuelo Basin case[8] are brought forward to identify their strengths and weaknesses, evaluate their effectiveness, and ultimately determine which ones can be used in the future.

While the legal basis for human rights protection is robust and judicial mechanisms are constitutionally warranted in Argentina, experts agree that this case presented special challenges since the legal protection was insufficient. According to the Center for Legal and Social Studies, one of the reasons why the intervention of the Supreme Court was crucial was the

6. CSJN, 8/7/2008, "Mendoza, Beatriz" Fallos (2008-331-1622).

7. Carolina Fairstein & Diego Morales, *En busca de soluciones judiciales para mejorar la calidad de vida de los habitantes de la cuenca Matanza-Riachuelo, in* CELS, INFORME ANUAL 2009, 333, 336 (2009), https://www.cels.org.ar/web/wp-content/uploads/2016/06/IA2009-8-En-busca-de-soluciones-judiciales-para-mejorar-la-calidad-de-vida-de-los-habitantes-de-la-cuenca-Matanza-Riachuelo.pdf. CELS (for the Spanish acronym Centro de Estudios Legales y Sociales) is one of the non-governmental organizations (or NGOs) accepted as a third-party to the *Mendoza* case.

8. This article considers the Matanza-Riachuelo Basin Case as the over-arching case. It includes key elements from the Supreme Court's *Mendoza* case and other relevant events that occurred before and after the judgment. The distinction is only methodological. Many authors and activists use the terms "Matanza-Riachuelo Basin case" and *Mendoza* case interchangeably.

necessity for political commitment to clean up the Matanza-Riachuelo river; this commitment would require authorities to plan, finance, and implement "long-lasting and sustainable interjurisdictional policies, based on a systemic and holistic diagnosis and approach to the problem."[9] The fragmentary and sporadic approach contributed to the 200-year delay in addressing the Matanza-Riachuelo river contamination.[10]

This article will proceed chronologically. Part II will begin in 2003 and examine the civil society and institutional activism that were key to building momentum toward the Supreme Court's historic 2008 decision. Part III will focus on the Court's enforcement mechanism after its July 8, 2008 decision; it will examine the victories, but also point out the limits of the activist role performed by the Court and civil society organizations from 2008 until today. Part IV will examine how stakeholders were successful at strengthening and reinforcing institutional mechanisms to allow them to actively hold authorities accountable in the development and implementation of a long-term environmental public policy for the Basin. Today, thirteen years after the *Mendoza* case decision, while there are still visible shortfalls in the basin cleanup, the lessons in environmental activism are relevant for current conflicts and ongoing struggles.

II. THE LEGAL BASIS FOR ENVIRONMENTAL CLAIMS FROM A HUMAN RIGHTS PERSPECTIVE

International law establishes a right to a healthy environment as a fundamental human right, and activists successfully formulated the Matanza-Riachuelo Basin cleanup demand based on the international human rights breach. That human rights approach meshed well with the positions developed by the Argentine constitutionalism and the Argentine Supreme Court starting in the early 2000s, which made the *Mendoza* decision possible. Part A focuses on the process of legal globalization of the environmental agenda that enabled the necessary constitutional legal protection. Part B describes the basin's environmental problem and the public agenda momentum for the Supreme Court to regain its prestige by taking on the case. Part C dives into the Court's rulings in 2006 and 2008, which resulted in the creation of a basin authority, a two-year participatory sanitation plan, and a monitoring system for the public policy implementation. Every step of the way, environmental activism taught a lesson.

Today, there is international expert agreement regarding the human rights obligations relating to the enjoyment of a safe, clean, healthy, and

9. Fairstein & Morales, *supra* note 7, at 336.
10. *Id.*

sustainable environment.[11] The global dispute regarding the strategies to confront the environmental crisis focuses on the way that authorities deal with it.[12] The global environmental agenda emerged through a process of "legal globalization" that resulted in the creation of local and international institutions, treaties, and legal frameworks establishing obligations on governments.[13] This process was uneven amongst countries and regions. Argentina's performance in taking on the environmental agenda was "erratic . . . and subsidiary to the general state policies."[14]

Beatriz Mendoza's story began in 2000, but the legal framework that enabled her claim started to solidify in the '70s around the world, and in the '90s in Argentina. The first United Nations Conference on the Environment held in Stockholm in 1972 marked a global agenda that was later adopted locally, closer in time to the second United Nations Conference in 1992.[15] In 1991, Argentina created the Secretariat for Natural Resources and Human Development, reporting to the President. Its goal was to push forward a cross-cutting policy amongst all areas of government.[16] Since the 1992 Rio Conference, in line with the principles adopted internationally,[17] the legal framework for environmental protection in the country became robust and included constitutional protection.[18]

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11. U.N. General Assembly, Report of the Independent Expert on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, John H. Knox, A/HRC/25/53 (Dec. 30, 2013).

12. Andrés Scharager, *Conflicto social, ambientalización y crisis política: judicialización en la cuenca Matanza-Riachuelo, Argentina*, 64 ECONOMÍA SOCIEDAD Y TERRITORIO, 693, 700 (2020), https://est.cmq.edu.mx/index.php/est/article/view/1566/1761. While it is true that some exceptional world leaders have openly denied climate change, this paper adopts a human-rights perspective that recognizes the crisis and the need for urgent actions to protect the human rights of those mostly affected by the climate crisis. *See, e.g.*, Ishaan Thadoor, *Bolsonaro, Trump and the Nationalists Ignoring Climate Disaster*, WASH. POST (Aug. 23, 2019), https://www.washingtonpost.com/world/2019/08/23/bolsonaro-trump-nationalists-ignoring-climate-disaster/.

13. Scharager, *supra* note 12, at 701; *see also* Lucas G. Christel & Ricardo A. Gutiérrez, *Making Rights Come Alive: Environmental Rights and Modes of Participation in Argentina*, 26 J. ENV'T. & DEV. 322, 327 (2017) (describing a process of "juridification").

14. Scharager, *supra* note 12, at 701.

15. *Conferences | Environment and Sustainable Development*, UNITED NATIONS, https://www.un.org/en/conferences/environment (last visited Feb. 17, 2022).

16. Decree No. 2419/1991, Nov. 12, 1991, [27265] B.O. 3. The presidential decree considers, "[t]hat it is necessary to establish in the sphere of the Presidency of the Nation an Organism that guides, coordinates and arranges all that is conducive to the promotion of the environment." (author's translation).

17. U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/Rev.1 (Vol.I), annex I (Aug. 12, 1992).

18. The general law for the environment and the constitutional provisions are described in detail in this section. Between 2002 and 2010 legislation was passed to regulate dangerous

The 1994 Constitutional reform adopted Sections 41 and 43 of the Constitution to warrant constitutional supremacy and judicial protection of environmental rights. Section 41, in the "New Rights and Guarantees" chapter, states:

> All inhabitants are entitled to the right to a healthy and balanced environment fit for human development in order that productive activities shall meet present needs without endangering those of future generations; and shall have the duty to preserve it. As a first priority, environmental damage shall bring about the obligation to repair it according to law. The authorities shall provide for the protection of this right, the rational use of natural resources, the preservation of the natural and cultural heritage and of the biological diversity, and shall also provide for environmental information and education . . . .[19]

The language in Section 41 adopts the sustainable development paradigm ("present generations are responsible for future generations' environmental goods").[20] Section 43 establishes a procedure for the

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activities and protect the environment, such as: Integral Management of Industrial and Services Activities Wastes, Law No. 25612, July 25, 2002, [29950] B.O. 1; Management and Disposal of PCBs, Law No. 25670, Nov. 18, 2002, [30029] B.O. 2; Water Management Regime, Law No. 25688, Dec. 30, 2002, [30060] B.O. 2; Regime of Free Access to Environmental Public Information, Law No. 25831, Jan. 6, 2004, [30312] B.O. 1; Integral Management of Household Waste, Law No. 25916, Sept. 3, 2004, [30479] B.O. 1; Environmental Protection of Native Forests, Law No. 26331, Dec. 19, 2007, [31310] B.O. 2; Minimum Environmental Protection Standards to Control Burning Activities, Law No. 26562, Dec. 15, 2009, [31802] B.O. 7; Regime of Minimum Standards for the Preservation of Glaciers and the Periglacial Environment, Law No. 26639, Oct. 28, 2010, [32016] B.O. 7. Argentina also ratified international treaties on environmental protection: U.N. Framework Convention on Climate Change, *opened for signature* June 4, 1992, 1771 U.N.T.S. 107, Kyoto Protocol, *opened for signature* Mar. 16, 1998, 2302 U.N.T.S. 162, U.N. Convention to Combat Desertification in Those Countries Experiencing Serious Drought and/or Desertification, Particularly in Africa, *opened for signature* Oct. 14, 1994, 1954 U.N.T.S. 3. Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, *opened for signature* Mar. 23, 1989, 1673 U.N.T.S. 57, Montreal Protocol on Substances that Deplete the Ozone Layer, *opened for signature* Sept. 16, 1987, 1522 U.N.T.S. 3, Convention on Biological Diversity, *opened for signature* June 5, 1992, 1760 U.N.T.S. 79, Protocol on Environmental Protection to the Antarctic Treaty, Oct. 4, 1991, 2941 U.N.T.S. A-5778, Convention on Wetlands of International Importance Especially as Waterfowl Habitat, Feb. 2, 1971, 996 U.N.T.S. 245, Vienna Convention on the Protection of the Ozone Layer, *opened for signature* Mar. 22, 1985, 1513 U.N.T.S. 293.

19. Art. 41, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.). Section 41 continues, "[t]he Nation shall regulate the minimum protection standards, and the provinces those necessary to reinforce them, without altering their local jurisdictions. The entry into the national territory of present or potentially dangerous wastes, and of radioactive ones, is forbidden."

20. *Id.*; *What is Education for Sustainable Development?*, UNITED NATIONS EDUC., SCI., & CULT. ORG. [UNESCO], https://en.unesco.org/themes/education-sustainable-development/what-is-esd/ ("The concept of sustainable development was described by the 1987 Bruntland

protection of the rights formulated in Section 41 by constitutionally granting the *acción de amparo*, a summary proceeding . . . about rights protecting the environment . . . [to] be filed by the damaged party, the ombudsman, and the associations which foster such ends . . . ."[21]

The Mendoza claim was filed under the 2002 Ley General del Ambiente (LGA) (General Law for the Environment),[22] which legislated the procedure for claims of environmental damage as a right of collective incidence under the constitutional mandate to establish minimum protection standards. Citing Section 43 of the Constitution, the law grants standing to sue to the damaged party, the Ombudsman, and environmental NGOs. Other affected parties may be joined to the lawsuit as third parties.[23] It gives judges broad discretion to request evidence to determine actual damage, enabling them to exceed the requests of the parties.[24] The LGA was the legal basis for what is later described as *judicial activism* by the Supreme Court in both the 2006 and 2008 decisions. The LGA also sets a list of principles for the interpretation and implementation of environmental public policy[25] and further enumerates the tools for its design.[26]

Understanding environmental rights as "the human right to clean air, water, and soil, not only for living citizens but also for future citizens,"[27] entails the recognition of three important characteristics that are especially evident in the Matanza-Riachuelo Basin Case. First, "environmental rights are collective rights": they require adopting a sustainable development approach and affording broad standing to sue. Second, "environmental rights are a matter of justice": those most affected by pollution and environmental risks are low-income communities, and their basic demands are access to housing with sewerage and clean water. Third, "environmental rights are concomitant with a number of procedural rights through which citizens and social organizations can secure or claim" their protection: they have the right to know, participate, and claim to translate the legal framework into reality.[28]

The human-rights approach to environmental conflicts enables a complex analysis that appreciates the need to combat environmental harm in

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Commission Report as 'development that meets the needs of the present without compromising the ability of future generations to meet their own needs.'").

21. Art. 43, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

22. Law No. 25675, Ley General del Ambiente [LGA], Nov. 27, 2002, [30036] B.O. 2.

23. *Id.* art. 30.

24. *Id.* art. 32.

25. *Id.* art. 4 (the list includes the prevention and precautionary principles, intergenerational equity, progressivity, responsibility, sustainability, and cooperation, among others).

26. *Id.* art. 8.

27. Christel & Gutiérrez, *supra* note 13, at 328.

28. *Id.*

order to guarantee the enjoyment of human rights.[29] The case at hand presents a "fusion of social and environmental inequality" that presents a heightened level of risk to health and impacts life quality and life expectancy.[30]

The LGA enshrines human rights obligations related to the environment, which comply with international law standards applicable to Argentina. Some of those principles are especially relevant for the purpose of this paper, as they are the tools used by stakeholders to push forward environmental activism.

First, states should provide for education and public awareness on environmental matters.[31] The federal environmental policy should promote a change in social values and practices, which enable sustainable development and use environmental education as a tool.[32] Environmental education is the basic instrument for the development of environmental consciousness amongst citizens.[33] States should also provide public access to environmental information.[34] The LGA sets as a goal for the federal environmental policy to organize and disseminate environmental information and to ensure that it is available, effective, and free.[35] Furthermore, the law demands the creation of a federal system of environmental information. It grants any citizen the right to obtain environmental information from authorities, and mandates annual reporting to Congress.[36]

To avoid undertaking or authorizing actions with environmental impacts, e.g. construction projects or land management plans, which interfere with the full enjoyment of human rights, States should require prior assessment of the possible environmental impacts of proposed projects and policies, including potential effects on human rights,[37] with citizen participation.[38] Further, states should provide for and facilitate citizen participation in decision-making related to the environment, and take the

29. Rep. of the Special Rapporteur on the Issue of Human Rights Obligations Relating to the Enjoyment of a Safe, Clean, Healthy and Sustainable Environment, U.N. Doc. A/HRC/37/59 (Jan. 24, 2018) [hereinafter U.N. Special Report on Hum. Rts. Relating to Environment].

30. María Gabriela Merlinsky & Richard Stoller, *Mists of the Riachuelo: River Basins and Climate Change in Buenos Aires*, 43 LAT. AM. PERSPS. 43, 48-49 (2016).

31. U.N. Special Report on Hum. Rts. Relating to Environment, *supra* note 29.

32. Law No. 25675, Ley General del Ambiente [LGA], art. 2(h), Nov. 27, 2002, [30036] B.O. 2.

33. *Id.* arts. 8.4, 14, 15. More recently, Law No. 27.621 was passed to establish a plan for environmental education throughout the country. Decree No. 356/2021, Mar. 6, 2021, [34670] B.O. 8.

34. U.N. Special Report on Hum. Rts. Relating to Environment, *supra* note 29, at 11.

35. LGA, art. 2(i).

36. *Id.*; *see also* Law No. 25831, Jan. 6, 2004, [30312] B.O. 1.

37. U.N. Special Report on Hum. Rts. Relating to Environment, *supra* note 29, at 11-12.

38. LGA, arts. 8.2, 11-13, 21.

views of the public into account in every decision-making process.[39] Every citizen has a right to be consulted and informed on procedures related to the preservation and protection of the environment,[40] and authorities should institutionalize procedures for mandatory consultations or public hearings. While public opinions are not binding, the authorities should justify publicly if the final decision is against those opinions.[41]

The implementation of these tools requires access to effective remedies for violations of human rights, domestic laws relating to the environment,[42] and constitutional provisions. Standing for environmental damage claims is broad, and judges have the discretion to order a wide range of remedies.[43] The law also establishes a presumption against the party causing harm if there is a violation of administrative environmental norms.[44] Finally, the LGA also ratified the creation of the Federal Council for the Environment ("COFEMA" for its Spanish acronym Consejo Federal de Medio Ambiente), as a "permanent body for the establishment and development of a coordinated environmental policy among the member states."[45]

Unlike other processes where the legal recognition of rights came about as a result of social demands,[46] the environmental issue was legally sanctioned first. Those rights gained social momentum only after a rising number of environmental conflicts emerged. Thus, activists found a legal basis to bring their case.[47] One author identifies a parallel process to legal

39. U.N. Special Report on Hum. Rts. Relating to Environment, *supra* note 29, at 12-13. The LGA promotes social participation in every decision-making process related to the environment. LGA, art. 2(c).

40. LGA, art. 19.

41. *Id.* arts. 20-21; *see also* Decree No. 1172/2003, Acceso a La Informacion Publica Decreto [Access to Public Information Decree], Dec. 3, 2003, [30291] B.O. 1.

42. U.N. Special Report on Hum. Rts. Relating to Environment, *supra* note 29, at 13.

43. LGA, arts. 30, 32.

44. *Id.* art. 29.

45. *Id.* art. 25. The COFEMA was first created through a memorandum of understanding, signed by provinces' representatives on August 31, 1990; the 1993 Federal Environmental Pact is also a precedent, where all the country's jurisdictions expressed their commitment with the 21 Principles adopted in Rio 1992, *see id.* annex II. Section 25 of the LGA ratifies these two agreements and introduces COFEMA to specific functions related to environmental education, the system of information, and environmental management.

46. For example, the right to abortion was enacted in 2020, after more than five years of the feminist movement efforts to put the issue in the public agenda. *See* Decree No. 516/2021, Aug. 13, 2021, [34725] B.O. 4.

47. Scharager, *supra* note 12, at 701. *See also* Christel & Gutiérrez, *supra* note 13, at 325-26 ("Unlike other cases in which social mobilization is a driving force of the constitutional enshrinement of environmental rights, no major evidence of social mobilization' influence is found in the Argentine process. The addition of environmental rights to the Argentine constitution was to a large extent a party-driven process that took place after the 1983 return to democracy.") (citation omitted).

institutionalization, where an increasing number of activities that exploit natural resources and directly impact local communities result in the emergence of environmental conflicts starting in 2003.[48] The Esquel community resistance to mining projects (2002-2003) is an excellent example of the success of social mobilization through protest, political pressure on authorities, delegitimization of public hearings, a referendum on the project, and finally, a legal prohibition of open-pit mining.[49]

Access to environmental information, including quality data, consultation processes, and public hearings are valuable procedural rights, as long as there is a civil society to demand their implementation.[50] After the 2001 social, economic, and political crisis in Argentina, momentum for the *Mendoza* decision emerged.[51] It resulted from the effort to restore the role of political institutions in the policy dispute after the rejection of the political class.[52] Citizen participation mechanisms appeared as institutional tools for political legitimacy. The Supreme Court seized the opportunity created by the rise in environmental conflicts and the need to restore trust in the political system to provide unique legal precedent by hearing a complex case involving a severe violation of multiple human rights. The next section dives into the Matanza-Riachuelo Basin environmental degradation neglect by authorities and the new Court's need to reestablish its legitimacy. The following section describes civil society and other stakeholders' strategic use of institutional participation mechanisms and cooperation to harness a unique momentum for the tribunal to decide the case.

III. LESSONS IN ENVIRONMENTAL ACTIVISM: THE *MENDOZA* CASE

A. Environmental Issues in the Public Agenda and the Matanza-Riachuelo Basin Crisis

The Matanza-Riachuelo Basin extends through sixty-five kilometers, covering an area of 2,240 kilometers,[2] including the jurisdiction of the

48. Scharager, *supra* note 12, at 701.

49. *Id.* at 703.

50. *See* Christel & Gutiérrez, *supra* note 13, at 326. ("[e]nvironmental rights remained dormant for over a decade until the first enabling laws (including the LGA) were passed and an increasing number of environmental issues . . . came to the surface through different modes of participation").

51. *See generally* CENTRO DE ESTUDIOS LEGALES Y SOCIALES [CELS], DERECHOS HUMANOS EN LA ARGENTINA INFORME 2002 [HUMAN RIGHTS IN ARGENTINA REPORT] (2002) [hereinafter 2002 HUMAN RIGHTS REPORT].

52. *See* José Esain, *Una Corte para el desarrollo sostenible*, *in* INFORME AMBIENTAL ANNUAL [ANNUAL ENVIRONMENTAL REPORT] 289, 299 (María Eugenia Di Paola et al. eds., 2009).

fourteen municipalities of the Buenos Aires Province, and part of the City of Buenos Aires. The value of river basins is undisputed, especially in the context of climate change, where the lack of freshwater requires attention to the preservation of natural conservation systems.[53] The Matanza-Riachuelo Basin begins in the Municipality of Cañuelas (higher basin), nurturing itself from twelve streams and two rivers (each of them is a sub-basin) that flow into the Río de la Plata.[54] The contamination of the basin is a result of an overall failure to adopt a sanitation policy—due to more than 200 years of uncontrolled slaughterhouse and industrial development—inadequate urban development planning, and a history of unfulfilled promises by authorities.[55] A large amount of the five million people that make up the basin population live in slums or precarious settlements that lack basic services.[56]

The Matanza-Riachuelo basin is severely affected by a lack of sanitary infrastructure, including the absence of safe water and sewer connections, which generates ground and water contamination by filtration. A second source of contamination is dumping untreated waste that contains toxic metals by manufacturing plants.[57] A third source of contamination is open-air garbage dumps along the banks of the river.[58]

The Matanza-Riachuelo Basin, especially the lower basin area, has historically been a scene of social conflict related to unequal access to housing and public services, among other claims, but they were never presented as an environmental issue.[59] During the '90s, together with the process of legal recognition of environmental rights, some initiatives approached the challenge of the basin sanitation from a public policy perspective. They all failed[60] due to the resource administration incapacity, jurisdictional incoordination, and overall lack of political will to build a long-term holistic approach to sanitation.[61] The Executive Committee created for the implementation of the 1993 "thousand-day plan" to sanitize the basin

53. Merlinsky & Stoller, *supra* note 30, at 46.

54. *See* Scharager, *supra* note 12, at 707.

55. DEFENSOR DEL PUEBLO DE LA NACION [NAT'L OMBUDSMAN], DECIMO INFORME ANNUAL [TENTH ANNUAL REPORT] 33 (2003) [hereinafter OMBUDSMAN REPORT]; *see also* Merlinsky & Stoller, *supra* note 30, at 44.

56. Fairstein & Morales, *supra* note 7, at 333.

57. This is especially problematic in the Dock Sud industrial hub where flammable chemicals have been reported, sadly earning the neighboring settlement the name "Villa Inflamable."

58. OMBUDSMAN REPORT, *supra* note 55, at 264; Merlinsky & Stoller, *supra* note 30, at 48.

59. Scharager, *supra* note 12, at 707.

60. OMBUDSMAN REPORT, *supra* note 55, at 265; Mariana Ferro, *Activismo Ambiental de los jueces y politica del agua en la cuenca Matanza-Riachuelo, Argentina*, 23 SOCIEDAD Y AMBIENTE 1, 2-3 (2020).

61. OMBUDSMAN REPORT, *supra* note 55, at 265; Ferro, *supra* note 60, at 5.

lacked regulatory and police powers. It resulted in a lost opportunity that led civil society organizations to demand a very different approach when the 2006 Basin Authority was created.[62]

Between the legal framework developed during the '90s and early 2000, and the 2006 Court ruling, two determining factors presented themselves in Argentina to build momentum for the Court's decision: the growing presence of environmental issues in the public agenda and the new institutional positioning of the Supreme Court.

Starting in 2003, environmental struggles began to reach the national agenda thanks to the Pulp Mills conflict with Uruguay, which succeeded in unprecedented visibility, compared to other municipal or provincial conflicts.[63] The conflict began when citizens of a Uruguayan locality located on the shores of the Uruguay River alerted Gualeguaychú citizens in the Argentinean shore about a project to build a pulp mill. Protests began, but the conflict escalated only two years later, when Uruguay granted permits for a second pump mill installation. The citizens organized themselves as the Gualeguaychú Environmental Citizen Assembly and the social mobilization of 40,000 neighbors in 2005 turned into 100,000 people on the streets by 2006.[64] In May 2004, Argentina filed a claim against Uruguay before the International Court of Justice for breach of international treaties for unilaterally granting pump mills authorization. The Argentinian President at the time, Nestor Kirchner, affirmed that the environmental cause was of *national interest* before thousands of protesters.[65]

Meanwhile, in Buenos Aires, the most polluted river in the country remained absent from public scrutiny,[66] until the Supreme Court became involved to find transformative solutions that would combat the environmental decay and improve the living conditions of approximately five million people. The environmental agenda reaching the public eye was not, by itself, enough to create momentum. The second factor was the need to build a democratic and legitimate Supreme Court.

During the '90s the Supreme Court of Justice was at its lowest levels of legitimacy, publicly regarded as following President Menem's agenda. The court increased its membership from five to nine justices, whose designation

62. OMBUDSMAN REPORT, *supra* note 55, at 265; Ferro, *supra* note 60, at 14; Merlinsky & Stoller, *supra* note 30, at 47.

63. Scharager, *supra* note 12, at 706.

64. *Id*. at 704.

65. *Id*. at 704-05.

66. *Id*. at 706.

created the publicly known "automatic majority."[67] After the 2001 crisis in Argentina,[68] the Supreme Court of Justice was under scrutiny by the public that was demanding its reform.[69] Citizens considered the Court to be co-responsible for the severe consequences of the institutional breakdown, which led to protests before the tribunal especially after the decision to legitimize the loss of small savers known as the "corralito."[70] A group of non-governmental organizations—two of which acted as third parties in the *Mendoza* case—presented the social demands in a specific proposal for judicial reform.[71] The document *A Court for Democracy*, publicly presented for the first time in January 2002, and reinforced in the 2003 update, was taken seriously by the recently elected authorities, who invited the authoring organizations to discuss its possible implementation.[72] Nestor Kirchner's government commitment to promote transparency and civil participation during the new Justices selection process culminated with the adoption of Presidential Decree 222/2003. It limited the executive discretional power to designate Supreme Court members, imposing requirements of terms of experience, technical and moral fitness, gender diversity, federal

67. CENTRO DE ESTUDIOS LEGALES Y SOCIALES [CELS], DERECHOS HUMANOS EN LA ARGENTINA INFORME [HUMAN RIGHTS IN ARGENTINA REPORT] 84 (2004) [hereinafter 2004 HUMAN RIGHTS REPORT]; Alba M. Ruibal, *La sociedad civil en el proceso de reformas a la Corte Suprema Argentina*, 70 REVISTA MEXICANA DE SOCIOLOGIA 725, 734 (2008).

68. *See generally* 2002 HUMAN RIGHTS REPORT, *supra* note 51 (describing the multiple human rights aspects of the 2001 social, economic, and political crisis in the country: "[d]uring December 2001, Argentina experienced a series of events that marked its institutional and political history. In only fifteen days, the country had five presidents, consolidated its financial default, abandoned the rigid exchange rate policy it had maintained since 1991 and devalued the Argentine peso.").

69. Ruibal, *supra* note 67; *see also* Leticia Barrera, *Performing the Court: Public Hearings and the Politics of Judicial Transparency in Argentina*, 37 POL. & LEGAL ANTHROPOLOGY REV. 326, 727 (2013).

70. Ruibal, *supra* note 67, at 742-43. The "corralito" was a dollar withdrawal restriction imposed on saving accounts that resulted in losses because the value of the peso was severely devalued. Those who deposited dollars would later withdraw the equivalent amount, but in pesos.

71. *Id.* at 738; *see* ASOCIACIÓN POR LOS DERECHOS CIVILES ET AL., UNA CORTE PARA LA DEMOCRACIA [A COURT FOR DEMOCRACY], https://www.cels.org.ar/web/wp-content/uploads/2017/07/corte_I.pdf (last visited Mar. 6, 2022); *see* ASOCIACIÓN POR LOS DERECHOS CIVILES ET AL., UNA CORTE PARA LA DEMOCRACIA II [A COURT FOR DEMOCRACY II], https://www.cels.org.ar/web/wp-content/uploads/2017/07/corte_II.pdf (last visited Mar. 6, 2022). The NGOs that authored the two documents were Asociación por los Derechos Civiles, Centro de Estudios Legales y Sociales (CELS), Fundación Poder Ciudadano, Fundación Ambiente y Recursos Naturales (FARN), Instituto de Estudios Comparados en Ciencias Penales y Sociales (INECIP), and Unión de Usuarios y Consumidores.

72. Ruibal, *supra* note 67, at 738.

representation, and creating procedures for civil contribution to the process.[73] After three justices resigned and two others were removed, three new members of the Court were sworn in following the participatory procedure.[74]

With its new composition, the Court established transparency and participation mechanisms for itself. Some of them were specifically demanded by civil society organizations in *A Court for Democracy*.[75] The Court, during this stage, took on the challenge to reduce the number of cases it heard and devote its resources to those that presented "institutional severity" or that would produce a precedent of sufficient relevance for lower courts.[76] The Court rebuilt itself, assuming a new role, based on a hybrid between the U.S. judicial review model and the European constitutional tribunal system.[77] In 2005, Ricardo Lorenzzeti, an expert in Argentinean environmental law, was appointed to the Court.[78] In 2006, the government reduced the number of the Court's members to five.[79]

By 2006 the weight of the environmental cause on the public agenda was undisputed. While the pump mill conflict exhibited exemplary results of social mobilization, the Matanza-Riachuelo Basin was a portrayal of policy failure;[80] the Court saw the opportunity and seized it.

B. Behind the Scenes: Social Activism

Civil society organizations' activism in support of the Matanza-Riachuelo Basin claim can be traced back to 2002, when the Association of Neighbors of La Boca filed several claims before the Federal Ombudsman Office.[81] The Federal Ombudsman created a special investigation unit

73. Decree No. 222/2003, Jun. 19, 2003, [30175] B.O. 2; Art. 99.4, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.). The Senate also regulated its own procedure to give the two-third consent to presidential nominations for Justices.

74. Eugenio Raúl Zaffaroni, Elena Highton de Nolasco, and Carmen Argibay were the individuals who were sworn in.

75. *See* 2004 HUMAN RIGHTS REPORT, *supra* note 67, at 80; Ruibal, *supra* note 67, at 735; *see also* Barrera, *supra* note 69. Among the most noteworthy measures, the Court established the online publication of the Court's decisions and uploading the files during the proceedings, as well as budgetary and personnel information, and regulated the amicus curiae and public hearings procedure.

76. Esain, *supra* note 52, at 300-01.

77. *Id.* at 299-300. According to Esain, the new composition broadened the democratic footing of the Tribunal. *Id.* at 300-01.

78. Scharager, *supra* note 12, at 714.

79. Law No. 26183, Dec. 15, 2006, [31055] B.O. 1.

80. Scharager, *supra* note 12, at 714.

81. *See* Paola Bergallo, *La causa "Mendoza": una experiencia de judicialización cooperativa sobre el derecho a la salud*, *in* POR UNA JUSTICIA DIALÓGICA 245, 254 (Roberto

devoted to monitoring and systematizing the multiple claims on the same issue as a strategy to take on a deeper analysis of the basin case.[82] Under the leadership of the Ombudsman Office, the 2003 Special Report on the Matanza-Riachuelo Basin was developed together with a group of organizations that were already involved in the Matanza-Riachuelo cause.[83] The main goals of this initiative were to diagnose the state of the Basin in all aspects; to prepare a report to reaffirm the seriousness of this problem and to reiterate the need for concrete measures by the competent authorities; and to suggest actions related to these urgent measures to restore the environment of the basin and thus, to preserve the health of the population through an adequate management of the natural resources.[84] The report also aimed to provide a useful resource of expert knowledge with the most up to date information in order to facilitate the future planning of concrete actions for the environmental recovery of the basin, analyze the legal consequences of competent authorities' actions, and evaluate the possibility of initiating judicial intervention if the report's recommendations were ignored.[85]

Interestingly, even though the 2003 report considered litigation as a strategy, there was no agreement to resort to the Supreme Court amongst the civil society organizations and actors involved.[86] The report had wide coverage by the media, but its impact on competent authorities was poor.[87] In November 2005, an updated version of the Special Report also had a wide resonance with the media and public. It denounced the lack of leadership to implement an adequate public policy.[88] Once the action was filed by seventeen individuals, including citizens living in Villa Inflamable and health workers, but only after the 2006 Supreme Court certification of the case,

Gargarella ed., 2014). The Spanish name of the organization is Asociación de Vecinos de La Boca (AVLB). By 2002, this NGO had presented several claims before the Ombudsman office related to the conditions of the basin and the right to health of its inhabitants. *Id.*

82. Scharager, *supra* note 12, at 710-11.

83. 2003 OMBUDSMAN REPORT ON MATANZA-RIACHUELO BASIN, *supra* note 4, at 9. Seven organizations collaborated in writing the report: AVLB, CELS, the Adjunct Ombdusman for the City of Buenos Aires, FARN, the City Foundation, Poder Ciudadano (Citizen Power), and the Buenos Aires Regional School of the National Technological University. When the case reached the Supreme Court, the Federal Ombudsman Office, AVLB, CELS, and FARN were accepted as third parties to the case.

84. *Id.*

85. *Id.* at 10.

86. Bergallo, *supra* note 81, at 259.

87. *Id.* at 255; Laura Rocha, *Cuatro meses de promesas oficiales incumplidas*, LA NACION (Mar. 30, 2004), https://www.lanacion.com.ar/sociedad/cuatro-meses-de-promesas-oficiales-incumplidas-nid587659/.

88. María Valeria Berros, *Relatos sobre el río, el derecho de la cuenca Matanza – Riachuelo* [Stories about the river, the law of the Matanza–Riachuelo basin], 1 REVISTA DE DRECHO AMBIENTAL DE LA UNIVERSIDAD DE PALERMO 111, 117 (2012).

more actors—including those organizations that collaborated on the report—joined the case as third parties.

Paola Bergallo analyzes the *Mendoza* case as a "cooperative judicialization" experience where there is a lot to learn in terms of legal strategies for the fulfillment of the right to health.[89] She describes the report as an "extrajudicial legal mobilization experience" that evidences a process of articulation towards social accountability between the Ombudsman Office and civil society organizations.[90] In fact, these organizations and the extrajudicial demands for clear action items are "a special feature of the judicialization experience in *Mendoza* that is absent in the majority of other claims for the right to health."[91]

It becomes evident that the level of pollution or environmental degradation is not enough for steering the course of decision-making.[92] By observing institutional and contentious participation in Argentina, some authors argue that a combination of contentious strategies, including social protest, judicial litigation, and expert controversy, can be successful in putting an environmental claim on the public agenda and having an impact on social appropriation of environmental rights, to the point of transforming public policy.[93] The Matanza-Riachuelo Basin case illustrates how the judicial strategy was successful in setting the stage for the development of institutional mechanisms for long-term participation by the society.

C. A Court for the Environment: Ensuring Public Policy Implementation Via Judicialization

The Court issued its first judgment on June 20, 2006, affirming its jurisdiction over the collective interest claim to put an end to pollution, environmental remediation of the basin, and the prevention of future

89. Bergallo, *supra* note 81, at 254-59.

90. *Id.*

91. *Id.*

92. Christel & Gutiérrez, *supra* note 13, at 334.

93. *Id.*

> Yet, we notice that institutionalized participation in Argentine environmental policy making has been rather inchoate, while the involvement of citizens and organizations in social protests and judicial litigations has been so far more effective. We do not argue that institutionalized participation is not important in enforcing environmental rights but rather that contentious participation is equally productive in putting environmental issues on the public agenda, in conveying the social reinterpretation of environmental rights, and—sometimes—in changing or steering the course of decision making. That is why we pay special attention to the connection between contentious and institutionalized modes of participation.

Id. See also Berros, *supra* note 88, at 118.

damage.[94] It left the individual monetary compensation claims to lower courts.[95] The decision to take on the case, as noted before, was deliberate. The Court brought the 2002 General Law for the Environment (Ley General Ambiente or LGA) to life, by issuing the first ruling, and instating itself as the "environmental"[96] or "activist Court" with a historic final sentence.[97] Sub-section 1 describes the creation of an interjurisdictional Basin Authority, boosted by the Court's intervention; sub-section 2 focuses on the 2006 decision and subsequent public hearings that constitute a unique participatory process of public policy design; sub-section 3 reviews the final 2008 sentence that creates an institutional space for civil society participation to monitor the sanitation plan's implementation. A combination of judicial and civil society activism transformed an initial damage claim into a transformative intervention to establish a public policy of sanitation.

1. The Basin Authority is Born

Jurisdictional fragmentation, regulatory dispersion, and lack of coordination are highlighted by most studies as the biggest obstacles that hinder a comprehensive approach to the basin territory.[98] Civil society organizations, especially those that presented the Special Report on the Matanza-Riachuelo Basin in 2003 and its update in 2005,[99] expressly demanded a basin authority to be created. The CSOs knew that the jurisdictional fragmentation could only be confronted with an interjurisdictional entity; one that facilitated coordination amongst the seventeen jurisdictions[100] and twenty-nine organisms with subject-matter

94. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 20/6/2006, "Mendoza, Beatriz c. Estado Nacional," Fallos (2006-329-2316).

95. *Id.*

96. Esain, *supra* note 52, at 289. Esain divides the Court's approach to environmental law matters into three periods, the "silence period" (until 2004), the "intermediate period" (2004-2006), and the "environmental Court period" which began with the June 20, 2006 decision.

97. *See* Ferro, *supra* note 60, at 14-15.

98. *Id.* at 22; Fairstein & Morales, *supra* note 7, at 335.

99. DEFENSOR DEL PUEBLO DE LA NACIÓN ET AL., INFORME ESPECIAL SOBRE LA CUENCA MATANZA-RIACHUELO [SPECIAL REPORT ON THE MATANZA-RIACHUELO BASIN], (2005) [hereinafter 2005 OMBUDSMAN REPORT ON THE MATANZA-RIACHUELO BASIN]. In this updated version, four new civil society actors joined the efforts: Greenpeace, Asociación Popular La Matanza, Fundación Metropolitana, and Universidad Nacional de La Matanza.

100. Arts. 121, 124, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.). The seventeen jurisdictions include the Federal Government, the Province of Buenos Aires, the City of Buenos Aires, and the fourteen Municipalities of the Province of Buenos Aires.

competence on the basin territory.[101] The proposal for a basin authority identified key characteristics necessary for a successful policy implementation. It should have a legal form of an interjurisdictional treaty between all jurisdictions, including municipalities. Further, it should guarantee effective participation and representation of citizens, and ensure autonomy for decision-making and the capability of exercising police powers. Finally, the authority should involve local-level and civil society organizations, including municipalities, in decision-making processes.[102] The 2005 updated Special Report analyzed the attempts to create such an entity and the reasons for the failure to reach an agreement.[103]

The new court's decision to hear the case resulted in the creation of a basin authority. On November 15, 2006, Congress passed Law No. 26168[104] to create the Authority for the Matanza Riachuelo Basin, which commonly is referred to as the ACUMAR.[105] Three months earlier, all the jurisdictions involved in the water basin administration, signed an agreement in support of the law. After it was passed, the Province of Buenos Aires[106] and the City of Buenos Aires[107] endorsed it through their respective legislatures. The Supreme Court's involvement was the determining factor that broke the inertia and built the common ground for the necessary Basin authority.

ACUMAR is an interjurisdictional organism, within the structure of the Environment and Sustainable Development Secretariat.[108] The ACUMAR's eight member first composition included the head of the Secretariat acting as

101. Andrés M. Nápoli, *Una política de Estado para el Riachuelo*, *in* INFORME AMBIENTAL ANNUAL 175, 211 (María Eugenia Di Paola et al. eds., 2009); *see also* 2003 OMBUDSMAN REPORT ON MATANZA-RIACHUELO BASIN, *supra* note 4, at 69-70 (recommending the creation of a basin authority and describing, in great detail, the enormous number of jurisdictions, organisms, and norms applicable to the basin).

102. 2005 OMBUDSMAN REPORT ON THE MATANZA-RIACHUELO BASIN, *supra* note 99, at 25.

103. *Id.* at 19-26.

104. Law No. 26168, Dec. 4, 2006, [31047] B.O. 1 (establishing the Autoridad de Cuenca Matanza Riachuelo or ACUMAR).

105. Nápoli, *supra* note 101, at 211; Fairstein & Morales, *supra* note 7, at 348. The creation of ACUMAR as an interjurisdictional entity constitutes the first impactful remedy that the *Mendoza* case designed to improve the way Argentina conducted policy for the basin.

106. The Province of Buenos Aires joined by Law No. 13642, B.A., Feb. 21, 2007, https://www.argentina.gob.ar/normativa/provincial/ley-13642-123456789-0abc-defg-246-3100bvorpyel/actualizacion.

107. The City of Buenos Aires joined by Law No. 2217, C.A.B.A., Dec. 7, 2006, [2613] B.O. 8, https://documentosboletinoficial.buenosaires.gob.ar/publico/20070126.pdf.

108. Law No. 26168, Ley de la Cuenca Matanza Riachuelo [Matanza Riachuelo Basin Law], art. 1, Dec. 4, 2006 [31047] B.O. 1. In 2015, the Secretariat became the Ministry of Environment and Sustainable Development. In 2018, a ministerial reform relegated the Ministry to the Secretariat and assigned ACUMAR under the Ministry of Interior, Public Works and Housing. By the end of 2019, a ministerial reform divided the unit's functions, leaving ACUMAR under the Ministry of Public Works.

President, three representatives of the Federal Executive Power, two representatives of the Buenos Aires Province, and two representatives of the Autonomous City of Buenos Aires.[109] A Municipal Council, made up of a representative of each Municipality of the fourteen jurisdictions, was created to assist and advise the new authority.[110] Following the demand for civil society involvement, the law also created a Social Participation Commission with advisory functions.[111] Further, the law ensured, unlike previous institutions and programs created for the basin sanitation,[112] that the basin authority had broad police powers to "regulate, control and promote industrial activities, the rendering of public services and any other activity with environmental impact in the basin . . . ." and to prevent further damage.[113]

Some of the NGOs involved in the *Mendoza* case criticized the choice to position the basin authority under the executive power orbit by law, instead of doing so through an inter-jurisdictional treaty, following the Special Report's recommendations.[114] While many of the Report's recommendations were adopted in the Law, the merely consultative role given to municipalities was considered insufficient, in view of their direct involvement with the territory of the basin, their citizens, and their particular problems.[115]

The creation of a Social Participation Commission was a groundbreaking step in the institutionalization of a space for civil society to intervene.[116] The Commission's internal procedures were established by Resolution 1/2008 in the "Operating Regulations of the Social Participation

109. *Id.* art. 2. In 2017, Article 2 was modified to give the President the authority to designate the Presidency of ACUMAR.

110. *Id.* art. 3.

111. *Id.* art. 4.

112. Fairstein & Morales, *supra* note 7, at 349.

113. Law No. 26168, Ley de la Cuenca Matanza Riachuelo [Matanza Riachuelo Basin Law], arts. 5, 7, Dec. 4, 2006 [31047] B.O. 1. Article 5 provides:

> In particular, the Authority is empowered to: a) Unify the applicable regime in matters of effluent discharges to receiving bodies of water and gaseous emissions; b) Plan the environmental management of the territory affected by the basin; c) To establish and collect fees for services rendered; d) To carry out any type of legal act or administrative procedure necessary or convenient to execute the Integral Plan for Pollution Control and Environmental Recomposition. e) To manage and administer, as a Central Executing Unit, the funds necessary to carry out the Integral Pollution Control and Environmental Recomposition Plan. (author's translation).

Id. art. 5. Further, Article 7 grants preventive measures power in case of danger to the environment of the basin's inhabitants. *Id.* art. 7.

114. Berros, *supra* note 88, at 126-27.

115. *Id.*; Nápoli, *supra* note 101, at 214-16.

116. Following Christel and Gutiérrez, institutionalizing space for public participation is a less contentious alternative to strategies like protests or judicial actions.

Commission of the Matanza Riachuelo Basin Authority"[117] after a participative process for regulatory development.[118]

However, it is not clear if the Commission fulfilled its mandate. In its 2009 annual report, FARN's President heavily criticized the Commission's lack of activity, "[b]eyond the sanctioning of the above-mentioned regulation, ACUMAR has not carried out practically any type of activity aimed at integrating the participation of the citizens in the Sanitation Plan".[119] His concerns were voiced during the public hearings held by the Court between 2006 and 2007. Part III will dive deeper into the achievements and shortfalls of this necessary (but probably insufficient) basin authority.

2. Judicial Activism

The innovative participatory process that the Court subjected the *Mendoza* case to between 2006 and 2008 focused on two fundamental elements that are environmental human rights: access to quality information and civil society participation.[120] The Supreme Court's involvement managed to obtain a Sanitation Plan presentation from the authorities and the creation of a basin authority as an interjurisdictional entity with police powers. It would also translate into a final sentence that was, after all, only the starting point.

The seventeen plaintiffs that filed the case before the Supreme Court of Justice, under its original and exclusive jurisdiction,[121] sued the Federal Government, the Province of Buenos Aires, the Autonomous City of Buenos Aires and forty-four companies for collective incidence damage[122] and personal injury as a result of the basin contamination. The Court decided to only rule on the collective incidence damage,[123] lacking sufficient factual

117. Resolution No. 1/2008, Aug. 11, 2008, [31476] B.O. 7.

118. Decree No. 1172/2003, Dec. 3, 2003, Annex V [30291] B.O. 1. The participative process for regulatory development was legally created in 2003 as a transparency institutional mechanism.

119. Nápoli, *supra* note 101, at 219-20.

120. Fairstein & Morales, *supra* note 7, at 338-39.

> The Supreme Court of Justice dealt with the case in a novel way, in which the call for several informative public hearings and the activism deployed by the judges over the course of two years to organize the process, gather data on the basin's problems and ensure the participation of all those involved were noteworthy.

Id. (author's translation).

121. Art. 117, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

122. *Id.* art. 41; Law No. 25675, Ley General del Ambiente [LGA], art. 230, Nov. 27, 2002, [30036] B.O. 2.

123. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 20/6/2006, "Mendoza, Beatriz c. Estado Nacional," Fallos (2006-329-2334 (given the contamination of interjurisdictional water resources and the federal and provincial governments as parties, as established in Section 7 LGA and Section 117 of the National Constitution).

basis of essential aspects of the personal injury claim. The introductory brief was not based on updated studies, but on journalistic publications or reports submitted by various organizations several years ago.[124]

Instead of rejecting the petition entirely, the Court adopted a proactive role and used the broad jurisdictional faculties, vested in it by the LGA,[125] to order sued companies to inform the Court of the liquids discharged into the river, their waste treatment systems, and the insurance employed.[126] It ordered the federal government, the Province of Buenos Aires, the City of Buenos Aires, and the COFEMA to present an integrated progressive plan,[127] with a schedule of interim and long-term goals. The plan was to consider "environmental territorial planning,"[128] "control over the development of anthropic activities,"[129] "environmental impact studies for the forty-four companies involved,"[130] "an environmental education program,"[131] and "a public environmental information program."[132] Further, the Court summoned a public hearing for parties to present the information requested;[133] and to inform the plaintiffs about the government's thirty-day deadline to provide further information.[134]

The Federal Ombudsman Office asked to join the case as *amicus curiae* and to join the fourteen municipalities as defendants, but the Court rejected the petition. Nevertheless, they added the Ombudsman Office as a third party to the suit. Similarly, the Court rejected the same request regarding the municipalities by seven non-governmental organizations, and only joined as third parties those that expressly referred to environmental matters in their statutes. This is how, Fundación Ambiente y Recursos Naturales (FARN), Fundación Greenpeace Argentina, Centro de Estudios Legales y Sociales

124. *Id.* at 2335.

125. LGA, art. 32.

126. CSJN, 20/6/2006, "Mendoza, Beatriz," Fallos (2006-329-2335-36).

127. LGA, arts. 4-5.

128. *Id.* arts. 8-10; CSJN, 20/6/2006, "Mendoza, Beatriz," Fallos (2006-329-2336).

129. LGA, art. 10; CSJN, 20/6/2006, "Mendoza, Beatriz," Fallos (2006-329-2336) (citing LGA, art. 10 in terms of adequate use of environmental resources, to maximize production with minimum degradation, and promoting social participation in decisions on sustainable development).

130. CSJN, 20/6/2006, "Mendoza, Beatriz," Fallos (2006-329-2316).

131. LGA, art. 14; CSJN, 20/6/2006, "Mendoza, Beatriz," Fallos (2006-329-2336-37).

132. LGA, arts. 16, 18; CSJN, 20/6/2006, "Mendoza, Beatriz," Fallos (2006-329-2337).

133. CSJN, 20/6/2006, "Mendoza, Beatriz," Fallos (2006-329-2337).

134. *Id.*

(CELS), and Asociación Vecinos de la Boca became third parties to the *Mendoza* case.[135]

A fifth non-governmental organization, Asociación Ciudadana por los Derechos Humanos [Citizen Association for Human Rights], was accepted as a third party on March 20, 2007, and a group of seventy Lomas de Zamora neighbors obtained the last third-party authorization by the Court.[136] Finally, the intervening parties in the case were completed with the incorporation of the fourteen municipalities as defendants, but only after a request to broaden the original petition was filed by the plaintiffs.[137]

Public Hearings

In that same decision, the Court adopted regulations for public hearings. Between the first June 20, 2006, decision and the final July 8, 2008 judgment, the Supreme Court developed a two-year participatory process of judicial public policy design. The first day of the first public hearing was devoted to the presentation of the Integral Plan for the Sanitation of the Matanza-Riachuelo Basin, by the Environment and Sustainable Development Secretary Romina Picolotti, and a short presentation by the plaintiffs.[138] On the second day of the first public hearing, the sued companies argued they had no responsibility for the basin contamination in providing simple services or innocuous activities, which was later rebutted during the NGO representative exposition (Andrés Napoli, representing FARN, CELS, and Greenpeace).[139] The Justices' questions were incisive, especially towards the companies[140] and government authorities after their poor presentation of the social and health aspects of the Sanitation Plan, as well as the strategies regarding companies' displacements and reconversion processes.[141]

When the Sanitation Plan was presented, the Court took on the challenge to produce further expert knowledge, inviting experts from the University of

135. Francisco Verbic, *El remedio estructural en la causa "Mendoza." Antecedentes, principales características y algunas cuestiones planteadas durante los primeros tres años de su implementación*, 43 FACULTAD DE CIENCIAS JURIDICAS Y SOCIALES 267, 271 (2013).

136. *See* Berros, *supra* note 88, at 121; Verbic *supra* note 135, at 272.

137. *See* Verbic *supra* note 135, at 272; Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 8/7/2008, "Mendoza, Beatriz c. Estado Nacional," Fallos (2008-331-1622,1629).

138. *See* Berros, *supra* note 88, at 122; CSJN, 8/7/2008, "Mendoza, Beatriz," Fallos (2008-331-1622, 1628).

139. A representative for the Asociación de Vecinos de La Boca and for the Federal Ombdusman Office also participated.

140. *See* Berros, *supra* note 88, at 123.

141. *Id.* at 124.

Buenos Aires (UBA) to evaluate it.[142] The development of expert reports is a key tool for environmental claims, where a combination of social and economic determinants is in place simultaneously, and multiple systemic human rights violations are present. An interdisciplinary group of professors from multiple UBA schools developed a very critical report. The Plan lacked information on feasibility, its goals were unclear, and it didn't explain how relocations would be implemented, especially noting that there was no space for the affected communities to voice their demands and desires.[143] Some of the criticism focused on the lack of participation of basin citizens in the hearings and ignoring individual narratives of plaintiffs or others similarly situated, giving preference to an elevated legal discussion.[144]

The second public hearing, held in February 2007, was devoted to the advancement of the Sanitation Plan implementation by Secretary Picolotti. The presentation was strongly influenced by the recent landmark creation of ACUMAR, which included the novel establishment of an institutional space for civil society participation.[145]

During the third public hearing, the Sanitation Plan was reviewed in light of the observations done by UBA experts in their report. Justices expressed concerns regarding the basin authority's institutional stability over time, given the impossibility to ensure budgetary allocation beyond the yearly resources determined by Congress.[146] Plaintiffs and third parties' representatives further criticized the plan. They argued that it dealt with human health superficially and lacked technical precision, naturalizing the basin contamination.[147] In terms of participation and information, they complained about the recently created Participation Commission at ACUMAR has not been implemented.[148]

Following the hearings and the expert report, the Court instructed ACUMAR and the defendant states to provide updated information regarding the state of water, air, and groundwater; a list of industries with polluting activities; relocations of citizens and industries; projects for the petrochemical hub; green credits; dump sites; river margin cleaning; drinking

142. CSJN, 8/7/2008, "Mendoza, Beatriz," Fallos (2008-331-1630).

143. *See* Berros, *supra* note 88, at 122-25. Similar concerns towards lack of participation were expressed by the Federal Ombdusman and the non-governmental organizations' representatives. *Id.* at 122.

144. MARIELA PUGA, LITIGO Y CAMBIO SOCIAL EN ARGENTINA Y COLOMBIA [LITIGATION AND SOCIAL CHANGE IN ARGENTINA AND COLOMBIA], 80, 82 (2012); *see* Berros, *supra* note 88, at 122.

145. *See* Berros, *supra* note 88, at 127.

146. *Id.* at 128.

147. *Id.* at 128-30.

148. *Id.* at 129.

water supply network; rainfall drainage; sewage sanitation; and the emergency health plan.[149]

The fourth and final public hearing was held in November of 2007. Several stakeholders presented their conclusions, including Secretary Piccoloti, the National Treasury Attorney, and representatives for the City of Buenos Aires, the municipalities, and the sued companies.[150] Homero Bibiloni, a representative for the municipalities, objected to the legitimacy of non-governmental organizations in representing the interest of the millions that live in the territory of the basin.[151] This position is especially relevant because Bibiloni was to replace Piccoloti and become the new Environment and Sustainable Development Secretary that would openly confront the non-governmental organizations involved in the implementation of the 2008 decision.[152]

3. Information and Participation. A New Institutional Role for NGOs Within a Mixed Monitoring System.

The first novelty of the 2008 *Mendoza* decision was a ruling that determined the existence of a legal duty to combat contamination and obtain concrete results.[153] The judicial activism in the case was specifically enabled in Section 32 of the LGA. And, although the Justices proactively demanded authorities to create a plan and carry it out, they restrained themselves from violating the division of powers.[154] This delicate distinction was achieved through an "exhortative" ruling, where the Court noted a constitutional breach by omission and reminded the executive authorities what they should

149. *See* Nápoli, *supra* note 101, at 196; Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 8/7/2008, "Mendoza, Beatriz c. Estado Nacional," Fallos (2008-331-1632).

150. *See* Berros, *supra* note 88, at 130.

151. *Id.* at 132-33. In his book, Bibiloni argues that the development of non-governmental organizations is a risk since they lack representativeness and groundwork, thus contributing to the reduction of the role of the state, in favor of their organizational interests. HOMERO MÁXIMO BIBILONI, AMBIENTE Y POLÍTICA: UNA VISIÓN INTEGRADORA PARA GESTIONES VIABLES 280-81 (2008), https://libros.unlp.edu.ar/index.php/unlp/catalog/book/335.

152. *See* Berros, *supra* note 88, at 133, 137; *See* Puga, *supra* note 144, at 74.

153. CSJN, 8/7/2008, "Mendoza, Beatriz," Fallos (2008-331-1636); *see* Fairstein & Morales *supra* note 7, at 336.

154. CSJN, 8/7/2008, "Mendoza, Beatriz," Fallos (2008-331-1634) ("the entity obliged to comply shall pursue the results and fulfill the mandates described in the objectives set forth herein, and it shall be within its powers to determine the procedures to carry them out . . . ") (author's translation).

do to prevent further noncompliance.[155] The public policy that should be undertaken was only suggested by the Court, thus ensuring that it did not exceed the limits of its power.[156] The structure of the remedy built in the decision was analogized to the structural injunctions in the U.S. system.[157]

The decision determined that ACUMAR would be the liable authority for the sanitation program implementation, "while keeping intact the primary responsibility of the Federal State, the Province of Buenos Aires and the Autonomous City of Buenos Aires."[158] Next, the Court outlined the scope of the program, leaving the concrete results and a strict schedule for the implementation to the discretion of the competent authority.[159] For each program item with a deadline for the fulfillment, the Court established "a daily fine to be paid by the President of the Basin Authority" in case of non-compliance.[160]

As previously noted, access to information and space for participation are two procedural rights, embodied in international standards and local regulations, necessary for accountability. The judicial decision emphasizes these legal obligations by demanding quality information production and publication by the basin authority, and by creating a novel mixed monitoring system for the execution of the judgment.

A Program for the Basin's Sanitation. International Measurement System and Public Information

The Court states that the program employed must improve the quality of life of the basin's inhabitants, restore the basin's environment in all its components, and prevent future damage with a sufficient and reasonable

155. José Esain & Andrés Napoli, *Riachuelo: Habemus Sentencia*, JOSE ESAIN-CONSULTORIA JURIDICA DERECHO AMBIENTAL: COMENTARIO A LA SENTENCIA POR EL CASO RIACHUELO, https://www.jose-esain.com.ar/2021/04/18/comentario-a-la-sentencia-por-el-caso-riachuelo-en-coautoria-con-andres-napoli/ (select "para descargar hacer click aquí" to access PDF) (last visited Mar. 6, 2022).

156. Néstor Cafferatta, *Sentencia colectiva ambiental en el caso Riachuelo*, 2 REVISTA DE DERECHO AMBIENTAL 141, 148 (2009) ("[A]fter accepting the evident state of things, responding to the 'what is the scenario' question, that entails a diagnosis of the extreme environmental degradation of the Matanza-Riachuelo Basin, and in light of the pathetic scene, the Court decides on the 'what do we want' question, setting goals to accomplish environmental recompositing; what it doesn't say, to avoid jurisdictional excesses, is 'how do we want it'") (author's translation).

157. *See* Verbic *supra* note 135, at 273.

158. CSJN, 8/7/2008, "Mendoza, Beatriz," Fallos (2008-331-1635).

159. CSJN, 8/7/2008, "Mendoza, Beatriz," Fallos (2008-331-1636); *See* Nápoli *supra* note 101, at 197.

160. CSJN, 8/7/2008, "Mendoza, Beatriz," Fallos (2008-331-1636) (author's translation).

degree of predictability.[161] In order to keep the authority accountable for fulfilling these objectives, it should adopt one of the international measurement systems and "inform the competent court of the enforcement of this judgment within 90 (ninety) working days."[162] As part of the sanitation plan, the Court gave ACUMAR thirty days to organize a digital public information system, accessible to the general public, which would concisely present all of the updated data, reports, lists, schedules, costs, etc., requested in the 2007 resolution.[163]

These first two orders for the sanitation program aimed to ensure quality participation and accountability after insufficient public information was provided to the Court during the judicial process, which transversally affected the other elements of the program.[164] The rest of the program framework sets strict deadlines for the basin authority to carry out activities related to the identification of contamination of industrial origin,[165] sanitation of dumpsites, [166] riverbank cleaning,[167] expansion of the drinking water

161. *Id.* at 1635-36.

162. *Id.* (author's translation).

163. *Id.*

164. *Id.* at 1636.

165. *Id.* at 1636-37. Contamination of industrial origin: inspections of all industries within thirty days; identification of contaminating ones; intimation to all the companies identified as polluting agents that throw wastes, discharges, emissions to the Matanza-Riachuelo Basin, submission of the corresponding treatment plan within thirty days, to be analyzed by ACUMAR within sixty days; adoption of total or partial closure and/or relocation measures; three-month periodical presentation of the status of water and groundwater, as well as the air quality of the basin; presentation of the industrial reconversion and relocation project for the Dock Sud petrochemical hub, as well as the state of progress and estimated deadlines of the Program for urbanization of slums and precarious settlements. *Id.*

166. *Id.* at 1637-38. Ensuring measures to prevent the dumping of waste in illegal dumps in the basin within six months, eradicating them within one year and preventing the formation of new open-air dumps; order measures for the eradication of informal settlements along the dumps; implementation of an Integrated Solid Urban Waste Management Plan (GIRSU for its Spanish acronym—Gestión Integral de Residuos Sólidos Urbanos). *Id.*

167. *Id.* at 1637. The cleaning informed on the completion of the stage of rat extermination, cleaning and weeding and the progress of the project to transform the entire riverbank into a landscaped area, as provided in the Matanza-Riachuelo Basin Integral Plan, including compliance deadlines and budgets involved. *Id.*

supply network,[168] rainfall drainage,[169] and sewage sanitation,[170] and the Emergency Sanitary Plan.[171]

A Mixed Monitoring System

The mixed monitoring system for the judgment execution, also described as an "institutional microsystem,"[172] is the result of the challenge created by fulfilling judicial orders,[173] especially when multiple human rights violations are intertwined and affect millions of people. The monitoring system "has triggered a supervised management [of public policy] whose main objective is to clean up and restore the Matanza-Riachuelo basin's environment."[174] In light of the foreseeable difficulties, the Court built this system to guarantee compliance with its order, the involvement of the public administration offices, the federal judicial power, in collaboration with non-governmental organizations.[175]

Three components make up the monitoring system. First, the National Audit Office has "specific control over the allocation of funds and the budgetary execution of everything related to the [Sanitation] Plan."[176] The Court affirmed that the case warranted this specific transparency effort and demanded ACUMAR secure budget items related to the sanitation program

168. *Id.* at 1638. The program description informed on the expansion plan of the collection, treatment and distribution of water supply carried out by the water sanitation and hydric development authorities, including foreseen programs until 2015. *Id.*

169. *Id.* The program description informed on the rainfall drainage plan, its current state, including foreseen programs until 2015. *Id.*

170. CSJN, 8/7/2008, "Mendoza, Beatriz," Fallos (2008-331-1622, 1639) (reporting water sanitation authority's progress, particularly with regard to the Berazategui and Riachuelo treatment plants).

171. *Id.* (carrying out socio-demographic maps and surveying environmental risk factors to determine health risk factors, population at risk, and baseline diagnosis for diseases in basin; using follow-up system to distinguish between diseases caused by different types of pollution and analysis; developing health programs according to diagnosis).

172. Cafferatta, *supra* note 156, at 149.

173. Nápoli, *supra* note 101, at 201 ("El esquema de control ideado por el máximo tribunal parte de reconocer las dificultades que frecuentemente impiden el cumplimiento efectivo de las obligaciones ordenadas a los poderes públicos en las sentencias, y que terminan por convertir a los mandatos de los tribunales en meras expresiones de voluntad." ["The control scheme devised by the highest court starts from recognizing the difficulties that frequently prevent the effective fulfillment of the obligations ordered to the public powers in the sentences, and that end up turning the mandates of the courts into mere expressions of will."] (author's translation)).

174. *Id.* at 202 (author's translation).

175. *Id.* at 183.

176. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 8/7/2008, "Mendoza, Beatriz c. Estado Nacional," Fallos (2008-331-1622, 1641) (author's translation).

implementation, to facilitate control.[177] Second, the civil monitoring committee (*cuerpo colegiado*), comprised of representatives of the non-governmental organizations acting as third parties to the case, with the coordination of the Federal Ombudsman Office, was created to "strengthen citizen participation in the control of compliance with the [sanitation] program". The Federal Ombudusman's functional autonomy is a fundamental tool to ensure transparency. It also has the capacity to receive suggestions from citizens and process them appropriately.[178] Finally, the federal trial court of Quilmes was entrusted with the judgement enforcement supervision, as it holds exclusive jurisdiction for all matters associated with compliance and all cases related to collective environmental damage in the Matanza-Riachuelo basin. The lower court shall act as the revision authority in case of a judicial challenge to ACUMAR administrative acts. The federal court's decisions in the case may be appealed directly to the Supreme Court.[179]

This monitoring system joins other activism strategies that, combining horizontal and vertical accountability, foster cooperation amongst agencies and institutional spaces for social participation, producing a mutual stimulus effect to ensure control and push for state action.[180] Through the *Mendoza* case judgement, the Supreme Court broke the cycle of state inaction that had left the Matanza-Riachuelo basin unattended, by ensuring that a critical mass of stakeholders were equipped with a set of innovative monitoring tools for accountability.[181] At that point, a whole new challenge would begin.

IV. LESSONS LEARNED THIRTEEN YEARS AFTER THE *MENDOZA* DECISION

The Center for Legal and Social Studies, a renowned human rights organization, third-party to the *Mendoza* case, and member of the monitoring committee, predicted that the challenge would begin the day after the judgment was rendered.[182] The compliance with the court's order depends to a large extent on the mutual efforts of the different actors, the cooperation among them, the strategies deployed simultaneously, and the Judiciary involvement to prevent the Matanza-Riachuelo basin from falling into

177. *Id.*

178. *Id.* (author's translation).

179. *Id.* at 1643-45; *see also* Bergallo, *supra* note 81, at 263 (adding that Judge Armella's recent appointment indicated likelihood of having more resources available for Mendoza judgement execution).

180. Bergallo, *supra* note 81, at 254-55, 263-64.

181. Andrés Nápoli & Javier García Espil, *Riachuelo: Hacer hoy pensando en la Cuenca del manana*, INFORME AMBIENTAL ANNUAL 2011, 177, 184 (2011).

182. Fairstein & Morales, *supra* note 7, at 337.

oblivion again.[183] Indeed, in complex cases like this, where the solution to structural problems requires a profound transformation to ensure sustainable long-term state action, the judgment is a turning point that breaks the cycle of inaction, but usually opens the door to "a new and challenging stage."[184]

Lessons in environmental activism are drawn from careful observation, critical analysis, and sensitive reflection. This part looks at the achievements and limits of the activist strategies after the *Mendoza* judgment. Section A dives into the limits of the judiciary's involvement, Section B focuses on civil society organizations, and Section C reaffirms the value of the institutional participatory mechanisms.

A. The Limits of Judicial Activism

Judge Armella, the head of the federal trial court of Quilmes, called for a hearing on July 23, 2008, initiating the monitoring of the fulfillment of the activities scheduled by the Supreme Court. To preserve the bilateral aspect of the process, he established that ACUMAR and the Federal Ombudsman Office were the two parties to the case.[185] From 2009 to 2011, Judge Armella produced more than thirty yearly interlocutory decisions, eviction orders, inspections, and relocations, imposing fines and continuously demanding the basin authority's reports.[186]

The active judicial role contrasted with the first years of the basin authority's weakness. Even before the judgment was rendered, during the first two years of its work (2007-2009), stakeholders expressed their concern over the lack of resources and other institutional deficiencies.[187] The City of Buenos Aires and several municipalities felt unrepresented in the basin authority, thus failing to build consensus and coordination amongst fragmented jurisdictions, which was one of the main reasons why it was created.[188] The lack of technical and operational capacity to undertake the massive task assigned to ACUMAR was reflected in reports by the monitoring stakeholders, including the monitoring committee, and the National Audit Office. The last one reported underspending of ACUMAR's budget.[189]

183. *Id.* at 348.
184. *Id.*
185. Nápoli, *supra* note 101, at 203.
186. Bergallo, *supra* note 81, at 265.
187. Nápoli & Espil, *supra* note 181, at 185-86.
188. *Id.*
189. *Id.*

In its 2009 report,[190] the monitoring committee reviewed each element of the sanitation plan ordered by the Supreme Court, reporting on its achievements and shortfalls. Until 2010, there was no "international monitoring system."[191] ACUMAR reported that the first system was adopted in 2010 through Resolution 566,[192] but the administrative act was not published.[193] The basin authority's website published the judicial presentations, but the available information was insufficient to fulfill the public information mandate.[194] Reducing the industrial contamination was deemed poor and slow, especially in terms of factory inspections. By 2010, the authority had not approved any industrial reconversion plan, and the monitoring committee criticized the regulations adopted to limit industrial discharges.[195] The monitoring committee also criticized the lack of participatory spaces, which established their role with the Participation Commission's duty to ensure citizen involvement.[196] Furthermore, the report concludes that small achievements contrast with the severe lack of quality information and institutional deficits to maintain control and fully diagnose the sanitation plan components.[197] Throughout the report, the monitoring committee highlighted the active judicial role in demanding basin authority's action, but the poor results illustrate the insufficient impact of those orders.

In August of 2010, Judge Armella imposed a daily fine on the ACUMAR President.[198] His two-year mandate from December 2008 to December 2010, which began after the previous Secretary was removed, was marked by the impossibility to show substantial fulfillment of the *Mendoza* judgment.[199] After this severe sanction, stakeholders observed a positive change in building institutional capacity with the hopes that it would result in a better fulfillment of its obligations.[200] By the end of 2010, the basin authority's President was replaced again.[201]

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190. DEFENSOR DEL PUEBLO DE LA NACION ET AL., CUENCA MATANZA RIACHUELO, INFORME 2009 [REPORT ON MATANZA RIACHUELO BASIN] [hereinafter 2009 OMBUDSMAN REPORT].

191. *See id.*

192. Resolution No. 1234/2013, Dec. 23, 2013, [32806] B.O. 22 (explaining that Resolution 566 incorporated the first system in 2010).

193. *Id.*

194. 2009 OMBUDSMAN REPORT, *supra* note 190, at 12.

195. *Id.* at 16-17.

196. *Id.* at 47.

197. *See* 2009 OMBUDSMAN REPORT, *supra* note 190.

198. Nápoli & Espil, *supra* note 181, at 187.

199. *Id.*

200. *Id.*

201. *Riachuelo: Mussi toma la posta tras una historia de promesas incumplidas*, PERFIL (Dec. 29, 2010, 7:43 PM), https://www.perfil.com/noticias/sociedad/-20101229-0019.phtml.

While Judge Armella showed strong activist initiative, using his vested powers to demand governmental action, he was also involved in a corruption case related to ACUMAR contracts,[202] which resulted in his removal.[203] This incident caused an impasse in the sanitation plan implementation,[204] especially during the period of the corruption revelation (August 26, 2012), the Judge's removal by the Supreme Court (November 6, 2012),[205] and the new assignment to two new trial courts (December 19, 2012).[206] In the removal decision, the Court divided the supervision of the judgment execution—the Federal Trial Court of Morón kept most of the Sanitation Plan monitoring, while Federal Judge in the City of Buenos Aires was ordered to control the contracts related to water and sewage supply plans and urban solid waste management.[207]

Those shortfalls indicate the limits of judicial activism. While the basin sanitation process complexity requires a broad institutional framework to build consensus and commitment, the Supreme Court itself prevented the affected population from being able to participate as parties.[208] By replacing Congress, which the Supreme Court had to do to activate public efforts to deal with the Matanza-Riachuelo basin conflict, it established procedural rules that might not always be the most efficient.[209] The *Mendoza* case judgment has, at the moment, thirteen incidental proceedings in the Federal Court No. 12 of the City of Buenos Aires and fifteen more heard by the Federal Court of Morón,[210] arising from "various serious human rights

202. Horace Verbitsky, *Niemblas del Riachuelo*, PÁGINA 12 (Aug. 26, 2012), https://www.pagina12.com.ar/diario/elpais/1-201868-2012-08-26.html.

203. Eduardo Videla, *Llegan los reemplazos de Armella*, PÁGINA 12 (Dec. 21, 2012), https://www.pagina12.com.ar/diario/sociedad/3-210333-2012-12-21.html.

204. Ferro, *supra* note 60, at 17.

205. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 8/7/2008, "Mendoza, Beatriz c. Estado Nacional," Fallos (2008-331-1630).

206. Videla, *supra* note 203.

207. *Id.*

208. *See* Santiago Cané, *Un problema integral que demanda soluciones integrales* [*An integral problem that demands solutions*], 11 REVISTA INSTITUCIONAL DE LA DEFENSA PUBLICA 11, 15 (2021).

> The judicial situation determined by the decisions of the Court itself, which only admits participation through the monitoring committee—made up of a very small group of organizations and currently without the presence of the National Ombudsman by decision of the Court itself—prevents in practice the population directly affected from being able to participate in the implementation of the judgment.

Id. at 16 (author's translation).

209. *Id.* at 15.

210. *See Especial Riachuelo: La Causa* [*Riachuelo Special: The Cause*] CENTRO DE INFORMACIÓN JUDICIAL, https://www.cij.gov.ar/riachuelo.html (last visited Feb. 18, 2022).

violations [that] are processed in an incidental manner with little connection to the main case file."[211]

Sixteen years after the claim was filed, the Court remains silent on the legal responsibility of the companies that throw polluting discharges into the basin daily. When the Supreme Court decided to prioritize the development of the public policy through political institutions, it also decided to postpone the definition of private entity responsibility, which enables their lack of involvement and commitment to technically reconvert and ensure treatment of discharges.[212] Furthermore, the consultative and relegated role of municipalities, observed by stakeholders when ACUMAR was created, is another limiting factor to the success of the sanitation plan.[213] If ACUMAR fails to act as a coordinating body amongst responsible jurisdictions, the entity becomes a shield for the federal, provincial, and municipal powers, receiving judicial orders and demands from the affected population instead of the respective government authorities.[214]

B. The Limits of Civil Society Organizations' Activism

One of the main limits of the CSO activism in the case is a result of the Court's decision to constrain the composition of the monitoring committee to a group of "elite" NGOs to the detriment of the grassroot ones.[215] This process is described as "judicial expropriation." While the phenomenon is true, the decision of the Court to give priority to the overall sanitation program instead of the individual monetary compensation is a novel approach for a complex case where the rights of millions throughout the basin are at stake.[216] Bibiloni, former President of ACUMAR, also questioned the non-territorial nature of these organizations, which impacted the space he gave the monitoring committee during his term.[217]

211. Cané, *supra* note 208, at 16 (author's translation).

212. *See* Nápoli, *supra* note 101, at 233; *see also* Cané, *supra* note 208, at 17 (explaining that the lack of information was the main pretext for the industries' exemption from responsibility and, while the current data proves without a doubt that they are in fact responsible, the Court remains silent.).

213. *See* Berros, *supra* note 88, at 126-27; *see* Nápoli, *supra* note 101, at 214-16.

214. Cané, *supra* note 208, at 17.

215. *See* Bergallo, *supra* note 81, at 22; *see also* Puga, *supra* note 144, at 80.

216. *See* Bergallo, *supra* note 81, at 23-24; *see also* Puga, *supra* note 144, at 80.

217. HOMERO MÁXIMO BIBILONI, AMBIENTE Y POLÍTICA: UNA VISIÓN INTEGRADORA PARA GESTIONES VIABLES 280-81 (2008), https://libros.unlp.edu.ar/index.php/unlp/catalog/book/335.

NGOs also face a structural problem to guarantee their continuous work in the area, given their budgetary restraints.[218] Their agendas may shift according to the funding sources that determine the funds allocation.[219] Furthermore, the Federal Ombdusman Office has not have an Ombdusman designated since 2009,[220] and while an adjunct was appointed and the monitoring committee continues to work on the case, the legal structure envisioned by the Supreme Court's mixed monitoring system reveals its fragility.[221]

Regardless of these limitations, the contribution of civil society organizations to the development of the *Mendoza* case, before and after the judicial decision, is undisputed. Periodical reports by the monitoring committee and other stakeholders produce valuable information, demand its publication, recommend improvements, and directly impact the policy implementation by ACUMAR and other relevant authorities. These contributions synergically combine with other public offices' initiatives such as the Prosecutor's Office,[222] the City of Buenos Aires Ombudsman Office,[223] and the City of Buenos Aires Public Defender's Office.[224]

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218. *See* Nápoli, *supra* note 101, at 208 ("we cannot overlook the fact that the task performed by the monitoring committee does not have resources that have been specifically provided for the performance of the task, taking into account that the Supreme Court ordered its creation without providing it with the necessary resources for its proper functioning, which is the reason why its members perform their activity 'ad honorem.'") (author's translation).

219. BIBILONI, *supra* note 217, at 281.

220. *See 55 Organizaciones piden al Congreso por la designación del Defensor del Pueblo*, ASOCIACIÓN CIVIL POR LA IGUALDAD Y LA JUSTICIA (Aug. 31, 2016), https://acij.org.ar/55-organizaciones-piden-al-congreso-por-la-designacion-del-defensor-del-pueblo/; *see also* María Eugenia Gago & Tristán Gómez Zavaglia, *El Defensor del Pueblo de la Nación: entre el olvido, la intención y la desidia* [*The Ombudsman of the Nation: between oblivion, intention and laziness*], SISTEMA ARGENTINO DE INFORMACION JURIDICA ¶ 4, http://www.saij.gob.ar/maria-eugenia-gago-defensor-pueblo-nacion-entre-olvido-intencion-desidia-dacf200022/123456789-0abc-defg2200-02fcanirtcod?&o=334&f=Total%7CFecha%7CEstado%20de%20Vigencia%5B5%2C1%5D%7CTema%7COrganismo%5B5%2C1%5D%7CAutor%5B5%2C1%5D%7CJurisdicci%F3n%5B5%2C1%5D%7CTribunal%5B5%2C1%5D%7CPublicaci%F3n%5B5%2C1%5D%7CColecci%F3n%20tem%E1tica%5B5%2C1%5D%7CTipo%20de%20Documento/Doctrina&t=9727.

221. Ferro, *supra* note 60, at 18.

222. *A 13 años del fallo "Mendoza," el Ministerio Público Fiscal presenta sus acciones más relevantes*, FISCALES (Aug. 7, 2021), https://www.fiscales.gob.ar/procuracion-general/a-13-anos-del-fallo-mendoza-el-ministerio-publico-fiscal-presenta-sus-acciones-mas-relevantes/.

223. *See, e.g.*, *Causa Matanza Riachuelo: 13 años, 13 testimonios*, DEFENSORIA DEL PUEBLO (July 8, 2021), https://defensoria.org.ar/noticias/causa-matanza-riachuelo-13-anos-13-testimonios/ (showcasing publications and participation in the development of the Matanza-Riachuelo case).

224. *See, e.g.*, *Se reunio el consejo federal de defensores y asesores generales de la Republica Argentina*, MINISTERIO PÚBLICO DE LA DEFENSA, https://www.mpd.gov.ar/index.php/noticias-feed/5655-se-reunio-el-consejo-federal-de-defensores-y-asesores-generales-de-la-republica-argentina-3 (noting the public defender's participation in public hearings).

By 2015, a new monitoring committee report presented the achievements and shortfalls of the *Mendoza* judgment execution.[225] The report recognized advancements in the sanitation plan, but still observed a lack of overall planning with an environmental perspective and disagreements amongst stakeholders' reporting in the case regarding the state of the basin. The monitoring committee reported being an active participant during the implementation of the *Mendoza* judgment, filing more than 250 briefs with opinions and demands before the courts, assisting with 110 hearings, and conducting 320 meetings.[226] It actively promoted access to public information and social participation that impacted the development of the judicial procedure and the overall sanitation plan.[227] Amongst its achievements, the demand for a more active social participation commission observed during the first years resulted in a shift of policy at ACUMAR. It began implementing its regulations by calling for local-level meetings during 2010,[228] which would slowly consolidate in the following years, in the form of roundtables.[229] Participation of grassroots initiatives and citizens in spaces for social deliberation and information has been an ongoing practice, especially regarding the slow housing development and the impact of long-term sanitation works.[230]

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225. DEFENSOR DEL PUEBLO DE LA NACIÓN ET AL., INFORME ESPECIAL A SIETE AÑOS DEL FALLO DE LA CORTE SUPREMA DE JUSTICIA DE LA NACIÓN QUE PERSIGUE MEJORAR LA CALIDAD DE VIDA DE LA POBLACIÓN, RECOMPONER EL AMBIENTE Y PREVENIR NUEVOS DAÑOS EN LA CUENCA MATANZA RIACHUELO (2015), http://www.dpn.gob.ar/documentos/20160304_30775_556677.pdf.

226. *Id.* at 3-4.

227. *Id.*

228. Nápoli & Espil, *supra* note 181, at 204.

229. "Roundtables" are spaces for diverse stakeholders to meet, especially local-level civil society organizations and affected citizens, with the relevant authorities to discuss, get information, approach their demands and suggestions for the implementation of public policy. *See Comisión de Participación Social* [*Social Participation Commission*], ACUMAR, https://www.acumar.gob.ar/participacion-social/ (last visited Mar. 20, 2022)*; see also* Romina Olejarczyk, *Conflictos (y ausencia de conflictos) en las relocalizaciones del Matanza-Riachuelo. Reflexiones preliminares en un municipio de la cuenca media* [*Conflicts (and absence of conflicts) in the relocations of Matanza-Riachuelo. Preliminary reflections in a municipality of the middle basin*], 17 GEOGRAFICANDO (2021), https://doi.org/10.24215/2346898Xe094 (reporting a case study analysis of the conflicts in housing relocation and describing the functioning of territorial roundtables).

230. Roundtables are reported regularly, at least since 2015, in the annual report mandated by Law No. 26168, Ley de la Cuenca Matanza Riachuelo [Matanza Riachuelo Basin Law], arts. 8, Dec. 4, 2006 [31047] B.O. 1. ACUMAR, INFORME ANUAL LEY 26.168, 52 (2015), https://www.acumar.gob.ar/wp-content/uploads/2016/12/Informe-HCN-Acumar-2015.pdf; ACUMAR, INFORME ANUAL LEY 26.168, 56 (2017), https://www.acumar.gob.ar/wp-content/uploads/2016/12/Anuario-Gestion-ACUMAR-2017.pdf; ACUMAR, INFORME ANUAL LEY 26.168, 41 (2018), https://www.acumar.gob.ar/wp-content/uploads/2016/12/Informe-

In terms of access to information, the July 2017 report of the organizations that comprise the monitoring committee was devastating.[231] They observed that the entity's website was deficient—it lacked updated information, had several broken links, and overall failed to comply with the public information standards set by the Supreme Court.[232]

A 2016 change in government, which meant the same political party would govern the three jurisdictions responsible for the basin's cleanup, had no impact on coordination results, contrary to the NGOs' expectations.[233] The repeated flaws in terms of "institutional volatility" were evidenced by multiple changes in authorities, including three different presidents in eighteen months.[234] More recently, the 2019 FARN report pondered achievements and shortfalls regarding the Court's decision implementation after its ten-year anniversary.[235] FARN's Executive Director highlighted the waste removal work, sanitary control, and sewage infrastructure, and mentioned the value of the information produced to ensure that the public policy and decision-making are data-oriented.[236] However, after the latest Supreme Court public hearing, the tribunal noted shortfalls in the fulfillment of the Plan's goals, ordered a new schedule of deadlines, and mentioned the weaknesses of the monitoring system.[237]

The technical and rational approach focused on large infrastructure projects that are interdependent, time consuming, and impact the citizens'

Congreso-2018.pdf; ACUMAR, INFORME ANUAL DE GESTIÓN 2019, 47 (2019), https://www.acumar.gob.ar/wp-content/uploads/2016/12/INFORME-ANUAL-DE-GESTIO%CC%81N-2019-LEY-26.168-ART.-8.pdf; ACUMAR, INFORME DE GESTIÓN ANUAL AL CONGRESO DE LA NACIÓN ARGENTINA 16-19 (2020), https://www.acumar.gob.ar/transparencia/informes-congreso/.

231. FUNDACIÓN AMBIENTE AND NATURAL RESOURCES (FARN) ET AL., 9 AÑOS DEL FALLO DE LA CORTE. UNA POLÍTICA DE ESTADO TODAVÍA AUSENTE [9 YEARS AFTER THE COURT RULING. A STATE POLICY STILL ABSENT] 4-5 (2017).

232. *Id.*

233. *Id.* at 3.

234. *Id.*

235. Andrés Nápoli, *Riachuelo: a diez años del fallo de la Corte Suprema de Justicia, aún queda mucho por hacer*, *in* INFORME AMBIENTAL 2019, 193 (Ana Di Pangracio et al. eds., 2019).

236. *Id.* at 194-95.

237. *Tras la audiencia pública en la causa Riachuelo, la Corte advirtió deficiencias en el cumplimiento del plan de saneamiento y requirió que en 30 días se establezcan plazos ciertos y fundados de cumplimiento de los objetivos de la sentencia* [*After the public hearing in the Riachuelo case, the Court noted deficiencies in compliance with the sanitation plan and required that within thirty days certain and well-founded deadlines be established for compliance with the objectives of the judgment*] CENTRO DE INFORMACIÓN JUDICIAL (Apr. 13, 2018), https://www.cij.gov.ar/nota-29861-Tras-la-audiencia-p-blica-en-la-causa-Riachuelo--la-Corte-advirti--deficiencias-en-el-cumplimiento-del-plan-de-saneamiento-y-requiri--que-en-30-d-as-se-establezcan plazos-ciertos-y-fundados-de-cumplimiento-de-los-objetivos-de-la-sentencia.html.

ability to observe short-term progress when there are urgent sanitary needs.[238] One of the consequences of the detachment of citizenship with the public policy is the lack of appropriation of rights-holders of the transformations that are directly aimed toward them. In that sense, spaces for citizen participation to voice their concerns are essential parts of the appropriation process.[239]

Thirteen years after the judgment, an undisputed achievement has been the "elevation of the environmental question to the level of public concern and policy," inclusion of the environmental problems in the civil society organizations' agenda and strengthening social understanding of natural resources as common goods.[240]

C. Coordinated Efforts: Institutional Participation Mechanisms to Contribute to the Environmental Agenda

The Supreme Court's judgment in the *Mendoza* case has consolidated the notion of procedural rights as essential components of an environmental public policy. Procedural rights, which enable civil society to channel demands through institutional mechanisms, bring the "right to know, participate and claim" to live.[241] Throughout the case development (2006-2008) until the final judgment (July 8, 2008) and beyond, the interdependent nature of access to information and participation rights with the human right to a healthy environment has become increasingly evident.

Public hearings, in this sense, were born during the 2006-2008 period, with an innovative regulation invented by then recently renewed Supreme Court. After the four public hearings to build a case to reach the final sentence, the Court again called for this participatory reunion in 2011,[242]

238. Cané, *supra* note 208, at 11-16.

239. Horacio Corti, *Editorial*, 11 REVISTA INSTITUCIONAL DE LA DEFENSA PUBLICA 7, 7-8 (2021); *see also* Leonel Bazan et al., *Reflexiones a 10 años de la sentencia del caso Mendoza/Riachuelo. Relatoria de encuentros coorganizadas por el CDH-UBA y el IJDH-UNLA* [*Reflections 10 years after the judgment in the Mendoza/Riachuelo case. Report of meetings co-organized by the HRC-UBA and the IJDH-UNLA*], 11 REVISTA INSTITUCIONAL DE LA DEFENSA PUBLICA, 33, 33-48 (2021).

240. Merlinsky & Stoller, *supra* note 30, at 49 (author's translation).

241. Christel & Gutierrez, *supra* note 13, at 328.

242. *Se Realizo una Audiencia Publica Ante la Corte por la Cause Riachuelo* [*A public hearing was held for the Riachuelo Cause*], CENTRO DE INFORMACIÓN JUDICIAL (Mar. 16, 2011), https://www.cij.gov.ar/nota-6420-Se-realiz--una-audiencia-p-blica-ante-la-Corte-por-la-causa-Riachuelo.html.

2012,[243] 2016,[244] and 2018.[245] The Court indicated the shortfalls in the implementation of the *Mendoza* judgment, highlighting the persistent underspending of the assigned budget—reported by the National Audit Office for 2016—and deemed the monitoring system to be insufficient to verify the fulfillment of the Sanitation Plan's goals.[246]

ACUMAR, through the Social Participation Commission, carried out six public hearings to promote citizen involvement in public policy decisions.[247] The topics brought to the hearings, as well as the results, were somewhat erratic. In 2012, the hearing was devoted to the presentation of the Master Plan for the Integral Management of Urban Solid Waste, but the records do not include a Final Report nor a response to the participant's concerns, as mandated by the applicable regulation.[248] In 2016, the public hearing was held to update the Integral Plan for the basin sanitation, originally presented by ACUMAR in 2010.[249] In this case, the procedure was fully complied with, but the resulting document was frequently criticized. Regardless of its shortfalls, the 2016 Plan included specific lines of action related to

243. *Causa Riachuelo: se realizó una audiencia pública ante la Corte Suprema [Riachuelo case: a public hearing was held before the Supreme Court]*, CENTRO DE INFORMACIÓN JUDICIAL (Oct. 11, 2012), https://www.cij.gov.ar/nota-10002-Causa-Riachuelo--se-realiz--una-audiencia-p-blica-ante-la-Corte-Suprema.html; *see also Causa Riachuelo: La Corte Supreme de Justicia Reanudo la Audiencia Publica* [*Riachuelo Cause: The Supreme Court of Justice Resumed the Public Hearing*], CENTRO DE INFORMACIÓN JUDICIAL (Oct. 25, 2012), https://www.cij.gov.ar/nota-10070-Causa-Riachuelo--la-Corte-Suprema-de-Justicia-reanud--la-audiencia-p-blica.html; *Causa Riachuelo: La Corte Supreme de Justicia Reanudo la Audiencia Publica* [*Riachuelo Cause: The Public Hearing Before the Supreme Court of Justice Has Ended*], CENTRO DE INFORMACIÓN JUDICIAL (Nov. 1, 2012), https://www.cij.gov.ar/nota-10157-Causa-Riachuelo--finaliz--la-audiencia-p-blica-ante-la-Corte-Suprema.html.

244. *Riachuelo: Se Realizo una Audiencia Publica Para Conocer el Avance del Plan de Saneamiento Ordenado por la Corte Suprema [Riachuelo: A Public Hearing Was Held to Learn the Progress of the Sanitaition Plan Ordered by the Supreme Court of Justice]*, CENTRO DE INFORMACIÓN JUDICIAL (Nov. 30, 2016), https://www.cij.gov.ar/nota-23965-Riachuelo--se-realiz--una-audiencia-p-blica-para-conocer-el-avance-del-plan-de-saneamiento-ordenado-por-la-Corte-Suprema.html.

245. *Se Realizo una Audiencia Publica ante la Corte Suprema por la Cause Riachuelo* [*A Public Hearing was Held before the Supreme Court of Justice for the Riachuelo Cause]*, CENTRO DE INFORMACIÓN JUDICIAL (Mar. 14, 2018), https://www.cij.gov.ar/nota-29417-Se-realiz--una-audiencia-p-blica-ante-la-Corte-Suprema-por-la-causa-Riachuelo.html.

246. *See* CENTRO DE INFORMACIÓN JUDICIAL, *supra* note 237.

247. *See generally Audiencia Publicas* [*Public Hearings*], ACUMAR, https://www.acumar.gob.ar/participacion-social/audiencias-publicas/ (last visited Feb. 18, 2022).

248. *See Audiencia Publica 2012* [*Public Hearing 2012],* ACUMAR (May 29, 2012), https://www.acumar.gob.ar/participacion-social/audiencias-publicas/2012-2/.

249. *See Audiencia Publica 2016* [*Public Hearing 2016*], ACUMAR (Nov. 16, 2016), https://www.acumar.gob.ar/participacion-social/audiencias-publicas/audiencia-publica-2016/; *see also* ACUMAR, PLAN INTEGRAL DE SANEAMIENTO AMBIENTAL ACTUALIZACION PISA 2016 [COMPREHENSIVE ENVIRONMENTAL SANITATION PLAN PISA 2016 UPDATE] 18 (2016).

participation and access to public information.[250] In 2017, a public hearing was held in the municipality of Almirante Brown to promote participation in the drafting of a Protocol for the development of relocation and reurbanization processes of slums and precarious settlements in the basin.[251] In 2019, the public hearing called for participants to contribute to three lines of action in relation to the main contamination sources of the basin: industry, sewage, and solid urban waste.[252] Recently, a new public hearing was held to publicly review the monitoring system that had been updated—without participation—in 2013 and 2017 by the Basin Authority.[253]

The institutional role of NGOs in the monitoring committee has been described throughout this article, citing to the numerous reports on their substantial role during the judgement's execution period. Furthermore, many of those same organizations, and other stakeholders, have exercised their right to request public information from the basin authority, which increasingly improved its response performance.[254] The response rate was close to zero until 2014, when a visible increase both in requests and responses began and continues to grow until today.[255]

In terms of the current situation of the basin, official data reported through the monitoring system shows an exponential increase in access to safe water between 2009 and 2019, reaching 78.5%.[256] By 2019, only 51.8% of the basin population has been connected to sewage collection network

250. PLAN INTEGRAL DE SANEAMIENTO AMBIENTAL ACTUALIZACION PISA 2016, *supra* note 249, at 192 (describing local-level roundtables and the need to better systematize the information regarding their development).

251. *See Audiencia Publica 2017* [*Public Hearing 2017*], ACUMAR (Dec. 14, 2017), https://www.acumar.gob.ar/participacion-social/audiencias-publicas/audiencia-publica-2017/; *see* Resolution No. 420-E/2017, Dec. 15, 2017, [33777] B.O. 62.

252. *See Audiencia Publica 2019* [*Public Hearing 2019*], ACUMAR (Sept. 2019), https://www.acumar.gob.ar/participacion-social/audiencias-publicas/audiencia-publica-2019/.

253. *See ACUMAR Realizo una Audiencia Publica para Discutir el Sistema de Indicadores* [*ACUMAR Held a Public Hearing to Discuss the Indicators System*], ACUMAR (Sept. 24, 2021), https://www.acumar.gob.ar/ultimas-noticias/realizamos-la-audiencia-publica-discutir-nuevo-sistema-indicadores/; *Informe Final de Audiencia Pública* [*Final Report of Public Hearing*], ACUMAR (Sept. 24, 2021), https://www.acumar.gob.ar/participacion-social/audiencias-publicas/audiencia-publica-2019/.

254. *Respuesta a requerimientos de información pública, Sistema de Indicadores* [*Response to Public Information Requirements*], ACUMAR (Oct. 20, 2021), https://www.acumar.gob.ar/indicadores/respuesta-requerimientos-informacion-publica-ambiental/.

255. *Id.*

256. *Población incorporada al área con servicio de red de agua potable* [*Population Incorporated into the Area with Drinking Water Network Service*] ACUMAR (July 20, 2021), https://www.acumar.gob.ar/indicadores/poblacion-incorporada-al-area-servicio-red-agua-potable/.

services.[257] The resources invested in sanitation have increased yearly,[258] as well as the removal of waste that impacts the state of the basin margins.[259] Out of the 1,771 housing solutions established in 2010 as a goal, only 4,977 have been finished, 3,458 are being developed, 1,734 are being designed, and 7,602 are reported without advancement.[260] The monitoring system has been criticized by experts as insufficient in order to reflect the level of execution of the *Mendoza* judgment.[261] Although the current system was validated by the execution judge, experts argue the system lacks a human rights perspective, which means it does not measure the real impact on the fulfillment of basin citizen's rights.[262] Several public hearing speakers followed this line of argument, taking advantage of the space provided by the review process convened by the basin authority to voice concerns regarding the monitoring system indicators.[263]

The ongoing challenge to keep the issue alive, keep authorities accountable, collaborate in the implementation of public policy, and maintain the environmental agenda present in the public arena, finds useful tools in activism in institutional participation mechanisms.

V. CONCLUSION: REINFORCING INSTITUTIONAL MECHANISMS FOR LONG-TERM PUBLIC POLICY

One of the major lessons from the case is that civil society organizations enhance their impact when they use institutional mechanisms to file their claims. The road traveled by civil society organizations until the Supreme

257. *Población incorporada al servicio de red cloacal* [*Population Incorporated into the Sewage Network Service*], ACUMAR (July. 20, 2021), https://www.acumar.gob.ar/indicadores/poblacion-incorporada-al-area-servicio-red-cloacal/.

258. *See Inversión en Plan de Saneamiento Ambiental* [*Investment in the Environmental Sanitation Plan*], ACUMAR (Apr. 20, 2021), https://www.acumar.gob.ar/indicadores/inversion-plan-integral-saneamiento-ambiental/.

259. *See Estado del Mantenimiento de las Márgenes* [*Maintenance Status*], ACUMAR (July 20, 2021), https://www.acumar.gob.ar/indicadores/estado-del-mantenimiento-las-margenes-2/; *see also Basurales Remanentes de la Linea de Base, por Tipologia* [*Landfills remaining from the Baseline, by Typology*], ACUMAR (Oct. 20, 2021), https://www.acumar.gob.ar/indicadores/basurales-remanentes-la-linea-base-tipologia/.

260. *Relación al Plan de Viviendas 2010* [*Housing Solutions in Relation to the 2010 Housing Plan*], ACUMAR (Oct. 20, 2021), https://www.acumar.gob.ar/indicadores/soluciones-habitacionales-relacion-al-plan-viviendas-2010/.

261. Jorge Sambeth et al., *Medición de Mandas Judiciales. Un Abordaje Interdiscplinario en la Cuenca Matanza-Riachuelo*, 11 REVISTA INSTITUCIONAL DE LA DEFENSA PUBLICA 75, 76 (2021).

262. *Id.* at 80.

263. *See Audiencia Publica 2021* [*Public Hearing 2021],* ACUMAR (Sept. 24, 2021), https://www.acumar.gob.ar/participacion-social/audiencias-publicas/audiencia-publica-2021/.

Court rendered its final judgment was not in solitude, and the contribution of other governmental agencies, such as the Ombudsman Office, proved essential in channeling the long-standing claim. The judicial power alone was also unable or unwilling to devote its tools to solve the complex case of multiple and historic human rights violations. It proved capable of transforming the reality only when other variables—historic, mediatic, political, social, and legal—set the stage.

In *Mendoza*, this sentiment is especially evident in the way the Federal Ombudsman Office took an organization's presentation, and later called on other organizations to put together a strong diagnosis report. A documented record of the Matanza-Riachuelo basin critical state was necessary for the court to build its case, beginning a process of documentation and information production that continues to actively support public policy implementation.

Current environmental conflicts illustrate the undisputed value of the Matanza-Riachuelo Basin case lessons. When environmental issues are in the public debate, the active participation of civil society through institutionalized mechanisms can bring about valuable results. Civil society's activism in the Offshore Seismic Acquisition Campaign, which involved the exploration on Argentinean shores for oil by foreign companies, succeeded in temporarily suspending the process of granting authorizations after actively participating in the public hearing called for by the Environment and Sustainable Development Ministry.[264] Furthermore, issues that have not yet reached the general public's attention, or remain distant from public eye, use the language of institutional mechanisms to expose their deficiencies. For example, environmental activists performed a "self-convened public

264. Resolution No. 16/2021, Sept. 23, 2021, [34756] B.O. 36. Interestingly, the hegemonic media described the event as an internal governmental conflict that limits the country's development, while environmental sources described it as a success. Pedro Gianello, *Otra Interna en el Gobierno: En el Gabinete Dicen que Juan Cabandie Pone en Peligro un Proyecto Petrolero* [*Another intern in the Government: in the Cabinet they say that Juan Cabandié endangers an oil project*], CLARÍN (July 7, 2021), https://www.clarin.com/politica/interna-gobierno-gabinete-dicen-juan-cabandie-pone-peligro-proyecto-petrolero_0_0kTJXNWvT.html; *see also El Mar Argentino, Salvado por Los Esfuerzos de la Sociedad Civil* [*The Argentine Sea, saved by the efforts of civil society*], 350.ORG (July 7, 2021), https://350.org/es/el-mar-argentino-salvado-por-los-esfuerzos-de-la-sociedad-civil/. On December 30, 2021 the government finally authorized a company to begin exploration, raising public protest against the initiative and bringing to the national agenda the debate regarding the development burden on the environment, Bruno Perrone, *Protestas y Debates por la Exploración Petrolera en la Costa Atlantica* [*Protests and Debates over Oil Exploration on the Atlantic Coast],* PAGINA 12 (Jan. 5, 2022), https://www.pagina12.com.ar/393452-protestas-y-debates-por-la-exploracion-petrolera-en-la-costa.

hearing"[265] on a pig farm project that was not open to citizen discussion, and whose revelation led the government authorities to delay the initiative.[266]

When public institutions create participation mechanisms to channel public demands, they invite the society to contribute to the development of a more accurate and efficient public policy, as long as there is an authority ready to listen. The Supreme Court, back in 2006, was ready. More than a decade after that milestone, the ongoing participation of civil society, judicial activism, and multiple stakeholders' involvement in keeping the authorities accountable, have undoubtedly contributed to keeping the Mendoza-Riachuelo cause alive. Beatriz Mendoza, now a public official at the Municipality of Avellaneda,[267] is a living proof of the everlasting commitment of those who fight for (environmental) justice.

265. *Sobre la Audiencia*, AUDIENCIAS PUBLICAS, https://audienciaspublicas.com/sobre-la-audiencia/ (last visited Mar. 6, 2022).

266. Agustina Grasso, *Cancilleria Atraso el Acuerdo de Producción Procina Para China Hasta Noviembre* [*Foreign Ministry Delays the Pork Prodcution Agreement for China Until November*], PERFIL (Aug. 31, 2020), https://www.perfil.com/noticias/ecologia/cancilleria-atraso-acuerdo-produccion-porcina-para-china-hasta-noviembre-2020.phtml; *see also* Claudia Regina Martinez, *Acuerdo Porcino con China: Cientos de Personas Participaron en Una Audiencia Publica Autoconvocada* [*Pork Agreement with China: Hundreds of People Participated in a Self-Convened Public Hearing*], EL DIARIO AR (Sept. 17, 2021, 1:16 PM), https://www.eldiarioar.com/sociedad/medio-ambiente/acuerdo-porcino-china-cientos-personas-participaron-audiencia-publica-autoconvocada_1_8312717.html.

267. Drovetto, *supra* note 3.

WHERE THERE IS A WILL, THERE IS A WAY: COMMENTS ON ENVIRONMENTAL ACTIVISM IN THE MATANZA-RIACHUELO BASIN CASE BASED ON SABRINA'S FRYDMAN ANALYSIS

Iryna Zaverukha*

The Fulbright-Jose Siderman Human Rights Fellowship for Argentine Lawyers of 2017-2018 brought Sabrina Frydman to Southwestern Law School.[1] Through the lenses of a legal practitioner, scholar, educator, and civil activist, Frydman drew the international community's attention to the Matanza-Riachuelo Basin case and the role that environmental activism played in addressing it.[2] The title case is famous because the Matanza-Riachuelo Basin is one of the most polluted rivers in the world,[3] and it was

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1. Sabrina Frydman received her law degree with a specialization in Public International Law from the University of Buenos Aires. As Siderman-Fullbright Fellow (2017-2018), she earned an LL.M. in Human Rights and Civil Liberties from Southwestern Law School. Frydman is an activist and educator of human rights, as well as a well-versed lecturer on international law. Most pertinent to this comment, Sabrina currently works as the head of the General Secretariat for the Matanza-Riachuelo Basin Authority (ACUMAR).

2. *See* Sabrina Frydman, *The Matanza-Riachuelo Basin Case: Lessons in Environmental Activism from the Argentine Supreme Court and Civil Society Organizations*, 28 SW. J. INT'L L. 47, 48-49 (2022).

3. Bryan Walsh, *Urban Wastelands: The World's 10 Most Polluted Places—Matanza-Riachuelo, Argentina*, TIME (Nov. 04, 2013), https://science.time.com/2013/11/04/urban-wastelands-the-worlds-10-most-polluted-places/slide/matanza-riachuelo-argentina/; *Riachuelo: Cleaning up Argentina's Most Polluted River*, WE BUILD VALUE (Jul. 25, 2018), https://www.webuildvalue.com/en/stories-behind-projects/riachuelo-cleaning-up-argentina-s-most-polluted-river.html; Luis Francisco Magni et al., *Evaluation of Heavy Metal Contamination Levels in River Sediments and Their Risk to Human Health in Urban Areas: A Case Study in the Matanza-Riachuelo Basin, Argentina*, 197 ENV'T RCSH. 1, 1 (2021), https://www.sciencedirect.com/science/article/abs/pii/S0013935121002735.

the subject of a landmark decision by the Argentinian Supreme Court of Justice in *Mendoza, Beatriz Silvia c/ Estado Nacional*.[4] In *The Matanza-Riachuelo Basin Case: Lessons in Environmental Activism from the Argentine Supreme Court and Civil Society Organizations*, Frydman describes the environmental deterioration of the basin, the complexity of the legal, administrative, and civic responses to 200 years' worth of pollution, and the infringement upon the human rights of people who live on the bank of the Matanza-Riachuelo River. The background of the case, the role of the parties and stakeholders, and the unique characteristics of the judicial process, led to and secured the creation of an interjurisdictional Basin Authority, a unique participatory process during public hearings, and institutional space for civil society participation to monitor the sanitation plan's implementation, are thought-provoking and at the same time inspirational.

The vulnerability of the environment against industrial, chemical, and human waste worsens when it faces governmental ambivalence, skepticism, and weak political will to effectuate systemic changes. Because of the high cost and the scale of the required reforms, solutions to major environmental problems cannot happen overnight. It is almost impossible to remediate the ecological damage, improve living conditions for affected residents, and gain substantial political credit during one or even a few political terms that are based on the electoral calendar. Yet, given the design of the modern state and the matrix of international relations, public authorities are the best suited to resolve or coordinate the environmental efforts of private and private-public entities. Some major impediments to environmental protection include the need to provide opportunities for the community and its residents to ensure compliance and access to the judicial mechanisms to protect environmental human rights. The right to monitor and apply legal remedies to address the problem of environmental hazard threats to health is reflected in the concept of environmental justice. Because environmental harm generally affects the most vulnerable populations, much of the scholarship on this subject focuses on the redress of discriminatory actions.[5]

Frydman, in her analysis of the legal, administrative, and environmental development of the Matanza-Riachuelo Basin Case, describes the

4. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 8/7/2008, "Mendoza, Beatriz c. Estado Nacional," Fallos (2008-331-1622); Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 20/6/2006, "Mendoza, Beatriz c. Estado Nacional," Fallos (2006-329-2316).

5. Gilbert P. Carrasco, *Public Wrongs, Private Rights: Private Attorneys General for Civil Rights*, 9 VILL. ENV'T. L.J. 321 (1998) (addressing the regulations that implement Title VI of the Civil Rights Act of 1964, which had attempted to redress U.S.-funded discrimination having a disparate impact on people of color).

momentum leading up to the Court's historic decision. Analysis of that momentum requires us to look at the problem retrospectively and allows us to assess prospectively the outcomes of the litigation and the lessons we can learn from it. In assessing the temporal characteristics that help to appreciate the connections and interdependencies of the chosen priorities, the responses—international and domestic—and the main actors that ultimately shaped the human-rights approach to environmental conflicts, we can see that that momentum requires a certain level of readiness and activism.

Frydman emphasizes activism that transcends the Argentinian borders and that is broader than a national civil society movement. At first, she refers to the globalization of the environmental agenda back in 1972, particularly to the UN Conference on the Human Environment (the Stockholm Declaration),[6] and later, to the 1992 Earth Summit in Rio de Janeiro.[7] The principles and recommendations adopted at these conferences paved the road for civil society activism to defend environmental rights. They also established a trajectory for states to implement environmental legislation and to establish governmental agencies for environmental protection.

The early 1990s were significant in Argentina because of the institutionalization of the Secretariat for Natural Resources and Human Development[8] and more importantly, because of the constitutional reform in 1994.[9] Since then, the Argentinian Constitution has formally protected and guaranteed the rights of all people to a healthy and balanced environment by imposing relevant duties on public authorities, as well as introducing a new legal mechanism called the summary proceeding, *accion de amparo*.[10] Finally, the General Law for the Environment (2002)[11] introduced the judicial procedure for seeking environmental damages and granted injured parties, the Office of Ombudsman, and environmental NGOs rights to sue while also giving broad jurisdictional functions to the judges. Eventually, the concept of judicial activism was coined by the Supreme Court in 2006 and 2008.[12]

6. U.N. Conference on the Human Environment, *Declaration of the United Nations Conference on the Human Environment*, U.N. Doc. A/CONF.48/14/ Rev.1 (June 16, 1972).

7. *Conferences | Environment and Sustainable Development*, UNITED NATIONS, https://www.un.org/en/conferences/environment (last visited Jan. 28, 2022); U.N. Conference on Environment and Development, *Rio Declaration on Environment and Development*, U.N. Doc. A/CONF.151/26/ Rev.1 (Vol. I), annex I (Aug. 12, 1992).

8. Decree No. 2419/1991, Nov. 12, 1991, [27265] B.O. 3.

9. Art. 41, CONSTITUCIÓN NACIONAL [CONST. NAC.] (Arg.).

10. *Id.* art. 41, 43.

11. Law No. 25675, Ley General del Ambiente [LGA] Nov. 27, 2002, [30036] B.O. 2.

12. Frydman, *supra* note 2, at 53.

As much as our generation could be justifiably dissatisfied with the current state of the environment, it is worth noting that formal recognition of the right to a healthy environment at the international level only began a half-century ago. The history of judicial protection of environmental human rights worldwide is even more short-lived. It took much longer for sovereign authorities worldwide to take responsibility and to recognize that the damages caused by pollution and environmental harm should be vindicated or compensated. Not until the 1990s did European courts come to recognize that human rights include environmental rights.[13] Historically and even today, international efforts to protect the environment depend on public awareness and have been furthered by environmental activism. As it was half a century ago, today public awareness and activism are the engine for environmental protection and sustainable development both domestically and internationally, given the often slow-paced consensual nature of international law.[14] Such awareness raises the value of democracy. Democratic societies can, at least theoretically, keep the governments accountable, and the judiciary independent. In the environmental context, these can be lifesaving functions.

According to Frydman, successful social mobilization in Argentina was possible because of existing law, governmental institutions, a new Supreme Court, and the rise of environmental conflicts and Matanza-Riachuelo Basin degradation. Although almost six million people make up the basin population, it only took a group of seventeen neighbors, professionals, and the named petitioner, Beatriz Mendoza, to bring major changes to a jurisdiction comprised of fourteen municipalities of the Buenos Aires Province and part of the city of Buenos Aires covering 2,240 square kilometers.[15] The petitioner sued the federal government, the Province of Buenos Aires, the City of Buenos Aires, and forty-four companies for collective incidental damage and personal damages resulting from the basin contamination.[16]

13. *See* Svitlana Kravchenko & John E. Bonine, *Interpretation of Human Rights for the Protection of the Environment in the European Court of Human Rights*, 25 PAC. MCGEORGE GLOB. BUS. & DEV. L.J. 245 (2012).

14. A state has an international obligation only if it voluntarily commits to it by signing a treaty or agreement. Even then, in states that predicate judicial enforceability on whether the international instrument is self-executing or has legal effect because of implementing domestic legislation, such treaties are often not worth the paper on which they are written. *See generally* Foster & Elam v. Neilson, 27 U.S. 253 (1829).

15. Frydman, *supra* note 2, at 56; Magni et al., *supra* note 3, at 1.

16. Frydman, *supra* note 2, at 77-78.

In 2016, the Court decided that it had jurisdiction to hear the case and created the basin authority.[17] Ultimately, Congress passed a law on the Authority for the Matanza Riachuelo Basin (ACUMAR for its Spanish acronym).[18] The basin authority had the power to "regulate, control and promote industrial activities, the rendering of public services, and any other activity with the environmental impact on the basin . . . ."[19] It also had the capacity to "intervene administratively in matters of prevention, sanitation, restoration, and rational use of natural resources."[20] The Court also set three simultaneous objectives for the basin sanitation program: "improving the quality of life of the basin's inhabitants; restoring the basin's environment in all its components (water, air, and soil); and preventing damage with a sufficient and reasonable degree of predictability."[21] To accomplish these objectives, the Court created a complex network of governmental institutions and non-governmental organizations, along with a unique monitoring system and new standards for public information exchange.[22] The judicial process also included recognition of the Federal Trial Court of Quilmes' jurisdiction over all matters associated with compliance and collective environmental damage in the Matanza-Riachuelo basin.[23] Frydman describes the institutional mechanisms and their purposes in her article very well. She also refers to the accountability of the established institutions, which civil society demanded and the judiciary secured, and which was necessary to bring about change. The article teaches various lessons. Some of them are unique for Argentina, and others relate to many other states.

Observing the lessons of the Matanza-Riachuelo Basin Case from an educator's perspective, the leadership, professionalism, and integrity, as well as the power of civil society, were essential components of its success.

First, the role of individual initiative is important, and the power of one person to bring about meaningful change is inspirational. Frydman begins her paper with an introduction of Beatriz Mendoza.[24] When the case began, Beatriz Mendoza had started to work as a social psychologist at the Health Center in Villa Inflamable, a neighborhood in the municipality of

17. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 20/6/2006, "Mendoza, Beatriz c. Estado Nacional," Fallos (2006-329-2316, 2328).

18. Law No. 26168, Dec. 4, 2006, [CXIV] B.O. 31047 (Arg.).

19. *Id.* art. 5.

20. *Id.*

21. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 8/7/2008, "Mendoza, Beatriz c. Estado Nacional," Fallos (2008-331-1622, 1635-36).

22. Frydman, *supra* note 2, at 70-74.

23. *Id.* at 74.

24. *Id.* at 48.

Avellaneda, in the Province of Buenos Aires.[25] Her name eventually became legendary in Argentinian Supreme Court jurisprudence because of the Matanza-Riachuelo Basin case.[26] Frydman's article focuses on the concept of activism: civic, professional, and judicial. Putting aside shortcomings and inefficiencies in the execution and implementation of the Court's decision, professional activism was just as essential as civic activism. The Ombudsman's office played a crucial role in maintaining and channeling basin-related claims after 2002.[27] Supreme Court Justices were proactive in finding a way to adjudicate the case and creative in developing a complex network of specialized institutions and a monitoring system. Personal efforts and the activism of the professionals, as well as of the citizens, cannot be underestimated. Conversely, when an opportunity is missed, or the institutions are not efficient because of the human factor, the influence of a single person, especially on the managerial level, can be devastating to the purpose, goal, and the process of the action. For example, we have learned about the turnover in the leadership of ACUMAR: three Presidents succeeded one another in just eighteen months.[28] We have also learned the Court needed to impose a daily fine on one of the ACUMAR Presidents, and about the inertia of the Social Participation Commission.[29] A lack of good management, and in some instances a lack of good leadership, slowed down the transformation processes and decreased their efficiency. A successful case, apart from integrity and leadership, requires the activism of public and private actors.

Non-governmental organizations historically have defended human rights violated by environmental devastation. The power of civil society should hold the government accountable to increase its efficiency.

As a Ukrainian, I have a full appreciation for civic activism. Ukrainian civil society was essential to the very existence of the State of Ukraine, especially during the war with Russia that began with the annexation of the Crimea peninsula in 2014.[30] I can also relate to the Argentinian case, as it demonstrates transitional changes that Argentina underwent after 1983 when

25. *Id.*

26. *Id.* at 48-49.

27. Andrés Scharager, *Conflicto social, ambientalización y crisis política: judicialización en la cuenca Matanza-Riachuelo, Argentina*, 20 ECONOMÍA, SOCIEDAD Y TERRITORIO 693, 710-11 (2020).

28. Frydman, *supra* note 2, at 81.

29. Frydman, *supra* note 2, at 71, 76.

30. *See* Iryna Zaverukha, *Terra Incognita on the Map of Europe: Crimea and the Donetck and Luhansk Regions*, EUROPE UPDATE: UKRAINE SPECIAL EDITION (Am. Bar Ass'n, Section of Int'l L., Europe Comm.) June 2017, at 3.

it reestablished its democracy.[31] The Matanza-Riachuelo Basin case also demonstrates the complexities of decentralizing administrative power. Both the transition to democracy and the decentralization of power depends mainly on the readiness of society. The experience of Central and Eastern European countries, in their transition from Soviet rule, demonstrates that both processes depend on how fast and how well society can reorganize itself in a free, yet untested, framework. Local authorities and non-governmental organizations must be capable of identifying the need for change and the means of implementing that change. The delegation of power must be secure, otherwise, it will be chaos. The whole idea is that the delegated functions must be performed more efficiently, and civil participation must be more accessible and more satisfactory. In the Matanza-Riachuelo Basin case, this meant the involvement of a wide variety of actors, including both governmental and non-governmental organizations. It was also important to establish social participation and access to public information.

In Ukraine, the efforts of Svitlana Kravchenko[32] and John Bonine[33] provide an exemplar of environmental activism which shaped itself through

31. *See generally* ARGENTINE DEMOCRACY: THE POLITICS OF INSTITUTIONAL WEAKNESS (Steven Levitsky & María Victoria Murillo eds., 2006).

32. Professor Svitlana Kravchenko (1949 - 2012), Ph.D., LL.D., was a professor at the School of Law, University of Oregon. She was the Founder and the Director of Oregon's LL.M. Program in Environmental and Natural Resources Law. Before moving to Oregon in 2001, Dr. Kravchenko was a faculty member at L'viv National University in Ukraine for twenty-nine years. Her academic record lists nearly 200 articles and a dozen books (in English, Ukrainian, and Russian). She acted as a role model for lawyers and citizen activists throughout Eastern Europe, the Caucasus, and Central Asia. She was the founder and the president of Environment-People-Law, the first public interest environmental law firm in Ukraine. She was also the co-founder and co-director of the Association of Environmental Law of Central and Eastern Europe, and an elected Regional Governor of the International Council of Environmental Law (ICEL). She served as a vice chair of the IUCN Commission of Environmental Law and as an advisor for the Ministry of Environment and the Parliament of Ukraine. She received the Senior Scholarship Prize from the International Union for Conservation of Nature (IUCN) Academy of Environmental Law. She was the longest serving member of the quasi-adjudicatory Compliance Committee of the U.N. Aarhus Convention in Geneva, Switzerland, and was its elected vice-chair. She also worked as a "citizen diplomat" in the international negotiation of the Aarhus Public Participation Convention. *Our Team: Svitlana Kravchenko*, ENVIRONMENT PEOPLE LAW, http://epl.org.ua/en/nash-kolektyv/ (last visited Feb. 3, 2021); Kravchenko & Bonine, *supra* note 13, at 245.

33. John Bonine, LL.B., is the B.B. Kliks Professor at the School of Law, University of Oregon. He is one of the pioneers of environmental law not only in Ukraine, where he serves as a Chair of the Board of Directors for the Ukrainian public interest environmental law firm Environment-People-Law, but also in the United States. He co-founded the world's first Environmental Law Clinic (at the University of Oregon) in 1978, which now works through the Western Environmental Law Center in Eugene. Professor Bonine is a co-founder of the Environmental Law Alliance Worldwide (ELAW), which is a network of 300 environmental lawyers in seventy countries. He is also the founder of the world-renowned Public Interest

a non-governmental organization. They are, respectively, Ukrainian and American educators and law practitioners, who played an essential role in the introduction of environmental law to post-Soviet-era Ukraine. They were among the first lawyers to bring environmental law cases to the courts. They codified the legacy of international and national jurisprudence in environmental law. In their casebook *Human Rights and the Environment: Cases, Law and Policy*, they showed how the courts in Europe, Africa, Asia, and the Americas have begun to interpret treaties, national constitutions, and human rights legislation to protect the environment through the recognition of rights.[34] But most importantly, with a group of students, they established the first environmental law non-governmental organization in Ukraine: Environment-People-Law (EPL).[35] Back in the 1990s, the post-totalitarian mentality of the general population was still state-oriented. The inertia that followed soviet socialist ideology held the majority of people paralyzed. They continued to expect the fulfillment of public functions and needs exclusively from the central government; they could not recognize the value of non-governmental organizations or fully appreciate local self-government institutions. It took some time for most of the people to understand how democracy works. Thankfully, people like Professor Kravchenko realized that the only way to pursue environmental justice in Ukraine was through a non-governmental organization. There are no other alternatives not only because governmental bureaucracy and inertia often do not reach the most vulnerable communities, but also because of corruption.

The problem of corruption arose also in the Matanza-Riachuelo Basin case.[36] According to the *Earth Island Journal*, six presidents of ACUMAR resigned under suspicion of corruption and because the public lost confidence

Environmental Law Conferences at the University of Oregon. He founded ENVLAWPROFESSORS, a discussion list used by 500 professors around the world, and of a network of U.S. public interest environmental lawyers. *John Bonine*, UNIV. OR. SCH. L., https://law.uoregon.edu/people/directory/jbonine (last visited Feb. 3, 2022); W. ENV'T L. CTR., https://westernlaw.org (last visited Feb. 3, 2022); PUB. INT. ENV'T L. CONF., http://pielc.org (last visited Feb. 3, 2022).

34. SVITLANA KRAVCHENKO & JOHN BONINE, HUMAN RIGHTS AND THE ENVIRONMENT: CASES, LAW, AND POLICY (2008).

35. Environment-People-Law (EPL) was the first environmental non-governmental organization in Ukraine. Kravchenko and a couple of her students founded the organization in 1994. The EPL's lawyers have worked on 590 cases, provided 4023 consultations, submitted 102 comments on laws, and worked on drafting some of the most significant environmental legislation. EPL won the first environmental lawsuit in the European Court of Human Rights. Today, the leader of EPL in Ukraine is Olena Kravchenko, who carries the legacy of her aunt in the fight for environmental rights and clean environment. ENVIRONMENT PEOPLE LAW, http://epl.org.ua/en/ (last visited Feb. 3, 2022); *see also Our Team: Olena Kravchenko*, ENVIRONMENT PEOPLE LAW, http://epl.org.ua/en/nash-kolektyv/ (last visited Feb. 3, 2022).

36. Frydman, *supra* note 2, at 77.

in them.[37] The cases of corruption ranged "from conflicts of interest and misappropriation of public funds to irregularities in the acquisition and public reporting of environmental data."[38] In one case, an environmental legal adviser within ACUMAR used her position to benefit private clients.[39] Ultimately, professionalism and leadership can only effect positive change if they are accompanied by integrity and dedication to the cause of justice.

The success of the Matanza-Riachuelo Basin case was possible mainly because of the common efforts of governmental agencies, the non-governmental sector, and the judiciary. It was important that the system of checks and balances was respected. The complexity of environmental crises and the socio-economic problems of affected populations includes housing, health care, access to potable water, sewage services, and sanitation, all of which test the system of overall governance. The voice of the community must be heard and affected communities must have the opportunity to be a part of the decision-making process. Opportunities for a community to make environmental decisions for themselves and the ultimate response to environmental crisis by the public authorities continue to be the battleground for U.S. human rights lawyers as well. The problem of community disenfranchisement in environmental decisions has various predicates.[40]

In her work, Frydman records the history of a collaborative effort to solve the Matanza-Riachuelo Basin's problems and the lessons that can be learned from this journey. It is predictable that Sabrina Frydman will have a significant impact on the further development of the case's legacy. As a hard-working legal practitioner, activist, and educator, she carries on the legacy of the fight for human rights and for the restoration of a degraded environment. She implements her knowledge in her daily work at the site and in the classroom, passing her experiences along to new generations.

37. Forest Ray, *Life Along the Banks of One of Latin America's Most Polluted Waterways*, EARTH ISLAND J. (Jan. 16, 2019), https://www.earthisland.org/journal/index.php/articles/entry/banks-latin-america-most-polluted-waterways/.

38. *Id.*

39. *Id.*

40. Robert W. Collin & Robin Morris Collin, *The Role of Communities in Environmental Decisions: Communities Speaking for Themselves*, 13 J. ENV'T L. & LITIG. 37 (1998); Eileen Gauna, *The Environmental Justice Misfits: Public Participation and the Paradigm Paradox*, 17 STAN. ENV'T L.J. 3 (1998); Sheila Foster, *Justice from the Ground Up: Distributive Inequities, Grassroots Resistance, and the Transformative Politics of the Environmental Justice Movement*, 86 CAL. L. REV. 775, 811-26 (1998).

THE INTERNATIONAL AID WORKERS' DILEMMA: NAVIGATING THE GRAY AREA BETWEEN INTERNATIONAL LAW AND CULTURAL RELATIVISM IN RESPONSE TO FEMALE GENITAL CUTTING

Kara O'Brien*

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I. INTRODUCTION

When the victim was seven, she was taken into the woods with the older women in her family. They made her lay down, encircled her, and forced her to stay still as they sliced off her inner lips, outer lips,

> and clitoris with a razor blade. Looking back, maybe I didn't fight the good fight when it came to FGM, but I didn't feel I had the tools to do so.[1]

International aid workers are ill equipped to address female genital cutting (FGC)[2] as a human rights violation against girls and women. FGC is a practice whereby girls and women are forcibly subjected to the cutting or removal of their genitalia, causing lifelong medical, psychological, sexual, and reproductive problems. FGC is estimated to affect at least two hundred million girls and women alive today,[3] and three million girls are estimated to be at risk of undergoing the procedure every year.[4] The practice takes place in over thirty countries where there are typically cultural and religious justifications.[5] While these justifications vary by region and include a mix of sociocultural factors within families and communities, FGC is deeply rooted in inequality between the sexes and constitutes an extreme form of discrimination against girls and women. Due to the lack of consent of the girls and women who undergo this procedure and the health risks involved, FGC is a human rights violation.

International laws outlaw FGC as a human rights violation primarily because it violates the right to be free from violence on the basis of sex and

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1. E-mail from RPCV 1, Returned Volunteer, U.S. Peace Corps (Mar. 8, 2018) (on file with author).

2. Female genital cutting (FGC) is sometimes referred to as female genital mutilation (FGM), female surgical cutting, or female circumcision. It is the harmful practice of cutting or removing female genitalia without any known health benefit. I have chosen to use the term FGC for this article. While FGM is more commonly used, it confers a dehumanizing tone before the reader is fully informed. It is also not my place to label and stigmatize girls and women who have been cut by referring to them as "mutilated" and those who practice the tradition as "mutilators." Women must be free to choose the term that best describes their experience. Female surgical cutting is fairly accurate; however, the emphasis is on the individual performing the cutting and it is not always performed surgically. Female circumcision is an inaccurate and misleading description that conflates the practice with male circumcision. Thus, FGC will be used in this paper as a better starting place to promote a conversation surrounding advocacy to eradicate this harmful practice with a trauma-informed approach.

3. Press Release, UNICEF, New Statistical Report on Female Genital Mutilation Shows Harmful Practice Is a Global Concern–UNICEF, U.N. Press Release (Feb. 5, 2016), https://www.unicef.org/turkey/en/press-releases/new-statistical-report-female-genital-mutilation-shows-harmful-practice-global; *see also* WHO, Female Genital Mutilation (Feb. 3, 2020), https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation.

4. *Eliminating Female Genital Mutilation: An Interagency Statement*, WORLD HEALTH ORGANIZATION [WHO], at 1 (2008), https://www.unfpa.org/sites/default/files/pub-pdf/eliminating_fgm.pdf.

5. *Id.*; *see also* UNICEF**,** FEMALE GENITAL MUTILATION/CUTTING: A GLOBAL CONCERN (2016).

gender.[6] Some international laws that address violence against girls and women are promulgated in the Universal Declaration of Human Rights (UNDHR), the Convention on the Elimination of all Forms of Discrimination against Women (CEDAW), the Declaration on the Elimination of Violence Against Women (DEVAW), the Convention on the Rights of the Child (CRC), and the Covenant Against Torture (CAT). Many countries recognize FCG as a human rights violation against women and girls in their domestic laws as well. For example, in Burkina Faso, the practice is illegal and courts can impose custodial sentences up to twenty-one years and a fine between five hundred thousand and three million West African CFA francs (around 900 to 5,400 U.S. dollars).[7] In the United States, violation of the federal law that outlaws FGC is punishable by up to ten years in prison, fines, or both.[8] However, customary international law and domestic laws are not enough to assist in the movement to eradicate the harmful practice. There is a much more complex dialogue surrounding FGC that must take place and it begins with incorporating cultural relativism.

While FGC is in direct violation of international human rights laws due to the violence it imposes on girls and women, eradicating the practice is not possible without addressing cultural relativism. Article 27 of the UNDHR protects everyone's right to freely participate in the cultural life of their community.[9] This is why cultural relativism is an important component to the discussion surrounding FGC; it holds no particular culture superior to another.[10] It is the notion that all cultural beliefs are equally valid and any truth is relative, depending on the culture involved.[11] Thus, cultural relativism holds that all religious, ethical, and political beliefs are relative to an individual within a society of a particular culture. Because FGC is a cultural practice in many communities, the discussion must include cultural relativism as well.

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6. Fisaha KG, *Female Genital Mutilation: A Violation of Human Rights*, 4 J. POL. SCI. & PUB. AFF. 1, 2 (2016).

7. *Burkina Faso: Urgent Need to Protect Girls from FGM and Forced Marriage*, AMNESTY INT'L (Oct. 10, 2018, 16:36 UTC), https://www.amnesty.org/en/latest/news/2018/10/burkina-faso-urgent-need-to-protect-girls-from-and-forced-marriage/.

8. STOP FGM Act of 2020, Pub. L. No. 116-309, 134 Stat. 4923 (2021) (codified as amended 18 U.S.C. § 116).

9. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948) [hereinafter Universal Declaration of Hum. Rts.]

10. Felicity Menzies, *Ethnocentrism: The Cultural Superiority Complex*, INCLUDE-EMPOWER.COM, https://culturepluconsulting.com/2015/06/04/ethnocentrism/ (last visited Mar. 14, 2021).

11. *Id.*

When examining the practice of FGC, it must be done in a way that gives people the freedom to practice traditions in each society without imposing western beliefs and moral views on others. People must be treated equally in dignity and in right, with respect to traditional and cultural practices. Thus, the dialogue surrounding FGC requires advocates to navigate the complicated space between FGC as a human rights violation while respecting the fact that it is a historic practice in many communities throughout the world. Understanding this complicated subject is challenging. International laws outlaw FGC as a human rights violation though hundreds of millions of people continue to practice partial and total cutting of girls and women as a part of their culture, creating a complex gray area to navigate working towards eradicating FGC in an appropriate way.

There are several non-governmental organizations, international aid organizations, and professional organizations that have directives against FGC in accordance with customary international laws.[12] These organizations, present in hundreds of countries, attempt to assist and further policies serviced from international and domestic laws. They have aid workers living in countries where FGC is widespread, but these aid workers are not equipped with the necessary tools to assist in the dialogue surrounding FGC. And while non-governmental organizations and international aid organizations have issued policies against FGC, programmatically the limited projects, inadequate interventions, and lack of trauma-informed training have stagnated efforts to end FGC and left aid workers ill equipped to address it.

Because these international aid workers are involved in the dialogue surrounding the eradication of FGC, they must be trained on how to be trauma-informed and provide survivor centered discussions. Some organizations prohibit workers from talking about FGC, while others have not developed a clear plan of action to communicate the health risks and encourage behavior change. This is particularly concerning when women in communities where FGC is practiced want to talk about it with aid workers, who are accessible in villages and health clinics. Because of directives banning aid workers from addressing FGC and the lack of tools and resources available, aid workers remain silent, and the practice of FGC continues. This further creates a complicated gray area that international aid workers are attempting to navigate on their own—uninformed and unprepared to have these discussions.

12. *E.g.*, *Ending Female Genital Mutilation: Red Cross and Red Crescent Experience*, INT'L FED'N RED CROSS & RED CRESCENT SOC'YS (Feb. 6, 2008), https://www.ifrc.org/en/news-and-media/opinions-and-positions/speeches/2008/ending-female-genital-mutilation-red-cross-and-red-crescent-experience/ [hereinafter *Ending Female Genital Mutilation*].

The law alone is a limited instrument of social change. Implementing a clear practice allowing international aid workers to speak about FGC would clear up some of the discrepancies in the current policies. This paper proposes incorporating trauma-informed and survivor centered training for international aid workers to cultivate a dialogue that addresses girls' and women's right to be free from violence while balancing cultural relativism and empowering the people in communities seeking to have a more effective conversation about eradicating FGC. A trauma-informed approach will resolve the gray area that international aid workers are attempting to navigate at this time, by openly addressing the complicated discussions surrounding FGC. This approach also combats western paternalism as the appropriate method for eradication and instead centers on the voices of survivors of FGC.

Experience has proven that legislation and government intervention have not been as influential in the reduction of this procedure as grassroots level efforts and collective decision making.[13] Changes to this practice must come from collaborative work in the communities where FGC is practiced. Communities that have employed a process of collective decision making have been able to abandon the practice.[14] That is why international aid workers in these communities can make a difference and should not be prohibited from speaking about FGC. Instead, they should be provided the tools necessary to participate in the dialogue and empower survivors to speak on the best way to eradicate FGC. There must be trauma-informed training in place to provide international aid workers with the tools they need to effectively communicate about the harms of FGC while addressing the importance of freedom of thought and culture. Once aid organizations have a clear plan of action and trauma-informed training in place, and not merely a declaratory position against FGC, international aid workers will have the tools to navigate the gray area between international law and cultural relativism in response to FGC.

II. BACKGROUND

Training international aid workers about the trauma is exigent since FGC is a human rights violation, which affects hundreds of millions of girls and women every day. These aid workers are involved in the dialogue but are unable to properly address the issue. Even with the number of girls and women affected by FGC, international aid organizations justify silencing and

13. Amanda Cardenas, *Female Circumcision: The Road to Change*, 26 SYRACUSE J. INT'L L. & COM. 291, 308 (1999).

14. *See* WHO, *supra* note 4.

disempowering their workers based on goals of cultural assimilation or institutional goals.

International aid primarily focuses on economic growth, agriculture, education, and health care. Aid workers in the health sector encounter FGC most often because of their work with girls and women at health facilities. Aid workers immersed in local communities worldwide who are addressing women's rights and gender equality are also familiar with the practice. FGC is a source of women's oppression in the private realm that causes physical and psychological harm, which is frequently addressed in the medical setting. [15] Because international aid workers are inevitably going to be confronted by FGC either through their work or relationships in the community, they need to be trained on how to properly address it.

In general terms, FGC is a practice whereby girls and women are forcibly subjected to the cutting or removal of their genitalia. This results in many health complications for girls and women throughout their lives. The practice of FGC is widespread and there are several historical justifications including religion, sexuality, family honor, hygiene, and marriage.[16] There is a social convention forcing girls and women to conform, because it is socially practiced and universally performed.[17] It can also be motivated by beliefs regarding acceptable sexual behavior for girls and women, such as reducing a woman's libido and controlling her urge to commit extramarital sexual acts.[18] Whatever the reason for performing FGC, these justifications ignore the lifelong trauma inflicted upon girls and women subjected to FGC. Understanding the complexities surrounding the practice of FGC requires a discussion of the health complications resulting from the practice.

A. Health Complications Resulting from FGC

FGC refers to a range of procedures of varying intrusiveness that remove parts of the female genitalia. FGC is defined as "all procedures involving partial or total removal of the external female genitalia whether for cultural

15. Preston D. Mitchum, *Slapping the Hand of Cultural Relativism: Female Genital Mutilation, Male Dominance, and Health as a Human Rights Framework*, 19 WM. & MARY J. WOMEN & L. 585, 592 (2013).

16. *See* EFUA DORKENNO & SCILLA ELWORTHY, MINORITY RTS. GRP., FEMALE GENITAL MUTILATION: PROPOSALS FOR CHANGE 13-15, (rev. ed. 1992), https://minorityrights.org/wp-content/uploads/old-site-downloads/download-869-Download-full-report.pdf.

17. *Fact Sheet: Female Genital Mutilation*, WHO (Jan. 21, 2022), https://www.who.int/news-room/fact-sheets/detail/female-genital-mutilation#:~:text=FGM%20is%20mostly%20carried%20out,rights%20of%20girls%20and%20women.

18. *Id.*

or other non-therapeutic reasons."[19] The practice is performed on girls ranging from newborn babies to adolescents, but it is typically performed on young girls between infancy and age fifteen.[20]

While some sources disagree about the classifications of FGC, they are fairly consistent with the World Health Organization (WHO), which has identified four common classifications of FGC: (1) clitoridectomy, (2) excision, (3) infibulation, and (4) unclassified or introcision.[21] With each of these procedures, there is physical pain that can result in immediate and long-term physical complications as well as psychological trauma. Health complications may occur during the procedure, immediately after it is performed, during sexual intercourse, while urinating, and at childbirth. Health risks include death, severe pain, bleeding, shock, infection, scarring, infertility, and painful urination from damage to the urethra.[22] Risks increase with the severity of the type of procedure performed. Complications from FGC can "include severe pain, hemorrhage, tetanus, infection, infertility, cysts and abscesses, urinary incontinence, and psychological and sexual problems."[23] The procedures pose serious mental and physical health risks. One guarantee is that the process will always be uncomfortable and is never fully consented to.

Health complications can arise at different points in times, stemming from health issues when the cutting itself is done to later in life when a woman gives birth. Health risks at the time of the cutting can occur because the person designated to do the procedure is often a traditional ceremonial circumciser, religious leader, elder, or sometimes a medical professional acting illegally.[24] Traditional practitioners wield influence and command respect for health issues in the community. In countries where the practice is illegal, health professionals are prosecuted more fiercely than traditional practitioners.[25] Leading health organizations are against health care experts performing the ceremony, even if it is safer than when performed by traditional practitioners. Health professionals owe a duty to safeguard the health of people, but it is important to note that medicalizing FGC does not

19. WHO, *supra* note 17.

20. *Id.*

21. MINORITY RTS. GRP., *supra* note 16, at 7.

22. *Id.* at 8-10.

23. Mitchum, *supra* note 15, at 592.

24. *See* Halima Embarek Warzazi (Chairman-Rapporteur), Econ. & Soc. Council, Comm. On Hum. Rts., Report of the Working Group on International on Traditional Practices Affecting the Health of Women and Children, at 20, U.N. Doc. E/CN.4/1986/42 (1986).

25. Els Leye et al., *Debating Medicalization of Female Genital Mutilation/Cutting (FGM/C): Learning from (Policy) Experiences Across Countries*. 16 REPROD. HEALTH (2019), https://doi.org/10.1186/s12978-019-0817-3.

reduce the harm of the procedure. The WHO is opposed to all forms of FGC and is emphatically against the practice being carried out by health care providers because of the various health risks.[26]

There are also vast complications later in life when a woman has sex or gives birth. Women subjected to FGC are significantly more likely to have complications during labor deliveries like postpartum hemorrhage and prolonged hospitalization, than women who did not undergo FGC.[27] The rates of infant resuscitation and prenatal death are higher among women who underwent the procedure, than women who have not.[28] The death rates among infants during and immediately after birth are higher to mothers who have experienced FGC (depending on the type of procedure done) ranging up to fifty-five percent higher death rates than women who did not have FGC done to them.[29]

Despite the growing recognition of health complications and risks to girls and women, it takes more than awareness of the harms to eradicate the practice. That is because it is a longstanding social norm and changing it will take interventions from people within the communities, outside support, and a readiness to accept the change. Because it is so deeply rooted within traditional practices, the discussion regarding eradicating FGC must include cultural relativism as well.

B. Cultural Realities

Changes to this practice must come from collaborative work in the communities where FGC is practiced, because it is deeply entrenched in culture and tradition. Efforts to end FGC must bring together many sectors including, but not limited to, the international community, government sectors, medical workers, aid organizations, educators, community leaders, and most importantly, FGC survivors. Amongst those included in the effort to eradicate FGC are international aid workers. This is not because it is necessary for them to be a part of the movement to eradicate FGC. Instead, they should be educated and trained by FGC survivors and those within the communities and cultures that practice the tradition, and not be prohibited from participating or left in the field to address it without any adequate training.

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26. *Id.* at 16.

27. *Reproductive Health and Research Policy Brief: Effects of Female Genital Mutilation on Childbirth in Africa*, WHO (2008), https://www.who.int/reproductivehealth/publications/fgm/effect_of_fgm_on_childbirth_africa.pdf.

28. *Id*.

29. *Id.*

FGC is widely practiced in thirty countries, and two million girls and women have been subjected to the practice today, according to the estimates.[30] Some of the countries that continue the practice are Burkina Faso, Somalia, Senegal, Mali, the United Arab Emirates, Indonesia, Malaysia, Oman, and South Yemen.[31] There are many countries in other African regions and in the Middle East where FGC is frequently practiced such as Sudan, Egypt, Chad, and Mauritania.[32] In South America, there are communities known to practice FGC in Columbia, Ecuador, Panama, and Peru.[33] The practice is also present in the United States and the United Kingdom,[34] though it is less pervasive. Many of these countries where FGC is frequently practiced also accept international aid and have foreign national workers working in these communities.

The prevalence of FGC around the world is high. The primary source of nationally representative data on FGC comes from household surveys.[35] The majority of people in countries with data believe that the practice should end.[36] The justifications for performing FGC vary by country and region. The most often cited justifications for this practice include religion, sexuality, family honor, hygiene, and marriage.[37] There are also ceremonial and superstitious reasons to continue the practice. For example, "the legend in cultures like those of the Mossi of Burkina Faso and the Bambara and the Dogon in Mali, believe that if the first-born baby's head touches the clitoris during childbirth, the child will die or it will cause symbolic or spiritual injury to the baby."[38] In regions where FGC is practiced in Ethiopia, Egypt, Sudan, and Somalia there is a belief that female genitals are dirty and the procedure makes a woman cleaner.[39]

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30. Press Release, UNICEF, New Statistical Report on Female Genital Mutilation Shows Harmful Practice Is a Global Concern – UNICEF (Feb. 5, 2016), https://www.unicef.org/turkey/en/press-releases/new-statistical-report-female-genital-mutilation-shows-harmful-practice-global.

31. *Female Genital Mutilation/Cutting: A Global Concern*, UNICEF *(*Feb. 2016), https://data.unicef.org/resources/female-genital-mutilationcutting-global-concern/ (download the full brochure for further detail).

32. *Id.*

33. *Female Genital Mutilation (FGM) Frequently Asked Questions*, UNITED NATIONS POPULATION FUND (Feb. 2022), https://www.unfpa.org/resources/female-genital-mutilation-fgm-frequently-asked-questions

34. *See id.*; Sharon Dixon et al., *Female Genital Mutilation in the UK - Where Are We, Where Do We Go Next? Involving Communities in Setting the Research Agenda*, 4 RSCH. INVOLVEMENT & ENGAGEMENT (2018), https://doi.org/10.1186/s40900-018-0103-5.

35. *Id.*

36. *Id*.

37. Press Release, UNICEF, *supra* note 30.

38. Cardenas, *supra* note 13, at 298.

39. *Id.* at 299.

Like other forms of gender-based violence, FGC is a manifestation of power and a means of controlling the sexuality of girls and women. It is not mandated by law or by religion. It is a cultural practice that is not bound by geography and not restricted by socioeconomic class. It has been handed down for generations. Justifications for abuse against women range from forced sterilization, abortions, sexual mutilation, and official indifferences to violence against women. FGC is certainly included in that category. International aid organizations that are indifferent to FGC by forbidding workers from discussing it, are part of the problem and contribute to the reason why the practice continues. Having international aid workers absent from the dialogue surrounding the eradication of FGC permits the practice to continue.

Many international aid workers work with people in communities that practice FGC. This includes living with people in villages for several years and working alongside many friends and colleagues that practice the tradition. Because many aid workers culturally assimilate to local environments, community members are comfortable enough to initiate a conversation about FGC and inquire into the practices of the countries that the workers come from. Cultural exchange is often a secondary focus of the international aid work. Accounting for cultural practices and traditions is a necessary component in successful development work. Because of this assimilation, it is ineffective for organizations to merely tell aid workers to remain silent and dismiss the practice of FGC when young girls and women are being harmed and may initiate discussions. A dialogue that is inclusive of culture and trauma-informed should be had.

Organizations need to shift their perspectives to permit aid workers to join the conversation about FGC instead of sending untrained individuals into villages without the tools to talk about it, or, even worse, telling them not to. Traditions are difficult to change—but no one in the human rights community disagrees that this one is violent and has no medical value. While the practice is widespread and deeply rooted in tradition, it grossly violates human rights and international law, covenants, and declarations.

III. A GLOBALLY RECOGNIZED HUMAN RIGHTS VIOLATION

International aid organizations should implement policies to properly address human rights violations by including trauma-informed training for their workers in the field as soon as possible in order to help eradicate FGC. Recognizing FGC as a human rights issue and implementing policies to protect women from the practice has been a long and ongoing process. The United Nations (UN) has made it clear that violence against girls and women is a violation of basic human rights. It has promulgated treaties,

recommendations, and declarations addressing the rights of girls and women, and there are a number of human rights instruments that define the norms and standards of protections for women.[40] While there have been many achievements along the way, the process is still not complete. If there is going to be actual change regarding violence against women, then international law, domestic policies, criminalization, and aid organizations enacting policies are not enough. All the pieces seem to be in place to make changes, but one part is missing—well-prepared international aid workers that are in unique position to work with local community members.

The number of declarations and covenants recognizing FGC as a women's rights issue and human rights violation is important, but there are problems in solely using international law to address FGC. It was not until the late twentieth century that women's rights became a concern to the international community.[41] By the time FGC was addressed, it was set aside by international organizations in order to avoid being culturally imperialistic. There still are international aid organizations that use the same justification to shun it aside and ban workers from speaking about FGC, even though it is widely recognized as a human rights violation.

Women's rights were not something that was recognized by international communities for a long time. Between 1975 and 1985, advocacy for women's rights increased with a focus on domestic violence, human trafficking, and sexual exploitation. Resolutions on violence later expanded to protect children and women during armed conflicts. In 1979, the Convention on the Elimination of all Forms of Discrimination Against Women[42] (CEDAW) was adopted. The original Convention did not explicitly mention violence against women and girls, but it was later clarified through General Recommendations. In 1993, the Declaration on the Elimination of Violence against Women[43] (DEVAW) was adopted to provide framework for analysis and action at national and international levels in conjunction with a call for the appointment of a Special Rapporteur on violence against women (appointed in 1994).[44] Later, in 2003, the Protocol to the African Charter on

40. *E.g.*, *infra* p. 107-08.

41. *Id.*

42. Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 13.

43. G.A. Res. 48/104, Declaration on the Elimination of Violence against Women (Dec. 20, 1993).

44. *Special Rapporteur on Violence Against Women, Its Causes and Consequences*, OFF. HIGH COMM'R FOR HUM. RTS. [OHCHR], https://www.ohchr.org/en/issues/women/srwomen/pages/srwomenindex.aspx (last visited Feb. 27, 2022).

Human and Peoples' Rights on the Rights of Women in Africa[45] was adopted. Article 4 of the Protocol is dedicated to violence against women. These human rights treaties are largely where the authority to characterize FGC as a human rights violation comes from.

Today, there is much stronger support for the protection of girls and women in many international and regional human rights treaties. There is the Convention Against Torture[46] (CAT), the International Covenant on Civil and Political Rights[47] (ICCPR), and the International Covenant on Economic, Social and Cultural Rights[48] (ICESCR) that generally address violence against human beings and recognize FGC as a form of physical torture and violence against women and children. Regionally, there is the African Charter on the Rights and Welfare of the Child, European Convention for the Protection of Human Rights and Fundamental Freedoms, and Beijing Declaration and Platform of Action for the Fourth World Conference on Women, among others.[49]

The expectations of the global community are recorded in the covenants and declarations, which are binding on signatories. Still, some countries decline to follow the treaties. And while international aid organizations are not explicitly bound by international laws, any agency advocating for healthcare and human rights should act in accordance with human rights laws and protections for girls and women. These organizations have policies campaigning against FGC, and they have workers and volunteers living in countries where FGC is widespread.[50] But these workers and volunteers are not trained to assist in the dialogue surrounding FGC, and so, despite international condemnation, FGC continues.

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45. African Charter on Human and Peoples' Rights, June 27, 1981, 1520 U.N.T.S. 217.

46. Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85.

47. International Covenant on Civil and Political Rights, Dec. 16, 1966, 999 U.N.T.S. 171.

48. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

49. WHO, WHO GUIDELINES ON THE MANAGEMENT OF HEALTH COMPLICATIONS FROM FEMALE GENITAL MUTILATION 41-42 (2016), https://apps.who.int/iris/bitstream/handle/10665/206437/9789241549646_eng.pdf?/

50. *See Fast Facts*, PEACE CORPS (Sept. 30, 2019), https://www.peacecorps.gov/news/fast-facts/ (showing which countries Peace Corps volunteers serve in*); Countries*, DRS. WITHOUT BORDERS, https://www.doctorswithoutborders.org/what-we-do/countries (last visited Feb. 26, 2022) (showing which countries Médecins San Frontières serves in); *Where We Work*, INT'L COMM. RED CROSS, https://www.icrc.org/en/where-we-work (last visited Feb. 26, 2022) (showing which countries International Red Cross serves in).

FGC of any kind has been recognized as a harmful practice and a violation of the human rights of girls and women.[51] It is considered a human rights violation because it violates women's right to live free of violence and their right to healthcare. [52] These rights are violated due to the health complications arising from the practice, which could result in death.[53] At the same time, many international covenants and declarations were being ratified, and many aid organizations shifted their focus to women's rights issues. The international community has made great progress in recognizing violence against women as a human rights violation. However, there are limitations in solely recognizing how women should be treated in the global community and signing on to declarations and covenants. While the laws are binding, they are not enforceable. The declarations can provide a powerful rhetoric to fuel grassroots efforts in countries that practice FGC. In order to harness the persuasive powers of aid workers, organizations should not silence their workers, but instead need to promote a unified approach and implement clear guidelines to navigate between the gray area of international law and cultural relativism, by training workers with a trauma-informed approach to address FGC.

IV. CULTURAL RELATIVISM

While FGC is in direct violation of international human rights laws due to the violence it imposes on girls and women, eradicating this practice is not possible without addressing cultural relativism. People have the right to freely participate in the culture of their countries and communities.[54] That is why cultural relativism must be addressed in the discussion surrounding FGC. There are many articles addressing the balance between universalism and cultural relativism as it pertains to FGC. Each article highlights the many complex issues about human rights and cultural relativism including concerns about western paternalism and xenophobia.[55]

Cultural relativism holds that no particular culture is superior to another. [56] It emphasizes that all religious, ethical, and political beliefs are relative to

51. *See* WHO, *supra* note 4.

52. Minority Health Improvement Act of 1994, H.R. 103-501, 103d Cong. § 603 (1994) (noting that FGM is a dangerous practice because women and girls often experience immediate physical complications following the operation).

53. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.

54. Universal Declaration of Hum. Rts., *supra* note 9.

55. Isabelle R. Gunning, *Female Genital Surgeries and Multicultural Feminism: The Ties That Bind; The Differences That Distance*, 13 THIRD WORLD LEGAL STUD. 17, 19-20 (1994).

56. Menzies, *supra* note 10.

an individual within a society of a particular culture. Under this premise, all cultural beliefs are equally valid. Thus, because FGC is a cultural practice in many communities, the discussion must include cultural relativism as well.

Most of the time, human rights and cultural relativism are compatible. FGC is one of those instances where both declarations on human rights to end the violence against girls and women are in place as well as the rights to cultural practices and beliefs. When examining the practice of FGC, it must be done in a way that gives people the freedom to practice traditions in each society, without imposing western beliefs and moral views on others.

Notably, culture is not monolithic and unchanging. While people must be treated equally with respect to tradition, it is difficult to give cultural relativism equal weight in the context of FGC. People can continue to practice their chosen cultural traditions while rejecting other beliefs. It is clear under the UNDHR, that people must be treated equally in dignity and in rights with respect to their cultural practices, and in many regions, those practices include FGC. However, the dangerous health complications and psychological trauma that FGC inflicts upon girls and women is an overwhelming reason for eradicating FGC instead of continuing the harmful practice in order to preserve tradition. FGC inherently violates a woman's right to be free from violence. The infringement on a person's health and risk of death should receive heightened attention and are reasons for a cultural shift.

International laws outlaw FGC as a human rights violation, though hundreds of millions of people continue to practice partial and total cutting of girls and women as a part of their culture, creating a complex gray area to navigate the work towards eradicating FGC in the appropriate way.

V. INTERNATIONAL AID WORKERS DILEMMA

International aid workers need to receive trauma-informed training to properly assist with the movement of FGC eradication. This eradication should be survivor centered and follow an empowerment model. The problem is that aid workers are either prohibited from speaking about FGC, poorly informed, untrained, or lack trauma-informed training, specifically. Because international aid workers are in the field working with individuals who have been impacted by FGC and in communities that continue the practice, the involvement of international aid workers in the dialogue surrounding FGC is inevitable. Thus, aid workers must be trauma-informed before they are sent into the field. Otherwise, they are at risk of causing harm, instead of offering assistance to the movement away from FGC.

International organizations and countries have advanced efforts to outlaw and criminalize FGC. This is an important step but only one aspect of

combatting the human rights violation. The law alone is not enough to change social behaviors, especially something deeply intrenched in tradition. Historically, permanent social change is only accomplished through something more than laws alone. Change must come from a collaborative effort and should include the governments, non-government organizations, local community leaders, and survivors of FGC at the forefront. Because efforts for social change involve so many different groups, everyone involved should be properly trained. That is why international aid organizations should give their workers the tools to respond and to discuss FGC.

International aid workers are operating in a gray area of enforcement between binding international human rights laws and the cultural practices of the countries that they are working in. Working with local communities at the grassroots level has a better chance of reaching a significant portion of the population and ending this harmful practice if the movement includes international aid workers. As humanitarians and health professionals, aid workers should be permitted to actively advocate against FGC. Instead of limiting their messages to their specific assignments, they should be permitted to incorporate other issues, already recognized as important by the local communities, and make them a part of their integrated outreach.

A. Local Communities Are Reaching Out

International aid organizations should harness the persuasive powers of aid workers by encouraging them to speak about human rights violations. International aid organizations that employ grassroots level volunteers are in an important position to respond to communities that support the practice of FGC, because they have often established rapport and are already in the field interacting with local communities. The aid workers must approach the local communities without any paternalistic judgment. International aid workers should be trauma-informed and open to bridging the gap between human rights violations and cultural practices. This also requires an understanding that, typically, abuses against girls and women take place in intimate and private spaces, and, thus, are beyond the reach of the international law or state protection. Therefore, a trauma-informed dialogue is necessary to empower and create a safe space for FGC survivors.

Trauma-informed training is a method to adopt an epistemological approach to FGC. What is an aid worker to do when a woman comes to her and tells her that she no longer wants to practice FGC and does not want to cut her daughter? What is an aid worker to do if a husband asks an international health worker to re-infibulate a woman after delivering her child? If an aid worker is prohibited from having a conversation about this

harmful practice and is not provided the necessary tools to address this, then there is not only a problem with implementing human rights issues and enforcing international law, but also a problem with our aid organizations masquerading as advocates for women's equality and development.

To empower, educate, and promote change, international aid workers should be encouraged to respond to women who address FGC with them. They should be encouraged to speak about human rights violations and feel free to discuss such violations without any obligation. Implementing clear policy practices across the board will assist aid workers to navigate the space between international laws and cultural relativism as they take on the complex issues of FGC. There are health organizations in rural communities across the world, such as: Médecins Sans Frontières (MSF; Doctors Without Borders), the United States Peace Corps, International Committee of Red Cross (ICRC), and Tostan International. So, there is an increasing number of aid organizations and workers in rural communities that require the proper training to discuss health complications and traditions surrounding the harmful practice of FGC.

1. Médecins Sans Frontières

Médecins Sans Frontières (MSF) is a medical humanitarian organization that has worked within over seventy countries in the past thirty-five years.[57] MSF has a formal policy against FGC because of the health complications and the violation of the rights of women and girls.[58] MSF works in regions of the world where FGC is practiced. According to its charter, its policy is to support local initiatives against the practice, but not to adopt a campaign against FGC.[59] MSF does incorporate the dire health consequences of the practice in its training for traditional birth attendants.[60] This is helpful for this particular organization because the aid workers are medically trained staff.

Medical professionals working for MSF can be confronted with ethical dilemmas regarding FGC. For example, a doctor or a nurse may face situations where a traditional practitioner who understands the importance of sterile procedures and knows that MSF workers have sterile tools, will

57. *See Who We Are*, MÉDECINS SANS FRONTIÈRES, https://www.msf.org/who-we-are (last visited Feb. 26, 2022).

58. *The Practical Guide to Humanitarian Law: Women*, MÉDECINS SANS FRONTIÈRES, https://guide-humanitarian- law.org/content/article/3/women/ (last visited Feb. 26, 2022).

59. *Female Genital Cutting*, MÉDECINS SANS FRONTIÈRES (Sept. 13, 1999), https://www.msf.org/female-genital-cutting (describing MSF's strong opposition to FGC and lack of involvement in continuing the practice).

60. *Id*.

request their tools to practice FGC in the community.[61] When they are faced with such issue, MSF workers are forced to navigate between the desire to help the local community and their oath to the medical practice, while simultaneously complying with MSF's policies. The regions that employ MSF workers also have domestic laws that require health practitioners to alert local authorities if a person comes across FGC, but it mostly goes unreported due to the unclear guidance and training about how to approach the subject.[62]

Thus, medical professionals working for MSF operate between the policies of the organization requiring them to not get involved with FGC, domestic laws demanding a reporting of any FGC practices, and international laws deeming this practice a human rights violation. All while the workers are respecting the culture and tradition of the local communities they work in, making it a gray area, which is incredibly difficult to navigate without the proper tools to address it. Ultimately, this unclear guidance can cause more harm than good for local communities continuing to practice FGC.

MSF is adamantly opposed to any sexual violence and is opposed to the practice of FGC. FGC is a form of sexual violence that medical professionals will often encounter in regions that continue this practice. Discussing FGC in certain countries requires breaking down barriers and opening up a conversation about this subject. It requires a much more affirmative step in training aid workers about how to approach it, instead of leaving FGC as an open gray area. A unified and clear policy approach on how to address FGC would be helpful.

2. United States Peace Corps[63]

The United States Peace Corps (Peace Corps) is in over sixty countries.[64] The Peace Corps has volunteers that work in various sectors such as education, agriculture, business, and health. The primary focus is on grassroots global development and cultural exchange.[65] Under the United States foreign policy framework, FGC is identified as a form of gender based-violence and the Peace Corps is a part of the State Department's "Global

61. Julian Sheather & Tejshri Shah, *Ethical Dilemmas in Medical Humanitarian Practice: Cases for Reflection from Médecins Sans Frontières*, 37 J. MED. ETHICS 162 (2011).

62. Elizabeth Edouard et. al, *International Efforts on Abandoning Female Genital Mutilation*, 19 AFR. J. UROLOGY 150 (2013).

63. Please note that the length of this section and use of personal interviews is due to my own experience and familiarity with the subject as a former United States Peace Corps volunteer.

64. *Countries*, PEACE CORPS, https://www.peacecorps.gov/countries/ (last visited Feb. 26, 2022).

65. *See generally*, *About*, PEACE CORPS, https://www.peacecorps.gov/about/ (last visited Feb. 26, 2022).

Strategy to Empower Adolescent Girls" which includes a plan to reduce harmful norms and practices such as FGC.[66] But this document does not have any specific guidance for Peace Corps volunteers or what the reduction of harm would entail.

Peace Corps volunteers in the health sector are predominantly the aid workers who could have a discussion about FGC due to the nature of their work. Many educators will also be approached because they work with young girls. Other volunteers may encounter the conversation due to their living in the local communities. Not every country that hosts volunteers practices FGC. Of the ones that do, it seems that the Peace Corps universally instructs the volunteers to not talk about FGC. Some volunteers resorted to online discussions about dealing with the lack of preparedness to address FGC in their host countries.

For example, a post on Reddit.com titled "FGM and the Peace Corps"[67] lists an exchange between volunteers in the Gambia, Cambodia, Burkina Faso, and an unknown location, and an incoming Peace Corps volunteer. The discussion started with the future volunteer asking the returned volunteers if they had the opportunity to discuss FGC with host country nationals or work on it as a project. The volunteers from the Gambia, Burkina Faso, an unknown country, and Cambodia all shared their stories of encountering FGC and a lack of training. The volunteer in Burkina Faso discussed it with some of the younger girls who would come by after school to ask questions. The volunteer told them that it was illegal to practice FGC, but that it was still performed in remote areas where there were no police present.[68] The second volunteer did not disclose which country the person served in. This volunteer wrote that the aid workers "were given a big fat DON'T TALK ABOUT FGM multiple times during service,"[69] so they did not. The volunteer serving in the Gambia wrote that almost all the women in the village were circumcised[70] and it was not unheard of for people to circumcise other people's children, if the job was not getting done.

During the Peace Corps health and cultural training in Burkina Faso from 2012-2015, there were some subjects that were considered too off-limits to discuss. Volunteers were advised to approach issues like FGC with caution and often told not to develop health projects or gender equality

66. U.S. DEP'T OF STATE ET. AL., UNITED STATES GLOBAL STRATEGY TO EMPOWER ADOLESCENT GIRLS (2016), https://2009-2017.state.gov/documents/organization/254904.pdf.

67. @Ta2d_Kate, *FGM and the Peace Corps*, REDDIT: R/PEACECORPS, https://www.reddit.com/r/peacecorps/comments/49jvxz/fgm_and_the_peace_corps/ (last visited Feb. 27, 2022).

68. *Id.*

69. *Id*.

70. *Id.*

projects about it. Even though the health volunteers worked in hundreds of rural villages where the practice was widespread, no training was provided regarding the different levels of FGC or the health complications. One trainer told the volunteers that they could use the phrase: "God made her that way, why change her?"—that was the limit. There was no discussion of the trauma inflicted upon girls and women who have experienced FGC, or what a trauma-informed approach to understanding could accomplish to help eradicate the practice. Likewise, there was no training on how to address a scenario when a survivor came to a volunteer and asked for help. Instead, when asked about FGC, in compliance with their directives from the Peace Corps, trainers told the aid workers not to engage in the dialogue.

One health volunteer recounts the time she was assisting a midwife with a delivery in the local health clinic:

> The impact on her body was clear. The midwife knew she was going to cut open this woman's vagina to allow the baby room to come out since her opening no longer had the skin it needed to stretch enough for the child. The energy in the room was one of sadness, concern, and frustration.[71]

This volunteer first learned about the prevalence of FGC in her host village during a prenatal consultation. She learned that when this woman was a young girl she was taken to the woods, held down by older women in her family, and her genitalia was cut. The woman was able to tell this story to the volunteer and the midwife without much visible trauma or emotion. She said that, as a result of the FGC, she did not enjoy sex, she had to wash her genital area constantly because there was no longer flesh there, and urinating was sometimes painful. She explained that she did not want to do it to her own daughter, but she was fairly certain the elders would intervene and cut her. The volunteer regrets not being able to further pursue the discussions surrounding the subject of FGC.[72]

Another volunteer shared that during her Peace Corps service she worked closely with her colleagues at the health clinic to put together healthy birth plans. While she was working, a group of young female students approached her and stated that they that wanted her to teach a lesson about FGC. She was unable to do so, because she was not permitted to lead such a discussion and because she was not prepared to do so. This volunteer believes that a clear practice on how to speak about FGC would clear the path for future aid workers:

71. Email from RPCV 1, *supra* note 1.

72. *Id.*

> I discussed FGM with women in regard to having a birth plan in place. Most of the women (young adults and older) had been excised which created complications during labor so my counterpart and myself had small conversations about having a birth plan in place. Some of the young girls wanted to have a lesson on FGM at their school because they were interested in it. [In regards to future aid workers] we had a picture book at the clinic that we used to discuss FGM and complications. I think something like that would be helpful.[73]

Other volunteers did not consider discussing FGC at all. An education volunteer reasoned:

> FGM was something I barely touched because it was never addressed to us during training by Peace Corps and I think being a male volunteer limited the appropriateness of my asking about it—both on my end since I was not comfortable bringing it up and because of cultural norms . . . and looking back, both aren't the best excuses. I just added to the system of injustice.[74]

It is clear that, while international aid organizations like the Peace Corps take part in initiatives that issue policies against FGC programmatically, the limited projects, inadequate interventions, and lack of training stagnates efforts to eradicate the practice and contributes to missed opportunities to engage in empowering local community members. If international aid workers hear young girls, women, and colleagues express an interest in discussing FGC, and frustration with the tradition, then aid workers should have the tools to respond and be prepared to discuss FGC. Using a trauma-informed model with a clear plan of action to communicate health risks and to encourage behavior change would help to effectuate change.

3. International Committee of the Red Cross

The International Committee of the Red Cross (ICRC) sends volunteers in one hundred and ninety countries worldwide.[75] The organization has a zero-tolerance policy concerning FGC. Unlike the Peace Corps and MSF, the ICRC does not have volunteers living in local communities for years at a time. For some initiatives, the organization will briefly go into a country, do

73. E-mail from RPCV 2., Returned Volunteer, U.S. Peace Corps (Mar. 19, 2018) (on file with author).

74. Telephone Interview with RPCV 3, Returned Volunteer, U.S. Peace Corps Volunteer (Apr. 1, 2018).

75. *National Societies Directory*, INT'L FED'N RED CROSS & RED CRESCENT SOC'YS, https://oldmedia.ifrc.org/ifrc/who-we-are/national-societies/national-societies-directory/ (last visited Feb. 27, 2022).

a training, and leave.[76] While training and collaboration with local communities is important, this is not an effective use of the persuasive powers of international aid workers. The ICRC is not prohibiting aid workers from discussing FGC, but the practice of brief meetings and short stays does not promote sustainable change. This is also not an effective use of aid workers and it is another example of a policy statement that does not match the organization's practices.

For example, in Chad, the ICRC trained four hundred and sixty young female volunteers in peer education skills and awareness.[77] In countries like Chad where the law specifies that harmful traditional practices, including FGC are prohibited, it is clear that aid workers coming in and training people briefly is not a sustainable approach to eradicating the practice. The ICRC has a website and a campaign dedicated to "Zero Tolerance Day" against FGC and there are many news articles about taking a stance against FGC, though it is unclear what sort of work is being done in other countries or what kind of training the volunteers have. There are plenty of non-governmental organizations that merely throw money at a project, then abandon it, and organizations that spend limited time working in local communities are not effective.

International aid workers who work in the field create real change by building rapport with the local communities. They have the ability to act within their own organizations toward the countries and communities that they work in while working alongside local partners. At present, they lack the appropriate resources and tools to engage in the dialogue surrounding FGC. Despite the zero tolerance policies in place, some organizations are not doing everything they can to end these human rights violations against girls and women.

4. Tostan International

Tostan International (Tostan) is an example of an organization that is using aid workers and local community members to affect change in behavior regarding FGC.[78] The organization applies customary international law principles and uses aid workers to establish rapport and create a dialogue with the local communities. Its model is survivor centered and empowerment focused. Tostan is a non-governmental organization that uses education

76. *See, e.g.*, *Chad Red Cross Involves African Tribal Chiefs in the Fight Against Female Genital Mutilation*, INT'L FED'N RED CROSS & RED CRESCENT SOC'YS, (Apr. 5, 2006), https://www.ifrc.org/en/news-and-media/news-stories/africa/chad/chad-red-cross-involves-african-tribal-chiefs-in-the-fight-against-female-genital-mutilation/.

77. *Ending Female Genital Mutilation*, *supra* note 12.

78. TOSTAN INT'L, https://www.tostan.org/ (last visited Feb. 27, 2022).

workshops dedicated to women to discourage the practice of FGC.[79] The organization only operates in rural villages that it is invited.

Tostan's employees run education workshops with the primary goal of sharing ideas with community leaders on human rights and group problem solving. Its method is very effective. For example, from 1997-2003, over one thousand villages in Senegal agreed to stop the practice of FGC.[80] This is an organization that follows a trauma-informed approach, focusing on the empowerment of local communities and recognizing that change in behavioral and traditional practices originates from the unified decisions of the communities.

Tostan's model for change is a prime example of why it is important to work with people at the grassroots level. Using international aid workers will have a much better chance of reaching more people and bring change to the harmful practice of FGC. Employees of this organization are confronted with the realities of cultural appropriation, assimilation, and integration goals. When local communities gain a voice centered around their own experiences, then practices begin changing.

B. The Role of Aid Workers Effecting Change Around Health Norms

International aid workers should be encouraged to participate in the dialogue surrounding FGC following trauma-informed training. Instead, they are forced to navigate the space between law and culture on their own. The collective experience of international aid workers is the lack of the tools that they need to discuss FGC. While they may have a need to protect themselves from unqualified individuals discussing health topics or human rights issues, the organizations have a responsibility to train volunteers if they are sending them out into communities. Aid workers are in a unique position. They are sitting in a daily experience within the communities that practice FGC and they are observing the traumatic effects that the cutting and removal of female genitalia have on girls and women in the local communities.

Many defenders of FGC would discourage international aid workers from engaging in a conversation about the practice. Likewise, many advocates who want to eradicate FGC may also discourage international aid workers from assisting, deeming their involvement and presence in other countries as imperialistic and unnecessary. The FGC debate highlights some complex issues about human rights and cultural relativism including

79. *See generally, id.*

80. Bethany Albert, *Female Genital Mutilation*, VILLAGE VOLUNTEERS, https://villagevolunteers.org/wp-content/uploads/2011/07/Female-Genital-Mutilation.pdf (last visited Feb. 27, 2022).

concerns about Western paternalism and xenophobia.[81] Discussions about basic human rights that involve female health can hardly be shunted aside on those grounds. Silencing aid workers only stunts progress that could be made towards eradicating violence against girls and women. The powers of international law are structured in a way that should give aid workers the tools to navigate through the complexity and relativism. All of the steps are in place to eradicate FGC, but one part is missing—the training for international aid workers that are in a unique position to work with local community members.

1. Foot Binding in China

International aid workers played a large role in the eradication of foot binding in China. FGC, like foot binding in China, represents society's control over women. The practice of foot binding perpetuated normative gender roles that are unequal and harmful to women.

Foot binding was the long practiced brutal tradition of breaking girl's toes and bones, aimed to change a female's feet to conform with ideals of beauty. Foot binding was practiced for a thousand years and was seen as a sign of beauty and marriageability.[82] It was practiced on young girls from age three to eleven years old. Bones in the foot were broken and bound for two years and toes were curled under in order to attempt to stop growth.[83] Awareness about foot binding in China first came from Western missionaries who began detailing the practice during the nineteenth and twentieth centuries. Foreign missionaries founded the first "anti-foot binding society" in 1897.[84] The group was called the "Natural Foot Society" and the reason the use of the aid workers was beneficial was because after training was completed, the leadership was then transferred to a committee of Chinese women.[85] This movement started among foreigners and later spread through China. The collaboration between international aid workers and local communities played the integral role in eradicating the harmful practice.

The anti-foot binding movement was able to reform the practice by focusing on an education campaign, the positive advantages of having "natural feet," and by forming societies with members pledging not to engage in the practice any longer and exhibiting their disengagement by, for

81. Gunning, *supra* note 55, at 19.

82. Ann-Marie Wilson, *How the Methods Used to Eliminate Foot Binding in China Can be Employed to Eradicate Female Genital Mutilation*, 22 J. GENDER STUD., 17 (2012).

83. *Id*.

84. *Id*. at 18.

85. *Id.* at 19.

example, not having their sons marry women with bound feet.[86] It started with the understanding of the physical and psychological trauma this practice has on women. The primary groups involved were Western missionaries, non-religious Westerners, and wealthier individuals in China. The practice was outlawed in 1912 and criminalized in 1981.[87] A thousand-year-old practice was reformed in just decades following the help of international aid workers, local communities, and legal policies.

FGC has significant parallels to the practice of foot binding. Like FGC, foot binding was practiced to control the sexual freedom of women, it was deemed necessary for proper marriages and family honor. Foot binding was violent and painful infliction upon the female body.[88] It took more than just the law to eradicate the practice because legal measures alone will not eliminate violence against women unless local communities also have a desire to change. The anti-foot binding movement focused on public opinion, education, and an integrative approach to eradication. It ended in conjunction with empowering women through education and promoting opportunities outside of the private sector.[89]

Efforts to eradicate FGC must also come from people who are familiar with the local culture and religion and who are accurately informed. Absent the tools, training, or resources, the practice will continue and by 2030, fifteen million more girls will be cut.[90]

2. Breast Ironing

Breast ironing, or breast flattening, is a practice used to protect girls from unwanted sexual advances and like FGC, is perpetuated allegedly for the good of women, but ultimately causes immediate and lifelong physical and psychological trauma.[91] When girls start showing signs of puberty, typically mothers will begin ironing their daughter's breasts using heating tools to try to prevent their breasts from developing. The aim of the ritual is to use heated spatulas, hammers, and rocks to halt breast growth in order to slow puberty

86. *Id.*

87. *Id.*

88. Gerry Mackie, *Ending Footbinding and Infibulation: A Convention Account*, 61 AM. SOCIO. REV. 999 (1996).

89. *Id.*

90. Rachel Revesz, *FGM: UN Calls for End of Violent Practice by 2030*, INDEP. (Feb. 8, 2016), https://www.independent.co.uk/news/fgm-un-calls-for-end-of-violent-practice-by-2030-a6861251.html.

91. Danielle Selby & Julie Ngalle, *Mothers in These African Communities 'Iron' Their Daughters Breasts*, GLOB. CITIZEN (Apr. 6, 2018), https://www.globalcitizen.org/en/content/breast-ironing-cameroon-harmful-practice-girls/.

and postpone girls' sexual relationships.[92] It involves the "repetitive pounding, pressing, ironing, [or] rubbing . . . of a pubescent girls' breasts . . . to stop of delay them from growing or developing."[93] Approximately 3.8 million teenagers are affected by breast ironing worldwide.[94] It is practiced largely in countries such as Cameroon, Nigeria, Benin, and Chad[95] and is considered an underreported crime related to gender-based violence.[96]

The practice of breast ironing is similar to FGC because it is a form of physical mutilation practiced out of tradition and justified by the intention of good will by family members and people in the community, yet it has harmful physical and psychological consequences for young girls. Like FGC, it is typically performed by a female family member, traditional healers, or midwives.[97] Under international laws, breast ironing is recognized as a form of violence against girls and women that violates human rights.[98] There are several treaties and declarations that recognize it as a harmful practice and highlight the rights of girls and women to live free from gendered violence and torture.[99]

Breast ironing is historically underreported. Some data has been collected in countries where it is practiced and shown that it is believed to take place to in order to combat sexual harassment, assault, exploitation, rape,

92. Julia Ada Tchoukou, *Introducing the Practice of Breast Ironing as a Human Rights Issue in Cameroon*, 3 J. CIV. & LEGAL SCI. (2014), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3040793.

93. Fikrejesus Amahazion, *Breast Ironing: A Brief Overview of an Underreported Harmful Practice*, 11 J. GLOB. HEALTH (2021), https://jogh.org/documents/2021/jogh-11-03055.pdf.

94. Selby & Ngalle, *supra* note 91.

95. Tchoukou, *supra* note 92.

96. *Breast Ironing Fact Sheet*, AFR. HEALTH ORG., https://aho.org/fact-sheets/breast-ironing-fact-sheet (last visited Feb. 27, 2022).

97. Amahazion, *supra* note 93.

98. *Id.*

99. Universal Declaration of Hum. Rts., *supra* note 9; Convention on the Elimination of all Forms of Discrimination Against Women, *opened for signature* Mar. 1, 1980, 1249 U.N.T.S. 23; Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3; African Charter on Human and Peoples' Rights, June 27, 1981, 1520 U.N.T.S. 217; Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women, *adopted* July 1, 2003, https://au.int/sites/default/files/treaties/37077-treaty-charter_on_rights_of_women_in_africa.pdf; African Charter on the Rights and Welfare of the Child, *adopted* July 1, 1990, https://au.int/sites/default/files/treaties/36804-treaty-african_charter_on_rights_welfare_of_the_child.pdf. *See also Campaign Launched to Counter 'Breast Ironing,'* NEW HUMANITARIAN (June 28, 2006), https://www.thenewhumanitarian.org/news/2006/06/28/campaign-launched-counter-breast-ironing; BAWE ROSALINE NGUNSHI, GENDER EMPOWERMENT & DEVELOPMENT, BREAST IRONING…A HARMFUL PRACTICE THAT HAS BEEN SILENCED FOR TOO LONG (2011), https://www.ohchr.org/Documents/HRBodies/CEDAW/HarmfulPractices/GenderEmpowermentandDevelopment.pdf.

and sexually transmitted diseases.[100] One of the leading groups that brought into the public sphere after it was uncovered by agencies like the German Technical Cooperation Agency (GTZ) and Dutch international organization Deutsche Gesellschaft für Internationale Zusammenarbeit (GIZ) in collaboration with Reseau National des Associations des Tantines (RENATA).[101] Their study focused on Cameroon and addressed the prevalence rate, method, and rationale regarding the practice.[102] Since then, breast ironing awareness advocates believe that enacting more laws against breast ironing would help educate others about this harmful practice.[103]

Breast ironing has not been completely eradicated, and there is still work to do. Primarily, this form of gender-based violence needs greater attention to increase awareness. People working with girls and women who underwent breast ironing need appropriate support and treatment. Those people working with the girls and women need appropriate trauma-informed and survivor-centered training. This coupled with changing the laws outlining harmful practices will help promote change. With breast ironing, the involvement of international aid workers and their recognition in the countries that practice breast ironing has helped to halt the tradition. For example, there are now laws criminalizing breast ironing in Cameroon (where it is practiced heavily) and a nationwide campaign against the practice organized by aid workers in 2014 helped reduce the prevalence of breast ironing by fifty percent.[104] Sex education is one of the tools used as a better way to prevent teenage pregnancies in young girls. Other governmental and non-governmental organizations have embarked on a mission to enact change.[105] Even international charities, like the Women and Girls Development Organization in London, are working to raise awareness of breast ironing.[106] While there is still work to be done to reduce the harmful practice of breast ironing, the intervention of international aid workers in collaboration with local communities has shown a reduction in the reach of the practice and in the number of girls and women impacted by this violence.

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100. Amahazion, *supra* note 93.

101. *See* Tchoukou, *supra* note 92, at 2.

102. *Id.*

103. Inna Lazareva, *Breast-Ironing: 'The Whole Community Needs an Education*,' GUARDIAN (Jan. 26, 2019), https://www.theguardian.com/global-development/2019/jan/26/uk-authorities-in-denial-of-prevalence-of-parents-breast-ironing-girls.

104. *See* Joe Penney, *Breast Ironing*, REUTERS (Jan. 27, 2014), https://widerimage.reuters.com/story/breast-ironing.

105. NEW HUMANITARIAN, *supra* note 99.

106. Emily Dugan, *'Breast Ironing': Girls 'Have Chest Flattened Out' to Disguise the Onset of Puberty*, INDEP. (Sept. 26, 2013), https://www.independent.co.uk/life-style/health-and-families/health-news/breast-ironing-girls-have-chests-flattened-out-disguise-onset-puberty-8842435.html.

3. Polio

Poliomyelitis, otherwise known as Polio, does not reflect violence against girls and women. However, it is an example of a health issue that has been eradicated in other countries through the use of informed training and collaboration with international aid organizations. It will likely be completely eradicated sometime in the near future. This is largely due to the efforts from international aid organizations such as the Bill and Melinda Gates Foundation, the U.S. Center for Disease Control and Prevention, and the World Health Organization working alongside medical professionals in other countries to vaccinate young children and eliminate the disease.[107] While the benefits of eradicating polio are now more apparent worldwide, when international aid organizations first tried to get involved in fighting polio, many groups were resistant to it, similarly to the resistance to ending the practice of FGC.

In order to make a difference and change people's opinions and beliefs about the polio vaccination, international aid workers and local communities worked together. Thirty years ago, there were approximately 350,000 cases of polio worldwide.[108] Initially, certain countries resisted polio vaccines. Pakistan was one of the countries where polio eradication seemed out of reach because of the myths and misconceptions surrounding the vaccine.[109] In 2012, hostile militants in Pakistan did not allow polio teams to vaccinate children in certain territories.[110] In an attempt to change the minds of people and enact change, the polio teams expanded to include international aid organizations and created awareness through education.

Through a host of workshops and discussions, paired with a commitment amongst aid workers and the government, change was made.[111] By 2017, there were only eleven reported cases of polio in Pakistan.[112] This is just another example of how international aid workers are instrumental in making a difference.

107. *See* Alina A. Visram, *Overcoming Obstacles to Polio Eradication in Pakistan*, UNICEF USA (Oct. 24, 2017), https://www.unicefusa.org/stories/overcoming-obstacles-polio-eradication-pakistan/33371.

108. *Id.*

109. *Id.*

110. *Id.*

111. *Id*.

112. *Id.*

V. STRIKING THE BALANCE AND INCORPORATING TRAUMA-INFORMED TRAINING

International aid organizations that have opted out of the movement to eradicate FGC owe an explanation why aid workers are being silenced or left unprepared in the field. If organizations continue to issue declaratory policies that take a stance against FGC but fail to properly train and prepare aid workers for work in local communities, they are allowing violence against girls and women to prevail. International aid workers must receive trauma-informed training before approaching the subject matter of FGC. In addition, efforts towards change must be implemented at the community level. Like the eradication of other harmful practices, such as foot binding, breast ironing, and polio anti-vaccination beliefs, changes to FGC must come from unified decisions within the communities. Aid workers working in these communities can make a difference and they should not be prohibited from speaking about FGC. Rather, aid workers should be provided the proper tools to address it.

Training international aid workers to use a trauma-informed approach to discussing FGC would enable them to facilitate a healing conversation about FGC and to avoid re-traumatization. Trauma-informed care is widely used in the medical field.[113] It is applicable to international development work, as it intersects with people who have been subjected to violence. Further, trauma-informed care is also beneficial in the practice of law and should be implemented in more legal trainings.[114]

Trauma-informed training is a growing base of knowledge about the negative impacts of psychological trauma inflicted upon individuals. It is an approach that comes from understanding the impacts of trauma, aimed at empowering and engaging the survivors it hopes to assist. Becoming trauma-informed starts with awareness of the impact of trauma among the population which the aid workers are serving. It then creates a space for physical and emotional safety, with focus on the strengths and resilience of the survivors of FGC. This empowers the decision making and pushes toward the eradication of FGC.[115]

After adopting a trauma-informed approach for discussions regarding FGC, international aid organizations can gain confidence that aid workers are better prepared to engage community members in this discussion. The

113. *See generally* Monique Tello, *Trauma-Informed Care: What It Is, and Why It's Important*, HARV. HEALTH PUB. (Oct. 16, 2018), https://www.health.harvard.edu/blog/trauma-informed-care-what-it-is-and-why-its-important-2018101613562.

114. *See* Sarah Katz & Deeya Haldar, *The Pedagogy of Trauma-Informed Lawyering*, 22 CLINICAL L.R. 359 (2016).

115. *See id.* at 375.

approach then must be a collaborative one that bridges support from decision makers of international aid organizations and those who volunteer for them. Development agencies are limited to following the policies set by their governments and have varying degrees of autonomy to make decisions at operational levels.[116] Silencing aid workers by preventing them from talking about FGC in relation to violence against girls and women is a human rights violation. Once aid organizations change their arbitrary policy standards and take a clearer stance, international aid workers can adopt a holistic approach to FGC that accounts for social and political concerns, presented in a way that does not stigmatize women.

The international community has a responsibility speak out against FGC. If international aid organizations follow international human rights laws as their only means to combat abuse like FGC, it may alienate certain people. Adding trauma-informed rhetoric and a collaborative approach will move eradication efforts forward. This approach should be centered on empowering survivors through education and discussion addressing FGC and cultural relativism. As a method to reach more members of the community they should also incorporate a health-based focus rather than emphasize gendered violence.[117]

In addition, organized partnerships in regions where FGC is widely practiced should focus on striking the balance between the law, culture, and lived experiences of girls and women who have been impacted by FGC. Because international aid workers have been effective in health reform in other instances such as foot binding, breast ironing, and polio, and they are assimilated in the local communities, they should be encouraged to participate in the movement to eradicate FGC in the countries that they work in. To eradicate FGC and create sustainable change, it will take more than legislation and organizing local communities alone. It must be a collaborative effort. International aid workers can bridge the gap between laws and local communities, so long as they are trained to be trauma-informed.

VI. CONCLUSION

International aid organizations should not prohibit workers from discussing FGC with the local communities that they work with. Instead, they should provide them with the tools and resources necessary to eradicate FGC. FGC is a harmful practice where girls and women are subjected to cutting

116. Michael Szporluk, *A Framework for Understanding Accountability of International NGOs and Global Good Governance*, 16 IND. J. GLOB. LEGAL STUD. 339, 354 (2009).

117. *See* MINORITY RTS. GRP., *supra* note 16.

and removal of their genitalia resulting in a lifelong physical and psychological trauma. Even though international laws outlaw FGC as a human rights violation, there are many regions of the world that continue to practice it due to the traditions upheld in the community.

Because FGC is such a complex subject and must be carefully addressed through balancing human rights and cultural relativism, international aid workers need tools to navigate the gray area in between. The implementation of a clear practice should incorporate trauma-informed training for international aid workers. It will cultivate the dialogue that addresses girls' and women's rights to be free from violence while balancing cultural relativism with empowering the people in the communities seeking to have a more effective conversation about eradicating FGC. Once there is a clear plan of action for international aid workers on how to navigate the gray area between international law and cultural relativism, practices instrumental to promoting the well-being of women and girls.

VII. ACKNOWLEDGEMENT FROM THE AUTHOR

This paper can be read as systemically violent because it does not include any stories or perspectives from survivors of female genital cutting (FGC). Articles like this should amplify the voices of survivors instead of speaking for them. As an educated white woman living in California and the United States, I recognize that I am privileged and that I am venturing into ideas of eradicating a traditional practice outside of my culture. I do so in an attempt to hold a mirror to those who have also engaged in international aid work in countries outside of the United States and other individuals who may have been guilty of harmful work to people in communities of need. It is my hope that this article will be most beneficial to those organizations going overseas, to initiate a dialogue surrounding FGC survivor focused empowerment and to shift policies and practices towards working with survivors of FGC, as well as actively work to resolve any past errors by not perpetuating the dominant Western perception of FGC only.

Additionally, this article is not meant to posit that survivors of FGC need saving from international aid workers or that international aid organization's presence is necessary to eradicate FGC. Instead, the carve out issue this paper is trying to address is that if individuals from international aid organizations, including individuals suffering from white savior complex, will be present in communities that practice FGC, it is better that they are informed and trained to address FGC.

For excerpts and advocacy of FGC survivors and their stories, please consider the following:

1. FAILURE TO PROTECT: HOW DISCRIMINATORY SEXUAL VIOLENCE LAWS AND PRACTICES ARE HURTING WOMEN, GIRLS, AND ADOLESCENTS IN THE AMERICAS, EQUALITY NOW (2021), https://www.equalitynow.org/resource/failure-to-protect-how-discriminatory-sexual-violence-laws-and-practices-are-hurting-women-girls-and-adolescents-in-the-americas/.

2. Purity Soinato Oiyie, *From Where I Stand: What We Need Is Free Education for Girls*, UN WOMEN (May 25, 2018), https://www.unwomen.org/en/news/stories/2018/4/from-where-i-stand-purity-soinato-oiyie.

3. Jaha Dukureh, *In the Words of Jaha Dukureh: We Are at a Tipping Point in the Movement to End FGM*, UN WOMEN (Feb. 27, 2018), https://www.unwomen.org/en/news/stories/2018/3/in-the-words-of-jaha-dukureh.

4. *Safe in Serengeti: Young Women and Girls Seek Refuge from Female Genital Mutilation in Mara, Tanzania*, UN WOMEN (Nov. 14, 2017), https://www.unwomen.org/en/news/stories/2017/11/feature-tanzania--women-and-girls-seek-refugee-from-female-genital-mutilation.

5. Magda Ahmed, *From Where I Stand: I Feel Like I am Creating Great Change,"* UN WOMEN: EGYPT (Sept. 16, 2018), https://egypt.unwomen.org/en/news-and-events/stories/2018/09/from-where-i-stand

6. Lizzy Davies, *Sadia Hussein: The FGM Survivor Who Is Saving Girls from the Knife*, GUARDIAN (June 23, 2021), https://www.theguardian.com/society/2021/jun/23/sadia-hussein-the-fgm-survivor-who-is-saving-girls-from-the-knife.

7. *Survivors Speak: Women Leading the Movement to End FGM*, UN WOMEN (Feb. 4, 2019), https://www.unwomen.org/en/news/stories/2019/2/compilation-women-leading-the-movement-to-end-female-genital-mutilation.

8. Danielle Jacobson et al., *The Lived Experience of Female Genital Cutting (FGC) in Somali Canadian Women's Daily Lives,* 13 PLOS ONE (2018), https://doi.org/10.1371/journal.pone.0206886

9. Leyla Hussein, *'I Had No Idea I Was an FGM Survivor Until a Nurse Asked,'* GLOB. CITIZEN (Feb. 24, 2020), https://www.globalcitizen.org/en/content/leyla-hussein-female-genital-mutilation-fgm/.

10. "*Kentucky FGM Survivor: "…Through Kentucky Passing the Law, My Chains Are Broken and I Feel Free*," AHA FOUND.,

https://www.theahafoundation.org/fgm-survivor-says-breaking-her-silence-was-beginning-of-her-healing/?utm_source=ga&utm_medium=search&utm_campaign=AHAFD-0001T-02-0002&gclid=CjwKCAjw2bmLBhBREiwAZ6ugo-6zFsf8g9srcgsuxPgezCDHBYjNT0LZuKR0nJodQN3sGPb-TrccPRoCvJ4QAvD_BwE (last visited Feb. 27, 2022).

ADDRESSING THE CRITICISM ON FLAGS OF CONVENIENCE: SHOULD FLAGS OF CONVENIENCE BE ABOLISHED FOR THE CRUISE INDUSTRY?

Arman Avagyan[*]

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I. INTRODUCTION

Cruise companies, which have experienced phenomenal growth in the last decade, widely employ flags of convenience.[1] This traditional maritime

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1. Joseph V. Micallef, *State of the Cruise Industry: Smooth Sailing into the 2020's*, FORBES (Jan. 20, 2020, 11:37 AM), https://www.forbes.com/sites/joemicallef/2020/01/20/state-of-the-cruise-industry-smooth-sailing-into-the-2020s/?sh=270e274f65fa.

> According to the Cruise Lines International Association (CLIA), the world's largest cruise industry trade organization, 32 million passengers were set to travel on cruise ships in 2020, up from 30 million in 2019. However, this growth came to an abrupt stop due

business practice has relied on developing states while lowering safety standards and generating environmental costs. Flags of convenience and open registries allow large cruise lines to pay little or no taxes in the countries where they are headquartered and conduct business. This note seeks to shed light on the issues surrounding flags of convenience and open registries and further advocates for the recognition of a "patron created value" and international uniformity in setting standards to address it.

Flags of convenience and open registries have allowed cruise companies to utilize century-old U.S. tax rules to avoid paying corporate taxes.[2] Cruise lines are evading taxes in other developed countries because the major cruise lines, and their parent corporations, are headquartered in the United States. Offshore registration allows the cruise lines to use Internal Revenue Code (IRC) Section 883, which exempts income earned by foreign corporations for the "international operation of a ship or ships," as long as their country of residence also extends the same protection to U.S. ships.[3] The term offshore refers to a location outside of one's national boundaries. For example, cruise lines incorporated in the United States register their ships internationally. These strategies give cruise companies the ability to shift their profits from high-tax jurisdictions that strictly enforce safety and labor regulations to low-tax jurisdictions with often weakly enforced safety and labor regulations.[4] Essentially, cruise lines such as Carnival Cruise Line keep its headquarters in a high-tax jurisdiction, like the United States, but register its vessels in a country like Panama, which does not tax companies for foreign-source income.[5] Effectively, cruise lines can make large profits while paying virtually no taxes in the jurisdiction that they are headquartered in and operate from.

Every year, flags of convenience and open registries cost the United States hundreds of millions of dollars in lost revenue. Major U.S cruise lines, like Carnival Cruise Line, would have owed around $600 million in corporate taxes on its reported $3 billion income in 2019.[6] Furthermore, the parent corporations of cruise lines pay significantly low taxes too. For example, in

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to the COVID-19 outbreak. Since 2009, cruise ship passengers have grown from 17.8 million to 30 million, an annual growth rate of 5.4%.

Id.

2. *See* 26 U.S.C. § 883(a)(1) (2018).

3. *Id.*

4. *See* Ved P. Nanda, *U.S. Perspective on the Legal Aspects of Cruises*, 66 AM. J. COMP. L. 213, 214 (2018).

5. *Id.*

6. Leticia Miranda, *Most Cruise Lines Don't Pay Federal Income Tax — Just One of the Reasons They Aren't Getting a Bailout*, NBC NEWS (Mar. 31, 2020, 3:57 AM), https://www.nbcnews.com/business/business-news/most-cruise-lines-don-t-pay-taxes-u-s-just-n1172496.

2019, Carnival Corporation paid an income tax of $71 million on $20.83 billion in revenue; Royal Caribbean Group, which registers its fleet in Liberia, paid $36.2 million in taxes on $10.95 billion in revenue; and Norwegian Cruise Line Holdings, which registers its ships in Bermuda, actually showed a tax benefit of $18.86 million on $6.46 billion in revenue.[7] Cruise lines can do this because their cruise ships are registered in countries that have little to no corporate taxes. Notably, with the use of technology, corporations can easily register a ship in a foreign country. For example, Panama has a beneficial open registry system that offers non-nationals a quick and easy online registration process for ships.[8]

Critics of flags of convenience and open registries, like trade unions, governments, and international organizations, agree that flags of convenience and open registries are a problem, but so far have been unable to bring about a uniform solution. As of 2020, 173 member states of the United Nations are Member States of the International Maritime Organization (IMO), whose mission is to promote safe, secure, environmentally sound, efficient, and sustainable shipping through cooperation.[9] However, although the IMO makes international rules that govern the industry, it lacks enforcement power. Additionally, although the United Nations Convention on the Law of the Sea (UNCLOS)[10] provides that port states have the power to enforce their laws and regulations that conform with international law, it also provides that once a vessel is twenty-four miles away from any coastline, it is considered to be on international waters and the nation of its registry has exclusive jurisdiction over that vessel.[11] The flag state, the country whose flag a vessel is registered under, is responsible for inspecting the vessel and its seaworthiness, safety, pollution prevention, and crew certification.[12] Enforcing international rules that govern the cruise industry is left to these countries where cruise ships are registered and whose economies often depend on tourism dollars. Panama, Bahamas, Bermuda, Malta, the Marshall Islands, and Liberia are a non-exhaustive list of countries whose economies depend on tourism and revenue from vessel registration fees. These countries

7. Jonathan Wolfe, *Cruise Lines Were Shut Out of the Stimulus. Here's Why.*, N.Y. TIMES (Apr. 8, 2020), https://www.nytimes.com/2020/04/08/travel/cruises-coronavirus-stimulus.html.

8. *Why So Many Shipowners Find Panama's Flag Convenient*, BBC NEWS (Aug. 5, 2014) https://www.bbc.com/news/world-latin-america-28558480.

9. International Maritime Organization Res. 1110(30), Strategic Plan for the Organization (Dec. 8, 2017).

10. United Nations Convention on the Law of the Sea, Dec. 10, 1982, 1833 U.N.T.S. 397 [hereinafter UNCLOS].

11. *Id.* arts. 3, 92.

12. *Flags of Convenience*, NGO SHIPBREAKING PLATFORM, https://shipbreakingplatform.org/issues-of-interest/focs/ (last visited Sept. 2, 2021).

are lax in enforcing international maritime laws, fearing that it will make them less competitive as low-tax and lax enforcement havens for cruise companies.[13]

Frustrated with cruise lines turning profits while "running roughshod over U.S. laws and values,"[14] on April 24, 2020, Congresswomen Doris Matsui and Jackie Speier introduced legislation in the U.S. House of Representatives limiting federal assistance for cruise industry companies that fail to undertake significant tax, environmental, medical, and labor reforms.[15] The Cruise Reform and Uniform Industry Standards Evoke Integrity Act (CRUISE Integrity Act) addresses the industry's abysmal history of negligence and evasion by requiring companies to incorporate and register vessels in the United States and adhere to strict standards to be eligible for federal aid.[16] However, federal bills like the CRUISE Integrity Act rarely gain traction because of the cruise industry's intensive counter-lobbying efforts in the U.S. Congress. For example, the cruise industry spent $3.2 million on lobbying within the first nine months of 2020.[17] The CRUISE Integrity Act would prohibit cruise lines from receiving federal funds and federal assistance unless such cruise lines have at least fifty percent of vessels registered in the United States,[18] a requirement that no cruise line currently meets.

Cruise lines can avoid paying high corporate taxes in their home countries and are often responsible for environmental and safety disasters. However, this note argues that ending flags of convenience goes too far. The cruise industry is a dominant player in the global tourism sector. Cruise lines also play an important role in the economies of many developing countries. However, despite the cruise industry's phenomenal growth and contribution to the global tourism sector, the cruise industry was crippled by the COVID-19 outbreak in 2020 when the U.S. Centers for Disease Control and

13. *Flags of Convenience*, INT'L TRANSP. WORKERS' FED'N, https://www.itfglobal.org/en/sector/seafarers/flags-of-convenience (last visited Sept. 2, 2021).

14. Press Release, Jackie Speier, Congresswoman, House of Representatives, Reps Speier and Matsui Introduce Bill to Crackdown on the Cruise Lines' Tax Evasion, Environmental, and Labor Violations (Apr. 27, 2020), https://speier.house.gov/2020/4/reps-speier-and-matsui-introduce-bill-to-crackdown-on-cruise-lines-tax-evasion-environmental-and-labor-violations.

15. Cruise Reform and Uniform Industry Standards Evoke Integrity Act, H.R. 6625, 116th Cong. (2019-2020).

16. *Id.*

17. Michael Smith, *Cruise Lines Lobby Trump's White House to End No-Sail Order*, BLOOMBERG (Oct. 29, 2020) https://www.bloomberg.com/news/articles/2020-10-29/cruise-lines-lobby-trump-s-white-house-to-end-no-sail-order.

18. H.R. 6625, § 2(a)(2).

Prevention (CDC) issued a temporary "No Sail Order," a circumstance that may heighten the stakes of reforming regulations in the industry.[19]

One standard that deserves further research to resolve issues with flags of convenience is an international convention, perhaps with the IMO, to create a uniform tax policy on cruise line revenue based on the number of a nation's residents that patronize a cruise line for example. As the cruise industry continues to experience dynamic growth, a uniform tax policy will require the cruise companies to pay their fair share in corporate taxes and follow international maritime laws. Money collected from this tax can be invested in preserving the environment and ensuring the safety of the crew at sea. Prior to exploring various resolutions regarding the taxation issue, Section II first discusses the history of flags of convenience and how this traditional maritime business practice has allowed the cruise industry to drastically grow in the last century. Section III addresses the oversight and jurisdiction issues of the cruise industry and how flag states fail to enforce international maritime laws to vessels registered under their flags. Section IV discusses how the tax should be implemented by the Member States of the IMO and how money collected from this tax can allow cruise companies to continue operating profitably while in the public interest. Finally, section V will conclude by responding to the critics of flags of convenience and open registries by analyzing the importance of keeping the cruise industry afloat.

II. HISTORY OF FLAGS OF CONVENIENCE

The modern use of flags of convenience can be traced back to the 1920s, when shipowners flagged or reflagged their vessels to avoid Prohibition laws in the United States.[20] During that time, several U.S. vessels, including two cruise liners, the *M/V Reliance* and the *M/V Resolute*, were reflagged in Panama to avoid the U.S. law banning the sale of alcohol aboard ships registered in the United States.[21] This new business model soon became a trend in the 1950s, diminishing the size of the U.S. flag fleet. While once considered the world's largest privately-owned merchant marine fleet, U.S. flag vessels became almost non-existent in the ocean trades.[22] Commercial shipping soon followed the trend of flying flags of convenience.[23]

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19. Frances Robles, *Extending Cruise Ban, C.D.C. Slams Industry for Spreading Coronavirus*, N.Y. TIMES (July 16, 2020) https://www.nytimes.com/2020/07/16/travel/coronavirus-cruise-ban-extended.html.

20. *See* N.P. READY, SHIP REGISTRATION 25-26 (1991).

21. H. Edwin Anderson III, *The Nationality of Ships and Flags of Convenience: Economics, Politics, and Alternatives*, 21 TUL. MAR. L.J. 139, 156 (1996).

22. *Id.* at 156-57.

23. *Id.* at 157.

During its early conception, the term "flag of convenience" was synonymous with shipowners using open registration tactics for political reasons or to conceal criminal or questionable activities.[24] Today, however, the term has evolved to represent a modern maritime business practice to circumvent developed countries' labor and tax regulations through foreign registration.[25] The Rochdale Report of 1970, published by the United Kingdom, lists the following six criteria that identify whether a ship is registered under a "flag of convenience": [26]

(1) The country of registry allows ownership and/or control of its merchant vessels by non-citizens;[27]

(2) Access to the registry is easy; ship may usually be registered at a consulate abroad. Equally important, transfer from the registry at the owner's option is not restricted;[28]

(3) Taxes on the income from the ships are not levied locally or are very low. A registry fee and an annual fee, based on tonnage, are normally the only charges made. A guarantee or acceptable understanding regarding future freedom from taxation may also be given;[29]

(4) The country of registry is a small nation with lax regulation for all the shipping registered, but the nation's receipts from small charges on a large tonnage may produce a substantial effect on its national income and balance of payments;[30]

(5) Manning of ships by non-nationals is freely permitted; and[31]

(6) The country of registry has neither the power nor the administrative machinery effectively to impose any governmental or international regulations; nor has the country even the wish or the power to control the companies themselves.[32]

The Rochdale Report makes it clear that most open registry countries are developing states that do business with shipowners from developed countries. Moreover, the Rochdale Report also highlights the possibility of

24. *Id.*

25. William R. Gregory, Flags of Convenience: The Development of Open Registries in the Global Maritime Business and Implications for Modern Seafarers (Nov. 1, 2012) (M.A. thesis, Georgetown University) (on file with author).

26. RT. HON. THE VISCOUNT ROCHDALE, COMMITTEE OF INQUIRY INTO SHIPPING: REPORT ¶ 184 (1970) (defining Flags of Convenience and providing the primary source for defining Flags of Convenience) [hereinafter ROCHDALE REPORT].

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

shipowners from developed countries exploiting developing countries by registering their vessels under foreign flags while knowing that developing countries lack the resources and financial ability to inspect ships to enforce governmental or international regulations. In this context, the creation of open registries has led to numerous environmental and safety disasters in the maritime industry due to the lack of inspections and enforcement of existing international maritime laws.

III. OVERSIGHT AND JURISDICTION

National and international laws governing the maritime industry are extensive and variable. As a result, cruise ships are subject to robust layers of concurrent jurisdictions from port and flag states. The United Nations Convention on the Law of the Sea remains an important source of international law that outlines port state jurisdiction over ships on the high seas. UNCLOS provides that port states have the power to enforce their laws and regulations that are in conformity with international law, on ships that are flagged under foreign countries.[33] However, UNCLOS also provides that for a ship to engage in international commerce and operate in international waters, it must be registered in a country and it shall be subject to that country's exclusive jurisdiction on the high seas.[34] Thus, once a cruise ship is in the high seas, otherwise known as international waters, it is only subject to its flag state's jurisdiction.

A. Maritime Regulations Should Treat All Cruise Lines Equally, Regardless of Flag Registry

The existing robust layers of maritime laws regulating the cruise industry should prevent disasters by treating all cruise lines equally, regardless of flag registry. The most notable example of the maritime industry enhancing passenger and crew safety on board a cruise ship after a disaster is the Costa Concordia disaster[35] that took place on January 13, 2012. After the Costa Concordia struck a rock in the Tyrrhenian Sea and capsized, leaving thirty-two people dead, the Cruise Lines International Association

33. UNCLOS, *supra* note 10, art. 3 ("Every State has the right to establish the breadth of its territorial sea up to limit not exceeding 12 nautical miles, measured from baselines determined in accordance with this Convention.").

34. *Id.* art. 94.

35. In that maritime disaster, the *Costa Concordia*, a cruise ship owned by Costa Cruises whose parent company is Carnival Corporation & plc, capsized and left thirty-two people dead. Amy Tikkanen, *Costa Concordia Disaster*, BRITANNICA (Jan. 13, 2012), https://www.britannica.com/event/Costa-Concordia-disaster.

(CLIA), the European Cruise Council (ECC), and the Passenger Shipping Association (PSA) adopted a new policy that required all embarking passengers to participate in muster drills[36] before sailing. Additionally, Carnival Corporation, the parent company of Costa Cruises, now requires all the brands in its extensive portfolio to conduct muster drills before sailing.[37]

Changing the timing of muster drills is just one of the cruise industry's many adaptations to regulations and protocols that were prompted by a disaster. Cruise industry regulations and protocols should not be afterthoughts of a disaster, instead they should be preventative measures. Passenger and crew safety is one of the countless issues that exist in the cruise industry today. Critics of flags of convenience highlight other issues too, like cruise lines escaping responsibility from environmental disasters.

Some of the largest critics of flags of convenience are environmental groups that believe the cruise industry has a legacy of polluting the oceans.[38] International environmental organizations, like Friends of the Earth, argue the cruise industry's business practices have put the environment, climate, and public health of coastal communities, passengers, crew, and coastal and marine ecosystems at risk.[39] Although the cruise industry is touting its implementing of preventative measures in pollution, all Carnival Corporation companies committed criminal environmental violations between 2017 and 2019.[40]

The largest criminal environmental fines ever levied in the United States for deliberate pollution have been levied against the cruise industry.[41] For example, the U.S. Coast Guard conducted an examination of the *Caribbean Princess* on September 14, 2013, during which certain crew members

36. A muster drill is a mandatory safety exercise with the objective to familiarize all passengers and the crew with the location (i.e., the muster station) where they are to assemble in the event of an emergency. *What Is a Muster Drill (Safety Briefing) on a Royal Caribbean Cruise Ship?*, ROYAL CARIBBEAN, https://www.royalcaribbean.com/faq/questions/muster-drill-onboard-safety (last visited Apr. 11, 2022).

37. "According to SOLAS . . . Chapter III, Regulations 19.2.2 and 19.2.3, whenever new passengers embark, a passenger Safety Briefing shall be given immediately before sailing or immediately after sailing. Passengers shall be instructed in the use of the lifejackets and the action to take in an emergency." *Safety Briefing–Muster Station Drill*, CARNIVAL, https://help.carnival.com/app/answers/detail/a_id/1200/~/safety-briefing---muster-station-drill (last visited Nov. 10, 2020).

38. *See generally* LINDA NOWLAN & INES KWAN, CRUISE CONTROL – REGULATING CRUISE SHIP POLLUTION ON THE PACIFIC COAST OF CANADA 28 (2001) (citing Bluewater Network's estimate that cruise ships are responsible for 77% of maritime pollution).

39. *Cruise Ship Record Card*, FRIENDS OF THE EARTH, https://foe.org/cruise-report-card/ (last visited Sept. 3, 2021).

40. *Id.*

41. *See* Judgment in a Criminal Case, United States v. Princess Cruise Lines, Ltd., No. 16-20897 (S.D. Fla. Apr. 19, 2017), ECF No. 30.

continued to lie in accordance with orders they received from Princess Cruise Lines supervisors.[42] According to papers filed in court, the *Caribbean Princess* had been making illegal discharges of oil-contaminated bilge waste around the U.S. waters.[43]

However, just like changing the requirement of when to perform muster drills after the Costa Concordia disaster, the cruise industry is now taking an active role in environmental stewardship with the genuine commitment of the industry. Cruise companies are now voluntarily installing and retrofitting ships with state-of-the-art[44] pollution control technologies.[45] The adoption of more advanced pollution control technologies allows cruise lines to help preserve the environment. For example, Carnival Corporation's AIDA Cruises made history in 2018 with the launch of *AIDAnova* as the first cruise ship in the world that powered by lithium natural gas (LNG) both at sea and in port.[46] LNG-powered ships are not only less harmful to the environment but are also beneficial to cruise lines. Using LNG helps cruise lines emit cleaner discharge while also causing less wear and tear on the engine, thus simultaneously helping the environment and costing the cruise lines less money for maintenance.[47] Since Carnival's first major step in creating LNG-powered ships, other cruise lines like MSC Cruises, Disney Cruise Line, and Royal Caribbean have also ordered LNG-powered ships for their own fleets.[48] However, as seen with the *Caribbean Princess*, cruise line companies are not always transparent about their environmental practices, no matter the steps they take in their environmental stewardship.[49]

Installing advanced pollution controlling technologies is only one small step in the right direction; more extensive action is needed. After reaching a

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42. *See* Plea Agreement in a Criminal Case, United States v. Princess Cruise Lines, Ltd., No. 16-20897 (S.D. Fla. Dec. 1, 2016), ECF No. 2.

43. *See* Joint Factual Statement, United States v. Princess Cruise Lines, Ltd., No. 16-20897 (S.D. Fla. Dec. 1, 2016), ECF No. 2-1.

44. *Environmental Stewardship*, CRUISE LINES INT'L ASS'N, https://cruising.org/en/about-the-industry/policy-priorities/environmental-stewardship (last visited Nov. 11, 2020) ("Cruise lines work with scientists and engineers to develop cutting edge, sustainable environmental innovations and practices, investing $1 billion in new technologies and cleaner fuels.").

45. Asia N. Wright, *Beyond the Sea and Spector: Reconciling Port and Flag State Control over Cruise Ship Onboard Environmental Procedures and Policies*, 18 DUKE ENV'T L. & POL'Y F. 215, 237 (2007).

46. *Pioneering Liquefied Natural Gas*, CARNIVAL CORP. & PLC, https://carnivalsustainability.com/pioneering-lng (last visited Nov. 8, 2020).

47. *Why More LNG-Powered Cruise Ships are Being Built*, HELLENIC SHIPPING NEWS WORLDWIDE (July 24, 2019), https://www.hellenicshippingnews.com/why-more-lng-powered-cruise-ships-are-being-built/.

48. *Id.*

49. Kate Wheeling, *How Cruise Ships Are Polluting Our Oceans*, PAC. STANDARD (Dec. 7, 2016), https://psmag.com/news/how-cruise-ships-are-polluting-our-oceans.

settlement with federal prosecutors to pay a $20 million penalty for violating a pollution probation, Carnival Corporation's CEO, Arnold Donald, admitted that there are gaps in how the world's largest cruise ship operator followed environmental rules.[50] After admitting to the pollution probation violations, Carnival created a "chief ethics and compliance" officer job and enhanced its Code of Business Conduct and Ethics by developing a Business Partner Code of Conduct & Ethics that focuses on the following key interests: business integrity; protecting the environment; respecting labor and human rights; complying with health, safety and security protocols; and reporting concerns.[51] If Carnival Corporation recognizes its "responsibility to provide industry leadership and to conduct [its] business as a responsible global citizen," then it should have no problem with a uniform international tax policy for the cruise industry so that no future gaps exist in following the existing international maritime laws for environmental sustainability.[52]

International organizations like Friends of the Earth argue for more transparency. In its 2020 Cruise Ship Report Card, Friends of the Earth graded, among other things, the level of transparency of eighteen major cruise lines and 193 cruise ships. On the Report Card, transparency is based on whether each cruise line responded with specificity to Friends of the Earth's 2020 requests for information regarding a cruise line's environmental practices.[53] Thirteen of the eighteen graded cruise lines received an "F" in transparency.[54] Thus, one must question whether there is genuine industry commitment to environmental stewardship and whether more needs to be done to enforce international laws regarding maritime pollution.

B. Regulation by Port States

According to international law, every cruise ship must abide by IMO regulations regardless of where it is flagged or where it visits. UNCLOS provides that when foreign vessels sail to port states, these vessels are subject to the laws of that country's jurisdiction when they are within the port state's

50. Tom Hudson, *Carnival Corp. Boss: 'There Were Some Gaps' in Environmental Oversight*, WLRN (Aug. 26, 2019), https://www.wlrn.org/show/the-sunshine-economy/2019-08-26/carnival-corp-boss-there-were-some-gaps-in-environmental-oversight.

51. *Carnival Corporation Names Peter C. Anderson as Chief Ethics & Compliance Officer*, PR NEWSWIRE (Aug. 12, 2019, 9:24 EST), https://www.prnewswire.com/news-releases/carnival-corporation-names-peter-c-anderson-as-chief-ethics--compliance-officer-300899986.html; *Ethics & Compliance*, Leading *Responsibly*, CARNIVAL CORP. & PLC, https://www.carnivalcorp.com/leading-responsibly/ethics-and-compliance (last visited Nov. 11, 2020).

52. *Id.*

53. FRIENDS OF THE EARTH, *supra* note 39.

54. *Id.*

territorial waters.[55] Thus, port states can enforce international and domestic laws and regulations to cruise ships when their ports are visited.

For example, the U.S. Coast Guard enforces the regulations set by the IMO and all other international and federal safety, security, and environmental regulations that govern the cruise industry, on every cruise ship that sails to and from the United States, regardless of registration.[56] Another example is that under the provision of MARPOL 73/78,[57] the United States can enforce direct action under the U.S. laws against foreign-flagged ships when pollution discharge incidents occur within the U.S. jurisdiction.[58] Cruise ships or crews that fail to meet regulatory standards in any area can face possible penalties ranging from substantial fines for noncompliance to prohibiting a vessel from leaving port.[59]

Many other nations around the globe where cruise ships sail, including the United Kingdom, European Union (EU), Australia, and Canada, to name a few, have similar oversight and comprehensive regulations for the cruise industry. In the EU, enforcement of the rights and obligations under the European Commission Regulation[60] relies mainly on the flag state and port state control, and the relevant systems available in the EU.[61] Thus, strict regulations in the industry require the average cruise ship to undergo dozens

55. UNCLOS, *supra* note 10, art. 220(1).

56. Jim Hull & Tim Sullivan, *Lax Regulations of Cruise Lines is a Myth*, TRAVEL WKLY. (Oct. 6, 2013), https://www.travelweekly.com/Articles/Lax-regulations-of-cruise-lines-is-a-myth.

57. International Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships, 1973, *opened for signature* June 1, 1978, 1340 U.N.T.S. 61. MARPOL 73/78 is short for International Convention for the Prevention of Pollution from Ships and is 73/78 short for the years 1973 and 1978. MARPOL 73/78 is one of the most important international maritime environmental conventions and was developed by the IMO with an objective to minimize pollution of the oceans and seas, including dumping and oil and air pollution. John R. Lethbridge, *MARPOL 73/78 (International Convention for the Prevention of Pollution from Ships)*, WORLD BANK (Apr. 1991), https://documents1.worldbank.org/curated/en/860841468330898141/pdf/816070BRI0Infr00Box379840B00PUBLIC0.pdf.

58. Hull & Sullivan, *supra* note 56.

59. *Id.*

60. Commission Regulation 392/2009, 2009 O.J. (L 131) 24 (EC). The Regulation on the liability of carriers of passengers by sea in the event of accidents lays down harmonized rules on liability and insurance for shipping companies and aims at an adequate level of compensation should an accident occur. This applies irrespective of the area of operation of the vessel, *see id.* ¶ 4, thus to all carriers engaging in international carriage, including between EU Member States, and certain types of domestic carriage, *id.* art. 2, (over five miles from the coastline). *See Safety of Passenger Ships*, EUR. COMM'N: MOBILITY & TRANSP., https://ec.europa.eu/transport/modes/maritime/safety-and-environment/safety-passenger-ships_en (last visited Sept. 11, 2021).

61. EUR. COMM'N: MOBILITY & TRANSP., *supra* note 60.

of announced and unannounced safety inspections every year.[62] Cruise ship inspections involve the implementation of thousands of specific requirements set by the IMO and other authorities.[63] However, although developed countries have the resources and money to ensure that cruise lines follow the industry's top priorities when cruise ships sail to their ports, cruise lines continue to conduct business with developing countries where IMO requirements and other regulations are not heavily enforced.[64]

C. Regulation by Classification Societies

Flag states license classification societies to classify and certify cruise ships based on their structure, design, and safety standards.[65] Classification societies are independent, non-governmental organizations in the maritime industry that conduct inspections on behalf of flag states, cruise lines, insurers, and other members of the community. These inspections help ensure that cruise ships comply with applicable standards and are managed responsibly.

Currently, there are more than fifty classification societies in the world and the thirteen largest marine classification societies are also members of the International Association of Classicization Societies (IACS). After international statutory regulations are developed by member states of the IMO, IACS provides guidance and technical support by developing unified interpretations. Each IACS member society applies these interpretations. International maritime regulations that are developed by the IMO and the classification rule requirements are then codified in the International Convention for the Safety of Life at Sea (SOLAS), an international maritime treaty which sets minimum safety standards in construction, equipment, and operation of merchant ships.[66] The IMO considers SOLAS as "the most

62. *Vessel Sanitation Program*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/nceh/vsp/desc/about_inspections.htm (last visited Sept. 11, 2021).

63. *Cruise Industry Regulation*, CRUISE LINES INT'L ASS'N, https://cruising.org/en/about-the-industry/policy-priorities/cruise-industry-regulation (last visited Sept. 11, 2021).

64. Sarah Mervosh, *Carnival Cruises to Pay $20 Million in Pollution and Cover-Up Case*, N.Y. TIMES (June 4, 2019) https://www.nytimes.com/2019/06/04/business/carnival-cruise-pollution.html ("[V]iolations included discharging plastic into waters in the Bahamas, falsifying records and interfering with court supervision of ships by sending in teams ahead of inspections to pre-empt environmental violations, according to the corporation's agreement with the Justice Department.").

65. Int'l Ass'n of Classification Soc'ys, *Classification Societies – Their Key* Role, https://www.iacs.org.uk/media/3784/iacs-class-key-role.pdf (last visited Sept. 11, 2021) [hereinafter Classification Societies].

66. International Convention for the Safety of Life at Sea, 1974, Nov. 1, 1974, 1184 U.N.T.S. 2 [hereinafter SOLAS].

important of all international treaties concerning the safety of merchant ships."[67]

However, although IACS and its individual members help promote maritime safety and clean seas by verifying compliance with published standards,[68] classification societies do not remedy all the issues that arise from flags of convenience because classification societies focus on establishing and maintaining technical standards for the construction and operation of ships. But the classification certificates that are issued by classification societies are a good initial step into ensuring environmental stewardship and passenger and crew safety. Despite that important role classification societies play in the maritime industry; flag states remain responsible for inspecting cruise ships registered under their names and are for enforcing international laws.

D. Regulation by Flag States

Flag states have exclusive jurisdiction over vessels registered under their flags on the high seas to the extent provided by international law.[69] Traditionally, the flag state is responsible for ensuring compliance with national and international laws and regulations concerning marine pollution and the construction, maintenance, and crewing of the vessel. UNCLOS provides that flag states have a duty to maintain regular checks upon the seaworthiness of ships, to ensure that crews are properly qualified, to hold inquiries into shipping casualties, to effectively exercise jurisdiction and control over their ships, to maintain a register of ships, to take measures to ensure safety at sea with regard to the construction, equipment and seaworthiness of ships, the manning of ships, labor conditions and the use of signals, the maintenance of communication, and the prevention of collision.[70] It is apparent that the enumerated flag state responsibilities found in UNCLOS are non-exhaustive.[71]

If a flag state has exclusive jurisdiction over cruise ships in the high seas, then it is evident that it must also exercise its jurisdiction to enforce the

67. *International Convention for the Safety of Life at Sea (SOLAS), 1974,* INT'L MAR. ORG., https://www.imo.org/en/About/Conventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-(SOLAS),-1974.aspx (last visited Sept. 11, 2021).

68. Classification Societies, *supra* note 65.

69. UNCLOS, *supra* note 10, art. 92(1).

70. *Id*. art. 94.

71. *Id*.

binding international rules to which it is subject.[72] However, critics of flags of convenience argue that flag states insufficiently police and enforce regulations, like pollution, since statistics show foreign-flag states act upon less than two percent of pollution-dumping cases referred to them by the U.S. Department of State.[73] This major flaw in the cruise industry must change immediately.

The cruise industry's use of flags of convenience has become a business practice that largely benefits cruise lines. In return, cruise lines play an important role in a flag state's economy because the economy of most flag states is almost entirely dependent on tourism and financial services to generate foreign exchange earnings.[74] Developing states are attractive business partners for cruise lines because the labor cost for maintaining a vessel in the registry of a developed state is too high for shipowners.[75] High crewing and operating costs cause vessel owners to utilize a flag of convenience to receive larger profits and remain competitive.

Flags of convenience not only diminished maritime employment in developed countries but also created a dependency issue by exploiting developing states. As a result, this dependency causes the economic development of developing countries to be influenced heavily by outside investors, like cruise lines. This quid pro quo business model makes it difficult for developing states to enforce international maritime regulations on cruise ships registered under their flags. Many flag states cannot afford the resources needed to inspect cruise ships, and, as a result, the cruise industry is often involved in many of the environmental and safety disasters in the maritime industry.[76]

IV. ADDRESSING THE TAX LOOPHOLE WITH A NOVEL APPROACH

Members of Congress of the United States must recognize the need to adapt the current tax laws to the growing cruise industry. In introducing the CRUISE Integrity Act, Congresswoman Speier stated, "For too long, cruise

72. Tamo Zwinge, *Duties of Flag States to Implement and Enforce International Standards and Regulations – And Measures to Counter Their Failure to Do So*, 10 J. INT'L BUS. & L. 297, 300 (2011).

73. Eric V. Hull, *Soiling the Sea: The Solution to Pollution is Still Dilution – A Re-Evaluation of the Efficacy of 40 C.F.R. § 122.3 and Annex IV of MARPOL*, 3 BARRY L. REV. 61, 68 (2002).

74. *About the Tourism Industry*, TOURISM TODAY, https://www.tourismtoday.com/training-education/tourism-careers/about-industry (last visited Nov. 7, 2020).

75. David Matlin, *Re-evaluating the Status of Flags of Convenience Under International Law*, 23 VAND. J. TRANSNAT'L L. 1017, 1050-51 (1991).

76. Bill Shaw et al., *The Global Environment: A Proposal to Eliminate Marine Oil Pollution*, 27 NAT. RESOURCES J. 157, 160-63 (1987).

lines have turned a profit while running roughshod over U.S. laws and values . . . all while incorporating abroad and using foreign-flagged ships to dodge U.S. taxes."[77] As written, the bill seeks to establish requirements that are unnecessarily detrimental to the cruise industry, such as the requirement to "have at least 50% of vessels registered in the United States." Requiring cruise lines to register their fleets in the United States is incredibly burdensome because the United States has the most stringent requirements of any maritime nation.[78] Rather than requiring cruise lines to register their fleets in the United States, where most major cruise lines are headquartered, member states of the IMO should work together to create a uniform tax policy for the cruise industry. This tax policy can be based on the number of a nation's residents that patronize a cruise line. The money collected from this tax can be invested in preserving the environment and ensuring the safety of the crew at sea. Thus, this tax will help cruise lines to continue operating profitably and in the public interest at the same time.

A. Flags of Convenience as a Quid Pro Quo Business Strategy

The use of open registries is vital for the cruise industry, but more importantly, it is critical for the economies of many developing states. The use of flags of convenience has led to a socio-economic dependency of developing countries upon the developed world.[79] Strict registration requirements from developed countries, like the requirements outlined in the CRUISE Integrity Act, are a reason why cruise line companies seek to register their ships in foreign countries. Another example include trade unions in the United States, like the International Transport Workers' Federation (ITF), who are responsible for the strict requirements regarding crewing a vessel.[80] Continuous lobbying from trade unions to push mandates that increase maritime employment has led to the opposite result of decreasing maritime employment in developed states.[81] The high labor costs of maintaining a cruise ship registered in a developed country, like the United States, is an unattractive business model to cruise line companies.

Cruise lines seek more attractive business models by choosing to register their ships in open registry countries. As a result, open registry countries obtain an income from maintaining the registries while the cruise line

77. Press Release, Jackie Speier, *supra* note 14.

78. Anderson, *supra* note 21, at 151.

79. *Id.* at 158.

80. Herbert R. Northrup & Richard L. Rowan, *The International Transport Workers' Federation and Flags of Convenience Shipping Campaign: 1983-1995*, 23 TRANSP. L. J. 369, 378 (1996).

81. *See id.* at 372-73.

companies increase profits. As highlighted in the Rochdale Report, cruise line companies from developed countries take advantage of developing countries by registering their vessels under foreign flags because they know that developing countries lack the resource and financial ability to inspect ships to enforce governmental or international regulations.[82]

The quid pro quo business strategy between cruise line companies and developing states seems like a good business model on its face for both entrepreneurs and open registry countries. However, the overall effect of open registries on the economies of developing states is negative.[83] Flags of convenience make it difficult for developing states to compete effectively, and cruise lines take advantage of the cheaper labor available in those countries.[84] Although the creation of open registries and their administration comes from developed countries, the movement to restrict the use of flags of convenience also comes directly from developed countries. Instead of tightening open registries, developed countries should work with the IMO to create a uniform international tax policy for the cruise industry.

B. "Patron Created Value" in the Cruise Industry

The cruise industry depends on passenger satisfaction because a good customer experience will create value. Creating customer value for cruise line companies will increase brand loyalty, market share, price, and ultimately lead to higher profits. For cruise lines, more passengers equal more revenue. According to CLIA's *2018 U.S. Economic Impact Analysis*, 12.68 million passengers embarked from U.S. ports in 2018, an 8.8% increase from 2016.[85] Modern-day cruise ships are the largest in the industry's entire history. The largest cruise ship as of 2020, Royal Caribbean's Symphony of the Seas, can hold up to 6,680 passengers and 2,200 crew members on any given sailing.[86] The Symphony of the Seas expects to make an average profit of $227 a customer per day, which means it can easily bring in a profit of

82. ROCHDALE REPORT, *supra* note 26, ¶ 311

83. I.M. Sinan, *UNCTAD and Flags of Convenience*, 18 J. WORLD TRADE L. 95, 107 (1984).

84. *Id.*

85. CRUISE LINES INT'L ASS'N, CONTRIBUTION OF THE INTERNATIONAL CRUISE INDUSTRY TO THE U.S ECONOMY IN 2018, 2 (2019) [hereinafter CLIA].

86. Mark Matousek, *The Biggest Cruise Ship in the World Has Robot Bartenders, a Water Slide with 92-foot Drop, and a Nine-Story Zip-line – Here's What It Looks Like*, BUS. INSIDER (Feb. 24, 2020, 8:19 AM), https://www.businessinsider.com/royal-caribbean-debuts-worlds-largest-cruise-ship-photos-2018-4.

$1.36 million a week.[87] However, because the cruise industry is only an American industry[88] on its surface, the majority of cruise line companies pay a 0.8% tax on their revenue, far below the U.S. corporate tax rate of 21%.[89]

The first step towards implementing a uniform tax policy for cruise line revenue, that is based on patron created value, requires an understanding of how many passengers from developed states are creating customer value for cruise line companies. This value can be determined through annual reports by cruise line parent corporations, which consider the revenue generated in various parts of the world from each of their cruise lines. According to CLIA's *2018 Global Economic Impact Study*, North America accounted for half of all cruise passengers with 14.3 million passengers, Europe was next with 25% and 7.2 million passengers, and the rest of the world accounted for the remaining 25% with 7.0 million passengers.[90] The United States alone accounted for 45.9% of cruise passengers in the world, followed by China, Germany, United Kingdom, Australia, Canada, Italy, Spain, France, and Brazil,[91] most of whom are developed countries. Finally, it is important to note that 89% of North American passengers sailed to the Caribbean in 2018. According to the United Nations' *World Economic Situation and Prospects 2020*, the Caribbean falls in a geographical region of developing economies.[92]

If passengers create value, it means that profits are being made simply from developed countries where most passengers sail from. Thus, cruise line companies should be taxed because they take in money from a developed country while paying virtually no corporate taxes in developing countries. The money collected from developed countries by taxing cruise line companies can be used to fund the resources needed to inspect cruise ships

87. Tanner Callais, *How Much the Biggest Cruise Ships (and Cruise Lines) Make Each Day*, CRUZELY (Mar. 23, 2019), https://www.cruzely.com/how-much-the-biggest-cruise-ships-and-cruise-lines-make-each-day/.

88. The cruise industry is an "American industry" on its surface because, although the three largest cruise companies are headquartered in Miami, Florida, all but one major cruise ship are registered outside the United States. Norwegian Cruise Line's Pride of America is the only major cruise ship flagged under the U.S. flag. The reason is because the Pride of America remains in the Hawaiian Islands year-round. The Jones Act prohibits foreign built and owned ships from transporting goods domestically in the United States. *See* Jana Kasperkevic, *Why There Is Only One Cruise Ship in the World with an All-American Crew*, MARKETPLACE (Sept. 29, 2017), https://www.marketplace.org/2017/09/29/working-cruise-ship-america-jobs-hiring/.

89. Zachary Crockett, *The Economics of Cruise Ships*, THE HUSTLE (Mar. 15, 2020), https://thehustle.co/the-economics-of-cruise-ships/.

90. CLIA, *supra* note 85.

91. *Id.* at 12.

92. *See* U.N. DEP'T OF ECON. & SOC. AFFAIRS ET AL., WORLD ECONOMIC SITUATIONS AND PROSPECTS 2020, at 4, U.N. Sales No. E.20.II.C.1 (2020).

and enforce existing international maritime regulations. In return, cruise lines will be able to operate profitably and in the public interest.

C. Total Uniformity in Setting Cruise Industry Standards

Implementing major changes in the cruise industry's operations and regulations is a long-term goal that will face powerful opposition from cruise line lobbyists. However, change is not impossible. New cruise ship regulations aiming to address safety issues are precedent in showing that adopting new regulations in the cruise industry is attainable. For example, CLIA demonstrated its ability to work effectively with IMO to adopt new industry-wide safety regulations following the Costa Concordia disaster.

The best regulation model for the cruise industry would be complete international uniformity in setting standards. Achieving that goal would render the flag registry issue moot. The IMO and its member states should seek to achieve reasonable international standards that better protect the safety of passengers and crew, the environment, and achieve equitable taxation. In adopting these standards, it is critical that the industry not be precluded from operating at scale. Raising taxes on cruise lines may raise cruise prices since when the costs go up, the cruise lines will inevitably raise their charges. However, cruise lines may tolerate higher costs more readily if costs are imposed across the board. This change requires international efforts to remedy the issue of flags of convenience because equal treatment will be critical to prevent some cruise lines from facing a competitive disadvantage in the industry.

Preventing cruise line companies from registering their vessels in countries with open registries and putting an end to the century-old maritime business practice of flying flags of convenience is not the right move. The economic dependency of developing states upon developed countries is a negative result of flags of convenience. Many of the problems associated with flags of convenience could be greatly reduced through a uniform tax policy and new industry standards. Creating a uniform tax policy for the cruise industry on an international basis will be done through the IMO. The IMO is the only international body that has the resources and mechanisms for ensuring some degree of uniformity in compliance with international regulations.[93] Currently, the IMO has 174 Member States, which includes 173 of the United Nations Members States plus the Cook Islands.[94]

93. Anderson, *supra* note 21, at 169.

94. *Member States, IGOs and NGOs*, INT'L MAR. ORG., https://www.imo.org/en/About/Membership (last visited Apr. 11, 2022).

V. CONCLUSION

Addressing the need to develop further research in a uniform tax policy for the cruise industry is a preliminary step in combatting the issues that come from flags of convenience and open registries. By acknowledging that passengers from developed states create value, a uniform tax policy will capture profits earned by cruise line companies. This uniform tax policy deserves further research. This solution considers developing states' need to build their economies and become less dependent upon developed countries where cruise companies are headquartered. A uniform tax on the cruise industry might serve as a testing ground and open room for ideas to eventually find a way to stop entrepreneurs from developed countries from exploiting developing states for corporate profit.

Lawmakers in the United States and critics of open registries around the world must understand that flags of convenience are vital for the cruise industry and critical for the economies of many developing states. Cruise line companies have made it clear that they have no problem with corporate tax loopholes in the current taxation system, and abolishing flags of convenience will not end the search for lower-cost options for these firms. International organizations have also made it clear that cruise lines choose to constantly violate international maritime laws regarding pollution and passenger and crew safety. Thus, a more realistic reform should address more equitable treatment in taxation and regulation, because a justly taxed cruise industry will not come about unless beneficiary companies allow cruise line companies to operate profitably and in the public interest.

REQUIRING FINANCIAL RESPONSIBILITY FROM FOREIGN HOSPITALS SEEKING MEDICAL TOURISTS FROM THE UNITED STATES

Melanie Khosravi[*]

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I. INTRODUCTION

Medical tourism is traveling outside one's country of residence to seek healthcare with organizations that support or offer incentives for such travel.[1] The total annual global value of the medical tourism industry is

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1. Christie M. Reed, *Medical Tourism*, 92 MED. CLIN. N. AM. 1433, 1433 (2008).

approximately $439 billion.[2] Every year, 1.4 million Americans travel offshore to receive various treatments, such as in vitro fertilization, dentistry, cosmetic, bariatric, orthopedic, and cardiac surgeries, as well as liver and kidney transplantations.[3] Medical tourism is appealing to American patients, especially to uninsured individuals, self-insured businesses, and third-party payers, all of whom seek to save thousands of dollars for various medical procedures.[4] Often, the total cost for hospitalization, physician fees, airfare, and accommodation for the patient and the spouse are far less than the cost of the procedure in the United States.[5]

Medical tourism is limited to those who can pay out-of-pocket expenses since insurance companies do not cover its cost.[6] If the U.S. healthcare system would lower prices or offer universal healthcare at affordable prices, the need for American patients to seek treatment abroad would lessen, although it would not be completely eliminated. As deductibles and out-of-pocket costs for healthcare in the United States rise,[7] a growing number of Americans are finding it more cost efficient to obtain their healthcare treatments abroad.[8]

As this article will show, cost seems to be the primary factor in choosing to travel.[9] For example, U.S. Senator Rand Paul, M.D., an ophthalmologist of eighteen years,[10] joined the rising number of American medical tourists by traveling to a hospital in Ontario, Canada, for a hernia repair surgery.[11] The surgery cost Senator Paul an estimated $5,000 to $8,000.[12] The same surgery in the United States would have cost him $12,365 to $19,179.[13]

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2. James E. Dalen & Joseph S. Alpert, *Medical Tourists: Incoming and Outgoing*, 132 AM. J. MED. 9, 9 (2019).

3. *Id.*

4. Mike Mitka, *Surgical Tourism: Some US Patients Travel Abroad for Less Costly Surgery*, 302 [J]AMA 1519, 1519 (2009).

5. Dalen & Alpert, *supra* note 2, at 9.

6. Aaron Carroll, *Taking a Look at Medical Tourism*, JAMA NETWORK (Mar. 27, 2019), https://jamanetwork.com/channels/health-forum/fullarticle/2759660?resultClick=1.

7. *Id.*

8. Beth Braverman, *1.4 Million Americans Will Go Abroad for Medical Care This Year. Should You?* FISCAL TIMES, (Aug. 17, 2016), https://www.thefiscaltimes.com/2016/08/17/14-Million-Americans-Will-Go-Abroad-Medical-Care-Year-Should-You.

9. *See infra* notes 21-23. There may be other considerations like availability of procedures, quality, or privacy. *See infra* notes 24-33.

10. *About Rand*, SENATOR RAND PAUL, https://www.paul.senate.gov/about-rand (last visited Feb. 19, 2021).

11. Shawn Radcliffe, *Sen. Rand Paul Joins Rising Number of Americans Going Abroad for Healthcare*, HEALTHLINE (Jan. 24, 2019), https://www.healthline.com/health-news/why-is-rand-paul-going-to-canada-for-surgery.

12. *Id*.

13. *Id*.

In recent years, several U.S. medical centers have sought to capitalize on this growing trend by partnering with foreign medical centers.[14] Simultaneously, displaying the names of their U.S. affiliates helps foreign healthcare facilities to not only attract local and regional patients, but to also draw in American medical tourists interested in the lower prices they offer.[15] Such affiliations with domestic medical giants may offer American patients a false sense of security from the familiar names they recognize. These patients may assume that the U.S. medical standards of care and medical negligence laws apply to these institutions. Instead, victims of medical malpractice are often left without any legal recourse, because these foreign institutions cannot be held accountable in the U.S. courts.[16] Besides, even if American patients could receive some relief in foreign courts, the obstacle-ridden process is often expensive, and the financial settlements are often not enough to fully compensate patients for the harm.[17] Therefore, to protect American patients' interests, the U.S. legislature should require that any American health care institution that accepts American patients at its offshore affiliate hospital take financial responsibility when the treatment falls below the U.S. medical standard of care, which is defined as the level and type of care that a reasonably competent and skilled health care professional, with a similar background and in the same medical community, would have provided under the circumstances that led to the alleged malpractice.[18]

II. THE APPEAL OF MEDICAL TOURISM TO AMERICAN PATIENTS

Medical tourism is appealing to American patients because it is affordable and offers treatments that are not readily available in the United States.[19] According to the United States Census Bureau, despite the enactment of the Affordable Care Act (ACA) in 2010, 8.5% or 27.5 million Americans were uninsured in 2018.[20] By the end of 2019, the percentage of

14. Jennifer B. Boyd et al., *Emerging Trends in the Outsourcing of Medical and Surgical Care*, 146 ARCH. SURG. 107, 108 (2011).

15. *The Globalization of Health Care: Can Medical Tourism Reduce Health Care Costs? Hearing Before the S. Special Comm. on Aging*, 109th Cong. (2006) (statement of Arnold Milstein, Chief Physician, Mercer Health & Benefits, Medical Director, Pacific Business Group on Health) Dr. Milstein testified that several large American employers have asked him to "assess the feasibility of using technologically advanced hospitals in lower wage countries to provide non-urgent major surgeries for their self-insured health benefits plans serving U.S. residents."

16. Boyd et al., *supra* note 14, at 109.

17. *See infra* notes 83-95 and accompanying text.

18. NANCY J. NILES, BASICS OF THE U.S. HEALTH CARE SYSTEM (2019).

19. Carroll, *supra* note 6.

20. U.S. CENSUS BUREAU, P60-267, HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2018 (2019).

uninsured Americans increased to 11% or 35.7 million individuals.[21] The high cost of medicine in the United States is the culprit behind the medical tourism industry that has forced Americans to seek cheaper life-saving alternatives. This is especially true for underinsured persons. For example, a heart bypass operation that costs $100,000 in the United States is only $12,000 in Thailand's Bumrungrad Hospital. The hospital employs more than 200 U.S.-trained, board-certified surgeons, which suggests that the quality of care should be similar to that in the United States.[22] A cardiac patient could face a $200,000 bill for a heart valve replacement surgery in the United States but would pay only $6,700 in India.[23] Likewise, an orthopedic patient could be charged $90,000 for a spinal fusion surgery in the United States, but would pay only $7,000 in Thailand.[24] Some destinations have even become internationally known as specialized medical hubs. For example, Thailand is famous for sex-change operations, Singapore is a top-rated cancer treatment center, and many facilities in Brazil are known for cosmetic surgery.[25]

Relatedly, since Canadian drug prices are 40% lower than their American counterparts, Canada offers Americans a better choice to purchase prescription medication, including post-operative pain medication.[26] Canada is not the only neighboring country where Americans travel for health care. Almost a million Californians alone travel to Mexico annually to receive medical care and purchase prescription drugs.[27] Approximately one million Americans and Canadians travel to Los Algodones, Mexico for dental care and oral and maxillofacial surgery every year.[28] These patients pay fees as

21. NAT'L. CTR. FOR HEALTH STAT'S, HEALTH INSURANCE COVERAGE: EARLY RELEASE OF ESTIMATES FROM THE NATIONAL HEALTH INTERVIEW SURVEY, JANUARY – JUNE 2019 (2020).

22. Boyd et al., *supra* note 14, at 108.

23. *Id.* at 111.

24. Mitka, *supra* note 4, at 1519.

25. Joseph L. Muzaurieta, *Surgeries and Safaris: Creating Effective Legislation Through a Comparative Look at the Policy Implications, Benefits, and Risks of Medical Tourism for the American Patient*, 29 TEMP. INT'L & COMP. L.J. 115, 122-23 (2015). South African clinics provide a variety of affordable treatments, such as renal transplantation surgery, reconstructive, orthopedic, general, and vascular surgeries, as well as Botox therapy and ophthalmic and cataract surgeries. Kristen Boyle, *A Permanent Vacation: Evaluating Medical Tourism's Place in The United States Healthcare System*, 20 HEALTH LAW 42, 43 (2008).

26. Donald W. Light & Joel Lexchin, *Foreign Free Riders and the High Price of US Medicines*, 331 BMJ 958, 958 (2005).

27. AUSTIN CHAMBERS, USITC, TRENDS IN U.S. HEALTH TRAVEL SERVICES TRADE (2015), https://www.usitc.gov/publications/332/executive_briefings/chambers_health-related_travel_final.pdf.

28. Jeffrey Young, *Welcome to Molar City, Mexico, The Dental Mecca America's Health Care Costs Built*, HUFFPOST (Nov. 14, 2019, 5:45 AM), https://www.huffpost.com/entry/welcome-to-molar-city-mexico-the-dental-mecca-americas-health-care-costs-built_n_5dc5772ae4b0fcfb7f651721.

low as 60% of the prices in the United States.[29] This tiny border village, also known as Molar City, as it has affectionately been dubbed by dental tourists, has attracted many patients from across the border for the past two decades.[30] Molar City offers unparalleled prices. For example, a dental bridge containing four implants to replace lost teeth costs an average of $21,500 in the United States compared to $9,300 in Mexico.[31] This notable difference explains why medical dental travel is an attractive option for the seventy-four million Americans who have no dental insurance,[32] as well as two-thirds of Medicare beneficiaries, or nearly thirty-seven million people, who lacked dental coverage in 2019.[33] Even individuals with dental insurance may have difficulty affording such procedures because dental plans typically offer generous coverage for checkups and cleanings, yet require patients to pay out-of-pocket for other treatments, such as root canals and crowns.[34]

Some patients travel for treatments that are not offered in the United States, are banned(such as stem cell therapy), or are still pending Food and Drug Administration (FDA) approval as they utilize new and not-yet-well-studied medical devices.[35] High hopes for tissue repair and regeneration for otherwise incurable diseases cause thousands of desperate patients to flock to open market clinics that charge tens of thousands of dollars for unproven therapies.[36] Not wanting his promising career to end by a neck injury, Peyton Manning, arguably one of the best quarterbacks in the history of the National Football League, traveled to Europe to undergo a stem cell procedure, which was banned in the United States.[37] Likewise, other famous athletes such as Tiger Woods, Rafael Nadal, and the late Kobe Bryant have received stem cell therapy abroad as well.[38]

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29. *Id.*

30. *Id*.

31. *Id*.

32. *Id.*

33. Chris Lee, *Most Medicare Beneficiaries Lack Dental Coverage, and Many Go Without Needed Care*, KAISER FAM. FOUND. (Mar.13, 2019), https://www.kff.org/medicare/press-release/most-medicare-beneficiaries-lack-dental-coverage-and-many-go-without-needed-care/.

34. Young, *supra* note 28.

35. *Medical Tourism's Most Distant Outposts*, FORBES (May 21, 2009, 5:00 PM), https://www.forbes.com/2009/05/21/stem-cell-parkinson-entrepreneurs-technology-tourism.html?sh=154afd11246f.

36. George Q. Daley, *The Promise and Perils of Stem Cell Therapeutics*, 10 CELL STEM CELL 740, 740 (June 12, 2012).

37. Amanda L. Chan, *Peyton Manning Underwent Stem Cell Treatment for Neck Injury*, HUFFPOST (Sept. 19, 2011, 11:28 PM), https://www.huffpost.com/entry/peyton-manning-stem-cell-treatment_n_970763.

38. Liz Szabo, *Superstar Athletes Popularize Unproven Stem Cell Procedures*, KAISER HEALTH NEWS (Aug. 5, 2019), https://khn.org/news/superstar-athletes-popularize-unproven-stem-cell-procedures/.

Similarly, Rick Perry, former United States Secretary of Energy and Texas Governor, underwent stem cell treatment for a recurring back injury.[39] The laboratory that cultured Perry's stem cells was the Texas branch of the South Korean RNL BIO, stem cell biotechnology company.[40] Another state-of-the-art stem cell clinic well-frequented by Americans was the Xcell-Center for Regenerative Medicine with branches in Düsseldorf and Cologne in Germany.[41] Xcell-Center was the largest stem cell clinic in Europe that offered stem cell therapies for various diseases, such as Parkinson's disease, cerebral palsy, multiple sclerosis, autism, and spinal cord injuries.[42] After a patient died in 2010, the German government shut the centers down.[43] However, the Xcell-Center has reopened its doors in Lebanon and India under the name Cells4health, offering the same type of therapies.[44]

III. GENERAL CONCERNS WITH MEDICAL TOURISM

The development of medical tourism has raised many ethical and legal issues pertaining to malpractice, consumer protection, organ trafficking, and alternative medicine.[45] Patients traveling abroad for medical care represent a vulnerable population that can succumb to unusual or resistant infections.[46] The risk of contracting hospital-associated and procedure-related infectious diseases after receiving medical procedures in foreign countries is elevated. For example, an investigation by the Centers for Disease Control and Prevention (CDC) and a subsequent inspection by the Secretariat of Health in Mexico linked thirty-one infected American patients suffering from a debilitating antibiotic-resistant infection after undergoing an invasive medical procedure, to a single Mexican hospital that had breached safety

39. Emily Ramshaw, *Perry's Adult Stem Cell Treatment Was Doctor's First Attempt*, TEX. TRIBUNE (Aug. 4, 2011), https://www.texastribune.org/2011/08/04/perrys-stem-cell-treatment-was-doctors-first-attem/.

40. *Id*.

41. *Medical Tourism's Most Distant Outposts*, *supra* note 35.

42. Jared Yee, *Europe's Biggest Stem Cell Clinic Shut Down After Baby's Death*, BIOEDGE (May 14, 2011), https://www.bioedge.org/bioethics/europes_biggest_stem_cell_clinic_shut_down_after_babys_death/9524.

43. Tamara Abraham, *Europe's Largest Stem Cell Clinic Shut Down After Death of Baby*, TELEGRAPH (May 8, 2011), https://www.telegraph.co.uk/news/worldnews/europe/germany/8500233/Europes-largest-stem-cell-clinic-shut-down-after-death-of-baby.html.

44. Timothé Cynober, *Stem Cell Tourism Makes Big Promises But May End Your Life…*, LABIOTECH (Aug. 9, 2016), https://www.labiotech.eu/in-depth/european-stem-cell-tourism/.

45. Puteri Nemie J. Kassim, *Medicine Beyond Borders: The Legal and Ethical Challenges*, 28 MED. & L. 439, 440 (2009).

46. Ambar Mehta et al., *Global Trends in Center Accreditation by the Joint Commission International: Growing Patient Implications for International Medical and Surgical Care*, 24 J. TRAVEL MED. 1, 2 (2017).

protocols.[47] Likewise, in 2014, the CDC identified nineteen cases of women with antibiotic-resistant infections who received cosmetic surgeries in the Dominican Republic and contracted nontuberculous mycobacterial surgical-site infections as a result.[48] Thus, foreign hospitals seeking medical tourists from the United States should be held financially responsible when American patients are harmed while receiving care at foreign hospitals.

Many countries with prominent medical tourism sectors, such as India, China, and Thailand, currently have endemic levels of commonly known infections, such as malaria, dengue, and enteric fever.[49] Some have a high prevalence of tuberculosis, HIV, as well as hepatitis B and C.[50] Generally, international standard-based certified (i.e., JCI-certified) blood and blood products used during surgeries and transfusions are not screened for dengue and West Nile viruses.[51] Additionally, receiving health care abroad carries an increased probability of acquiring infections with antibiotic-resistant organisms not commonly found in the United States. Medical tourists returning home with exotic or highly antibiotic-resistant organisms pose significant public health risks.[52] They place others at risk of exposure to these infections, burden the American medical system,[53] and create potential biosecurity issues.[54]

Although every procedure carries inherent risks, foreign medical standards of care may not reflect the same safety precautions that the U.S. standards of care requires.[55] The CDC has enumerated some risks specific to medical tourists.[56] It warned that these patients are likely to face various kinds of risks including communication barriers, antibiotic-resistant

47. *See* Bridget Kuehn, *Medical Tourism-Linked Infections*, 322 [J]AMA 108, 108 (2019). *See also* Ian Kracalik et al., *Verona Integron-Encoded Metallo-β-Lactamase–Producing Carbapenem-Resistant Pseudomonas Aeruginosa Infections in U.S. Residents Associated with Invasive Medical Procedures in Mexico, 2015–2018*, 68 CDC MORBIDITY & MORTALITY WKLY. REP. 463, 463 (2019).

48. *See When Medical Tourism Is No Vacation*, 311 [J]AMA 1848, 1848 (2014).

49. Lin H. Chen & Mary E. Wilson, *The Globalization of Healthcare: Implications of Medical Tourism for the Infectious Disease Clinician*, 57 CLINICAL INFECTIOUS DISEASES 1752, 1753 (2013).

50. *Id*.

51. *Id*.

52. *See* Valorie Crooks et al., *Ethical and Legal Implications of the Risks of Medical Tourism for Patients: A Qualitative Study of Canadian Health and Safety Representatives' Perspectives*, 3 BMJ OPEN 1, 6 (2013), https://bmjopen.bmj.com/content/bmjopen/3/2/e002302.full.pdf.

53. *See generally* Kuehn, *supra* note 47.

54. *See generally*, C. Michael Hall & Michael James, *Medical Tourism: Emerging Biosecurity and Nosocomial Issues*, 66 TOURISM REV. 118-26 (2011).

55. Kuehn, *supra* note 47.

56. *See Medical Tourism*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://wwwnc.cdc.gov/travel/page/medical-tourism (last visited Feb. 12, 2022).

organisms, low-quality and counterfeit medications, and deadly pulmonary embolisms due to their immediate postoperative flight home.[57] Lengthy air flights where the patient is in a fixed position for hours at a time can cause deep vein thrombosis in the lower extremities, which can travel to the lungs, and develop pulmonary embolisms, which could be deadly.[58] Additionally, unlike American facilities, foreign medical centers are not required to disclose quality reports, and most do not release outcomes of medical and surgical procedures to a central database.[59] Thus, patients cannot evaluate a center's specific short-term or long-term outcomes for their upcoming procedure.

Due to lack of international quality of care standards, patients suffer debilitating injuries during various procedures performed in distant medical facilities. For example, similar to their American counterparts, German patients who avoided long kidney transplant lists by visiting commercial transplantation centers in India and Pakistan, experienced higher mortality rates than they would in Germany due to substandard tissue matching practices.[60] Also just like American patients, Australian plastic surgery patients returning from inexpensive cosmetic surgeries in Bangkok suffered complications such as "hideous scarring" and infections from breast implants.[61] On one occasion, a Rhode Island woman died of a blood clot due to post-surgical complications four days after she traveled to Wockhardt Hospital, an associate hospital of Harvard Medical International in India,[62] for a tummy tuck and breast reduction.[63]

Some Mexican plastic surgeons with questionable credentials operate in unregulated manners, with neither adequate licensing nor facilities, and cause disfigurement and fatal infections.[64] Consequently, secondary-repair surgeons in San Antonio, Texas, have witnessed an increased number of

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57. *See* Frédéric Lapostolle et al., *Severe Pulmonary Embolism Associated with Air Travel*, 345 NEW ENG. J. MED. 779, 780 (2001). *See also* Ognjen Gajic et al., *Long-Haul Air Travel Before Major Surgery: A Prescription for Thromboembolism?*, 80 MAYO CLINIC PROC. 728, 728 (2005).

58. Diane York, *Medical Tourism: The Trend Toward Outsourcing Medical Procedures to Foreign Countries*, 28 J. CONTINUING EDUC. HEALTH PROF. 99, 101 (2008).

59. *See* Neil Lunt et al., *Are There Implications for Quality of Care for Patients Who Participate in International Medical Tourism*?, 11 EXPERT REV. PHARMACOECONOMICS & OUTCOMES RES. 133, 135 (2011).

60. Nicolas P. Terry, *Under-Regulated Health Care Phenomena in a Flat World: Medical Tourism and Outsourcing*, 29 W. NEW ENG. L. REV. 421, 463 (2007).

61. *Id*. at 463-64.

62. Elizabeth Gluck, *"Incredible [Accreditable] India": Trends in Hospital Accreditation Coexistent with the Growth of Medical Tourism in India*, 1 ST. LOUIS U. J. HEALTH L. & POL'Y 459, 465 n.48 (2008).

63. Kerrie S. Howze, Symposium, *Medical Tourism: Symptom or Cure?*, 41 GA. L. REV. 1013, 1030 (2007).

64. *Mexican Border Plastic-Surgery Clinics Booming*, FOX NEWS (Feb. 7, 2005), https://www.foxnews.com/story/mexican-border-plastic-surgery-clinics-booming.

emergency room visits due to botched plastic surgery procedures where women undergoing operations in Mexico are left with broken and slipping breast implants, infections, and large scars.[65]

The fact that most American physicians are reluctant to care for patients with adverse results from operations performed abroad only aggravates the problem.[66] Likewise, most American insurance companies do not reimburse for follow-up care, especially in cases in which non-FDA approved materials, procedures, or medications are used.[67] Neither health care organizations in foreign countries nor the intermediaries that facilitate overseas medical tourism are bound by regulations and standards set forth by the Health Insurance Portability and Accountability Act (HIPAA).[68] This means that foreign providers are not bound to follow the strict personal health data privacy safeguards that are required in the United States.

The intermediaries or brokerages that promote and facilitate overseas medical travel for U.S. residents receive referral fees from the offshore providers for patient referrals.[69] Nonetheless, medical tourism companies have greater expertise in tourism than in medical dealings, and in many cases, may not have any medical expertise or personnel[70] to assess the fitness of candidates for the desired procedures.

Upon return to their home countries, some patients experience medical emergencies that impact their overall medical cost substantially. Although studies in this area are limited, a study from Alberta, Canada, reported that "more than $560,000 was spent treating fifty-nine bariatric medical tourists by twenty-five surgeons between 2012 and 2013."[71] This study suggested that complication rates were considerably higher (42.2–56.1%) than similar surgeries performed in Alberta (12.3%).[72] Thus, the combined number for all

65. *Id*. Similarly, a woman who visited Mexico for a plastic surgery experienced severe gangrene and her skin peeled off when emergency room doctors lifted her from one bed to another. *Id.*

66. Boyd et al., *supra* note 14, at 109.

67. *Id*.

68. *See* Purvi B. Maniar, *HIPAA Considerations for Intermediaries in Medical Tourism*, 2 MED. TRAVEL TODAY 1, 1 (2014), https://www.ebglaw.com/content/uploads/2014/06/21090_health-article-maniar-HIPAA_considerations_for_intermediaries_in_Med_Tourism-4-30-08.pdf.

69. Brandon W. Alleman et al., *Medical Tourism Services Available to Residents of the United States*, 26 J. GEN. INTERNAL MED. 492, 496 (2010).

70. Roy G. Spece, Jr., *Medical Tourism: Protecting Patients from Conflicts of Interest in Broker's Fees Paid by Foreign Providers*, 6 J. HEALTH & BIOMED. L. 1, 3 (2010).

71. David Kim et al., *Financial Costs and Patients' Perceptions of Medical Tourism in Bariatric Surgery*, 59 CAN. J. SURGERY 59, 59 (2016). Canadian data is provided as a parallel because such data for U.S. tourists is not available.

72. *Id*. at 60.

post-operative surgical emergencies has the potential to burden the home country's medical system for the harm inflicted abroad.

Notably, American patients are not the only ones at risk of harm by the medical tourism industry. There are international concerns about organ procurement [73] as the practice of international transplant tourism undermines the ethical principle of non-malfeasance.[74] Reports from the World Health Organization (WHO) raise concerns about stories involving the hastened execution of Chinese death-row prisoners if they are found to be a matching organ donor[75] and Pakistani villagers living with a single kidney after selling the other kidney to a wealthy foreigner.[76] According to the Pakistani Supreme Court filings, kidney patients are visiting Pakistan for transplantation with vended organs.[77]

Moreover, countries that attract many medical tourists could witness an increase in prices for available care and reduction in available domestic resources, especially for indigent citizens.[78] This results in a two-tier system of healthcare in the destination country, one tier for the local poor and one for medical tourists.[79] Thus, the tourism industry reduces available resources and increases prices of available care.[80] Some argue these countries benefit from medical tourism in the region because it provides access to new medical technology and foreign-trained doctors.[81] In reality, these countries experience a "brain drain" of local talent into private, for-profit organizations.[82]

IV. AMERICAN LEGAL EXPECTATIONS AND LOCAL CUSTOMS

American patients, who are accustomed to their domestic legal and healthcare systems, might not realize the gravity of the risk associated with

73. Boyd et al., *supra* note 14, at 109.

74. *Medical Tourism: Ethical Pitfalls of Seeking Health Care Overseas*, RELIAS MEDIA (Nov. 1, 2007), https://www.reliasmedia.com/articles/107772-medical-tourism-ethical-pitfalls-of-seeking-health-care-overseas.

75. Simon Denyer, *China Used to Harvest Organs from Prisoners. Under Pressure, That Practice is Finally Ending*, WASH. POST (Sep. 15, 2017), https://www.washingtonpost.com/world/asia_pacific/in-the-face-of-criticism-china-has-been-cleaning-up-its-organ-transplant-industry/2017/09/14/d689444e-e1a2-11e6-a419-eefe8eff0835_story.html.

76. *Medical Tourism: Ethical Pitfalls of Seeking Health Care Overseas*, *supra* note 74.

77. *Several Villagers Living with One Kidney in Punjab: Report*, DUNYA NEWS, (May 23, 2017, 8:45 PM) https://dunyanews.tv/en/Pakistan/389669-Several-villagers-living-with-one-kidney-in-Punjab.

78. *See* C. Michael Hall, *Health and Medical Tourism: A Kill or Cure for Global Public Health?*, 66 TOURISM REV. 4, 9 (2011).

79. I. Glenn Cohen, *Medical Tourism, Access to Health Care, and Global Justice*, 52 VA. J. INT'L L. 1, 5 (2011).

80. *See* Muzaurieta, *supra* note 25, at 128.

81. *See id*. at 130.

82. *Id*. at 126.

receiving care abroad. The information available on the internet is often limited to unreliable anecdotal accounts. Alarmingly, there are only a few legal remedies available for American medical tourists when something goes awry.

In the United States, in addition to federal regulations, individual states implement guidelines on the practice of medicine through the licensure of physicians.[83] Unlike the United States, many international healthcare systems are not well-monitored or regulated.[84] For medical negligence suits in the United States, a jury of ordinary people from all walks of life determines whether a physician erred and what the patient's appropriate remedy, including the amount of the award for pain and suffering, should be.[85] In contrast, in India, for example, patients can sue either in civil courts, which can take fifteen to twenty years to resolve, or in special consumer courts, which do not grant awards for non-economic damages like pain and suffering.[86] Additionally, attorneys are not permitted to take such cases on contingency basis.[87] Even though India has many regulatory systems, such as the Medical Council of India, the Indian Medical Association, and various departments of health within the government, they are often ineffective and have little impact on the standard of medical care because they do not require any meaningful accountability for healthcare providers.[88] Consumer groups, the Indian Supreme Court, and even member physicians, have all publicly accused the Medical Council of India of corruption and incompetence in disciplining member physicians.[89]

Medical negligence suits fare just as badly in Thailand, home to Bangkok's Bumrungrad International Hospital, which is the leader in medical tourism and the largest private hospital in Southeast Asia.[90] Although the Ministry of Public Health is responsible for regulating the national health care,[91] it has traditionally failed to regulate the safety or quality of medical services. The Thai civil code for medical malpractice law

83. *Navigating State Medical Licensure*, AM. MED. ASS'N, http://www.ama-assn.org/residents-students/career-planning-resource/navigating-state-medical-licensure (last visited Oct. 4, 2021).

84. *See generally* Nathan Cortez, *Recalibrating the Legal Risks of Cross-Border Health Care*, 10 YALE J. HEALTH POL'Y L. & ETHICS (2010).

85. Bashir Mamdani, *Medical Malpractice*, 1 INDIAN J. MED. ETHICS 57, 58 (2004).

86. *Id.*

87. *Id.*

88. Muzaurieta, *supra* note 25, at 80.

89. *Id.* at 140-41.

90. Steve Finch, *Thailand Top Destination for Medical Tourists*, 186 CAN. MED. ASS'N J. E1 (2014).

91. Cortez, *supra* note 84, at 42.

is underdeveloped and essentially non-existent.[92] A party seeking relief may only recover for negligence.[93] Additionally, patients' medical records often "disappear," judges prohibit pretrial discovery, and even if a patient is successful, the recovery usually does not exceed $2,500.[94]

Like Thailand, Mexico is a civil law country; tort litigation in Mexico is virtually non-existent, and the courts do not utilize jurors or *stare decisis*.[95] Additionally, like India, Mexico's new National Commission for Medical Arbitration provides some relief but the compensation averages around $4,800 without recognition of non-economic damages, like pain and suffering.[96]

Many countries do not require that their hospitals participate in international accreditation programs nor do they require that these hospitals report positive or adverse patient outcomes.[97] Some locations do offer minimal quality of care statistics, but since there is no uniformity in the methodology used to gather this data, these statistics do not provide the patients with much useful information.[98] Patients often rely on hospital mortality rates, but such numbers are a "crude measure of quality," as they do not accurately capture the actual risks involved at a certain facility.[99]

Existing regulatory bodies are insufficient sources of information for medical tourists. Simply having access to non-uniform, unverified, and very limited data points is not sufficient for patients to make an informed decision regarding their care. Therefore, medical tourism destinations must ultimately provide data on quality controls and processes, equipment availability, and other key metrics that define the risk of care at a given facility. Similarly, doctors working at these tourism destinations should provide evidence of their education, training, and special skills required for procedures that they perform. This information should then be examined and scrutinized as the basis for licensing schemes for increased transparency and be presented in a manner that the average patient can easily digest. Although the malpractice insurance system creates a quasi-regulatory mechanism, in most countries other than the United States, insurance markets are typically non-existent,

92. *Id.* at 43.

93. *Id.* Although Thailand is a civil code country, no Thai statutes specifically address medical malpractice. Thus, patients most frequently claim damages under Section 420 of Thailand's Civil and Commercial Code, which requires any "person who, willfully or negligently, unlawfully injures the life, body, health, liberty, property, or any right of another person" to pay remuneration. Thus, Patients bear the burden of proving negligence in Thai courts. *Id.*

94. *Id.* at 44.

95. *Id*. at 68.

96. *Id.*

97. I. Glenn Cohen, *Protecting Patients with Passports: Medical Tourism and the Patient-Protective Argument*, 95 IOWA L. REV. 1467, 1489-91 (2010).

98. Muzaurieta, *supra* note 25, at 144.

99. *Id*.

and most citizens of destination countries tend to be unaware of their right to sue for receiving substandard care.[100]

V. U.S.-AFFILIATED HEALTH CARE FACILITIES

Some U.S. clinics have joined the market of medical tourism by opening foreign affiliates or partnering with foreign local clinics engaged in medical tourism.[101] A large number of Americans visit these facilities for their medical needs. For example, after the FDA sent Houston-based Celltex a warning letter in 2012 for not having the necessary clinical trials and regulatory approvals for the mesenchymal stem cell therapy it offered, the company shifted its clinical operations to Mexico.[102] Today, Celltex operates out of Hospital Galenia in Cancun and caters mostly to American patients.[103]

Many reputable U.S. university medical centers have also joined this growing trend in hopes of capitalizing on the local patient population as well as the medical tourism industry in foreign countries.[104] By lending their names to their foreign affiliates, these American medical giants profit enormously. For instance, Johns Hopkins Hospital opened a hospital in India[105] and manages the 461-bed Tawam Hospital in Abu Dhabi[106] with

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100. Muzaurieta, *supra* note 25, at 141. On the other hand, medical error is the third-leading cause of death in the United States. Ray Sipherd, *The Third-leading Cause of Death in US Most Doctors Don't Want You to Know About*, CNBC (Feb. 22, 2018), https://www.cnbc.com/2018/02/22/medical-errors-third-leading-cause-of-death-in-america.html. American physicians collectively pay over six billion dollars annually for malpractice insurance to protect themselves from potential malpractice suits. Michael Klaus, *Outsourcing Vital Operations: What if U.S. Health Care Costs Drive Patients Overseas for Surgery?*, 9 QUINNIPIAC HEALTH L.J. 219, 229-230 (2006). In a recent national survey, seventy-five percent of American doctors admitted to ordering more tests and procedures than medically necessary to specifically reduce the risk of malpractice lawsuits. Hal Scherz & Wayne Oliver, *Defensive Medicine: A Cure Worse than the Disease*, FORBES (Aug. 27, 2013, 10:52 AM), http://www.forbes.com/sites/realspin/2013/08/27/defensive-medicine-a-cure-worse-than-the-disease/. Some argue the malpractice system causes health insurance companies to directly pass the cost on to patients and cause physicians to practice defense medicine. Klaus, *supra* at 235.

101. CHAMBERS, *supra* note 27.

102. Anna Azvolinsky, *Texas Stem Cell Law Opens Door for Controversial Treatments*, SCIENTIST MAG. (Mar. 27, 2018), https://www.the-scientist.com/news-analysis/texas-stem-cell-law-opens-door-for-controversial-treatments-29901.

103. *Id.*

104. Boyd et al., *supra* note 14, at 108.

105. *Id.*; *see also HCL Healthcare*, JOHNS HOPKINS MED. INT'L., https://www.hopkinsmedicine.org/international/international_affiliations/asia_pacific/hcl_healthcare.html (last visited Oct. 9, 2021).

106. *America's Top Hospitals Go Global*, FORBES (Aug. 25, 2008, 5:00 PM), https://www.forbes.com/2008/08/25/american-hospitals-expand-forbeslife-cx_avd_0825health.html#1ce9d67b2aa5 [hereinafter *Go Global*). *See also In Depth: America's Top Hospitals Go Global*, FORBES (Aug. 25, 2008, 5:00 PM),

neonatal, fertility, emergency, oncology, intensive and cardiac care services.[107] Hopkins is also affiliated with Turkey's Anadolu Medical Center, a 209-bed acute care hospital, which it recognizes as "the best in Turkey, southern Eurasia and the Middle East," with services in cardiology, neurology, oncology and women's health.[108] It also provides medical services through Pacífica Salud Hospital Punta Pacífica, in Panama,[109] Singapore's 1,200-bed Tan Tock Seng Hospital,[110] and has recently signed a consulting agreement with China Northwest International Medical Center to build a new world-class medical center in Xi'an, the largest city in the northwest region of China.[111]

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https://www.forbes.com/2008/08/25/american-hospitals-expand-forbeslife-cx_avd_0825health_slide.html#43b1ebed3548 [hereinafter *In Depth: Go Global*).

107. *Tawam Hospital*, JOHNS HOPKINS MED. INT'L., https://www.hopkinsmedicine.org/international/international_affiliations/middle_east/tawam_hospital.html (last visited Oct. 9, 2021).

108. *Anadolu Medical Center*, JOHNS HOPKINS MED. INT'L., https://www.hopkinsmedicine.org/international/international_affiliations/europe/anadolu_medical_center.html (last visited Oct. 9, 2021).

109. *Pacífica Salud Hospital Punta Pacífica*, JOHNS HOPKINS MED. INT'L., https://www.hopkinsmedicine.org/international/international_affiliations/latin_america_caribbean/hospital_punta_pacifica.html (last visited Oct. 9, 2021).

110. *Johns Hopkins Singapore*, JOHNS HOPKINS MED. INT'L., https://www.hopkinsmedicine.org/international/international_affiliations/asia_pacific/singapore_international_medical_centre.html (last visited Oct. 9, 2021).

111. There are many examples of these large U.S.-based hospitals moving abroad. Harvard and Boston Universities have partnered with the United Arab Emirates (UAE) to create the 500-acre Dubai Healthcare City. Boyd et al., *supra* note 14, at 108. In collaboration with non-profit Partners HealthCare International (PHI), a subsidiary of Harvard University, they developed the Harvard Medical School Dubai Center, home to the Institute for Postgraduate Education and Research and the center of Dubai Healthcare City's education programs. Cohen, *supra* note 97, at 1472; *see also* PARTNERS HEALTH CARE INT'L, https://international.partners.org (last visited Feb. 19, 2021). Partners HealthCare is home to five Harvard Medical School-affiliated teaching hospitals, including Brigham and Women's Hospital, Massachusetts General Hospital, Massachusetts Eye and Ear, McLean Hospital, Spaulding Rehabilitation Network and, community hospitals such as Newton-Wellesley Hospital and North Shore Medical Center. PARTNERS HEALTH CARE INT'L, https://international.partners.org (last visited Feb. 19, 2021). Harvard University has also partnered with India's Wockhardt Hospital, which is a group of nine multispecialty hospital system with a total bed capacity of 1,200 and locations in Mumbai, Nashik, Rajkot, and Nagpur. *Wockhardt Hospital Group, India*, MEDICAL INDIA TOURISM https://www.medicalindiatourism.com/wockhardt-hospital-group-in-india.html (last visited Oct. 9, 2021). Cleveland Clinic, which has a campus in Toronto, has partnered with the 1,600-bed King Faisal Specialist Hospital & Research Center in Riyadh, King Faisal Specialist Hospital & Research Centre, https://www.kfshrc.edu.sa/en/home/about (last visited Feb. 19, 2021), and holds 1.8 percent minor equity and affiliation with Jeddah's 300-bed International Medical Center in the Kingdom of Saudi Arabia. Shannon Mortland, *Clinic Takes Stake in New Saudi Hospital*, CRAIN'S CLEVELAND BUS. (Mar. 8, 2004, 1:30 AM), https://www.crainscleveland.com/article/20040308/SUB/403080721/clinic-takes-stake-in-new-saudi-hospital. Cleveland Clinic has also opened its UAE branch of 364-bed multidisciplinary Luxury Cleveland Clinic Abu Dhabi hospital, with all western-trained and North American/European board-certified consultant physicians. *Go Global*, *supra* note 105; *Physician Careers*, CLEVELAND CLINIC ABU DHABI, https://www.clevelandclinicabudhabi.ae/en/careers/career-opportunities/physician-

In total, Johns Hopkins Hospital has eighteen partnerships, Cleveland Clinic has ten, Mayo Clinic has five, and Massachusetts General Hospital has four.[112] Many of these facilities contain state-of-the-art technology, employ U.S.-trained physicians, and are located in developing countries, where labor and overhead costs are significantly lower than in the United States.[113] To accommodate foreign patients, some of these offshore hospitals employ U.S.-trained and board-certified physicians, apply to receive internationally accepted accreditation,[114] provide luxury amenities, such as translation services, and enhance communications with physicians in home countries to maintain the continuity of care.[115] There are also many healthcare brokers available in the United States and abroad that readily arrange air travel and hotel accommodations, provide tourist information, and arrange admission to various hospitals and access to physicians throughout the world.[116]

The leaders of these American treatment centers and teaching institutions often mention a desire to improve local healthcare as their motivation, but they also stand to make a significant amount of money in return from their investments.[117] Concerns persist about these private hospitals that entice local physicians to treat foreign medical tourists rather

careers/pages/default.aspx (last visited Feb. 19, 2021). Additionally, Cleveland clinic is affiliated with major medical centers in the Bahamas, Dominican Republic, Guatemala, El Salvador, India, Panama, Honduras, and Costa Rica. *Locations & Representatives*, CLEVELAND CLINIC, https://my.clevelandclinic.org/patients/international/locations (last visited Feb. 19, 2021). Mayo Clinic is affiliated with the International Medical Center in Saudi Arabia, Rhoda Madson, *International Medical Center in Saudi Arabia Joins Mayo Clinic Care Network*, MAYO CLINIC: NEWS NETWORK (Mar. 21, 2018), https://newsnetwork.mayoclinic.org/discussion/international-medical-center-in-saudi-arabia-joins-mayo-clinic-care-network/, Sir Run Run Shaw Hospital in Hangzhou, China, Rhoda Madson, *Sir Run Run Shaw Hospital in China Joins Mayo Clinic Care Network*, MAYO CLINIC: NEWS NETWORK (Sept. 7, 2017), https://newsnetwork.mayoclinic.org/discussion/sir-run-run-shaw-hospital-in-china-joins-mayo-clinic-care-network/, Centro Médico Puerta de Hierro, in Guadalajara, Mexico, Rhoda Madson, *Centro Médico Puerta de Hierro in Mexico Joins Mayo Clinic Care Network*, MAYO CLINIC: NEWS NETWORK (Feb. 20, 2019), https://newsnetwork.mayoclinic.org/discussion/centro-medico-puerta-de-hierro-in-mexico-joins-mayo-clinic-care-network/, St. Luke's Medical Center in Taguig City, Philippines, Rhoda Madson, *St. Luke'sMedical Center in the Philippines Joins Mayo Clinic Care Network*, MAYO CLINIC: NEWS NETWORK (Oct. 19, 2016), https://newsnetwork.mayoclinic.org/discussion/st-lukes-medical-center-in-the-philippines-joins-mayo-clinic-care-network/, and Raffles Medical Group in Singapore, Rhoda Madson, *Raffles Medical Group First Member in Asia Joins Mayo Clinic Care Network*, MAYO CLINIC: NEWS NETWORK (July 28, 2015), https://newsnetwork.mayoclinic.org/discussion/raffles-medical-group-becomes-first-member-from-asia-to-join-the-mayo-clinic-care-network/.

112. Mehta et al., *supra* note 46, at 2.
113. Boyd et al., *supra* note 14, at 107.
114. Mitka, *supra* note 4, at 1519.
115. Carroll, *supra* note 6.
116. Dalen & Alpert, *supra* note 2, at 9
117. *Go Global*, *supra* note 106.

than the local population in hospitals built for and dedicated to the local communities.[118] The combination of reputable names and cheap prices attracts many American patients to these off-shore facilities. This is evident by an increasing trend of reputable American hospitals opening their doors abroad after the terrorist attacks of 9/11, which caused a decline in the number of international medical travelers,[119] especially those from the wealthy Arab countries, due to discrimination and difficulty obtaining visas.[120] Before the attacks, the U.S. Department of Commerce reported revenues of more than one billion dollars annually from inbound travel to the United States for medical care.[121] Not wanting to forego the steady stream of cash from the Middle Eastern patients, some U.S. hospitals decided to bring their services to these patients by lending their names and resources to their foreign counterparts[122]—all while asserting a desire to improve local healthcare.

Additionally, these countries provide generous tax incentives, because they realize that by partnering with prestigious American hospitals or medical schools, their own facilities attain instant credibility and can become regional draws for economic development.[123] For example, Dubai Healthcare City is a tax-free zone.[124]

VI. JOINT COMMISSION ACCREDITATION

Within the United States, the Joint Commission (JC) accredits and certifies domestic healthcare facilities and programs.[125] The JC is a Chicago-based non-profit tax-exempt private corporation that has inspected and accredited more than 22,000 U.S. healthcare organizations and programs on behalf of the U.S. government.[126] In 2019, the JC reported $182,737,650 in

118. Boyd et al., *supra* note 14, at 109-10.

119. Leonard Karp, *Medical Travel*: *Global Impact and Local Response*, 21 HEALTH POL'Y NEWSL. (2008).

120. Finch, *supra* note 90, at E1.

121. Karp, *supra* note 119.

122. *See id.*

123. Nur Syafiqah Abd Mutalib et al., *Medical Tourism: Ethics, Risks, and Benefits*, 50 INDIAN J. PHARMACEUTICAL EDU. & RES. 261, 267 (2016).

124. *See* Cohen, *supra* note 97, at 1472; *see also Dubai Healthcare City*, INVEST IN DUBAI, https://freezones.invest.dubai.ae/en/dubai-healthcare-city/about (last visited Feb. 19, 2021).

125. *Facts About the Joint Commission*, THE JOINT COMMISSION, https://www.jointcommission.org/about-us/facts-about-the-joint-commission/ (last visited Feb. 19, 2021) (facilities that can earn JC's accreditation include hospitals (general, psychiatric, pediatric, and rehabilitative], dental and medical practices, dialysis centers, imaging centers, and nursing homes).

126. *History of The Joint Commission*, THE JOINT COMMISSION, https://www.jointcommission.org/about-us/facts-about-the-joint-commission/history-of-the-joint-commission/ (last visited Feb. 18, 2022). *See also* Wilson Huhn, *A New Frontier: A Constitutional Perspective on "Socialized Medicine,"* 15 MICH. ST. UNIV. J. MED. & L. 297, 302 (2011).

total revenue.[127] The JC was created in 1951 and is comprised of a twenty-one member Board of Commissioners.[128] The JC accreditation is a condition of licensure for the receipt of Medicaid and Medicare reimbursements in the United States.[129] The JC accredited 80% of U.S. hospitals,[130] including hospitals in the U.S. Department of Veterans Affairs, the federal Bureau of Prisons, and the Indian Health Services. According to the Deloitte Center for Health Solutions, the annual healthcare market spending in the United States is estimated to be $4 trillion.[131] This makes the JC caretaker to a substantial amount of money.

The Joint Commission's Washington, D.C. office works with a variety of government entities from the legislative branch (Congressional offices, MedPAC), the executive branch (Centers for Medicare and Medicaid Services, FDA, CDC, Department of Veterans Affairs, Department of Defense, and others), the federal oversight bodies (Government Accountability Office, Offices of Inspectors General), and the national stakeholder groups and coalitions.[132]

Under authority of section 1865 of the Medicare Act, an amendment to the Social Security Act of 1935, hospitals accredited by the JC are

127. *2019 IRS Form 990*, THE JOINT COMMISSION, https://www.jointcommission.org/about-us/policies-and-financials/financial-statements/. The salary of the JC CEO was about $1 million in 2013 and $1,630,910 in 2018. Stephanie Amour, *Hospital Watchdog Gives Seal of Approval, even After Problems Emerge,* WALL ST. J. (Sept. 8, 2017), https://www.proquest.com/docview/1936595782?accountid=6749. *See also Joint Commission on Accreditation of Healthcare Organizations*, NON PROFIT LIGHT, https://nonprofitlight.com/il/oakbrook-terrace/joint-commission-on-accreditation-of-healthcare-organizations (last visited Feb. 18, 2022); *see also Joint Commission on Accreditation of Healthcare Organizations*, NON PROFIT LIGHT, PROPUBLICA. https://projects.propublica.org/nonprofits/organizations/362229255 (last visited Oct. 21, 2021); *see also 2018 IRS Form 990*, THE JOINT COMMISSION, https://www.jointcommission.org/-/media/tjc/documents/about-us/financial-statements/2018-form-990-tjc-pdc-no-salaries.pdf (individual salaries are redacted on the public disclosure tax forms published on the Joint Commission's website).

128. *Facts About the Joint Commission*, *supra* note 124.

129. *Federal Deemed Status*, THE JOINT COMMISSION, https://www.jointcommission.org/resources/news-and-multimedia/fact-sheets/facts-about-federal-deemed-status/ (last visited Oct. 21, 2021).

130. Paige Minemyer, *Investigation: Joint Commission Rarely Revokes Accreditation from Hospitals that Put Patients at Risk*, FIERCE HEALTHCARE, (Sept. 11, 2017, 9:15 AM), https://www.fiercehealthcare.com/regulatory/investigation-reveals-joint-commission-unlikely-to-revoke-accreditation-from-hospitals.

131. Dan Munro, *Annual U.S. Healthcare Spending Hits $3.8 Trillion*, FORBES (Feb. 2, 2014, 11:03 PM), https://www.forbes.com/sites/danmunro/2014/02/02/annual-u-s-healthcare-spending-hits-3-8-trillion/?sh=799b8e4b76a9.

132. *Federal Relations and Public Policy*, THE JOINT COMMISSION, https://www.jointcommission.org/about-us/federal-relations-and-public-policy/ (last visited Feb. 19, 2021).

automatically "'deemed' to have met all the regulatory requirements specified in the Act, except for a rule concerning utilization, the psychiatric hospital special conditions, and the special requirements for hospital providers of long-term care."[133]

To earn and maintain the Gold Seal of Approval from the JC, hospitals and healthcare facilities undergo an on-site survey every three years.[134] The JC has significant power to revoke or suspend the accreditation and to sanction healthcare organizations.[135] However, often in case of a violation, most hospitals retain their accreditations even when Centers for Medicare and Medicaid Services (CMS) determines that their violations were significant enough to cause, or likely cause, serious patient injury or death.[136] For example, after three patients in Cooley Dickinson Hospital in Northampton, Massachusetts, died as a result of medical neglect, as determined by the CMS, the JC did not change the status of the hospital's accreditation.[137]

To attract medical tourists and show their credibility, offshore medical facilities highlight their status as approved by an internationally accepted accreditation organization.[138] One of these accreditation organizations is the Joint Commission International (JCI) or, as it was formerly known, the Joint Commission on Accreditation of Hospitals.[139] JCI is the global arm of the JC.[140] JCI began to evaluate, inspect, and accredit offshore hospitals in 1998.[141] In 2009, there were 270 JCI accredited hospitals in thirty-eight countries.[142] By July 2016, 939 foreign hospitals in sixty-six countries had been accredited.[143] Since then, this number has increased by 20% every year.[144] Among the sixty-six countries that partake in the JCI accreditation program, five contain nearly half of all such centers; with United Arab Emirates amounting to 17%, Saudi Arabia 11%, China 8%, Brazil 6%, and

133. INSTITUTE OF MEDICINE, MEDICARE: A STRATEGY FOR QUALITY ASSURANCE: VOLUME II SOURCES AND METHODS 119 (Kathleen N. Lohr ed., 1990).

134. *Facts About the Joint Commission*, *supra* note 125.

135. James R. Goldberg, *The Joint Commission's Unpoliced Tax Exempt Status Has a Staggering Effect on the Economics of Medicine*, AM. MED. MONEY MACHINE (May 18, 2015), https://www.theamericanmedicalmoneymachine.com/the-joint-commissions-unpoliced-tax-exempt-status-has-a-staggering-effect-on-the-economics-of-medicine/.

136. Minemyer, *supra* note 130.

137. Stepahnie Armour, *Hospital Watchdog Gives Seal of Approval, Even After Problems Emerge*, WALL ST. J., (Sept. 8, 2017, 12:45 PM), https://www.wsj.com/articles/watchdog-awards-hospitals-seal-of-approval-even-after-problems-emerge-1504889146.

138. Gluck, *supra* note 62, at 478.

139. Dalen & Alpert, *supra* note 2, at 10.

140. Boyd et al., *supra* note 14, at 107.

141. *Id*.

142. Mitka, *supra* note 4, at 1519.

143. Mehta et al., *supra* note 46, at 2.

144. Dalen & Alpert, *supra* note 2, at 10.

Thailand 6%.[145] The average cost of a full JCI survey in 2010 was $46,000.[146] The majority of facilities requesting JCI accreditation are hospital programs (62%), followed by ambulatory care programs (14%), academic medical center hospital programs (8%), and clinical laboratory programs (7%).[147] The remaining are primary care programs (4%), long-term care programs (3%), home-care programs (2%), and medical transport programs (1%).[148]

Foreign hospitals are not alone in advertising their facilities and services as JCI-accredited to attract more revenue. AARP's spokesperson and CEO of Patients Beyond Borders, Josef Woodman, has also used JCI-accreditation to advertise medical tourism.[149] According to Mr. Woodman, many "leading private hospitals in Mexico and Costa Rica have been awarded full accreditation by the . . . JCI, the same agency that accredits hospitals like Johns Hopkins, Cleveland Clinic, and Mayo here in the US." [150] What Mr. Woodman, and by extension AARP, failed to mention is the significant difference in accountability and standard of accreditation between U.S.-based and foreign institutions.

VII. LACK OF LEGAL ACCOUNTABILITY IN JCI ACCREDITED FACILITIES

JCI accreditation should give patients confidence that their chosen international healthcare provider is held to higher standards and regularly monitored.[151] For example, Dubai Healthcare City (DHCC) on its website claims, that "[a]ccredited hospitals and clinics in Dubai Healthcare City strive to help people heal better and feel better."[152] In regard to medical negligence, DHCC's CEO, Dr. Ramadan Al Beloushi, asserts that all complaints of medical malpractice within DHCC are investigated by the Dubai Healthcare City Authority-Regulation (DHCR) "to ensure that health

145. Mehta et al., *supra* note 46, at 2.

146. *JCI Accreditation*, HEALTH-TOURISM, https://www.health-tourism.com/jci-accreditation/ (last visited Feb. 12, 2022).

147. Mehta et al., *supra* note 46, at 2.

148. *Id.*

149. *See* Kate Hays, *Good News: Your Medical Options Now Include Latin America*, AARP (Sept. 20, 2011, 11:40 AM), https://blog.aarp.org/healthy-living/good-news-your-medical-options-now-include-latin-america.

150. *Id*.

151. *See Why Seek Out a JCI-Accredited Hospital*, WORLD HOSP. SEARCH, https://www.worldhospitalsearch.org/the-value-of-jci-accreditation/why-seek-out-a-jci-accredited-hospital/ (last visited Feb. 19, 2021).

152. *Dubai Healthcare City*, *supra* note 124.

standards are maintained in the free zone."[153] Dr. Al Beloushi claims that DHCR has "a transparent and fair mechanism to encourage patients to come forward for medical-related complaints."[154] On its face, once a complaint is received, a formal investigation is initiated and the findings are sent out to an independent committee comprising of specialists from outside the UAE to determine the validity of the complaint.[155]

However, it appears that there is a conflict between patients' interest and DHCA's interest, as DHCA's primary aim is to promote medical tourism and create new income streams for Dubai.[156] Complete transparency might not be a feasible business practice. For example, when a patient suffered from medical negligence in Dubai Healthcare City, the UAE government was quick to suppress the story on the internet.[157] In 2016, Mohammad Imran Hussain, a Canadian citizen, underwent a successful heart operation at Mediclinic, one of the main hospitals in DHCR.[158] As part of his postoperative care, to monitor and stabilize any abnormalities in Mr. Hussain's heart rhythm, his surgeon used a temporary epicardial pacing wire, which was subsequently removed in anticipation of his discharge.[159] Possible complications of epicardial pacing wire removal include bleeding, wire fragment migration, and infection secondary to retained wire fragments.[160] Meanwhile, cardiac-surgery patients should be closely monitored by the nursing staff for any signs of complications, and appropriate emergency equipment should be readily available to intervene immediately upon emergencies.[161] There is no evidence that Mr. Hussain was closely monitored by a capable or informed nursing staff, or that emergency

153. Suchitra Bajpai Chaudhary, *Dubai Healthcare City and Medical Malpractice Procedures*, GULF NEWS (May 15, 2016) https://gulfnews.com/going-out/society/dubai-healthcare-city-and-medical-malpractice-procedures-1.1813051.

154. *Id*.

155. *Id*. Once the complaint form and the supporting documents are obtained by CPU, then the complaint is logged, and an investigation is opened. The investigation process takes between three to six months. If the complaint is out of its scope, the case is referred to the authority concerned, and the complainant is informed of the action. *Id*.

156. Radha Stirling, *Family to Sue Mediclinic for $55m.*, LINKEDIN (Aug. 8, 2017), https://www.linkedin.com/pulse/family-sue-mediclinic-55m-dubai-medical-negligence-law-radha-stirling/ (last visited Feb. 19, 2021).

157. Nick Webster, *Dubai Surgeon Suspended After Patient Left Brain Damaged*, NAT'L NEWS (Nov. 9, 2016), https://www.thenationalnews.com/uae/health/dubai-surgeon-suspended-after-patient-left-brain-damaged-1.225032.

158. *Dubai Mediclinic Negligence Law Spotlighted After Patient Left Brain Damaged due to Alleged Mediclinic Violation*, DETAINED IN DUBAI, https://www.detainedindubai.org/medicalnegligence (last visited Feb. 19, 2021).

159. *Id*. Other complications include pericardial or mediastinal tamponade and ventricular dysrhythmias. *Id*.

160. Lourie G. Johnson et al., *Complications of Epicardial Pacing Wire Removal*, 7 J. CARDIOVASCULAR NURSING 32, 32 (1993) (discussing the potential complications of epicardial pacing wire removal).

161. *Id*. Such complications include changes in hearth rate, blood pressure, and breathing. *Id*.

equipment was placed by his bed.[162] When Mr. Hussain developed a pericardial tamponade and the subsequent hemodynamic compromise, no one noticed until it resulted in heart and multi-organ failure.[163] Although he was resuscitated, Mr. Hussain sustained permanent brain injury due to diminished blood flow to his brain tissue because of the delay in his care.[164] Mr. Hussain's injuries have left him disabled and incapable of caring for himself.[165]

Mr. Hussain's family sued Medclinic in UAE courts for $55 million after DHCA found that the hospital breached international standards of care and that there was a clear "mismanagement in dealing and recognizing the main complication (cardiac tamponade)."[166] Although DHCA initially found that Mediclinic had mismanaged Mr. Hussain's case, it issued only a letter of warning and ruled to suspend the cardiac surgeon's license for three months.[167] This is because Mediclinic is the largest DHCA investor.[168] Mediclinic suspended Mr. Hussain's surgeon for three months.[169] Mediclinic then appealed DHCA's mismanagement decision and tried to avoid liability by shifting blame onto its sub-contracted staff.[170] Mediclinic's appeal was accepted, without the possibility of making further submissions.[171]

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162. DETAINED IN DUBAI, *supra* note 158.

163. *Id*.

164. Webster, *supra* note 157.

165. Stirling, *supra* note 156.

166. *Id*. It is standard international practice to plan for procedures and interventions, preparing the patient and responsible health care teams to carefully monitor for potential complications. No physician works in a vacuum. Particularly with complex procedures like heart surgery, a competent health care team is required to properly care for the patient and minimize complications. The team is composed of the primary treating physician and all other hospital staff members charged with the responsibility of caring for the patient. *Id*. There are three methods to seek remedy for a medical malpractice or negligence claims in the UAE. One can apply to the Dubai Health Authority for a misconduct ruling; open a criminal case against the alleged negligent party; or take civil action through the courts. In all scenarios though, the courts rely heavily on evidence provided by the DHA. Thus, if the DHA's findings are unsatisfactory or biased, the claimant has little recourse, even if action is taken via an alternative remedy path. It is important to allow truly independent reviews and compensation to victims. The UAE is known to "cover up" human rights violations and censor any criticism of government bodies via their Dubai Media Office and Telecommunications Regulatory Authority where it is deemed to be in the best interests of the government. Journalism is largely restricted, and criticism is criminalized. In line with the government views of negative publicity, of course the DHCA has not been inclined to rule in the favor of claimants because this could negatively impact the country's image. In fact, it is obliged to protect and promote the UAE's reputation, even where it is unfair and to the detriment of victim claimants. *Id*.

167. Webster, *supra* note 157.

168. DETAINED IN DUBAI, *supra* note 158.

169. Webster, *supra* note 157.

170. Stirling, *supra* note 156.

171. DETAINED IN DUBAI, *supra* note 158.

This is clear evidence that JCI accreditation should not provide peace of mind when it comes to accountability. A goal of the JCI-accredited facilities is to promote medical tourism, so any adverse judgments regarding negligence will negatively impact their reputation. Thus, they have an incentive to suppress similar stories.

VIII. LEGAL CONCERNS FOR AMERICAN PATIENTS

By expanding abroad, particularly to the Middle East and Asia, American treatment centers and teaching institutions are building not only their brands, but also enlarging their bank accounts, especially because they are not bound by the U.S. legal system.[172] In the United States, medical negligence is defined as:

> the failure by a doctor, hospital or other provider of medical services to provide that service with the degree of skill and care generally accepted among providers of such services as the standard required in providing it that either injures a person who would have been served by the provider or risks injury to a person in the position of that person.[173]

A medical malpractice action is defined as "a claim in tort or in contract for damages because of the death, injury, or monetary loss to any person arising out of any medical, dental, or surgical diagnosis, treatment, or care by any provider of healthcare."[174] In the United States, medical malpractice laws are designed to "1) deter unsafe practices, 2) compensate victims of negligence, and 3) exact corrective justice."[175]

Even with these laws and extensive regulations, an average of 250,000 people in the United States die from medical errors every year.[176] Other reports indicate that this number is as high as 440,000.[177] Among the Medicare beneficiaries, the Office of the Inspector General for Health and Human Services has reported that U.S. hospitals contribute to the death of 180,000 Medicare patients annually.[178] Such studies are not available regarding medical tourists, as foreign institutes are not required to publish any quality control measures or data. However, one might suspect a higher incident of medical negligence in countries with no governmental quality of

172. *In Depth: America's Top Hospitals Go Global*, *supra* note 106.

173. STEPHEN M. SHEPPARD, THE WOLTERS KLUWER BOUVIER LAW DICTIONARY DESK EDITION (2012), LexisNexis.

174. Todd v. Johnson, 965 So. 2d 255, 256 (1st Cir. 2007).

175. Klaus, *supra* note 100, at 235.

176. Sipherd, *supra* note 100.

177. *Id*.

178. DANIEL R. LEVINSON, DEP'T HEALTH & HUM. SERV.'S, ADVERSE EVENTS IN HOSPITALS: NATIONAL INCIDENCE AMONG MEDICARE BENEFICIARIES, at ii (2010).

medical care directives due to the lack of accountability in the cases of medical mishaps.

Injured American patients can pursue international malpractice claims by either suing the foreign providers in the foreign jurisdiction or in U.S. courts.[179] The likelihood of obtaining meaningful relief in a foreign court is low.[180] Some countries like Thailand and Mexico have underdeveloped medical negligence laws.[181] Litigation in some countries such as India may take up to twenty years.[182] In other countries, courts do not generally rule against a governmental entity such as the Dubai Healthcare City or Malaysia's Ministry of Finance, which runs the medical tourism industry in the country–instead of ministry of health.[183] Additionally, many foreign hospitals do not carry malpractice insurance, and if they do, the financial settlements are so low that they do not compensate patients to the same degree as in the United States.[184]

Suits against foreign providers in U.S. courts also present many legal obstacles for American patients, such as lack of personal jurisdiction, forum non-conveniens, choice of law, and enforcement.

A. Lack of Personal Jurisdiction

One of the legal obstacles which American patients face in suing foreign providers in the U.S. courts is the absence of personal jurisdiction, which bars a plaintiff from hailing a foreign provider into the U.S. court. Personal jurisdiction is established when defendants avail themselves by having "minimum contacts" with the forum state either through some purposeful contacts or through a substantial and continuous connection with the forum.[185] Additionally, the long-arm statutes of states may not reach foreign healthcare providers because jurisdiction is limited to a tortious conduct by act or omission committed within the forum state.[186] Traditionally, U.S. courts have been reluctant to find personal jurisdiction over foreign physicians.[187] For example, in *Gatte v. Ready 4 a Change, L.L.C.*, the District Court for the Western District of Louisiana found insufficient contacts to

179. Muzaurieta, *supra* note 25, at 157-58.

180. Boyd et al., *supra* note 14, at 109.

181. Cortez, *supra* note 84, at 43, 68.

182. *Id.* at 2.

183. DETAINED IN DUBAI, *supra* note 158; Carroll, *supra* note 6.

184. Boyd et al., *supra* note 14, at 109.

185. Helicopteros Nacionales de Colombia, S.A. v. Hall, 466 U.S. 408, 413-14 (1984); World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 291 (1980).

186. Muzaurieta, *supra* note 25, at 158-59.

187. *Id.* at 158.

establish specific jurisdiction and granted defendants' motion to dismiss in a wrongful death action arising from medical negligence on the part of medical practitioners who performed reconstructive surgery on a patient in Mexico.[188]

The only other avenue to establish minimum contacts is through the presence of brokers engaging in business in the forum state or through advertising services over the Internet. Under the Corporate Negligence doctrine, not only does plaintiff need to demonstrate that the foreign healthcare provider was unfit or incompetent, but also that the U.S. company knew or should have known about the incompetence based on some pattern of misconduct.[189] Thus, the majority of U.S. courts are reluctant to hold medical tourism firms incorporated in the United States accountable for the negligence of foreign physicians operating independently of the medical tourism firms.[190] Nevertheless, foreign healthcare providers could be hailed into the U.S. court system when they regularly solicit business, engage in any other persistent course of conduct, or derive substantial revenue from goods used, consumed, or services rendered in the states.[191] For example, in *Gatte v. Dohm*, the U.S. Court of Appeals for the Fifth Circuit found one of the co-owners of the Minnesota-based medical tourism company, Ready 4 A Change, liable because the deceased patient had used its services to schedule a post-weight loss contouring and body sculpting surgery at a clinic in Mexico.[192]

Using the "Zippo sliding scale" test, courts have held that the greater a website's commercial nature and level of interactivity, the more considerable its purposeful availment of the forum state's jurisdiction.[193] Websites that simply make information available are characterized as passive and websites that facilitate or conduct business transactions are characterized as interactive. In *Romah v. Scully*, the U.S. District Court for the Western District of Pennsylvania held that a Toronto hospital was not bound by jurisdiction in Pennsylvania because the hospital's mere advertisements of its medical services in Philadelphia and Pittsburgh were insufficient to meet the minimum contacts burden.[194] Suits that involve foreign providers in U.S. courts and personal jurisdiction laws are fact-specific, so it is difficult to

188. Gatte v. Ready 4 A Change, L.L.C., No. 11-CV-2083, 2013 WL 12347069, at *1, *3 (W.D. La. Sept. 16, 2013).

189. Cortez, *supra* note 84, at 15.

190. Philip Mirrer-Singer, *Medical Malpractice Overseas: The Legal Uncertainty Surrounding Medical Tourism*, 70 L. & CONTEMP. PROBS. 211, 216-17 (2007).

191. Linda Sandstrom Simard, *Hybrid Personal Jurisdiction: It's Not General Jurisdiction, or Specific Jurisdiction, But Is It Constitutional?*, 48 CASE W. RES. L. REV. 559, 562 (1998).

192. Gatte v. Dohm, 574 F. App'x 327, 332 (5th Cir. 2014).

193. *See* Zippo Mfg. Co. v. Zippo Dot Com, Inc., 952 F. Supp. 1119, 1124 (W.D. Pa. 1997).

194. Romah v. Scully, No. 06-698, 2007 WL 3493943, at *1, *7-*8 (W.D. Pa. Nov. 13, 2007).

predict the outcome of a case and to determine whether a U.S. court would assert personal jurisdiction over a foreign provider.[195]

B. Forum Non-Conveniens

Even if personal jurisdiction can be established, U.S. courts have discretion to dismiss a case if venue is more proper in a foreign forum where the medical procedure was performed, witnesses reside, and evidence is more readily available.[196] For example, in *Jeha v. Arabian American Oil Co.*, the U.S. District Court for the Southern District of Texas dismissed a medical negligence suit against a Saudi-based oil company, because the critical evidence and witnesses were all located overseas.[197] And, although lengthy judicial delays in foreign courts may be acceptable to gain access to the judicial system, receiving measly recoveries from foreign courts is not an adequate reason to bypass forum non-conveniens concerns.[198] For example, in *Gonzalez v. Chrysler Corp.*, the U.S. Court of Appeals for the Fifth Circuit held that a $2,500 maximum recovery in Mexico was not an adequate reason to bypass forum non-conveniens concerns.[199]

C. Choice of Law and Enforcement

Even if an American patient successfully overcomes the hurdles of personal jurisdiction and forum non-conveniens, the healthcare provider will insist that the law of the foreign country where the medical procedure was provided should govern.[200] Unfortunately, the laws in most destination countries favor the healthcare provider and patients are often left with no recourse.[201] Notwithstanding the choice of law, foreign courts are often reluctant to enforce the decisions of their U.S. counterparts.[202] Therefore, any judgment against a foreign healthcare provider without assets in the United States will be difficult to enforce.[203]

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195. Cortez, *supra* note 84, at 10-11.

196. *See* Piper Aircraft Co. v. Reyno, 454 U.S. 235, 257 (1981).

197. *See* Jeha v. Arabian Am. Oil Co., 751 F. Supp. 122, 127 (S.D. Tex. 1990).

198. Cortez, *supra* note 84, at 13.

199. Gonzalez v. Chrysler Corp., 301 F.3d 377, 383 (5th Cir. 2002).

200. In practice, the two most common ways U.S courts resolve the issue of foreign law are (1) not to apply it, whether concluding that it does not apply under a conflicts analysis or dismissing the case on forum non-conveniens grounds; or (2) to rely on party experts in what at best they make of foreign law in a mixed issue of fact and law. Vivian Grosswald Curran, *Federal Rule 44.1: Foreign Law in U.S. Courts Today*, 30 MINN. J. INT'L L. 231, 251 (2021).

201. Muzaurieta, *supra* note 25, at 161.

202. Cohen, *supra* note 97, at 1503.

203. *Id*.

IX. POSSIBLE SOLUTION FOR AMERICAN PATIENTS

Medical tourism rules should be altered to allow patients to make fully informed decisions about their healthcare needs based on providers' full disclosure.[204] Although the parties involved in the medical tourism industry such as insurers, brokers, and foreign facilities certainly understand the risks associated with medical tourism, they are not quick to disclose these risks to vulnerable patients. Instead, they shield themselves from liability by utilizing release forms, waivers, and other contractual measures that do not specify the risks involved and do not provide full disclosures as customary.

It is nearly impossible for American courts to force foreign medical institutions to accept liability for medical mishaps that affect American patients. However, the U.S. government could exercise its authority by extending its reach to the U.S.-based tax-exempt JCI. The U.S. government should require that the JCI accredit only those foreign hospitals that show adequate liability insurance from internationally recognized insurance firms. Additionally, the U.S. government could require that the JCI, as a condition of accreditation for these offshore hospitals,[205] demand that American hospitals who lend their names to foreign affiliates assume full financial responsibility by acquiring insurance for any medical mishaps abroad. The U.S. government could also, as a condition for accreditation, require that the JCI publicly report the outcomes of any procedure at the foreign facilities, including surgical site infections, length of stay, or need for re-operation.

In the alternative, CMS could extend its reach to the U.S. hospitals that allow their names to be used abroad. For example, an investigation after a patient's suicide, who had been on suicide watch at the Timberlawn Behavioral Health System in Dallas, revealed that the JC oversight failed to deliver safe conditions, based on evidence of rape and overcrowded hallways.[206] Following these discoveries, the CMS cut off the hospital's Medicare funding, reasoning that the violations were "an immediate jeopardy to patient safety and health."[207] Similarly, in medical malpractice cases abroad, the CMS should withhold Medicare funding from U.S.-based hospitals, located in the United States, that lend their names to foreign institutions, which in turn lure American patients to their offshore facilities.

Additionally, the U.S. government could mandate that the American affiliates of these hospitals, that are reaping the benefits of this unaccountability, require their host institutions to place disclaimers on their websites indicating that such affiliation does not translate into liability in U.S. courts.

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204. Muzaurieta, *supra* note 25, at 133.

205. *See id.* at 142.

206. Armour, *supra* note 137.

207. *Id.*

X. CONCLUSION

Sacrificing potential legal remedies in exchange for life-prolonging medical care may sometimes be the only option American patients have for care that otherwise they could not afford. Lower costs incentivize American patients to travel to offshore U.S.-affiliated hospitals and medical facilities to seek care. However, they are often left without any recourse when faced with medical negligence. These facilities use their U.S. affiliation to attract more revenue but are not accountable for medical mishaps.

The United States has little political influence to force other nations to implement specific regulatory frameworks in their healthcare systems. Therefore, the U.S. government cannot directly demand that these foreign institutions disclose their lack of accountability to American patients. However, the U.S. government should exercise its authority and require that the U.S.-based JCI or the U.S. affiliates accept full financial liability. The legislature could accomplish this goal by demanding full proof of internationally recognized medical malpractice insurance for American patients from U.S.-based institutions that lend their names to foreign medical centers—especially when esteemed institutions feature as guarantors of quality in the foreign medical facilities' advertising.

THE UBER CHALLENGE: A COMPARATIVE ANALYSIS OF REGULATORY SCHEMES GOVERNING TRANSPORTATION APP FIRMS

Abigail M. Lombardo[*]

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I. INTRODUCTION

Is the convenience of on-demand transportation worth the cost of taxi mafias in Indonesia,[1] violent protests throughout Europe, [2] or fatal attacks on drivers?[3] Some describe the rapid expansion of ride-hail applications (apps) as an example of "disruptive innovation,"[4] or, as Uber phrases it, "first-to-market."[5] These examples show that ride-hail app firms' impact reaches well beyond disrupting their predecessors—taxicabs. Uber's innovative technology and business model unduly imposes costs on its drivers, riders, and others who share the road by private or public transportation.[6] At a minimum, well-designed regulations are needed to address (1) discriminatory treatment that competitively disadvantages rivals and traditional for-hire transportation services, (2) safety of and responsibility to workers and consumers, and (3) managing means of transportation in overcrowded city centers.

The existing regulatory responses to Uber's presence are a result of various factors, including discriminatory treatment, which allowed ride-hailing companies to avoid regulations that apply to licensed taxi drivers. This treatment is addressed as one of three goals in the regulation of transportation app firms. Addressing each goal is important for protecting consumers, workers, and businesses within the United States, and in the sixty-nine other countries where Uber is present.[7] The question remains, whether any one country or municipality has found a balanced way to regulate these companies without unnecessarily restricting their freedom of

1. Harrison Jacobs, *'Why Should We Make Foreigners Rich?': Taxi Drivers are Taking on Uber and Grab in Bali, and Some are Turning to Violence*, BUS. INSIDER (Jun. 23, 2018, 7:30 AM), https://www.businessinsider.com/uber-grab-bali-attacks-taxi-drivers-2018-6.

2. J. B. Bailey, *The World Trade Organization Should Lyft the Globe Out of Its Uber Problem*, 19 J. INT'L BUS. & L. 61, 70 (2019).

3. Uber Tech., Annual Report (Form 10-K) 28 (Dec. 31, 2019) [hereinafter 2019 Annual Report].

4. Hung-Hao Chang, *The Economic Effects of Uber on Taxi Drivers in Taiwan*, 13 J. COMPETITION L. & ECON. 475, 477-78 (2017) (disruptive innovation business is justified if it creates a new market with different consumers).

5. 2019 Annual Report, *supra* note 3, at 37-38.

6. This note is focused on Uber Technologies Inc., but the comparative analysis may be broadly applied to other ride-hail app firms, as well as those that offer food delivery services.

7. 2019 Annual Report, *supra* note 3, at 18. (78% of Uber trips booked in 2019 took place outside of the United States).

enterprise.[8] This note surveys a sample of regulatory schemes to determine how well they serve the recommended regulatory goals and offers tentative conclusions about the desirability of certain approaches given ride-hail and gig applications' impact on, and disruption of, traditional industries.

II. BACKGROUND

Ubercab Inc. was founded in March of 2009 as one of the first ride-hail applications in the United States.[9] The company offered a "one-click car service," which connected users with professional drivers, or what would be known today as UberBlack.[10] Ubercab—rebranded as Uber Technologies, Inc. to avoid tensions with the taxi industry—marketed itself as "everyone's private driver" until 2012, when it launched UberX.[11] At around two-thirds the cost of an UberBlack, UberX allowed nonprofessional drivers to use their personal vehicles to offer rides.[12] From then on, the app firm continued to expand and develop its "first-to-market" offerings, whether it be to autonomous vehicle development, air transportation, or non-emergency medical transportation.[13]

Uber was founded on the sharing economy concept. Through smartphone applications, drivers could share underutilized assets, their

8. Gabriel Doménech-Pascual & Alba Soriano-Arnanz, *Taxi Regulation in Spain under the Pressure of the Sharing Economy*, *in* UBER & TAXIS COMPAR. L. STUDS. 358, 365, 373-74, (Rozen Noguellou & David Renders eds., 2018) (discussing the role of the National Commission on Markets and Competition, an independent regulatory authority, and its argument that the Spanish Supreme Court ruling, which restricted one PHV (private hire vehicle) license to every thirty persons of the region, "impose[d] unreasonable restrictions on both competition and freedom of enterprise which is inefficient and reduces social welfare" by applying tech and social innovations that reduce transaction costs necessary to share underutilized resources (cars)).

9. 2019 Annual Report, *supra* note 3, at 9 (Uber amended their registration a year later under Uber Technologies, Inc.).

10. *See infra* note 16; *Uber Black*, UBER, https://www.uber.com/us/en/ride/uberblack/ (last visited Feb. 13, 2022). For an overview of Uber's changes in design, see Nathan McAlone, *This is How Uber Used to Look When It First Started Out and How It's Changed over Time*, BUS. INSIDER (Feb. 10, 2016, 1:54 PM), https://www.businessinsider.com/ubers-design-history-2010-2016-2016-2.

11. *See* Avery Hartmans & Paige Leskin, *The History of How Uber Went from the Most Feared Startup in the World to Its Massive IPO*, BUS. INSIDER (May 18, 2019, 11:42 AM), https://www.businessinsider.com/ubers-history#april-2007-travis-kalanick-becomes-a-millionaire-at-age-30-he-sells-his-startup-called-redswoosh-to-a-cloud-company-called-akamai-for-23-million-its-the-second-companys-hes-been-involved-in-since-he-dropped-out-of-ucla-in-1998-1.

12. Available to those nonprofessional drivers who were screened and passed a background check. *See id.*

13. *See* 2019 Annual Report, *supra* note 3, at 8, 32; *accord.*, Uber Tech., Form 8-K SEC filing (Feb. 10, 2021) (Uber divested their autonomous vehicle and air transportation sectors in exchange for a minority stake in the respective companies).

personal vehicles, with riders in need of convenient transportation.[14] For a service fee to drivers, Uber connected them with a rider in their area. This is more than just an intermediation service, though. Uber screens drivers and riders (with the discretion to restrict their use of the app), sets prices, and processes the parties' transactions.[15] On the one hand, Uber has done its part to broker a range of services[16] which broadened users' options for travel. A consumer previously averse to municipal carpool services can now pay a menial cost for an UberPool, while those seeking town cars may call an Uber LUX with the touch of a button. But, on the other hand, this innovative means of travel broke into the market without compatible regulations for its unique business model.

Although regulations applicable to Uber existed at the time, there were two issues. First, drivers and riders were transacting as private citizens, and questions loomed in the early stages as to what responsibilities drivers and riders owed to each other. This looked more like giving a family member gas money for driving you to the airport,[17] rather than hiring a taxi to provide the same transportation. Second, Uber did not claim to be a transportation business but a technology company,[18] and it rejected traditional transportation regulations as inapplicable to its business.[19] As the conflict with and resistance to ride-hail companies became more prevalent, individual cities and associations acted as laboratories for regulatory experiments.[20] To find a framework for a well-designed ride-hail app firm regulation, distinct

14. Bailey, *supra* note 2, at 61-62.

15. *See generally* 2019 Annual Report, *supra* note 3.

16. UBER, *Rides around the World*, UBER, https://www.uber.com/us/en/ride/ride-options/ (last visited Feb. 13, 2022). Uber offers various options for riders, which differ between cities. *Id.* The following is a brief description of each service, limited to those found in the regions discussed in this note: UberX (1-4 riders, "affordable, everyday rides"), UberXL or Van (1-5 riders, "affordable rides for groups up to 5"), Uber Green (1-3 riders, "low-emission rides"), UberPool (1-2 riders, temporarily unavailable in the United States and Canada due to COVID-19), Uber Transit ("real-time public transit information in the Uber app"), WAV (1-4 riders, "wheelchair-accessible rides"), Scooter (1 rider, "fasters & cheaper), Comfort (1-4 riders, "extra legroom and top rated drivers"), Taxi (1-4 riders, "local taxis at the tap of a button"), Select (1-4 riders, "top rated drivers with our riders' preferred vehicles"), Black (1-4 riders, "premium rides in luxury cars"), and Uber Lux (1-4 riders, "top-rated drivers in luxury vehicles"). *Id*.

17. McAlone, *supra* note 10.

18. *Uber B.V. Terms and Conditions*, UBER, https://www.uber.com/legal/en/document/?country=pakistan&lang=en&name=general-terms-of-use (last modified Dec. 31, 2019).

19. Nayeem Syed, *Regulating Uberification*, 22 COMPT. & TELECOMM. L. REV. 14, 16 (2006).

20. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the county.").

regulatory schemes will be more closely examined, with the recommended goals in mind, alongside Uber's responses.

A. California, United States

Since Uber's 2010 launch in San Francisco, CA,[21] the sunshine state was a source of both growth and conflict. In 2013, the California Public Utilities Commission (CPUC) was one of the first jurisdictions[22] to deem Uber a "transportation network company" (TNC).[23] The CPUC classified Uber not as a technology company, but as a company that was essentially a limousine dispatch office.[24] Therefore, the *transportation* service Uber provided, as opposed to the operation of the app, was subject to the CPUC's transportation service regulations.[25] This classification established regulatory hurdles for Uber to overcome before it could continue business in its home state. TNC's must obtain a CPUC permit, conduct criminal background checks, implement conduct policies,[26] and require minimum insurance.[27] Resisting Uber's challenges to the new regulations, the CPUC argued that they were necessary to protect the public interest, as it was unclear what protections Uber's then-existing model offered.[28]

Effective January 1, 2020, California attempted to further regulate Uber through Assembly Bill No. 5 (A.B. 5). A.B. 5 codified the "California Supreme Court's landmark, unanimous *Dynamex* decision" and created a rebuttable presumption that workers are employees versus independent contractors.[29] The Legislature intended to restore protections and basic

21. *The History of Uber*, UBER: NEWSROOM, https://www.uber.com/newsroom/history/ (last visited Dec. 20, 2020).

22. *Transportation Network Company (TNC) Legislation*, TEX. A&M TRANSP. INST., https://policy.tti.tamu.edu/technology/tnc-legislation/ (last visited Feb. 13, 2022).

23. Syed, *supra* note 19.

24. *Id.*

25. *Id.*

26. *See Transportation Network Companies*, CAL. PUB. UTILS. COMM'N., https://www.cpuc.ca.gov/regulatory-services/licensing/transportation-licensing-and-analysis-branch/transportation-network-companies (includes Zero Tolerance Policies, Accessibility Plans, Approved Trade Dress, Driver Training Programs, and plans to prevent the use of its platform by unaccompanied minors) (last visited Feb. 13, 2022).

27. Syed, *supra* note 19.

28. *Id.*

29. Assemb. B. 5, 2019-2020 Leg., Reg. Sess. (Cal. 2019) (enacted) (codified as CAL. LAB. CODE §§ 2750.3, 3351 and CAL. UNEMP. INS. CODE §§ 605.5, 621) (includes various exempt occupations, such as certain health care professionals, real estate licensees, barbers and cosmetologists, and insurance agents); Nate Hertweck, *California Gov. Newsom Signs Critical AB5 Exemption for Music Makers into Law*, *Advocacy*, GRAMMY (Sept. 9, 2020, 4:56 PM), https://www.grammy.com/advocacy/news/california-gov-newsom-signs-critical-ab5-exemption-music-makers-law (a recent amendment has exempted music makers from A.B. 5).

workplace rights of misclassified workers.[30] As employees, ride-hail drivers would have rights and protections, including minimum wage, workers' compensation, unemployment insurance, paid sick leave, and paid family leave.[31] This classification is a widespread point of contention for Uber.[32]

The enactment of A.B. 5 brought about *People v. Uber Technologies Inc.*,[33] which was filed just five months after A.B. 5 took effect. California's Attorney General, joined by the City Attorneys of Los Angeles, San Diego, and San Francisco, sought to enjoin Uber from classifying drivers as independent contractors and require it to comply with the new law.[34] California's complaint states, "on information and belief, the illicit cost savings Defendants have reaped as a result of avoiding employer contributions to state and local unemployment and social insurance programs totals well into the hundreds of millions of dollars."[35] Uber filed a motion to stay this action pending the result of their own constitutional challenge to A.B. 5 and the result of Proposition 22.[36] Together with other app-based gig firms,[37] Uber broke the record for California's costliest ballot battle[38] with almost $200 million in contributions to their campaign for Proposition 22.[39]

30. Cal. Assemb. B. 5 §1(e) (enacted).

31. *Id.*

32. As highlighted by the following discussion of labor law disputes, *infra* p. 181, 193-200.

33. People v. Uber Techs, Inc., 270 Cal. Rptr. 3d 290, 296 (2020).

34. Bobby Allyn, *California Judge Orders Uber and Lyft to Consider All Drivers Employees*, NPR (Aug. 10, 2020, 5:30 PM), https://www.npr.org/2020/08/10/901099643/california-judge-orders-uber-and-lyft-to-consider-all-drivers-employees.

35. Complaint for Injunctive Relief, Restitution, and Penalties at 22, People v. Uber Techs. Inc., 270 Cal. Rptr. 3d 290 (2020) (No. A160706); *see also* KEN JACOBS & MICHAEL REICH, INST. RES. LAB. & EMP. U.C. BERKLEY, WHAT WOULD UBER AND LYFT OWE TO THE STATE UNEMPLOYMENT INSURANCE FUND? 1 (2020), https://laborcenter.berkeley.edu/what-would-uber-and-lyft-owe-to-the-state-unemployment-insurance-fund/ (finding that if Uber and Lyft had treated workers as employees, the two TNCs would have paid $413 million into the state's Unemployment Insurance Fund between 2014 and 2019).

36. Ord. to Stay Preliminary Injunction at 2, People v. Uber, 270 Cal. Rptr. 3d 290 (Aug. 10, 2020) (No. A160706).

37. CAL. SEC'Y OF STATE, CAMPAIGN FINANCE: YES ON 22–SAVE APP-BASED JOBS AND SERVICES, http://cal-access.sos.ca.gov/Campaign/Committees/Detail.aspx?id=1422181&session=2019&view=late1 [hereinafter Yes on 22 Campaign Finance] (noting only the other app-based gig firms as contributors: Doordash, Instacart, Postmates, and Lyft) (last visited Dec. 20, 2020).

38. Ryan Menezes, et al., *Billions Have Been Spent on California's Ballot Measure Battles. But This Year Is Unlike Any Other*, L.A. TIMES, https://www.latimes.com/projects/props-california-2020-election-money/ (last updated Nov. 13, 2020).

39. Yes on 22 Campaign Finance, *supra* note 37 (total contributions between Jan. 1, 2020, and Oct. 17, 2020, was $190,270,230.49; Another $6,146,107.73 was contributed between Oct. 19, 2020, and Nov. 2, 2020). The initial contributions were made in August 2019, before A.B. 5

California voters passed the initiative during the November 2020 general election.[40] At the beginning, Uber took this win and the company submitted similar proposals in other states and countries.[41] But now, the enacted legislation has been deemed unconstitutional by a Judge Frank Roesch of the Alameda County Superior Court,[42] and local regulation and the judicial process will dictate whether Uber will be able to continue to work under its preferred business model in California.[43]

B. Sao Paulo, Brazil

Brazil is Uber's second-biggest market with seventeen million users and a 2019 reported revenue of $918 million (following the United States with a 2019 reported revenue of $8.225 billion).[44] As one of Uber's largest mobility

was made law, *California Proposition 22, App-Based Drivers as Contractors and Labor Policies Initiative (2020)*, BALLOTPEDIA, https://ballotpedia.org/California_Proposition_22,_App-Based_Drivers_as_Contractors_and_Labor_Policies_Initiative_(2020) (last visited Feb. 13, 2022). Despite Uber's efforts to paint Proposition 22 as favorable to drivers, the company did not hide the proposition's double-sided nature. *See Uber Announces Results for Fourth Quarter and Full Year 2019, Investor*, UBER (Feb. 6, 2020), https://investor.uber.com/news-events/news/press-release-details/2020/Uber-Announces-Results-for-Fourth- Quarter-and-Full-Year-2019/. The concerted investments in Proposition 22 were meant to "protect [drivers and delivery people's] ability to work flexibly and *clarify Uber's role as a marketplace*." *Id.* (emphasis added).

40. Suhauna Hussain & Johana Bhuiyan, *Prop. 22 Passed, A Major Win for Uber, Lyft, DoorDash. What Happens Next?*, L.A. TIMES (Nov. 4, 2020, 7:06 PM), https://www.latimes.com/business/technology/story/2020-11-04/prop-22-passed-what-happens-next. Proposition 22 was quickly met with lawsuits involving both the campaign spending and the constitutionality of the initiative as enacted. Lauren Hepler, *Lawsuits and Labor Backlash: Prop. 22's Cutthroat Final Days*, CAL MATTERS (Oct. 27, 2020), https://calmatters.org/politics/california-election-2020/2020/10/lawsuits-labor-prop-22/ (class action discrimination lawsuit that asserts unlawful coercion of drivers to support the measure) (Oct. 30, 2020). Uber is not alone as fellow gig-app Instacart faces suit based on worker misclassification. People v. Maplebear, Inc., No. D077380, 2021 BL 54204 (Cal. App. 4th Dist. Feb. 17, 2021); *see also* Maeve Allsup & Erin Mulvaney, *California Courts Grapple with Proposition 22's Gig Fallout*, BLOOMBERG L. (Feb. 25, 2021, 2:31 AM), https://news.bloomberglaw.com/us-law-week/california-courts-grapple-with-proposition-22s-gig-fallout (detailing the various legal actions filed and pending against gig companies).

41. *See* Joel Rosenblatt, et al., *Uber Won Its Prized Contractor Status for Drivers. Now What?*, BLOOMBERG L. (Nov. 4, 2020, 8:45 AM), https://www.bloomberglaw.com/bloomberglawnews/daily-labor-report/XODAEA8000000?bna_news_filter=daily- labor-report#jcite; *infra* note 148.

42. Order Granting Petition for Writ of Mandate at 11-12, Castellanos v. State of California, No. RG21088725, https://s3.documentcloud.org/documents/21046832/castellanos-order.pdf.

43. Kate Conger, *California's Gig Worker Law is Unconstitutional, Judge Rules*, L.A. TIMES (Aug. 23, 2021), https://www.nytimes.com/2021/08/20/technology/prop-22-california-ruling.html?referringSource=articleShare; Margot Roosevelt & Suhauna Hussain, *Prop. 22 Is Ruled Unconstitutional, a Blow to California Gig Economy Law*, L.A. TIMES (Aug. 23, 2021), https://www.latimes.com/business/story/2021-08-20/prop-22-unconstitutional.

44. 2019 Annual Report, *supra* note 3, at 143.

markets, it is little wonder that it chose to invest in Brazil.[45] The Sao Paulo Tech Center was Uber's first company-wide hub in Latin America,[46] and its foundation followed the city's 2016 enactment of a progressive regulatory scheme, Decreto Municipal No. 56.981 (Decreto 56.981).

Decreto 56.981 exemplifies adaptive regulation in a variety of ways. Like California's TNC, Decreto 56.981 created the Accredited Transport Technology Operators (OTTC) classification, separate and apart from taxi services. Decreto 56.981 also set up a kilometer credit system, monitored by the City Hall, which essentially requires Uber to pay for drivers' use of public infrastructure.[47] Kilometer credits are meant to regulate private road user's "urban and financial impact" on the environment, traffic flow, and public expenditure related to urban infrastructure.[48] Further, Decreto 56.981 established the Comitê Municipal de Uso do Viário (CMUV) to monitor this decree.[49] The CMUV issues the requisite registration to drivers who show that they (1) have a license to carry out paid activity,[50] (2) are individual contributors to social security,[51] (3) have a clean criminal record,[52] (4) completed a training course approved by the CMUV,[53] and (5) provide remunerated transport services solely and exclusively through OTTCs.[54] Notably, Sao Paulo's regulation also covers driverless-rides[55] and requires that a portion of kilometer credits used be allotted to female drivers,[56] a commendable example of progressive regulatory action.

To understand the reason for Decreto 56.981's enactment, a look back at events in Brazil before these regulations can be helpful. Osvaldo Luis Modolo Filho was a fifty-two-year-old Uber driver, when two teens ordered a ride using a fake Uber account. The couple stabbed Filho, stole his car, and left him on the street to die.[57] Prior to 2016, at least sixteen Brazilian Uber

45. Uber, 2021 Investor Presentation at 27 (Feb. 10, 2021), https://s23.q4cdn.com/407969754/files/doc_financials/2020/q4/InvestorPresentation2021.pdf.

46. Camila Carvalho, *Standing for Safety: Meet the Uber Sao Paulo Tech Team, Engineering*, UBER (Jul. 28, 2020), https://eng.uber.com/meet-sao-paulo-tech/.

47. Decreto No. 56.981, de 10 de Mayo de 2016, DIÁRIO OFICIAL DO SÃO PAULO [D.O.E.S.P] de 11.05.2016, arts. 8-12 (Braz.).

48. *Id.*

49. *Id.* art. 26.

50. *Id.* art 15-A, § 1.

51. *Id.* § 3.

52. *Id.* § 4.

53. *Id.* § 5.

54. *Id.* § 6.

55. *Id.* art. 21-25 (vehicle sharing rental service available in public places on public roads only granted to OTTCs).

56. *Id.* art. 16.

57. *Id.*

drivers were murdered. These tragic events were exacerbated by the user's ability to pay cash and the minimal information required to create a rider account.[58] Requiring credit card payments, a key to the convenience of the ride-hailing process, [59] limits the amount of cash drivers would carry throughout their shift, which in turn could provide more protection from thieves or violence.[60] Despite Uber's claims that their tracking technology made their services safer than taxis, the violence and fatalities in Brazil required decisive action by the app firm and regulators.[61]

In general, Uber's expansion around the world has been accomplished in two ways. For countries with established precedent, Uber appears to conform with existing regulations; for areas without such precedent, Uber does business until its side effects become so pronounced that regulations must adapt to the issues that arise from its presence. Regulators may have greater bargaining power in the latter scenario, in which case it may be worthwhile to consider the success or lack thereof in meeting the following goals in current regulatory schemes.

III. END DISCRIMINATORY TREATMENT

Many countries where Uber is present have strict requirements and established procedures for obtaining a license as a driver for hire, whether or not there is a distinction between taxis and private hire services.[62] This first goal addresses the discrepancy between the treatment of Uber and its predecessors, which includes taxis, limousines, and other modes of for-hire

58. Mike Isaac, *How Uber Got Lost*, N.Y. TIMES (Aug. 23, 2019), https://www.nytimes.com/2019/08/23/business/how-uber-got-lost.html (Some insiders believe that this was an attempt to increase ridership, and thus global expansion, by limiting "friction" and allowing riders to sign up without requiring them to provide identification beyond an email or a phone number. Most Brazilians used cash far more frequently than credit cards, which meant "that after a long shift, a driver could be expected to be carrying a lot of money.").

59. 2019 Annual Report, *supra* note 3, at 30 ("[t]he convenient payment mechanisms provided by our platform are key factors contributing to the development of our business").

60. Isaac, *supra* note 58*;* 2019 Annual Report, *supra* note 3, at 28 (payments through the app meant more control from Uber, but also protection for drivers from serious safety incidents resulting from cash-paid trips, which accounted for 11% of Uber's 2019 global gross bookings).

61. Isaac, *supra* note 58*;* 2019 Annual Report, *supra* note 3, at 28.

62. Delphine Aurélie Laurence Defossez, *The Regulation of a Project of the Dereuglation: UBER in Brazil and the European Union*, 3 J. L. REGUL. 1, 13 (2017) (noting how the Law Commission for England and Wales advocated for similar standards for drivers to meet purposes of public safety, accessibility, enforcement of the legislation, and environmental protection, but "expressly stipulate[ing] that such companies should not be subject to sector-specific rules" aimed at taxis).

transportation in a city.[63] To lessen this discrepancy, effective regulatory schemes could hold ride-hail firms and taxis to the same or similar standards or to mitigate the competitive advantage Uber gains by its misclassification,[64] which allows it to offer lower prices for the same services provided by the incumbents.

When Uber entered the market, it had some curb appeal as one of the latest innovations within the evolving world of technology. It served users in multiple ways, it raised the standards for vehicles for hire, like taxis,[65] it created the opportunity for a new revenue stream for drivers, and it eliminated the exchange of payment at the end of a trip (in most, but not all cases, as seen in Brazil). The original conflict stemmed from the fact that Uber allowed private citizens to offer the same services as taxi drivers, without the rigorous tests of both the driver and the vehicle that were required of their counterparts. Although taxis were utilizing some form of "e-hailing" at the time, this did not level them with the new low-cost Ubers.[66]

A. Equation

One way to address the conflict between ride-hail drivers and taxis is by equating the two's regulatory standards, or requiring Uber to adapt to existing standards, which was the approach taken in Taiwan.[67] When Uber first arrived in Taipei in 2013, it maintained its U.S. business model and worked as an intermediary between riders and existing privately licensed drivers.[68] Since Uber did not own the vehicles, it was considered a "platform matchmaker rather than a transport provider."[69] Therefore, the local Uber

63. Uber's effect on the taxi industry focuses on metropolitan areas as the company has yet to successfully "penetrate lower-density suburban and rural areas," where personal vehicle ownership is less expensive and more convenient. 2019 Annual Report, *supra* note 3, at 21.

64. Based on their savings from worker classification and avoidance of transportation regulations if classified as a technology/information service company.

65. Chang, *supra* note 4, at 499.

66. *Id.* at 480; *see also*, CRISTIANO AGUIAR DE OLIVEIRA AND GABRIEL COSTEIRA MACHADO, DOES UBER COMPETITION REDUCE TAXI DRIVERS' INCOME? EVIDENCE FROM BRAZIL 6 (2017), https://lawle2014.files.wordpress.com/2017/10/cristiano-oliveira.pdf (door-to-door taxis have the same matching, georeferencing, and evaluation characteristics as Uber).

67. *See infra* note 74; *see* also *The History of Taxi Services in Prague*, PRAGUE TAXI, https://www.prague-taxi.co.uk/the-history-of-taxi-service-in-prague/ (Prague, Czech Republic also requires Uber drivers to have a taxi license and visible taxi designation) (last visited Feb. 21, 2022); *The Government and Uber Signed a Memorandum. Uber Will Adapt to Czech Law, and Drivers Will Meet the Conditions for Regular Taxi Drivers*, PRAGUE TAXI, https://www.prague-taxi.co.uk/the-government-and-uber-signed-a-memorandum-uber-will-adapt-to-czech-law-and-drivers-will-meet-the-conditions-for-regular-taxi-drivers/ (last visited Feb. 21, 2022).

68. *See* Chang, *supra* note 4.

69. *Id.*

entity and drivers did not feel obligated to comply with laws applied to taxi drivers, primarily those that restricted Uber's services to those which could only be offered with government-issued taxi licenses.[70] This resulted in millions in regulatory fines and a 2017 relaunch of Uber under a government-approved model.[71] In 2019, the pressure from the taxi industry[72] resulted in the Ministry of Transportation and Communication's "Uber Clause," which required drivers to work within the Metropolitan Taxi Program (MTP).[73] Emile Potvin, Uber's APAC director of public policy, stated that Uber's desire to partner with the government led it to join Taiwan's MPT, despite not being a taxi company.[74] Although customer-facing changes are minimal, Uber has traded away the use of its preferred business model to maintain its presence in Taiwan.[75] Uber's adaption there shows that equitable treatment of ride-hail drivers and the taxi industry is possible without forcing out one or the other.[76] Given the relative novelty of the Uber Clause, further effects of Taipei's imposition of regulatory compliance, and the extent to which Uber will compromise to keep doing business there, would help advance the analysis, especially as innovative technology continues to develop.

B. Differentiation

Alternatively, regulators could differentiate ride-hails from taxis but hold them to equitable standards, much like Sao Paolo's approach. For EU Member States, local schemes flow from the European Union Court of

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70. *Id.*

71. 2019 Annual Report, *supra* note 3, at 132 ("Prior to the Company adjusting and relaunching its operating model in April 2017 to a model where government-approved rental companies provide transport services to Riders, Drivers in Taiwan and the local Uber entity have been fined by Taiwan's Ministry of Transportation and Communications in significant numbers across Taiwan.").

72. Matthew Fulco, *Uber Stays in Taiwan, But at a Price*, TAIWAN BUS. (Mar. 24, 2020), https://topics.amcham.com.tw/2020/03/uber-in-taiwan/ (In 2017, Taiwan attempted to appease the taxi industry by changing Uber's status from private cars to rental cars, but incumbents found regulations insufficient as they were still being undercut in terms of price).

73. *Id.*

74. "From the recent situation, Uber has suffered a big loss in Taiwan, because a pure sharing economy hasn't been established here," says AppWorks' Chen. "You can observe that it's just a repackaging of the old taxi business model. The only difference is the taxi doesn't have to be yellow anymore…For its part, Uber had few cards left to play. Taiwan was one of just two East Asian markets–Hong Kong being the other–where the company had a successful business of its own that it wished to maintain. Elsewhere in the region, local competitors, whether taxis or large ride-sharing operations like China's Didi Chuxing and Singapore's Grab, had already won the day.
Id.

75. *See id.*

76. *See id.;* Jessica, Pan, *UberTAXI is Arriving Soon*, UBER: NEWSROOM (Sept. 22, 2017), https://www.uber.com/en-TW/newsroom/ubertaxi-arriving-soon/.

Justice's 2017 holding in *Elite Taxi Association Professional v Uber Spain,*[77] alongside the Treaty on the Functioning of the European Union (TFEU).[78] Generally, the EU regulations allow for the freedom to provide services, but explicitly exempt the field of transport from this freedom.[79] The court in *Elite Taxi* began the analysis by noting that the act of connecting nonprofessional drivers using their personal vehicles with consumers for urban travel is an intermediation service, not necessarily a transport service.[80] Further, non-public urban transport services, i.e., taxis, "must be classified as 'services in the field of transport.'" The court reasoned:

> That intermediation service must thus be regarded as forming an integral part of an overall service whose main component is a transport service and, accordingly, must be classified not as 'an information society service'… but as a service in the field of transport'…That classification is indeed confirmed by the case-law of the Court, according to which the concept of 'services in the field of transport' includes not only transport services in themselves but also any service inherently linked to any physical act of moving persons or goods from one place to another by means of transport. . . .[81]

Based on the nature of Uber's services, along with the influence and control it exercises over how those services are provided,[82] the court held that Uber did not meet the requisite definition under the TFEU to qualify as free to provide its services, but instead, it should be subject to the same regulatory measures as taxi services. The impact of this holding throughout the EU Member States resulted in either ending the discriminatory treatment in favor of ride-hailing apps or ending the app's business altogether.

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77. Case C-434/15, Elite Taxi Ass'n Prof'l v. Uber Spain, 2017 E.C.R. 10 at p. 10 (Notably, transport and related services have not been adopted by the European Parliament, and the Council of the EU of common rules or other measures based on Article 91(1) TFEU and therefore the Member States themselves act as regulators and ensure that intermediation services within these states conform with the rules of the TFEU).

78. *Id.* at. 8; Consolidated Version of the Treaty on the Functioning of the European Union, 2012 O.J. (C 326) 47 [hereinafter TFEU].

79. Directive 2006/123 on Services in the Internal Market, Dec. 12, 2006, https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32006L0123&from=EN.

80. Elite Taxi Ass'n Prof'l, Case C-434/15, at 5 (further clarifying that by enabling the transfer of information by a smartphone, application in this setting meets the classification as an "information society service" defined by article 1(2) of Directive 98/34 and article 2(a) of Directive 2000/31); *see also* TFEU (both transport and intermediation services are protected in their freedom to provide services).

81. *Id.* at 9.

82. *Id.* (establishing that Uber determined the maximum fare, received the client's money, and then paid the driver; it also set standards for the vehicles' quality, the drivers, and their conduct, which can in some circumstances result in their exclusion).

Two German courts[83] found that when Uber directed assignments and collected customers' payments, it took on a position that taxi drivers had already occupied.[84] For these reasons, nonprofessional drivers could not legally provide transport services in their own vehicles, as they do in the United States. In response to this holding, Uber modified its operations and split its offerings into professional services (private hire vehicle or PHV) and intermediary services (UberTaxi).[85] In Berlin, all PHV drivers must have a private hire driving license, with a concession for commercial passenger transportation,[86] while Uber mediates trips through a PHV operator.[87] Alternatively, Uber's intermediary services, UberTaxi, arranges trips between taxi drivers and consumers at official taxi rates.[88] Compared to the adaptive regulatory option, Sao Paolo and Berlin's treatment seem to balance the taxi industry's concerns, lessening Uber's competitive advantage by avoiding licensing costs, with Uber's ability to conduct business.

C. Numerus Clausus

Within either of the aforementioned approaches, regulators could employ the concept of *numerus clausus*[89] through the use of medallions or licenses, which regulate the number of taxis or PHVs[90] by region,[91] population, or both.[92] This would lessen the impact of cars on the road, and

83. OVG, Sept. 24, 2014, 3 Bs 174/14, https://www.landesrecht-hamburg.de/bsha/document/MWRE140002655; OVG, Apr. 10, 2015, 1 S 96.14, https://gesetze.berlin.de/bsbe/document/JURE150006690.

84. Defossez, *supra* note 62, at 15.; Jenny Gesley, *Legal Challenges for Uber in the European Union and in Germany*, LIBR. OF CONG. (Mar. 14, 2016), https://blogs.loc.gov/law/2016/03/legal-challenges-for-uber-in-the-european-union-and-in-germany/; OVG, Sept. 24, 2014, 3 Bs 174/14, para. 14; OVG, Apr. 10, 2015, 1 S 96.14, para. 28-32.

85. Jenny Gesley, *Legal Challenges for Uber in the European Union and in Germany*, LIBR. CONGRESS (Mar. 14, 2016), *https*://blogs.loc.gov/law/2016/03/legal-challenges-for-uber-in-the-european-union-and-in-germany/.

86. *Vehicle Requirements, Germany*, UBER, https://www.uber.com/de/en/drive/requirements/vehicle-requirements/ (last visited Dec. 20, 2020).

87. *Id.*; *Fleet Partners, Germany*, UBER, https://www.uber.com/de/de/drive/vehicle-solutions/fleet-partners/ (Drivers could also apply to be an employee through a rental car company, still facilitated by Uber's technology, or become an Uber partner by setting up their own rental car company) (last visited Dec. 20, 2020).

88. *Berlin*, UBER https://www.uber.com/global/en/cities/berlin/ (last visited Dec. 20, 2020).

89. For further perspective on this approach, see Doménech-Pascual & Soriano-Arnanz, *supra* note 8, at 360-62.

90. *See id.*

91. *Id.*

92. Royal Decree 1057/2015 (B.O.E. 2015, 109832) (Spain).

competition, by controlling the supply of available services. Taiwan exemplifies this concept; medallions are required of taxi operators, and worth a substantial amount of money, so much so that many taxi drivers will work within a cooperative or a company so that numerous drivers may lawfully operate under a single medallion.[93] This motivation highlights why Uber's 2013 entry into the market harmed the incumbent taxi industry. As already mentioned, Taipei was able to maintain *numerus clausus* by equating the standards for taxis and Ubers, but the circumstances of this regulatory scheme are unique.[94]

Various regions of Spain employ *numerus clausus*, but unlike Taiwan, they differentiate the treatment between taxis and Ubers, which leaves the door open for incumbents to fight back. In Barcelona, Uber first adapted to local regulations on passenger transport vehicles (VTC)[95] licensing and the number of licenses available, which were allotted separately from taxi licenses, but vigilant taxi industry protestors forced the regulator's hand in 2019.[96] New restrictions, which required rides to be scheduled at least fifteen minutes in advance, eliminated the convenience of Uber's on-demand services and the company, along with its competitor Cabify, left the city for the second time.[97] This new measure shows the power and persistence of the incumbent taxi industry, who "celebrated what they hailed as a victory of a traditional profession threatened by the disruptive forces of the gig economy."[98] Uber does business in sixty-nine other Spanish cities,[99] but Barcelona is no longer on that list. This raises the question whether other

93. Chang, *supra* note 4, at 480.

94. *See* Fulco, *supra* note 72.

95. Fran Serrato, *Uber Returns to Operating in Madrid with Licensed Drivers*, EL PAÍS (Mar. 30, 2016), https://english.elpais.com/elpais/2016/03/30/inenglish/1459323814_036208.html.

96. Renata Brito & Joseph Wilson, *Uber, Cabify Stop Services in Barcelona Due to Tighter Laws*, ASSOCIATED PRESS (Jan. 31, 2019), https://apnews.com/article/597506ab5d574fe2a07c62b39271b14b; Luis Doncel, *Taxis vs. Uber: A War Between Very Similar Enemies*, EL PAÍS (Jan. 29, 2019, 05:07 EST), https://english.elpais.com/elpais/2019/01/29/inenglish/1548749144_862481.html (Following a series of strikes revolved around the stricter health, safety, and driving qualifications required of taxi drivers).

97. Brito & Wilson, *supra* note 96; Joseph Catà & Jordi Pueyo, *Cabify Returns to Barcelona Using Loophole Against New Restrictions*, EL PAÍS (Mar. 7, 2019, 7:03 EST), https://english.elpais.com/elpais/2019/03/07/inenglish/1551956650_438232.html (Cabify has returned to Barcelona after they found a loophole to the fifteen minute rule by applying the restriction only to the first time a customer requests a ride and requiring customers to sign a one-year contract, but the company has also decided to adapt its service from a third party platform to a transport business so it can operate in the city).

98. Catà & Pueyo, *supra* note 97.

99. *Use Uber in Cities Around the World*, UBER, https://www.uber.com/global/en/cities/ (last visited Feb. 25, 2021).

cities will follow suit or the ride-hail firm's presence is thwarted only in more populous regions with strong and united opposition from incumbents.

The success of regulations within this first goal seems dependent on the incumbents' influence within the region. Beyond the aforementioned changes, factors such as access to technology (on-demand pickup via app), means of payment (through the app or in-person, card or cash), and the type of vehicles and services would seem to fall within the traditional scope of competition. The balance found within schemes that equate the licensing requirements, making the competitive advantages, such as seamless tech or luxury vehicles, less of a result of discriminatory regulation, seem to effectively move toward a balance between Uber's ability to conduct business with the taxi industry's interest in fair competition. But regulatory schemes, like those established in Taiwan, were successful due to the unique local circumstances. Similar results with balancing the regulator's desires and Uber's ability to conduct business may not be possible elsewhere. Nevertheless, requiring Uber and its drivers to adapt to existing regulations appears to be the most promising way of achieving this goal.

IV. SAFETY AND RESPONSIBILITY TO DRIVERS AND RIDERS

An end to discriminatory treatment helps satisfy the second regulatory goal,[100] to eliminate or at least limit Uber's externalities and require greater safety and protection to its drivers and riders. This includes adequate insurance in case of an accident, data privacy, protection of individual autonomy, and drivers' rights, regardless of workers' classification. To allow Uber[101] to continually assert their status as a tech company or intermediary "negates the basic principles established with modern law, whereby the market competition and regulation of new business models, *irrespective of*

100. Doménech-Pascual & Soriano-Arnanz, *supra* note 8, at 362 ("Thirdly, it makes little sense to fight those externalities, [pollution and congestion], by establishing a *numerous clausus* only for taxies and not other vehicles," use of Pigouvian taxes or fines could better tackle these externalities).

101. *See* 2019 Annual Report, *supra* note 3, at 10 (Uber previously licensed its brand to Didi in China, Yandex. Taxi joint venture in Russia and CIS countries, and Zomato in India, which plays into the grander scope of responsibility to those working under the Uber umbrella); *see also* Uber, 2021 Investor Presentation (Feb. 10, 2021), https://s23.q4cdn.com/407969754/files/doc_financials/2020/q4/InvestorPresentation2021.pdf (Unable to maintain these agreements, Uber now has a stake in its top competitors: 35% stake in Russia and CIS countries' Yandex. Taxi; Around 16% of Grab in Southeast Asia, around 15% of Didi in China).

the terminology utilized, must align with the basic requirements of consumer protection."[102]

A. Insurance Policies

Although Uber provides some insurance to supplement a driver's personal policy in most regions, the extent of that coverage varies around the world. In the EU, Uber, and AXA, a worldwide insurance giant, announced an expansion of the joint "multimillion-dollar deal"[103] to provide EU drivers with Partner Protection. "Uber and AXA share the belief that everyone, including independent workers, should have the option of benefitting from optimum protection for themselves and their families."[104] Qualifying independent contractors[105] in the EU enjoy a range of protections, including

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102. Mišo Mudrić, *Introduction* to JASENKO MARIN ET AL., UBER—BRAVE NEW SERVICE OR UNFAIR COMPETITION, 1, 4 (76 IUS GENTIUM 2020).

103. *See* Greg Bensinger, *Uber's First-Quarter Sales Rise 70% as It Preps for IPO*, WALL ST. J., May 23, 2018, at B2.

104. *See* Press Release, AXA, Uber and AXA Join Forces to Set a New Standard for Protection of Independent Drivers and Couriers (May 23, 2018), https://www.axa.com/en/press/press-releases/uber-and-axa-join-forces-to-set-a-new-standard-for-protection-of-independent-drivers-and-couriers. As of December 2021, Uber now works with Allianz Partners to provide its Partner Protection Program across twenty-three European countries. Press Release, Allianz, Allianz Partners and Uber are Partnering to Provide Benefits and Protection Insurance for Independent Drivers and Couriers in Europe (Dec. 6, 2021), https://www.allianz-partners.com/content/dam/onemarketing/awp/azpartnerscom/press-releases/2021/Allianz-Partners-Uber-Partnership-Press-Release.pdf.

105. *See Partner Protection Insurance with Allianz Partners*, UBER, https://www.uber.com/be/en/drive/insurance/ (choose "Can all Uber partners participate in Partner Protection?" from "Frequently asked questions" dropdown) (last visited Feb. 13, 2022) [hereinafter *Partner Protection*].

> Only independent/self-employed Uber partners are eligible for Partner Protection. For this program, a self-employed partner is one that uses the Uber app under a service contract that they entered into directly with Uber BV, Rasier Operations BV or Uber Portier BV, and is not an employee of a transport company such as a taxi or limousine fleet owner. Partners who are the principal of a business entity and the only individual employed by such entity to provide Transportation/Delivery Services may qualify.

Id. Eligibility Requirements further depend on whether a driver has a passenger. "All independent Uber partners are eligible for the benefits, *Id.* (choose "What are the eligibility requirements for the On-Trip and Off-Trip protections?" from "Frequently asked questions" dropdown), "[f]rom the moment of accepting a trip or food delivery request through to completion of that request and for 15 minutes after it has been completed." *Id.* (choose "What is defined as 'On-Trip' and 'Off-Trip'?" from "Frequently asked questions" dropdown). For Off-Trip coverage, one "must be an "Active Uber Partner," having completed 150 trips in the previous 8 weeks" (averaging 2-3 trips a day, every day for eight weeks *instead of the hours worked or length of trip*) "if you are Driver Partner, or 30 trips in the previous 8 weeks if you are a Delivery Partner." *Id.* (choose "What are the eligibility requirements for the On-Trip and Off-Trip protections?" from "Frequently asked questions" dropdown).

accident, injury, illness, and paternity benefits at no cost.[106] In contrast, drivers in the United States,[107] Brazil,[108] and Egypt,[109] only receive coverage while they are online or on a trip. Insurance is provided based on a driver's country, not municipality, of operation, but in each of the regions analyzed in this note, drivers are responsible for the vehicle insurance while they are offline. This begs the question why EU drivers can receive more expansive coverage, and even greater coverage proposed,[110] than their global counterparts, but none of the regulatory schemes outlined require additional insurance coverage for Uber's current operations.[111]

What appears to be adequate coverage now could change in years to come. In 2019, and before the devastating results of the COVID-19 pandemic, Uber closed a $1 billion investment deal to develop self-driving hardware and vehicles.[112] This deal followed a tragic accident in March 2018 which suspended public-road testing of autonomous vehicles.[113] A year later, Pennsylvania allowed Uber to conduct the same testing and California granted the company a permit for testing with a trained driver in the vehicle.[114] Under the newly formed parent-subsidiary ATG, Uber was

> For Maternity Cover, if you are the natural mother of the child (and may need additional time off before the birth), we have extended the threshold to 6 months, in which you must have completed 300 trips if you are Driver Partner, or 60 trips in the previous 8 weeks if you are a Delivery Partner.

Id.

106. At no cost so long as a driver meets eligibility requirements listed *in Partner Protection*, *supra* note 105.

107. *Driver Insurance, United States*, UBER, https://www.uber.com/us/en/drive/insurance/ (on-trip insurance covers third-party liability insurance, on-trip insurance covers third-party liability, un/underinsured motorist bodily injury, contingent comprehensive and collision) (last visited Dec. 20, 2020).

108. *Driver Insurance, Brazil*, UBER, https://www.uber.com/br/en/drive/insurance/ (on-trip insurance covers accidental death, total or partial disability due to an accident, and hospital and dental expenses) (last visited Dec. 20, 2020).

109. *Driver Insurance, Egypt*, UBER, https://www.uber.com/eg/en/drive/insurance/ (on-trip injury protection insurance - Uber explicitly notes provided insurance is not "commercial vehicle insurance nor is it a substitute for comprehensive vehicle [or medical] insurance") (last visited Dec. 20, 2020).

110. AXA, *supra* note 104 ("Uber and AXA expect to propose a full set of personalized offers tailored to the different profiles and needs of each partner driver or courier, notably including injury protection, income protection, family protection, health covers, retirement, savings").

111. Although, this question may be adequately answered through a look at the progressive European tax system, *see* Alberto Alesina et al., *Why Doesn't the United States Have a European-Style Welfare State?*, 2001 BROOKINGS PAPERS ON ECON. ACTIVITY 187, https://www.brookings.edu/wp-content/uploads/2001/06/2001b_bpea_alesina.pdf.

112. 2019 Annual Report, *supra* note 3, at 21.

113. *See* Daisuke Wakabayashi, *Self-Driving Uber Car Kills Pedestrian in Arizona, Where Robots Roam*, N.Y. TIMES (Mar. 19, 2018), https://www.nytimes.com/2018/03/19/technology/uber-driverless-fatality.html.

114. 2019 Annual Report, *supra* note 3, at 23.

focused on the long-term potential for cost-effective autonomous ride-hails and UberElevate,[115] which provided rides via helicopter in New York, and on developing various electric aircrafts (eVTOL).[116] Despite what may have been an innovative step for Uber on its path to expand its transportation offerings, the company seems to have avoided insurance and safety concerns for the time being. As of February 2021, Uber has divested ATG and UberElevate projects to Aurora Innovation and Jody Aviation, respectively, in exchange for minority stakes in the companies.[117] Nevertheless, these areas should be monitored as regulators develop effective schemes for ride-hail app users' safety.

B. Worker Classification

The controversy with worker classification, the gig economy, and the aforementioned battle in California is still an ongoing issue in terms of workers' rights and protections.[118] To understand Uber's view on the matter, it may be worth first considering its business model:

> We have concluded that we are an agent in these arrangements as we arrange for other parties to provide the service to the end-user. Under this model, revenue is net of Driver and Restaurant earnings and Driver incentives. We act as an agent in these transactions by connecting consumers to Drivers and Restaurants to facilitate a Trip or meal delivery service.

115. *Id.* at 5.

116. *Uber Air: Designing for the Community*, White Paper, 8 (2021) https://d1nyezh1ys8wfo.cloudfront.net/static/PDFs/Uber+Air_Designing+for+the+Community.pdf?uclick_id=eb6184a3-f7fa-4195-bb3b-aa5815663866.

117. 2021 Investor Presentation, *supra* note 101, https://s23.q4cdn.com/407969754/files/doc_financials/2020/q4/InvestorPresentation2021.pdf.

118. *See* Emergency Petition for Writ of Mandate and Request for Expedited Review, Castellanos v. State of California, Cal. Sup. Ct. (2021), https://www.courthousenews.com/wp-content/uploads/2021/01/Prop22-CalifSCWrit.pdf. (On Jan. 12, 2021, alongside the Service Employees International Union and others, four California residents, including three app-based workers and one customer, filed an emergency petition for writ of mandate with the California Supreme Court to decide the constitutionality of Proposition 22 where it requires a seven-eighths supermajority vote to enact any legislation, deceivingly named "amendments," which restricts the "unlimited" authority of the CA Legislature in the CA Constitution to enact any laws which would grant the driver's collective bargaining rights, or "preclude it from providing incentives for companies to give app-based drivers more than the minimal wages and benefits provided by Proposition 22" and generally restricts local and state governments from acting in a way contrary to "the purpose of the initiative." The petition was denied without prejudice for refiling in the appropriate court.)

As stated in Uber's 2019 Annual Report, drivers, not end-users, i.e., riders, are its customers.[119] Its revenue is primarily derived from the service fees paid by the drivers and restaurants to use the platform.[120] Uber's dependency on its drivers highlights its pervasive need to evaluate how measures such as A.B. 5 take away from their main revenue stream.[121]

As it stands, Proposition 22, the recently passed legislation which carves out an exception from A.B. 5 for gig-workers, claims to support the independence of workers who treat their gigs as supplementary income. However, the measure's findings lack data to fully understand what their customer base looks like or the preference for one worker classification over the other. "Prop 22" touts the benefit to "millions of California[n] consumers and businesses" and the threat to flexible work opportunities for "hundreds of thousands of Californians."[122] Whether or not drivers have other streams of income or benefits through some other means, workers' rights advocates still seek to protect the lifeblood of the company, their drivers, "by ensuring they receive the compensation and benefits they have earned through the dignity of their labor."[123]

119. 2019 Annual Report, *supra* note 3, at 92 ("Our sole performance obligation in the transaction is to connect Drivers and Restaurants with end-users to facilitate the completion of a successful ride-sharing trip or Eats meal delivery. Because end-users access our platform for free and we have no performance obligation to end-users, end-users are not our customers").

120. *Id.*

121. Since the early impact of COVID-19 in February/March 2020, Uber food delivery revenue has hedged lost revenue resulting in restrictions on shared rides. The food delivery sector of Uber increased by 130%, according to their 2021 SEC filing, Uber Tech., Form 8-K SEC filing (Feb. 10, 2021). Additionally, it is worth considering the recent acquisitions of Drizzly and Postmates, alongside the numerous partnerships Uber has entered as a result of their success in the food delivery sector, which it ultimately favored over the development of autonomous vehicles and air travel. Postmates, *Postmates 2018 Economic Impact Report Details how Ondemand Technology Helps Retail Merchants Grow 4x Faster* (Apr. 12, 2018), https://buyer-static-gcp.postmates.com/press-releases/postmates-economic-impact-report.pdf.

122 CAL. BUS. & PROF. CODE § 7449 (West, Westlaw through Ch. 10 of 2022 Reg. Sess.), *invalidated by* Castellanos v. State, No. RG21088725, 2021 WL 3730951 (Cal. Super. Aug. 20, 2021).

123. *See* People v. Uber Techs, Inc., 270 Cal. Rptr. 3d 290 (2020) (citing Dynamex Operations W. v. Superior Court, 4 Cal.5th 903, 952 (2018)).

Minimum wage and other protections have been established in New York City[124] and Seattle,[125] but this was done without a change in worker classification. While the text of Proposition 22 guarantees 120% of minimum wage, a study by Ken Jacobs from UC Berkeley Labor Center and Michael Reich from UC Berkley Center on Wage and Employment Dynamics found, "after considering multiple loopholes," an estimated actual wage of $5.64 for a 30 hour a week driver. [126] This amount is "one third of the required minimum pay for drivers in New York City."[127] Although the answer may not be A.B. 5 or Proposition 22, there is a clear need for some equitable standard for determining how to compensate Uber drivers.

A study from the UC Santa Cruz Institute for Social Transformation provides insights related to drivers, as opposed to employees, which Uber has not yet offered. The study was requested to help San Francisco "better understand this workforce and determine whether the labor policies of emerging mobility companies align with the City's labor principle, namely that they 'ensure fairness in pay and labor policies and practices.'"[128] The key goal of its methodology was to consider "a representative sample of on-demand *work* being done in the city, not of all on-demand *workers*."[129]

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124. Shira Ovide, *An Uber Wage Experiment Worked*, N.Y. TIMES (Oct. 1, 2020), https://www.nytimes.com/2020/10/01/technology/uber-wages-new-york.html (minimum wage of $17.22 per hour after expenses); *see also* Emma G. Fitzsimmons & Noam Scheiber, *New York City Considers New Pay Rules for Uber Drivers*, N.Y. TIMES (July 2, 2008), https://www.nytimes.com/2018/07/02/nyregion/uber-drivers-pay-nyc.html (at the time of the Taxi and Limousine Commission's 2018 study 40% of drivers qualified for Medicaid and 15% for food stamps).

125. Seattle, Wash., Ordinance 125976 (Nov. 25, 2019) (Seattle has also passed an ordinance establishing job security for TNC drivers through deactivation protections; minimum wage for drivers set at $16.39/hour).

126. *See* Ken Jacobs & Michael Reich, *The Uber/Lyft Ballot Initiative Guarantees only $5.64 an Hour*, UC BERKELEY LAB. CTR. (Oct. 31, 2019), https://laborcenter.berkeley.edu/the-uber-lyft-ballot-initiative-guarantees-only-5-64-an-hour-2/ (the study's calculation includes gross driver earnings, driver costs, including waiting time/miles and compensation for expenses, and health benefits); *see also*, California Labor Federation (@californialabor), INSTAGRAM (Oct. 21, 2020), *https://www.instagram.com/p/CGm_bxQAyRP/* (a photo sent from a food delivery driver showing numerous other drivers waiting over an hour for pickups, highlighting the fact that drivers are not compensated for the time on the job, but just the work completed). For additional commentary in the discussion of actual wages, *see generally* the driver-generated comments that were compiled by @ravbuc. @Horror-Return2321, REDDIT: R/UBERDRIVERS, https://www.reddit.com/r/uberdrivers/comments/p9ipzj/can_we_get_a_list_of_what_citystate_pays_out_per/ (last visited Sept. 16, 2021).

127. *See* Jacobs & Reich, *supra* note 126.

128. Chris Benner et al., *On-Demand and On-The-Edge: Ride-Hailing and Delivery Workers in San Francisco*, Introduction, UC SANTA CRUZ INST. SOC. TRANSFORMATION (May 5, 2020), https://transform.ucsc.edu/wp-content/uploads/2020/05/OnDemandOntheEdge_ExecSum.pdf.

129. *Id.* at 1.

> This is important. Representative samples of all *people* who do some work for on-demand app companies show many people working for short periods of time or earning only a small portion of their earnings from this type of work. But we wanted to develop a representative sample based on the actual work being done in the city, which we believe is a better basis for understanding labor practices and developing labor market policy.[130]

Of the 862 surveys in the three months surrounding initial COVID-19 stay-at-home orders, some key findings are as follows: (1) the workforce is highly diverse (seventy-eight percent are people of color and fifty-six percent are immigrants),[131] (2) workers are financially struggling (forty-five percent could not handle a $400 emergency expense, one fifth does not have health insurance, and fifteen percent rely on some form of public assistance)[132] and "COVID-19 has had a starkly negative impact" on driver's finances and job opportunities within the app,[133] (3) the job is "not a gig for most people" (fifty percent work more than forty hours and forty percent work twelve or more straight hours at least several times a month),[134] (4) earnings are low (averaging $900/week, but when accounting for wear-and-tear to vehicles, twenty percent of drivers "might be earning nothing" after expenses), and (5) opportunities for work, bonuses, or incentives are structured according to the number of jobs workers decline (twenty-seven percent deactivated or threatened with deactivation).[135] The available data is generally limited, as it relates to drivers in California, but this external research offers further useful considerations.

130. *Id.*

131. *Id.* at 4.

132. *Id.*

133. *Id.* at 2-3 (food delivery drivers reported two to fourteen percent more difficulty in these areas than ride-hail drivers).

134. *Id.* at 3 (seventy-one percent work more than thirty hours a week, forty-six percent support others with their earnings, and thirty-two percent reported sometimes or often sleeping in their cars before or after performing app-work); *see generally* UBER, *Driving Time*, https://help.uber.com/driving-and-delivering/article/driving-time?nodeId=c8785b5d-e2eb-42be-8c99-000d111e06d0 (last visited Oct. 14, 2021) (unlike non-exempt employees under CA Labor Code § 512(a), which requires thirty-minute breaks under six hours, "Drivers using the Uber app will be *prompted* to go offline for at least 6 hours after a total of 12 hours of driving time in a 24-hour period").

135. Benner et al., *supra* note 128, at 3-4 (this level of control further supports driver's status as employees under A.B. 5).

Uber itself provides little information about its drivers in California,[136] and the available sources are deficient.[137] Proponents of classifying gig workers as employees state that misclassification is a significant factor in the erosion of the middle class and the rise in income inequality.[138] Meanwhile, an economist for Uber projected a seventy-six percent decrease in the number of drivers finding work on the Uber platform if they were reclassified as employees.[139] Uber's primary argument in favor of classifying drivers as independent contractors is flexibility. However, labor laws do not prohibit flexible working conditions, nor do they require duty of loyalty clauses; Uber does.[140] Focusing on drivers who seek a supplementary income made it easier to argue that the benefits such as health insurance are outweighed by the advantages of flexible hours since these drivers could have insurance from their primary employer or family. Without representative data from Uber as to the number of active drivers or their working hours,[141] it is difficult to

136. Since the measure passed in November 2020, Yeson22.com has been deactivated and any mention of its passing removed from Uber's website. It has now been enveloped by UBER, WORKING TOGETHER*:* PRIORITIES TO ENHANCE THE QUALITY AND SECURITY OF INDEPENDENT WORK IN THE UNITED STATES (2020), https://ubernewsroomapi.10upcdn.com/wp-content/uploads/2020/08/Working-Together-Priorities.pdf; *see also* Benner at el., *supra* note 128.

137. *E.g.*, 2020 ESG Report touts that 80% of drivers were satisfied with the experience driving for Uber yet fails to provide the data as to how many persons were surveyed. *ESG Report*, UBER (2020), https://s23.q4cdn.com/407969754/files/design/Uber-2020-ESG-Report-Final.pdf; *2020 Investor Presentation February 6, 2020*, UBER, https://s23.q4cdn.com/407969754/files/doc_financials/2019/sr/InvestorPresentation_2020_Feb13.pdf (citing 5 million drivers which covers both ride-hail "mobility" drivers and food delivery drivers as of 2020 Q4).

138. Lauren Hepler, *Uber, Lyft and Why California's War Over Gig Work is Just Beginning*, CAL MATTERS (Aug. 13, 2020), https://calmatters.org/economy/2020/08/california-gig-work-ab5-prop-22/?; Complaint for Injunctive Relief, Restitution, and Penalties, *supra* note 35.

139. Alison Stein, *Analysis on Impacts of Driver Reclassification*, MEDIUM (May 28, 2020) https://medium.com/uber-under-the-hood/analysis-on-impacts-of-driver-reclassification-2f2639a7f902 (noting "the losses are concentrated in less urban markets") (last visited Dec. 20, 2020).

140. Carmel DeAmicis, *Despite Uber's Arguments, Flexibility for Employees Is a Company's* Choice, VOX (Aug. 11, 2015) https://www.vox.com/2015/8/11/11615468/despite-ubers-arguments-flexibility-for-employees-is-a-companys-choice; *see also* Benjamin Sachs, *Uber's Flexibility Myth: Reprise*, ON LABOR (Aug. 19, 2020), https://onlabor.org/ubers-flexibility-myth-reprise/; *contra* Dara Khosrowshahi, *I Am the C.E.O. of Uber. Gig Workers Deserve Better.*, Opinion, N.Y. TIMES (Aug. 10, 2020), https://www.nytimes.com/2020/08/10/opinion/uber-ceo-dara-khosrowshahi-gig-workers-deserve-better.html.

141. *See generally* CA APP-BASED DRIVER SURVEY, (June 2020) https://d3n8a8pro7vhmx.cloudfront.net/themes/5ef0e34fc294806719977470/attachments/original/1592866174/cadriversurvey.pdf?1592866174 (study commissioned by Uber and surveyed 718 California rideshare and food delivery drivers over twenty-four days) (last visited Dec. 20, 2020); Stein, *supra* note 139 (although this post is commonly cited as a source of authority for Uber, the number of active drivers in California is estimated at 209,000 per quarter which would make the survey cited representative of less than .003% of drivers).

determine whether Uber or its customers are the true beneficiaries of Proposition 22. That said, perhaps a simple solution may be not to classify all one million American Uber drivers[142] the same way, but instead distinguish those who value the flexibility of Proposition 22 from those who qualify for and are thus entitled to the full legal benefits and protections of employment. The option to join Fleet Partnerships is available to Uber drivers in countries outside of the United States[143] and should be considered as at least a step toward remedying issues concerning worker classification.

To drivers within the EU, the courts holding in *Elite Taxi v. Uber Spain*, and its finding that Uber exercises "decisive influence" over business, suggests that "Uber drivers are in fact workers entitled to the national minimum wage or sick pay and that they may also be taxed on an employment basis."[144] In early 2021, the United Kingdom Supreme Court held in favor of an employee/worker classification[145] based on five aspects relating to control: (1) fares are fixed by Uber and drivers have no say in the remuneration they receive, (2) drivers are required to accept and follow Uber's standard contractual terms, (3) drivers have no choice about whether to accept a request a ride, and are penalized based on their rate of acceptance, and cancellation, of trip requests, (4) although drivers provide the physical equipment, the technology "integral to the service is wholly owned and controlled by Uber and is used as a mean of exercising control over drivers,[146]

142. UBER, WORKING TOGETHER, *supra* note 136, at 3.

143. *Join a Fleet in Germany*, UBER, https://www.uber.com/de/en/drive/vehicle-solutions/fleet-partners/ (last visited Nov. 6, 2021) (in Germany, for example, and many other countries, drivers may join a "fleet" similar to the franchise structure contemplated in the United States where drivers work as employees under a private hire vehicle operator).

144. K&L Gates LLP, *Uber May Face Stricter Regulation by Member States after EU's Highest Court Rules it is a Transport Service*, LEXOLOGY (Jan. 25, 2020), https://www.lexology.com/library/detail.aspx?g=70c66dd8-7e6e-44ee-b7e9-5a80077e7353.

145. Uber BV v. Aslam [2021] UKSC 5 (appeal taken from EWCA Civ. 2748) (issue of the lack of a contract between Uber and drivers in light of their assertion that Uber as an agent acted on behalf of drivers to book rides);

> In a recent judgment, the Grand Chamber of the CJEU has emphasized that, in determining whether such a relationship exists, it is necessary to take account of the objective situation of the individual concerned and all the circumstances of his or her work. The wording of the contractual documents, while relevant, is not conclusive. It is also necessary to have regard to how relevant obligations are performed in practice.

See also Case C-610/18, AFMB Ltd v. Raad van bestuur van de Sociale verzekeringsbank, 2020, E.C.R. 1432 ¶¶ 60-61.

146. The court makes an interesting note that the rating systems for both drivers and customers are purely internal tools to determine performance levels. They are not used so that a driver or passenger may choose whether or not to accept a ride or pay a higher fare. "This is a classic form of subordination that is characteristic of employment relationships." Uber BV v. Aslam [2021] UKSC 5 at 31.

and 5) all means of communication between driver and passenger, to make payments, or lodge complaints, are channeled through Uber.

In stark contrast to California voters' decision on Proposition 22, the EU and the UK courts have been more successful in awarding drivers' protections, like minimum wages and holidays.[147] Although a larger-scale analysis would be required to determine the relative differences in wages across these regions, the crux of the matter for Uber rests in balancing flexibility and worker rights and protections.[148] None of the regulatory schemes outlined thus far, which rely on the binary categories of employee and independent contractor, appear to have found this balance, if one exists.

In the end, the most equitable solution may not lie in the binary worker classification. Uber itself stated that gig work could not fit within this traditional system, which motivated it to lobby in favor of labor regulation reform.[149] Whether app-based workers will usher in a new classification is something only time will tell, but some conclusions may be drawn for the sake of this note.[150] A shift in focus from breadth (global expansion) to depth (strengthening the existing system) does not place an unreasonable administrative burden on Uber. This could be achieved by an individualized determination of a person's intent when signing on to become a driver. Drivers who use Uber as a primary source of income could sign a formal employment contract like those seen in Fleet Partnerships outside of the United States.[151] For those seeking supplementary income, the protections provided by Proposition 22 may have been a good start, although the

147. Delphine Strauss, *'Momentous' Uber Ruling Prompts Call for Clarity on UK Workers' Rights*, FIN. TIMES (Feb. 19, 2021), https://www.ft.com/content/1bf50459-b0a3-42d5-8be3-4b721c7a5142; *See also* Adam Pharaoh, *Uber: The Gig Is Up*, FIN. TIMES (Feb. 19, 2021), https://www.ft.com/content/69779482-c462-44cd-b416-6752c0d92bbb (Uber as a large corporation is not impacted as much as its direct competitors).

148. *A Better Deal: Partnering to Improve Platform Work for All*, UBER, https://uber.app.box.com/s/tuuydpqj4v6ezvmd9ze81nong03omf11?uclick_id=084011f0-33b2-43d8-941c-857b0ef562f4 (Uber has introduced and called on EU officials to implement California's Proposition 22 framework), https://www.vice.com/en/article/wx8y9x/uber-wants-to-export-prop-22-to-europe.

> These new benefits would be provided in addition to Uber's longstanding commitment to accessible work and worker-defined flexibility. We commit to working proactively and in partnership with lawmakers in Washington, DC and in state capitols on legislation to deliver certainty for millions of independent contractors who will increasingly rely on independent work to help them face the economic challenges that lie ahead during a recovery from the COVID-19 pandemic.

UBER, WORKING TOGETHER, *supra* note 136, at 5.

150. Conclusions tied to ride-hail drivers, but practically speaking, they would apply just as much to food delivery drivers.

151. UBER, WORKING TOGETHER, *supra* note 142.

legislation itself raised constitutional questions.[152] The one size fits all classification has been the point of contention between fair labor advocates and Uber, so a compromise between parties must be reached, which is well within their capacity.

C. Data Privacy

Convenient access to Uber comes with an exchange of user data; the misuse of which should be a concern to regulators under this goal. Preliminary discussions for regulation of Uber in Egypt highlighted concerns with data privacy. The relationship between Uber and the Egyptian government was controversial at first. Egypt's first wave of regulatory attempts was a draft of Law No. 87 of 2018.[153] This law required government access to Heaven, Uber's internal software which tracks live data about customers, drivers, and their journeys.[154] Those circumstances differ from those in Taiwan, where Uber was willing to comply with stricter regulations to maintain its stake in the market. Although Cairo was Uber's third-largest city by the number of rides, company spokespersons denied any assertion that the company would share real-time access to rider data.[155] Its 2019 Annual Report stated that it might not be willing to provide certain personal data in order to operate their app, thus risking their stake in Egypt's market.[156]

Egypt's Parliament eventually passed Resolution 2180 of 2019 (the executive regulation of Law No. 87 of 2018), which required ride-sharing apps to provide passenger data only when requested by security agencies, similar to the United States.[157] Uber praised Egypt as "one of the first

152. *See* Castellanos v. State, No. RG21088725, 2021 WL 3730951 (Cal. Super. Aug. 20, 2021). Proposition 22, enacted as CAL. BUS. & PROF. CODE § 7451 was declared unconstitutional but remains active legislation. Uber contends it will seek an appeal of this decision. *Supra* p. 182.

153. Law No. 87 of 2018 (Ministerial Resolution Issued to Regulate Activities of Ride-Sharing Companies), *al_Jaridah al_Rasmiyah*, Vol. 23, Jan. 11, 2018, arts. 9, 11; *See* also Declan Walsh, *Dilemma for Uber and Rival: Egypt's Demand for Data on Their Ride*, N.Y. TIMES, June 11, 2017, at 10N.

154. *See also* Walsh, *supra* note 153.

155. *Id.* (Matt Kallman, Uber Spokesperson, "we do not and have never provided any government with real-time access to riders' data, and we'll always fight to protect their privacy").

156. 2019 Annual Report, *supra* note 3.

157. This approach is standard, at least in the United States in limited circumstances, following the requisite procedure. *See Guidelines for United States Law Enforcement*, UBER (Jan. 1, 2021), https://www.uber.com/legal/en/document/?_ga=2.46755171.530939684.1614472203-1981180667.1612570982&country=united-states&lang=en&name=guidelines-for-law-enforcement (last modified 4/3/2021).

countries in the Middle East to pass progressive regulations."[158] The same year, "as [Egyptian] security agencies stepped up demands [for consumer data], the Uber app started to crash in Egypt, said an official with knowledge of talks between Uber and the Egyptian government."[159] As Resolution 2180 currently reads, Egypt does require unfettered access to live data. However, if Uber did not maintain their strict policy against sharing personal information, "this law could provide authorities with the locations and social networks of activists, dissidents, and rival politicians . . . ."[160] After Resolution 2180's enactment, Uber invested $20 million into its new support center in Cairo[161] and acquired Careem, a vehicle for hire company based in Dubai,[162] which, pending approval, allows it to conduct business in Egypt, Jordan, Saudi Arabia, the United Arab Emirates, Pakistan, Qatar, and Morocco.[163] The public has yet to see how Uber will proceed with its operations in Cairo, if the data privacy it hopes to protect is at risk of misuse by the government.

The potential misuse of data does not include data breaches, which has already cost the company close to $150 million in aggregate settlements with regulators in the United States, United Kingdom, Netherlands, and France.[164] Regulators have addressed cybersecurity concerns across the board in order to increase app users data protection with the EU's General Data Protection Regulation (GDPR), the California Consumer Privacy Act (CCPA), Brazil's General Data Protection Law (Lei Geral de Proteção de Dados Pessaoais or

158. Jared Malsin, *Egyptian Ride-Hailing Bill Spurs Surveillance Concerns*, WALL ST. J., May 7, 2018, at A9 (an executive who declined to be identified did state that if the law were amended to look like its original draft version (87/2018), it would raise concerns).

159. Declan Walsh, *Sisi Extends His Grip to the Plots of Egyptian Soap Operas*, N.Y. TIMES, Apr. 4, 2019, A6 N; *see also* 2019 Annual Report, *supra* note 3, at 38 (Uber's failure to share personal data with government authorities may result in an assessment of significant fines or penalties against the company or shutting down Uber or Careem in Egypt either temporarily or indefinitely).

160. Andrews Boyles Petersen, *Scoot over Smart Devices: The Invisible Costs of Rental Scooters*, 17 SURVEILLANCE & SOC'Y 191, 194 (2019).

161. *Egypt Passes Law Regulating Uber, Careem Ride-Sharing Service*, REUTERS (May 7, 2018, 9:33 AM), https://www.reuters.com/article/us-egypt-uberidUSKBN1I81VG.

162. A vehicle for hire company based in Dubai. *Uber Completes Acquisition of Careem*, UBER (Jan. 2, 2020), https://investor.uber.com/news-events/news/press-release-details/2020/Uber-Completes-Acquisition-of-Careem/default.aspx.

163. *Id.*

164. 2019 Annual Report, *supra* note 3, at 42 (failure to report the 2016 breach cost $148 million total to the Attorneys General of all fifty U.S. states and the District of Columbia, $1.6 million to the aforementioned European regulators, in additional to "costly and time-consuming regulatory investigations and litigation form other government entities;" Uber's recent acquisition of Careem, which publicly disclosed a data security breach in April 2018, may result in additional liabilities to the company).

LGPD).[165] Non-compliance with the GDPR's heightened consent standards, disclosures, and personal data rights could cost a company four percent of its total worldwide revenue (not including compliance costs with any individual EU Member State's regulations).[166] Brazil's LGPD includes strict requirements for processing sensitive personal data related to children and adolescents[167] and creates the National Data Protection Authority (ANPD) to monitor compliance with the law.[168] A party that violates the LGPD may be fined up to two percent of its annual revenue in Brazil or prohibited from exercising data processing activities; sanctions are determined by the peculiarities of the case and consider the offender's cooperation, its economic condition, and the level of damage.[169] In terms of their personal information, Californians enjoy the right to know who collects their data and how it is used, to delete certain information and to opt-out of its sale, and the right to non-discrimination in exercising their CCPA rights.[170] The more the internet becomes integral to every aspect of daily life, the more each of these regulations will be intended to protect citizens whose data privacy increasingly depends on an understanding of a given website or apps' terms and conditions.

The data protection regulations in place are promising safeguards to prevent Uber's misuse of customer data and to protect against other breaches of the company's security system. Alongside the need to regulate the innovative technology developed each year, the data used in its operations must also be protected, even if it only holds companies liable for their failure to protect it. Data protection schemes may still be in their early stages of development, but those with access to the data must uphold the duty, as a company or as required by law, to ensure data safety internally and to ensure its freedom from misappropriation externally.

165. *Id.*

166. *Id.*

167. Lei No. 13.709, arts. 11, 14, de 14 de Agosto de 2018, Diário Oficial da União [D.O.U.] de 15.8.2018.

168. *Id.* arts. 55-A, 55-J

169. *Id.* art. 52

170. California Consumer Privacy Act of 2018, CAL. CIV. CODE § 1798.155(b) (West 2021) (fines range from $2,500 to $7,500 per violation depending on the offender's volition).

D. Sexual Misconduct and Sexual Assault

Between 2017 and 2018, Uber cataloged 5,981 sexual assaults ranging from unwanted kissing to rape.[171] Continuous background checks and rating systems for both drivers and riders appear to be the only explicit means of regulation in this area, but Uber has taken it upon itself to address the protection of those within its company, its users, and its riders. Uber's 2017-2018 U.S. Safety Report, in partnership with various experts, including the National Sexual Violence Resource Center (NSVRC), detailed procedures to combat sexual misconduct and sexual assault.[172] Although the number of reported assaults meant that 99.9% of rides were safe,[173] Uber nevertheless implemented changes to protect both its riders and drivers—individual claims of sexual assault or sexual harassment by Uber riders, drivers, or employees no longer mandate arbitration, and survivors may settle claims without a confidentiality provision. Additionally, Uber committed to publishing a safety transparency report with "data on sexual assaults and other incidents that occur on the platform."[174]

The company's efforts to protect riders and drivers from sexual assaults are commendable despite losing an estimated $1 billion from its market cap following the 2017-2018 U.S. Safety Report.[175] In response to the users' and

171. Kate Conger, *Uber Says 3,045 Sexual Assaults Were Reported in U.S. Rides Last Year*, N.Y. TIMES (Dec. 5, 2019), https://www.nytimes.com/2019/12/05/technology/uber-sexual-assaults-murders-deaths-safety.html (data only covers the United States; Uber did not provide data on countries outside the United States). Uber's Chief Legal Officer at the time wrote that "every form of transportation is impacted by this issue," Tony West, *Uber Delivers U.S. Safety Report*, UBER: NEWSROOM (Dec. 6, 2019), https://www.uber.com/en-GB/newsroom/2019-us-safety-report/, noting that in the same years covered by Uber's Safety Report, the New York Police Department (NYPD) reported 1,125 sex offenses in the transit system. *Id.*; N.Y. POLICE DEP'T, COMPLAINTS FOR OFFENSES DESCRIBED IN ADMINISTRATIVE CODE 14-150(D) OCCURRING IN TRANSIT JURISDICTION CALENDAR YEAR 2018 (2018), https://www1.nyc.gov/assets/nypd/downloads/pdf/analysis_and_planning/transit-bus-crime-reports/2018/complaints-in-transit-report-cy-2018.pdf; N.Y. POLICE DEP'T, COMPLAINTS FOR OFFENSES DESCRIBED IN ADMINISTRATIVE CODE 14-150(D) OCCURRING IN TRANSIT JURISDICTION CALENDAR YEAR 2017 (2017), https://www1.nyc.gov/assets/nypd/downloads/pdf/analysis_and_planning/transit-bus-crime-reports/2017/complaints-in-transit-report-cy-2017.pdf.

172. UBER, 2017-2018 U.S. SAFETY REPORT app. IV (2019), https://www.uber-assets.com/image/upload/v1575580686/Documents/Safety/UberUSSafetyReport_201718_FullReport.pdf?uclick_id=7c46110e-12bf-4035-a87f-b22fc5921bdd (sexual misconduct ranging by severity "staring or leering" to "verbal threat of sexual assault").

173. Conger, *supra* note 171.

174. Tony West, *Turning the Lights On*, UBER NEWSROOM, (May 15, 2018) https://www.uber.com/newsroom/turning-the-lights-on/.

175. 2017-2018 U.S. SAFETY REPORT, *supra* note 172 at 61 ("In reality, riders account for nearly half of the accused parties across the 5 most serious sexual assault categories."); Yusuf

regulators' demands, Uber has made progress in protecting individual autonomy. The in-app features of the 2018 "Safety Toolkit" allow drivers and riders to share their ongoing trips, access the emergency button to connect with 911 in under a minute, and to access RideCheck, which "leverages technology in the driver's smartphone to detect potential motor vehicle crashes" or suspicious activity by notifying users to ensure their safety.[176] In Brazil, the app also includes inappropriate message detection and audio recording on a trip.[177] The protections available are clearly better than none at all, but they do not provide a comprehensive solution, beyond driver and rider screening, that preemptively avoids violations of users' individual autonomy. Perhaps if Uber were held fully liable to its end-users in all areas of safety and responsibility, it would focus less on expansion and more on safety of the millions who already use the app.

V. MANAGE TRAFFIC CONGESTION AND MAINTAIN PUBLIC INFRASTRUCTURE

It is difficult to deny that Uber puts more cars on the road, which is neither as efficient nor environmentally friendly as a public transit system. Many cities with dependable public transportation already seek to restrict additional cars on the road, which becomes increasingly difficult with Uber in the market.[178] Effective use of public utilities could help serve overcrowded metropolitan areas as well as the first regulatory goal, if the number of ride-hail vehicles and taxis began to overlap; thus, limiting the number of cars on the road in favor of public transit. The final goal is stated broadly, since it encompasses aspects of the previously stated goals and those lightly touched on here, such as environmental and economic impact.[179]

Khan, *Uber Is Set to Lose $1 Billion in Market Value After It Reported 6,000 Sex Assault Cases (UBER)*, MKTS. INSIDER (Dec. 6, 2019, 11:21 AM), https://markets.businessinsider.com/news/stocks/uber-stock-price-1-billion-to-get-wiped-from-market-cap-on-sex-assaults-2019-12-1028743506.

176. 2017-2018 U.S. SAFETY REPORT, *supra* note 172, at 22-24.

177. *Driver Safety, Brazil*, UBER, https://www.uber.com/br/en/drive/safety/ (last visited Dec. 20, 2020); *Elas na direção: mulheres dirigindo suas vidas*, UBER (Oct. 22, 2019), https://www.uber.com/pt-BR/blog/mulheres-na-direcao/.

178. *See generally ViaVan and BVG Launch BerlKönig in Berlin*, VIA VAN (Sept. 7, 2018), https://www.viavan.com/berlin-launch/ (companies like Via are working to create public ride-hail services, it also partnered with Berlin's public transit authority to offer an on-demand shuttle service).

179. See Gregory D. Erhardt et al., *Do Transportation Network Companies Decrease or Increase Congestion*, SCIENCE ADVANCES 1 (2019), for consideration of the environmental impact of the time drivers spend on the road without passengers ("deadheading"), idle waiting for a trip, or the time spent traveling to pick up a passenger.

According to various studies conducted in the United States, ride-hail firms' impact on municipal infrastructure, traffic, and public transportation correlates with their expansion and pricing. The U.S. Energy Efficient Mobility Systems 2019 Annual Report[180] presents a few conclusions based on TNC simulations which explore "the future impacts of emerging technologies on urban mobility."[181] Not surprisingly, these findings have their limitations, but simulated TNC operations based on supply, demand, and network congestion illustrated that, at the lowest simulated price, ride-hailing is sufficiently inexpensive to replace mass transit for regular commutes completely.[182] Moreover, increasing market penetration of the TNC vehicles deteriorates traffic performance by increasing the total time spent on the road and decreasing the harmonic mean speed for road segments of parking, or stagnation in traffic flow resulting from drivers exiting and reentering traffic during pickups and drop-offs..[183] Finally, "[a]s more customers seek pooled rides, the wait times and overall travel delays increase, which limits uptake by other customers. In addition, empty vehicle miles traveled also increase which counteract the benefits of pooling."[184]

The impact of ride-hail services in cities with prominent public transportation, or with congested roads, is clear, but Uber may have already thought of this. Uber has acquired various companies in support of Uber Transit, which seeks to provide access to public transportation.[185] Interestingly, Uber CEO Dara Khosrowshahi stated that the company's goal was to replace personal car ownership as "the cities of the world don't need

180. U.S. DEP'T. OF ENERGY, OFF. OF ENERGY EFFICIENT & RENEWABLE ENERGY (EERE), VEHICLE TECH. OFF., DOE/EE-1988 8199, FY2019 ENERGY EFFICIENT MOBILITY SYSTEMS ANNUAL PROGRESS REPORT (2019) [hereinafter VTO 2019 PROGRESS REPORT], https://www.energy.gov/sites/prod/files/2020/06/f76/VTO_2019_APR_EEMS_COMPILED_REPORT_FINAL_compliant_.pdf*; see also* MICHAEL J. SPRUNG ET AL., U.S. DEP'T. OF TRANSP., BUREAU OF TRANSP. STATS., TRANSPORTATION STATISTICS ANNUAL REPORT 2018 (2018) [hereinafter DOT 2018 ANNUAL REPORT], https://doi.org/10.21949/1502596.

181. DOT 2018 ANNUAL REPORT, s*upra* note 180, at 328.

182. VTO 2019 PROGRESS REPORT, *supra* note 180, 158-59 ("[A] moderate price drop, ride-hailing is not affordable enough to take regularly for the full commute, but rather it serves as a first/last-mile link to a mass transit stop...This result is robust to account for actual mass transit use, suggesting that this complementarity is not just driven by non-users of mass transit who do not have experience using mass transit...").

183. *Id.* at 303 (parking algorithm is randomly selected and does not account for double parking, which disrupts the traffic flow like a temporary lane reduction).

184. *See* VTO 2019 PROGRESS REPORT, *supra* note 180.

185. *Uber Transit*, UBER, https://www.uber.com/us/en/transit/ (last visited Feb. 21, 2022); David Reich, *Uber is Acquiring Routematch to Support Cities in Providing More Accessible Public Transportation*, *Newsroom*, UBER (July 16, 2020), https://www.uber.com/newsroom/uber-routematch/.

more cars in them."[186] Uber's effort to redefine itself as a feeder system for public transit is dubious. If Uber truly intended to replace personal car ownership in favor of a less congested and more efficient transportation system, it would be impressive and helpful to the environment. However, it is difficult to believe that was its main purpose if one considers where Uber derives its revenue from—drivers' service fees.

In its move to become a wider transportation platform, Uber has not created a more efficient system, but instead broadened its revenue streams to micromobility, i.e., electric bikes and scooters, and even to public transit.[187] Some could see this as a private company stepping in for the logical participant, public transit entities themselves, to provide access to these transportation systems via their popular and user-friendly app when the agencies themselves could not. This seems just as conceivable a scenario as one that considers Uber's monetary motivation to increase its own visibility across as many means of transportation as possible. Consider Berlin's public transit authority, Berliner Verkehrsbetriebe (BVG), which developed its own app to promote the use of public resources.[188] Jelbi is a route builder app that connects users with all possible means of travel, whether it be train, bus, bike/scooter rental, rideshare, or taxi.[189] In practice, the differences between the two seem minimal. However, when looked at through the lens of global expansion—as of Q3 2020, Uber has expanded UberTransit into ten new cities worldwide—it is difficult to decide whether Uber is focused on "potentially reducing city emissions and congestion" or whether it is only a *potential* positive side effect.[190]

Regardless of Uber's intentions, increasing accessibility to public transportation is proving beneficial to the extent that users may now consider it as an option alongside ride-hailing services. In San Francisco, which has many transit options within the city and surrounding areas, over ten million

186. Mike Cherney & Newly Purnell, *Uber Readies Services to Mass-Transit Hubs*, WALL ST. J., Jan. 30, 2019, at B2.

187. *Id.*; *New Mobility Supply Chain Meet the Leader*, UBER (Dec. 4, 2019), https://www.uber.com/blog/new-mobility-supply-chain-meet-the-leader jeffrey/#:~:text=New%20Mobility%20is%20rapidly%20expanding,to%20point%20B%20more%20efficiently.

188. *Jelbi App*, JELBI, https://www.jelbi.de/en/jelbi-app-2/ (last visited Oct. 15, 2021). Los Angeles also developed a public ride-hail system as of June 2021. For a discussion on key differences between this new program and private ride-hailing, see Madalyn Amato, *Need a Ride? Metro Micro Offers $1 Rideshares Around L.A.*, L.A. TIMES (June 30, 2021, 3:26 PM), https://www.latimes.com/california/story/2021-06-30/metro-micro-1-dollar-rides-los-angeles.

189. *Id.*

190. Uber 2020 Current Report, Form 8-K (Feb. 10, 2021), https://d18rn0p25nwr6d.cloudfront.net/CIK-0001543151/78add76d-5381-403e-b6cd-12fd6ace3269.pdf.

people per week used the Municipal Railway (Muni) system and Bay Area Rapid Transit (BART) before the COVID-19 pandemic.[191] With Uber Transit, users may review nearby public transportation when planning a trip.[192] Alongside Uber's traditional ride-hail offerings, this transit option lists the distance from the nearest station (and an Uber ride to get there if need be), the cost of a ticket, a number of transfers you needed to complete the trip, and how soon one can arrive at the destination.

This is an important step for Uber. The environmental and congestion concerns of cities, like Los Angeles, were worsened when more drivers hit the road. The move towards an all-encompassing transportation company, whether of a person or goods via UberEats, requires a delicate balance between dominating an industry and widening access to other means of transportation to benefit cities and their residents. Uber was based on the sharing economy concept whereby the sharing took place between drivers and riders. Uber itself works toward self-regulation by expanding this sharing principle to the relationship between riders and municipal public transportation infrastructures.

This goal, again, managing traffic congestions and maintaining public infrastructure, has an environmental impact as much as it allows for efficient use of existing means of transport. Studies have shown that, despite ride-hailing companies' visions, they do not lessen traffic congestion[193] or emissions.[194] Following Proposition 22, Uber is not incentivized to reduce the number of drivers on the road, because it does not compensate for unengaged time.[195] More cars on the road may equate to reduced wait times

191. *Muni Ridership*, https://www.sfmta.com/reports/muni-ridership; *Ridership*, https://www.bart.gov/about/reports/ridership; *Interactive Estimated Ridership Stats*, LA METRO, https://isotp.metro.net/MetroRidership/Index.aspx (numbers based on the February 2020 total average weekly boardings between Muni and BART; for the sake of comparison, in February 2019, the year Uber Transit launched, there were 475,047 fewer total average weekly boardings).

192. *Partnering with Transit Systems*, UBER (May 20, 2016), https://www.uber.com/us/en/community/supporting-cities/transit/.

193. *Ride-Hailing's Climate Risks: Steering a Growing Industry Toward a Clean Transportation Future*, UNION OF CONCERNED SCIENTISTS (Feb. 2020), https://www.ucsusa.org/sites/default/files/2020-02/Ride-Hailing%27s-Climate-Risks.pdf ("A typical ride-hailing trip is about 69% more polluting than the trip it replaces, and can increase congestion during peak periods…[I]f ride-hailing companies increase pooling to 50% and convert to electric vehicles, they can reduce emissions by about 52% compared with the displaced trips").

194. Erhardt et al., *supra* note 179 (contrary to TNC's vision of reducing congestion in major cities, the research found that they are the biggest contributor to growing traffic congestion in San Francisco).

195. Adam Stocker, *Op-Ed: California's Prop 22 Is Not Only Bad for Drivers, It's Bad for Traffic and the Environment*, CAL. STREETS BLOG (Oct. 5, 2020), https://cal.streetsblog.org/2020/10/05/op-ed-californias-prop-22-is-not-only-bad-for-drivers-its-

for customers, in exchange, however, for increased traffic and emissions while drivers wait for their rides,[196] also known as "deadhailing."[197]

A few regulatory schemes consider this goal. New York City enacted measures that limit the number of drivers that can be logged on to the app at a given time or in an area.[198] San Francisco recently passed the legislation which taxes ride-hailing services 3.25% for single rides and 1.5% for shared rides.[199] The taxes are put towards the city's "Muni" public transit system to address its chronic shortage of drivers.[200] These regulatory steps acknowledge the concerns of an oversupply of transportation means and waste of public infrastructure in San Francisco.

Unlike its neighbor Sao Paulo, Brasilia, Brazil's capital, enacted its own regulation, which deepened ride-hail drivers' effect without solving any of the regulatory concerns previously mentioned. Brasilia's Article 3 of the Projeto de Lei 777/2015 prohibits drivers from stopping "at places specially set for taxis or at bus stops."[201] This regulation also fails to meet the first regulatory goal, which seeks to equate the treatment of taxis to Ubers. Areas reserved for taxis are not uncommon,[202] and keeping these areas limited to dense city centers would allow for taxi drivers and public transportation to maintain their stake in the urban transportation market. By keeping more cars off the streets, these regulations could limit the use of ride-hail services to less populated areas where taxis or public transportation may be less convenient or unavailable. This would not prevent Uber from tapping into a certain market, but it would prevent further congestion of areas with established and functioning passenger transport systems.

To tie these findings into the previous regulatory goals and Sao Paolo's kilometers credit system, consider ride-hail app firms' use via drivers of the public road and welfare system. As mentioned, Uber has no incentive to

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bad-for-traffic-and-the-environment/; *Together on the Road to Zero Emissions*, UBER, https://www.uber.com/us/en/drive/services/electric/ (this said, Uber does incentivize Californian's who drive with electric vehicles with a 5-percentage point reduction of their service fee) (last visited Dec. 20, 2020).

196. Stocker, *supra* note 195 (in light to COVID-19, more travelers may opt for ride-hailing apps in lieu of public transportation).

197. Erhardt et al., *supra* note 179.

198. *Important Changes to Driving in New York City*, UBER (Sept. 12, 2019), https://www.uber.com/blog/new-york-city/tlc-rule-changes/.

199. *San Francisco City Tax*, UBER, https://help.uber.com/riders/article/san-francisco-city-tax?nodeId=dc98da55-47d4-4adc-9b14-70338ee51bf4 (last visited Feb. 13, 2022).

200. *Id.*

201. Defossez, *supra* note 62, at 19 (*citing* Projeto de Lei 777/2015, de 19 Novembro de 2015 art. 3, https://legislacao.cl.df.gov.br/Legislacao/consultaProposicao-1!777!2015!visualizar.action (last visited Apr. 9, 2022)).

202. Doménech-Pascual & Soriano-Arnanz, *supra* note 8, at 358.

prevent drivers from logging in, as it only pays them for the completed work. Underpaid drivers are thus spending more time to seek a minimal wage job. As shown by the UC Santa Cruz research, those using app-work as a primary source of income may be unable to support themselves without welfare programs, which is concerning for both drivers and taxpayers. Further, to the extent the discriminatory treatment favors these app firms, conditions are worsened. Private car transportation should not be less expensive than public transit when ride-hailing takes a greater toll on the environment. It is a series of events, which when considered separately, may not have as significant impact on the communities, as when taken together. It is for these reasons well-designed regulations are needed.

VI. CONCLUSION

Uber's course of business has allowed it to avoid regulations imposed on other transportation companies, neglect worker and consumer protections, and further congest cities with established transportation systems. The schemes discussed here addressed some of the goals recommended at the start of this note. Approaches like those taken in Sao Paolo, consisting of creating a regulatory body and regulations which to some extent address each of these goals, are a feasible example of an adaptive and progressive approach to regulating Uber. In consideration of ride-hail and gig application's impact and disruption of traditional industries, regulators must find meaningful standards in their treatment of the ride-hailing apps as soon as possible.

FILLING THE LEGAL VOID IN INTERSTATE LEGAL GENDER RECOGNITION IN THE EUROPEAN UNION: A U.S. STYLE FULL FAITH AND CREDIT CLAUSE AND *COMAN*-BASED APPROACH

Magda Mirisch-Krueger[*]

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I. INTRODUCTION

Gender-reveal parties, where expecting parents announce their baby's sex, are a damaging phenomenon in our pop culture.[1] Even Jenna Karvunidis,

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1. Rachel Charlene Lewis, *The Internet Has (Literally) Accelerated Gender Reveal Parties*, BITCH MEDIA (Sept. 10, 2020, 10:01 AM), https://www.bitchmedia.org/article/gender-reveal-parties-causing-wildfires-destruction.

a fellow Southwestern student, who started the trend in 2008, is now against it.[2] The idea of parents' determining the identity for their child is not only limiting, but also potentially harmful to the new person. It is unnecessary and wrong. Gender identity cannot be decided without the most important consideration and the only one that matters: the person's self-determination.

"Self-determined gender . . . is a cornerstone of the person's identity,"[3] and there is no reason for denying that right. Gender identity may or may not correspond with the sex assigned at birth. It is manifested in gender expression, including sense of the body, dress, speech, and mannerisms, but gender expression may or may not conform to a person's gender identity.[4] Furthermore, gender identity may not follow Western binary concepts of gender.[5] It is time all countries allow for gender self-determination in legal gender assignment, inclusion of non-binary gender markers,[6] and postponement of the attribution of legal gender. Yet, many countries still deny these rights—invoking public policy considerations such as national identity, custom, and tradition. The only practical disadvantage raised by the opponents is the administrative institutional cost of reassigning gender and revising the documents and records. But this has proved to be a *de minimis* problem.[7]

Improving the recognition procedures of trans, nonbinary, and intersex people is one of the 2020-2025 action items of the first-ever EU LGBTIQ Strategy, presented by the President of the European Commission in the 2020 State of the Union 2020 address.[8] In the European Union (EU), legal gender can be confirmed through a self-determination procedure in only four Member States.[9] The vast majority of states have adopted differing

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2. Jenna Karvunidis, *I Started the 'Gender Reveal Party' Trend. And I Regret It*, GUARDIAN (June 29, 2020, 2:00 EDT), https://www.theguardian.com/lifeandstyle/2020/jun/29/jenna-karvunidis-i-started-gender-reveal-party-trend-regret.

3. U.N. Secretary-General, *Protection Against Violence and Discrimination Based on Sexual Orientation and Gender Identity*, ¶ 21, U.N. Doc. A/73/50 (July 12, 2018).

4. *The Yogyakarta Principles Plus 10: Additional Principles and State Obligations on the Application of International Human Rights Law in Relation to Sexual Orientation, Gender Identity, Gender Expression and Sex Characteristics to Complement The Yogyakarta Principles*, THE YOGYAKARTA PRINCIPLES, Nov. 10, 2017, at 6 [hereinafter *Yogyakarta Principles + 10*].

5. Some cultures have long recognized and respected the existence of a third gender, e.g., South Asian *hijras*, *kathoeys* in Thailand, or *ashtime* in Ethiopia. Tomás Mier, *Death of an Indigenous Essential Worker Sparks Debate over Gender Identity*, L.A. TIMES (Aug. 24, 2021, 5:00 AM), https://www.latimes.com/california/story/2020-08-24/angela-martinez-muxe-obituary.

6. *The Yogyakarta Principles: Principles on the Application of International Human Rights Law in Relation to Sexual Orientation and Gender Identity*, THE YOGYAKARTA PRINCIPLES, Mar. 2007, at 11-12 [hereinafter *Yogyakarta Principles*].

7. RICHARD KÖHLER & JULIA EHRT, LEGAL GENDER RECOGNITION IN EUROPE: TOOLKIT 83 (Jennie Kermode ed., 2nd ed. 2016).

8. *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee, and the Committee of the Regions, Union of Equality: LGBTIQ Equality Strategy 2020-2025* COM (2020) 698 final (Nov. 12, 2020) [hereinafter *2020-25 Strategy*].

9. *Id.* at 1.

requirements for gender reassignment such as age, a disorder diagnosis, medical procedures—including sterilization—and a divorce. In five countries, there are no legal norms regulating gender reassignment at all.[10]

Additionally, the EU has another, long recognized, problem: a "legal void" in registering a legally obtained civil status (such as gender) in another Member State primarily because the regulations in the civil status area differ between the states.[11] The Treaty on the Functioning of the European Union (TFEU) asserts the principle of mutual recognition in civil and criminal matters, but it does not mention civil status. Civil status is explicitly excluded from the EU Directive on mutual recognition of civil and commercial judgments.[12] The European Court of Justice (ECJ) and the European Court of Human Rights (ECtHR) held that civil status is within the exclusive competence of each Member State. Although there have been cases before those tribunals addressing interstate recognition of the legal name and marital status that was changed in another EU jurisdiction, neither of the EU courts has ever addressed interstate gender recognition.[13]

The EU Member States have shown no interest in uniform rules for civil status mutual recognition. On the contrary, the recognition has become more complex. There are many bilateral and multilateral agreements[14] with exceptions, or conventions ratified by a limited number of countries, in addition to local rules applicable in each Member State.[15] The latest

10. European Commission, *Legal Gender Recognition in the EU, the Journeys of Trans People towards Full Equality* 7 (June 2020) [hereinafter *Journeys towards Full Equality*].

11. *Civil Status Documents–Challenges for Civil Registrars to Circumvent Problems Stemming from the Legal Void*, at 4 (2012), https://www.europarl.europa.eu/RegData/etudes/IDAN/2012/462500/IPOL-JURI_NT(2012)462500_EN.pdf [hereinafter *Civil Status Documents*].

12. Council Reg. 44/2001, Jurisdiction and the Recognition and Enforcement of Judgments in Civil and Commercial Matters, 2000 O.J. (L 12) 1, 3 (EC); *see generally*, Consolidated Version of the Treaty on the Functioning of the European Union, 2012 O.J. (C 326) (EU) [hereinafter TFEU].

13. There is also an International Commission on Civil Status, but not all European countries are members and, furthermore, even less signed and ratified its conventions. More importantly, the last ICCS convention on the decisions regarding a sex reassignment signed in Vienna in 2000 is not very helpful in protecting the rights of non-gender conforming people. *See generally* Convention (No. 29) on the Recognition of Decisions Recording a Sex Reassignment, Dec. 12, 2000, http://www.ciec1.org/SITECIEC/PAGE_Conventions/fAQAAE8K_EZqYWdzVVhGZ3poXwU.

14. Hague Convention and ICAA, not ratified by all countries, and Denmark seems to be excluded from the agreements. *Commission Green Paper, Less Bureaucracy for Citizens: Promoting Free Movement of Public Documents and Recognition of Civil Status Records*, at 6, COM (2010) 747 final (Dec. 14, 2010) [hereinafter *Green Paper*].

15. *Id.* at 7.

regulation[16] focuses on simplifying the formalities in the authentication of documents and mutual administrative cooperation, but there is no more determined movement in the direction of automatic recognition of civil status documents and judgments.

The lack of uniformity in the regulations of legal gender recognition and the "legal void" in the area of registering a legally obtained gender reassignment in another Member State[17] is unduly burdensome to already stigmatized and marginalized groups. What happens when a transgender person relocates to a state with more demanding procedures and wants to have the gender reassignment recognized or wants to enforce it? The answer is not simple. The local courts make those decisions on a country-by-country and case-by-case basis. Such ad hoc adjudication denies the transgender people legal predictability and reliance. Moreover, the recognition or enforcement procedure is not always simple and clear.[18] Procedural standards vary too. In some countries, for example Holland or Ireland,[19] an administrative certificate reconfirms gender, and others require a court judgment to recognize a preferred gender.[20] This creates a problem when the receiving court refuses recognition for the lack of finality in the decision of an administrative body. The petitioner, now, must return to the organ that granted their gender reassignment decision to obtain a certificate stating the decision was final. Cost, time, and undue burdens accumulate. Finally, when the gender recognition results in a same-sex marriage, the judgment will not be recognized in the EU Member States that prohibit same-sex unions, unless the petitioner obtains a divorce.[21]

Practical issues that result from the discrepancy between one's lived gender and gender marker in the official documents permeate all areas of life, including access to health care and financial services or competing in the job market. For example, during a job interview, a college diploma with a different legal name will unnecessarily deviate attention to the very personal subject of gender identity rather than the candidate's qualifications. As a result, transgender people are reluctant to travel fearing discrimination and

16. Commission Regulation 2016/1191, Promoting the Free Movement of Citizens by Simplifying the Requirements for Presenting Certain Public Documents in the European Union and Amending Regulation, art. 26, 2016 O.J. (L 200).

17. *Civil Status Documents*, *supra* note 11 at 5; *see also Green Paper*, *supra* note 14 at 13.

18. *See generally* Inês Espinhaço Gomes, *Queering European Union Law: Sex and Gender Beyond the Binary and Cisnormativity*, *in* STUDY PAPERS (Europa Kolleg Hamburg study paper 04/19, ed. 2019).

19. Dep't Soc. Prot., *Apply for a Gender Recognition Certificate/Revised Birth Certificate*, GOV'T IR. 3 (last updated Apr. 22, 2021), https://www.gov.ie/en/service/b55abf-gender-recognition-certificate/?referrer=https://www.welfare.ie/en/Pages/GRC1.aspx.

20. *Journeys towards Full Equality*, *supra* note 10, at 109.

21. Same-sex marriage is not legal in Romania, Poland, Hungary, Bulgaria, Latvia, Lithuania, and Slovakia. Arpi Avetisyan & Juliana Teoh, *Together We Can Make the Coman Judgment a Reality: The Freedom of Movement of Same-Sex Couples Across the EU*, ILGA EUROPE (Mar. 28, 2019, 9:00 AM), https://ilga-europe.org/blog/together-we-can-make-coman-judgment-reality.

suspicion that they have used falsified documents.[22] The stakes are even higher for asylum seekers and refugees who face discrimination and violence.[23]

Furthermore, nonrecognition of legal gender obtained in another Member State may violate human rights[24] and such fundamental principles of the EU like freedom of movement and residence.[25] The law, instead, could foster the positive change advocated by human rights experts. Their guidelines have been outlined in the Yogyakarta Principles[26]—the most comprehensive and significant proclamation of states' obligations under the international human rights law in relation to sexual orientation and gender identity.[27]

The ideal solution is achieving uniformity among national regulations of gender self-determination in all EU Member States. This is very unlikely to happen in the foreseeable future due to the states' sovereignty and interest in maintaining strong identity and values, which are shaped by, among other factors, local attitudes towards marriage and gender. Even assuming that the Member States would take steps towards that outcome, it would be a long process.[28]

Another proposed solution is transferring the competence for regulating the area of civil status, including gender, from Member States onto the EU institutions,[29] assuming those institutions would follow the self-determination framework and provide easy access to legal recognition. This is rather wishful thinking, especially in light of the current conservative shift in some EU countries. Even under a tighter federal structure like that in the United States, marriage has traditionally been regulated by the states because it reflects traditional values of the local society, often fortified by religious beliefs.

This note argues that there is a feasible and more direct solution that would allow for automatic and nearly unconditional interstate legal gender

22. Transgender Europe, Submission to the DG Home Affairs Consultation on the 'Post-Stockholm Programme,' (Jan. 21, 2014) (on file with author).

23. KÖHLER & EHRT, *supra* note 7, at 18.

24. Possible violations of the ECHR include right to respect for private and family life, right to marry and to found a family, and prohibition of discrimination. *See, e.g.*, Hämäläinen v. Finland, App. No. 37359/09, 219 Eur. Ct. H.R. (2014).

25. TFEU, *supra* note 12, at 17; *see also id.* at Titles IV and V; Charter of Fundamental Rights of the European Union art. 45, 2000 O.J. (C 364); *Eur. Parl. Fact Sheets on the Eur. Union*, EUR. PARL., https://www.europarl.europa.eu/factsheets/en/sheet/147/free-movement-of-persons (last visited Oct. 3, 2020).

26. *Yogyakarta Principles*, *supra* note 6.

27. SHEILA QUINN, AN ACTIVIST'S GUIDE TO THE YOGYAKARTA PRINCIPLES 134 (2010).

28. *Civil Status Documents*, *supra* note 11, at 5.

29. *Id.*

recognition. The existing legal void can be filled with a combination of legislative and judicial measures. The EU should adopt a full faith and credit clause (FFCC) to introduce a clear uniform rule for mutual recognition and enforcement of gender reassignment judgments. That basic legal framework should be complemented with strategic litigation to address the limitations of the FFCC. The guidelines are readily available in a recent case in the area of LGBTQ and civil status. In its landmark decision in *Coman v. Romania*,[30] the ECJ held that a Member State cannot impair the right to move and reside freely in the EU, even if it means recognizing a valid same-sex marriage contracted in another member state that could not be legally contracted in Romania. Because the areas of gender and marriage involve the same right to respect for family and private life and apply similar reasoning, that ruling could be expanded to the recognition of a legal gender acquired in another Member State.

II. BASIC FRAMEWORK: A EUROPEAN FULL FAITH AND CREDIT CLAUSE FOR THE BENEFIT OF INTERSTATE GENDER RECOGNITION

A. Current Constitutional Doctrine and Practice in the United States

Article IV of the U.S. Constitution makes it clear that the states must give "Full Faith and Credit . . . in each state to the public Acts, Records, and judicial Proceedings of every other State." Furthermore, it gives Congress the power to "prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."[31] The Effect Clause subjects the right to recognition conferred by the FFCC clause to qualifications that Congress may impose.[32] The longstanding constitutional doctrine asserts that if a state court rendered a valid judgment, it is binding on all other states.[33] The receiving state may, however, reject a judgment from another state if there is a strong public policy that would oppose applying the laws of the state rendering the judgment to the dispute.[34]

The clause was intended to protect individual, judicially confirmed, rights in relation to the right to travel and to advance enforcement of those rights.[35] It deliberately imposed a binding obligation on the states.[36] That obligation is self-executing, thus promoting legal certainty and efficiency by

30. Case C-673/16, Coman v. Romania, ECLI:EU:C:2018:385, (Jun. 5, 2018).

31. U.S. CONST. art. IV, §1.

32. *Id.*; David B. Cruz, *Sexual Judgments: Full Faith and Credit and the Relational Character of Legal Sex*, 46 HARV. C.R.-C.L. L. REV. 51, 57 (2011).

33. Cruz, *supra* note 32, at 56.

34. *Id.* at 58.

35. Pamela K. Terry, *E Pluribus Unum? The Full Faith and Credit Clause and Meaningful Recognition of Out-of-State Adoptions*, 80 FORDHAM L. REV. 3093, 3134-35 (2012).

36. Cruz, *supra* note 32, at 56.

mandating the states to respect other states' judgments and the individual rights that flow from those judgments.[37]

In practice, in most states, a valid court order[38] reaffirming a person's legal gender is deemed sufficient to establish the person's gender for all legal purposes in the receiving state.[39] For example, in Texas there is no judicial procedure to obtain a court order recognizing a change of gender, but Texas recognizes such orders from other jurisdictions.[40] Similarly, Ohio does not have a statute or administrative policy that permits issuing a new birth certificate to a transgender person, but Ohio will issue a new birth certificate upon the presentation of a valid court order from another state.[41]

In cases of gender reassignment, some scholars have suggested that the constitutionally protected right to travel might be implicated when a state refuses to recognize a valid out-of-state legal gender determination.[42] However, recent case law and legal writing in the United States has focused instead on the FFCC imposed requirement that compels the states to accept other states' determinations of legal gender, either through administrative or court-ordered gender reassignment on a birth certificate for any legal purpose.[43]

This note explores both approaches for gender judgments in Europe: establishing a clear principle of recognition among the EU Member States by adopting a full faith and credit clause and asserting the violation of the right to free movement in preliminary rulings referred to the European Court of Justice (ECJ). While the right to free movement seems to be a surefire approach for civil status claims before the ECJ[44] and as such might be sufficient, establishing the overarching principle of automatic mutual recognition in the EU Constitution would provide regularization of that issue in Europe.

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37. Terry, *supra* note 35, at 3106-07.

38. A court order is preferable for the FFCC protection in case of any legal dispute. COURTNEY G. JOSLIN ET AL., LESBIAN, GAY, BISEXUAL, AND TRANSGENDER FAMILY LAW §9-2 (2020).

39. *Id.*

40. *Id.*

41. *Id.*

42. Cruz, *supra* note 32, at 53.

43. JOSLIN ET AL., *supra* note 38, at 53.

44. The impairment of the right to free movement has already been established in other civil status aspects, *i.e.*, person's name and marital status, but should now be explicitly affirmed in a gender recognition case. Case C-148/02, Garcia Avello v. Belgium, 2003 E.C.R. I-11613 ¶ 24 (Oct. 2, 2003); Case C-353/06, Grunkin-Paul v. Germany, 2008 E.C.R. I-07639 ¶ 36 (Oct. 14, 2008).

B. Adoption of a Full Faith and Credit Clause in Europe for the Benefit of Interstate Gender Recognition.

The adoption of a full faith and credit clause seems to be the most straightforward solution for automatic mutual recognition of gender judgments in the EU. Scholars have already advocated[45] for an equivalent of the American full faith and credit clause to simplify complex mutual recognition of civil and commercial judgments.[46] However, the preferable methods of adopting a European full faith and credit clause proposed so far[47] do not cover civil status. This might be because the EU Constitution contains applicable provisions referring to civil[48] and criminal[49] judgments, which are followed by the "facilitating" provisions.[50] Civil status is not mentioned in the TFEU, and it has been excluded from subsequent regulations on mutual recognition; interstate gender recognition remains an exclusive domain of the Member States. This part of the note explores different methods of amending the existing legal framework in Europe towards extending the reach of a potential European full faith and credit clause to civil status. There are three main options: a resolution, an amendment to TFEU, and a new judicial interpretation of the TFEU recognition provisions.

A resolution on automatic interstate recognition of civil status, or specifically of legal gender reassignment, that parallels the American full faith and credit clause, would be a relatively easy method of adopting the clause. Apart from the European Parliament and Council enacting the resolution, other conventions and mutual agreements would need to be concurrently repealed.[51] Otherwise, such full faith and credit resolution would only add to the plethora of existing rules and regulations and bilateral or multilateral agreements, which, in practice, translates to unreliable result in local courts and case-by-case adjudication. In civil and commercial judgments, the European Council's attempts at simplifying the mutual

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45. *See* Agnieszka Frąckowiak-Adamska, *Time for a European "Full Faith and Credit Clause,"* 52 COMMON MKT. L. REV. 191, 193-94 (2015).

46. Because civil and commercial judgments in Europe involve some aspects of marriage (implicating civil status), *e.g.*, property, maintenance, etc., I will discuss solutions offered to simplify the mutual judgments recognition in that area, omitting solutions to problems in recognition and enforcement of criminal judgments. The TFEU separates the mutual recognition into two provisions: Article 81 addresses "judicial cooperation in civil matters" and Article 82 "judicial cooperation in civil matters." For clarity of this paper, I will focus on civil matters, which include civil and commercial judgments. TFEU, *supra* note 12, arts. 81-82.

47. *See, e.g.*, Frąckowiak-Adamska, *supra* note 45, at 197.

48. TFEU, *supra* note 12, art. 81(1) ("The Union shall develop judicial cooperation in civil matters having cross-border implications, based on the principle of mutual recognition of judgments and of decisions in extrajudicial cases.").

49. *Id.* art. 82 ("Judicial Cooperation in Criminal Matters").

50. *Id.* art. 67(4) ("The Union shall facilitate access to justice, in particular through the principle of mutual recognition of judicial and extrajudicial decisions in civil matters.").

51. Steps needed to achieve the result of automatic mutual recognition for gender judgments are based on the analysis for civil and commercial judgments. *See* Frąckowiak-Adamska, *supra* note 45, at 194.

judgment recognition through independent legal acts, including resolutions, had already resulted in a complex system—difficult to follow even for the practitioners.[52] Thus, the requirement of repealing existing multilateral acts must be considered as a factor that might complicate the solution taking full effect since it would depend in part on the action of individual signatories.

On the other end of the spectrum, an idea but less feasible solution, the EU could "Americanize" the formulation of Articles 81 (civil matters) and 82 (criminal matters) by amending the TFEU to firmly establish the principle of the full faith and credit that must be given to other EU Member States statutes, public records, and court judgments. The text of the TFEU could drop the distinction between "civil"[53] and "criminal,"[54] merging them into one mutual recognition requirement, regardless of the type of judgment or record, so interstate civil status recognition would not be left behind. A resolution would still be needed to make it clear that the revised provision of TFEU now covers interstate gender recognition establishing the EU competence in the area, and to specify the rules of its application and possible narrow exceptions.[55]

A new clause compelling interstate recognition of all judgments and records would a solution that is the most effective and clear in operation for achieving automatic recognition. The inclusion FFCC equivalent that covers civil status in the EU primary law, i.e., the TFEU, will make it clear that the new clause preempts any other existing law or practice. Moreover, when recognition becomes the constituting Treaty principle, the refusal to recognize an out-of-state gender recognition could be narrowly defined.[56] In this scenario, the resolution will serve not to establish a new principle of mutual recognition of civil status judgments, but to set the rules and define exceptions.[57] The latter would be limited to account for mistakes or dysfunctions of legal systems.[58] For example, if the same gender claim was brought in the receiving country earlier than before the foreign court, a review of the foreign judgment by the receiving country court would be warranted.[59] Such formulation would render the recognition of gender

52. *Id.* at 193.

53. TFEU, *supra* note 12, art. 81 ("Judicial Cooperation in Civil Matters").

54. *Id.* art. 82 ("Judicial Cooperation in Criminal Matters").

55. *See generally* Frąckowiak-Adamska, *supra* note 45.

56. *Id.* at 212.

57. *Id.* at 210.

58. *Id.* at 209-10.

59. RZECZNIK PRAW OBYWATELSKICH [OMBUDSMAN], BIULETYN RZECZNIKA PRAW OBYWATELSKICH 2020, NO. 2 [BULLETIN OF THE OMBUDSMAN 2020, NO. 2], POSTĘPOWANIA W SPRAWACH O USTALENIE PŁCI: PRZEWODNIK DLA SĘDZIÓW I PEŁNOMOCNIKÓW [PROCEEDINGS IN

reassignment judgments not only automatic, but as close to unconditional as possible.

Alternatively, the existing "civil judicial cooperation" provision in Article 81(1) of the TFEU could be given direct effect by a resolution that would mandate not only automatic recognition but would also make clear that civil status, and with that gender, judgments, belong to the "civil matters" covered by the Article. The enactment would also need to repeal all other existing rules on recognition of civil status judgments.

The process of amending the Treaty on the Functioning of the European Union, however, is not trivial. Since shifting the competence to the European Union from the Member States in the interstate gender recognition is a "key change" it would be subject to "ordinary revision."[60] The process of such revision requires an intergovernmental conference to adopt the proposal for amendment by consensus.[61] While this is still feasible, the requirement of ratification by *all* EU countries is not, especially because so far member states have not shown interest in harmonizing their legislation in the area.[62] Another wrinkle is the general opt-out by Denmark and Ireland, and their occasional participation in certain acts,[63] which proves the point of unlikely unanimous ratification of the treaty revision.

Based on the specific needs of the area of interstate gender recognition, the most desirable solution seems to be the automatic and nearly unconditional recognition introduced by the new mutual recognition clause, paralleling the American Full Faith and Credit Clause. The new recognition framework would be further developed in a resolution establishing specific rules and defining narrow exceptions.

The functioning of the new recognition principle could also be reinforced by a decision of the ECJ. Since it might also be the most unattainable goal, the explicit inclusion of civil status in the already existing provision in the TFEU on the mutual civil judgments' recognition is the next preferable solution.

Lastly, it is worth mentioning, that some recognition and enforcement efforts were undertaken by conventions.[64] This note does not explore this approach for achieving the FFCC-like automatic interstate gender recognition, because it has insufficient binding force. Unless a convention is transformed into a regulation, its effect is binding only on countries who

CASES FOR THE DETERMINATION OF GENDER: GUIDELINES FOR JUDGES AND LAWYERS] 30 (2020) (Pol.).

60. *Revision of the Treaties*, EUR-LEX, https://eur-lex.europa.eu/summary/glossary/treaties_revision.html (last visited Jan. 26, 2022).

61. *Id.*

62. *Civil Status Documents*, *supra* note 11, at 8.

63. *See* Rąckowiak-Adamska, *supra* note 45, at 213.

64. Jan-Jaap Kuipers, *Cartesio and Grunkin-Paul: Mutual Recognition as a Vested Rights Theory Based on Party's Autonomy in Private Law*, 2 EUR. J. LEGAL STUD. 66 (2009).

signed it, and more importantly, ratified it.[65] This may be only a fraction of the EU Member States.

C. The Public Policy Exception

In the United States, a state can refuse to enforce a foreign judgment when it clashes with the local values,[66] citing the public policy exception to the Full Faith and Credit Clause. Debate continues whether, in the name of a unified federal system, the clause should instead preclude the possibility of the dominance of the single state's interest in preserving its own policies.[67] Another argument is that public policy is too vague and all-encompassing to allow the states to use it as a justification for rejecting a judgment from another state.[68] Nevertheless, regardless of the perceived shortcomings, the exception must be addressed when discussing the Full Faith and Credit Clause.

It seems that the EU may fare significantly better in narrowing the interpretation of its constitutional public policy exception. The TFEU contains an express public policy, public security, and public health provision in Article 52, in the chapter addressing the right of establishment as an integral part of the free movement of persons, services, and capital.[69] The exception allows for "special treatment" of the foreign nationals on the aforementioned grounds and could consequently limit the freedom of movement.[70] However, the ECJ has ruled on numerous occasions that the public policy may only be invoked when there is a "genuine and sufficiently serious threat" to "one of the fundamental interests of society,"[71] and as a "derogation from a fundamental principle of the Treaty," must be narrowly construed.[72] Further, the application of the public policy provision may amount to indirect discrimination on the grounds of nationality, which is

65. *See generally* Frąckowiak-Adamska, *supra* note 45.

66. Elizabeth Redpath, *Between Judgment and Law: Full Faith and Credit, Public Policy, and State Records*, 62 EMORY L.J. 639, 655 (2013).

67. Terry, *supra* note 35, at 3107.

68. *Id.*

69. TFEU, *supra* note 12, art. 52.

70. *Id.*

71. The exception was justified when there was a crisis in the oil, telecommunication, and electricity sectors in the member state or there was a threat of a serious harm to the social security system, or when it was necessary to the survival of the population, but it can never be applied on purely economic grounds. None of those reasons may be conceivably present in the legal gender recognition scenario. *European Commission, Guide to the Case Law of the European Court of Justice on Articles 49 et seq. TFEU, Freedom of Establishment*, at 15, COM (2017) 1839123 final (June 4, 2003).

72. *Id.*

expressly prohibited by TFEU.[73] Theoretically, a receiving country could not refuse to make necessary adjustments in a birth certificate based on a gender recognition judgment from another Member State, when such changes could be made based on a domestic court order, citing the public policy exception.

Moreover, the *Coman* court specifically, when mandating a Member State to recognize a foreign same-sex marriage for purposes of granting residency to the non-citizen spouse, explicitly dismissed the public policy justification in case of marriage where potentially such "safety valve" could be more needed.[74] Marriage creates new rights for other people, including children. Gender recognition, on the other hand, is a distinctively individual right to self-determination and self-expression. It affects other people, but not directly, like marriage. Therefore, looking out for other members of the society as the basis for public policy justification for obstructing a fundamental right of the EU would unlikely be a persuasive argument for rejecting an out-of-state gender reassignment judgment.

Similarly, in cases addressing the interstate recognition of legal names,[75] the ECJ recognized the supremacy of the fundamental freedoms guaranteed by the TFEU—in particular, those involving the right to move and reside in the territory of the Member States—over local interest. The court ruled[76] that the refusal to register the name obtained in another state, which conflicts with the rules of the receiving state, creates an inconvenience that would inhibit the right to free movement and that cannot be justified by an overriding public policy.[77]

What seems to impair the full benefit of the Full Faith and Credit Clause protection in the area of marriage and gender recognition in the United States does not then appear as such in the European context. If invoking local public policy was not a sufficient basis for not recognizing a valid same-sex marriage from another jurisdiction in *Coman*, it will likely not stand in the way of recognizing legal gender reassignment in the EU.

The particular judgment reconfirming gender should be final and reviewable only if there is a mistake. For example, if the same petition was brought in the receiving state's court earlier than before the foreign court. The review of the out-of-state gender recognition judgment may also be desired when a foreign court issues a judgment contrary to the person's lived gender.[78] The finality of that judgment would strip the person of ever having a possibility of obtaining legal recognition of their gender; it would force someone to live with the disastrous consequences of the unfavorable judgment even in a more gender-friendly state.[79] But those instances are rare

73. *Id.* at 58.
74. Case C-673/16, Coman v. Romania, ECLI:EU:C:2018:385 ¶¶ 45-46 (June 5, 2018).
75. C-148/02, Garcia Avello v. Belgium, 2003 E.C.R. I-11613 ¶ 42 (Oct. 2, 2003).
76. Case C-353/06, Grunkin-Paul v. Germany, 2008 E.C.R. I-7675 (Oct. 14, 2008).
77. Kuipers, *supra* note 64, at 83.
78. Cruz, *supra* note 32, at 54.
79. *Id.*

and could be remedied with the possibility of reconfirming one's gender through a new proceeding. Gender is fluid throughout life[80] anyway so a quick and easily accessible legal procedure should allow for the new legal reassignment of gender at any point. Thus, the finality of the initial unfavorable out-of-state judgment would not preclude the petitioner from the possibility of obtaining a new legal gender reassignment in the receiving state.

The American Full Faith and Credit Clause comes with the public policy exception that may allow an unwilling receiving state to get out of its mutual recognition obligation. The EU constituting treaty has an express provision to a similar effect. In the EU, however, the narrow interpretation of the public policy exception and its explicit preclusion in case law in the civil status area, addressing interstate recognition of names and same-sex marriage, substantially minimizes this potential drawback.

III. SUPPLEMENTARY APPROACH: *COMAN V. ROMANIA*

A. What Coman has Achieved.

Relu Coman, a Romanian and American citizen, met Robert Hamilton, an American, in New York. They lived together for four years in the United States, before Coman decided to relocate to Brussels, Belgium, to work in the European Parliament. Hamilton stayed in New York. The couple got married in Brussels in 2010. In 2013, they inquired about the possibility of moving to Romania, where Hamilton would require a resident permit to be able to stay there longer than three months. He was entitled to a derived right of residence in Romania on the grounds of his marriage to a Romanian citizen, but his application was denied because his same-sex marriage was not recognized in Romania.[81]

Coman and Hamilton challenged the decision in the local court alleging discrimination on based on sexual orientation, infringing on their right to free movement in the EU.[82] They argued that the Romanian law prohibiting same-sex marriage violates the Romanian Constitution's provisions that protect "the right to personal life, family life and private life and . . . the principle of equality."[83] The matter reached the Romanian Constitutional Court. The Court had doubts on the interpretation of the conflicting EU law and referred

80. QUINN, *supra* note 27, at 23.

81. Case C-673/16, Coman v. Romania, ECLI:EU:C:2018:385 ¶¶ 9–12 (June 5, 2018).

82. *Id*. ¶ 13.

83. *Id*.

the questions on the meaning of the term "spouse" and the resulting obligation to grant the right of residence to the ECJ.[84]

The ECJ held that Romania must recognize a valid foreign same-sex marriage, even where same-sex marriage is not legal, for the purposes of granting the non-resident spouse a permit to reside in that country.[85] The court interpreted the right of citizens of the EU and their family members to move and reside freely within the territory of the Member States[86] and how it relates to the protection of private and family life.[87] It concluded that the Member States may enjoy their competencies in regulating marriage, but they cannot obstruct the exercise of the fundamental rights on the ground that the law of that Member State does not recognize same-sex marriage.[88]

The ECJ explicitly rejected the public policy justification for unilateral interpretation of a fundamental freedom by a Member State.[89] The exception may be relied upon only if there is a "genuine and sufficiently serious threat to a fundamental interest of the society."[90] Absent such a threat in this case, the prohibition of same-sex marriage in the receiving state did not justify non-recognition of the valid marriage contracted in another Member State when the non-recognition would impede the right to free movement and residence within the EU.[91]

In addressing same-sex marriage, the court made a point relevant to interstate gender recognition. It acknowledged "the right to lead a normal family life, together with their family members" in both the member state where the marriage was contracted and in the Member State to which the citizens return with the valid marriage certificate.[92] Like marriage, legal gender recognition often affects family life, including spousal and parental rights.[93]

Coman could have made the case for interstate recognition of civil status even stronger had the ECJ addressed not only freedom of movement and the respect for private and family life, but also the principle of non-discrimination based on sexual orientation and gender.[94] The court,

84. Council Directive 2004/38, art. 2, 2004 O.J. (L 158) 47 (EU); Charter of Fundamental Rights of the Eur. Union, arts. 7, 8, 21, 45, 2012 O.J. (C 326) 55.

85. *Coman*, Case C-673/16, ¶ 51.

86. Council Directive 2004/38, 2004 O.J. (L 158) 47 (EU); TFEU, *supra* note 12, art. 21.

87. *Coman*, Case C-673/16, ¶ 48.

88. *Id*. ¶¶ 42, 46, 51.

89. *Id*. ¶¶ 42-46.

90. *Id*. ¶ 44.

91. *Id*. ¶¶ 46, 51.

92. *Id*. ¶ 32.

93. *Id.* ¶ 50.

94. While there is no provision in the EU law that explicitly prohibit gender identity discrimination, the Chart of the Fundamental Rights of the European union prohibit discrimination. The ECJ has found that discrimination based on past or future "gender reassignment" may amount to sex discrimination, which is explicitly prohibited in several EU

interestingly, ignored that argument even though discrimination on the basis of sexual orientation was raised in the original proceedings.[95] However, the focus on the interstate aspect of civil status judgment recognition can hardly be considered *Coman*'s weakness for the purposes of interstate gender recognition. Its reasoning offers the strongest analogy. Other civil status cases[96] may be used to support the argument of discrimination on the grounds of both nationality and gender, if needed.[97]

B. Strategic Litigation

After cases covering interstate recognition of legal names, *Coman* tackled recognition of another component of European civil status—marriage. The path now seems well-paved to a judgment that will announce that although gender belongs to the Member States' exclusive competence, non-recognition of an out-of-state gender reassignment judgment violates the EU fundamental principles that take precedence over a Member State's law, and its public policy may not be used for justification. If a full faith and credit clause is adopted, the verdict could also interpret the new TFEU provision or resolution when it refers to gender judgments. The EU court ruling could establish that mutual recognition mandated by the clause is automatic and nearly unconditional.

So far, neither the ECJ nor the European Court of Human Rights (ECtHR) has addressed interstate gender recognition. In the area of civil status, the ECJ has held that although marriage and names belong to the exclusive competence of the Member States, the EU fundamental right of freedom of movement and respect for private and family life takes

directives. Also, the European Court of Human Rights has found states in breach of the European Convention for the Protection of Human Rights and Fundamental Freedoms when transgender citizens were banned from seeking legal recognition of their gender. *See* AMNESTY INT'L, THE STATE DECIDES WHO I AM: LACK OF LEGAL GENDER RECOGNITION FOR TRANSGENDER PEOPLE IN EUROPE 20 (2014).

95. Manon Beury, *The CJEU's Judgment in Coman: A Small Step for the Recognition of Same-Sex Couples Underlying European Divides over LGBT Rights*, STRASBOURG OBSERVERS (July 24, 2018), https://strasbourgobservers.com/2018/07/24/the-cjeus-judgment-in-coman-a-small-step-for-the-recognition-of-same-sex-couples-underlying-european-divides-over-lgbt-rights/.

96. *See, e.g.*, Case C-267/06, Maruko v. Versorgungsanstalt der Deutschen Bühnen, ECLI:EU:C:2008:179 ¶ 37 (Apr. 1, 2008) (challenging Germany's refusal to recognize same-sex marriage, the court admits that even though civil status falls within the competence of the member states, the principle of non-discrimination in the EU law, like other EU fundamental rights, may not be violated).

97. *See* Cruz, *supra* note 32, at 54 (equal protection of the laws not available to transgender people when questioning their lived gender while accepting the lived gender of cisgender people, constitutes one of the constitutional arguments raised by scholars and litigants in the United States).

precedence.[98] The interstate gender recognition case should be decided by the ECJ to reaffirm those principles specifically in the gender area.

Due to its binding force, an ECJ's verdict would be preferable to an ECtHR decision.[99] The Member States must comply with the latter but only if they are parties to the dispute.[100] A failure to comply may have some consequences (the court does monitor compliance with its judgment and progress in implementing the orders), but the verdict is not binding in any way on non-parties.[101] In the absence of such obligation, other local courts may be reluctant to follow the judgment to avoid charges of overreaching.[102] Another reason why the ECJ is a proper venue is that strategic litigation could supplement a full faith and credit clause preferably included in the TFEU or enacted in the EU primary law. The ECJ is the appropriate court to interpret the new provision and foreclose the possibility of a public policy pathway to non-recognition of a gender judgment from another Member State.[103]

The ECJ could mandate the EU Member States to mutually recognize valid gender reassignments mirroring the *Coman* decision, regardless of the receiving state's conflicting policies. Just like in *Coman*, the fact that same-sex marriages are not valid in Romania could not preclude local recognition of such marriage validly contracted in another EU Member State. In the case of interstate gender recognition, different requirements for legal gender reassignment in the receiving state, cannot invalidate a valid gender reassignment from another Member State. The issue can be formulated on the same legal grounds, the same rights are implicated—freedom of movement and residence and continuation of family life that has been created or strengthened in another Member State—and similar reasoning would apply. Like with marriage, the states will retain their competence to regulate legal gender recognition in their territory. But the court, by asserting that that competence is subordinate to the EU fundamental right of freedom of movement and residence, would force the states to mutually recognize gender reassignment from another Member State.

Moreover, like in *Coman*, the two justifications for non-recognition of out-of-state gender judgments should be explicitly rejected: the excuse of the

98. *Coman*, Case C-673/16, ¶¶ 45–46; *Garcia*, Case C-148/02, I-11649-1-11650; *Grunkin-Paul*, Case C-353/06, I-7675.

99. Gundega Mikelstone, *The Binding Force of the Case Law of the Court of Justice of the European Union*, 20 JURISPRUDENCIJA 469, 473 (2013).

100. Laurence R. Helfer & Erik Voeten, *International Courts as Agents of Legal Change: Evidence from LGBT Rights in Europe*, 68 INT'L ORG. FOUND. 77, 77-78 (2014).

101. *Id.* at 81.

102. *Id.*

103. The ECtHR opinions are not as impactful, but helpful. The ECJ adopts the ECtHR judgments as persuasive authority in its reasoning. In civil status cases, the Article 8 right to respect for private and family life of the European Convention on Human Rights is implicated since gender, like name, is a means of personal identification and a link to family, in the court's opinion. Likewise, in *Coman*, the ECtHR caselaw related to private and family life also supported the court's judgment. *See* Beury, *supra* note 95.

interpretation of the EU law and public policy exception. In *Coman*, the court repeated the doctrine that the EU must respect the Member States' national identity "inherent in their fundamental structures, both political and constitutional," however, it denied the states the freedom to unilaterally interpret the fundamental rights of the EU without any control by the EU institutions.[104] The ECJ should also expressly reject the public policy justification for refusing to recognize judgments from another EU jurisdiction. Following *Coman*'s dictum, it should not matter that a judgment from another Member State does not comply with the local requirements for legal gender reassignment, because its recognition does not pose a "sufficiently serious threat to a fundamental interest of the society."[105]

Procedurally, it is the national court of the Member State that makes a reference for a preliminary ruling to the European Court of Justice.[106] The court submits a question about the interpretation of a provision of the EU law[107] usually to ascertain that the national legislation complies with that law.[108] It may also seek a review of the validity of the EU law.[109] NGOs and LGBT organizations, like ILGA-Europe, can help to publicize the availability of the legal recourse or to pressure the courts to refer questions in the area of interstate gender recognition to the ECJ.

C. Erga Omnes Effects

Additionally, the area of gender recognition would also benefit from *erga omnes* effects of the ECJ decision that would mandate unconditional recognition of an out-of-state gender reassignment.[110] The influence of the international courts' judgments often extends beyond the litigants in a particular dispute,[111] especially with national and international media

104. Case C-673/16, Coman v. Romania, ECLI:EU:C:2018:385 ¶ 43 (June 5, 2018).

105. *Id.* ¶ 44.

106. Court of Justice, *Court of Justice of the European Union*, CURIA, https://curia.europa.eu/jcms/jcms/Jo2_7024/en/.

107. In *Coman*, the Romanian Constitutional Court asked the ECJ for interpretation of the term "spouse" in the EU Directive. Beury, *supra* note 95. It is surprising that Romanian court would ask for a preliminary ruling on the subject of same-sex marriage, giving the conservative political and religious majority in the country and rejection of two bills on same-sex couples legal recognition by the Romanian parliament. *See* Constantin Cojocariu, *Same-Sex Marriage Before the Courts and Before the People: The Story of a Tumultuous Year for LGBT Rights in Romania*, VERFBLOG (Jan. 25, 2017), https://verfassungsblog.de/same-sex-marriage-before-the-courts-and-before-the-people-the-story-of-a-tumultuous-year-for-lgbt-rights-in-romania/.

108. Court of Justice, *supra* note 106.

109. *Id.*

110. Helfer & Voeten, *supra* note 100, at 15.

111. *Id.* at 2.

coverage. The judgment may help overcome opposition to a particular policy change resulting from the political process.[112] It would help shape social attitudes by influencing domestic courts, executives, and international organizations. On the most practical level, the legal practitioners will be able to use the reasoning in their argument before the courts.[113] A judgment compelling mutual recognition in the area of gender could potentially bring awareness and changes not only in the interstate recognition of gender reassignment, but also in national requirements for legal gender reassignment, moving towards uniform self-determination model and eliminating medical and procedural hurdles in all EU Member States.

Taking *Coman* as an example, commentators admit that its verdict is an important counterweight to the recent rise of bans on same-sex marriages in the EU.[114] Potential effects of the outcome of the case extend beyond the grant of residency to Mr. Hamilton, as evidenced by the amount of *amicus curiae* briefs submitted by European and international organizations.[115] ILGA-Europe explains that the case has an "immensely positive impact not only for couples in Romania, but all over the EU."[116] Now, the European Commission may launch an infringement procedure against any noncompliant Member State.[117] The pressure from the European institutions will hopefully eventually ensure more equality and inclusion for the LGBTQ community in the EU countries. The ECJ's clarification in *Coman* that the term "spouse" is gender-neutral[118] is helpful in raising awareness and initiating a public discourse about gender and its implications.

Although the shift towards the equality of rights may not be immediate, the aftermath of the *Coman*'s decision in Romania shows that the ECJ judgment may give rise to a heated public debate on the issues raised before the court. Fearing possible pressure from the EU institutions to legalize same-sex marriage, a coalition of religious and conservative NGOs launched a national campaign to include the definition of marriage as a union between a man and a woman in the Romanian Constitution.[119] The constitutional court did not amend the Constitution but clarified the interpretation of the Constitution, reaffirming that same-sex marriage is not included in the meaning of marriage. Nevertheless, addressing the issue raised awareness about the problems of the marginalized groups and mobilized local support organizations and the LGBTQ community.[120]

112. *Id.* at 3.
113. *Id.* at 4.
114. Beury, *supra* note 95.
115. *Id.*
116. *Id.*
117. Avetisyan & Teoh, *supra* note 21.
118. Case C-673/16, Coman v. Romania, ECLI:EU:C:2018:385 ¶ 35 (June 5, 2018).
119. Cojocariu, *supra* note 107.
120. *Id.*

IV. CONCLUSION

"Obviously, one cannot be required to maintain two different identities."[121]

Paradoxically, civil status (including gender recognition), an area where the Member States of the European Union are given most freedom, is the area where uniformity, at least in terms of automatic and unconditional judgment recognition, is most desired. Practical inconveniences in accessing the job market, healthcare, financial services, or travel amount to undue burden. Gender, as well as name and marital status define and express a person's identity. As declared in the Yogyakarta Principles + 10, it is an obligation of the states to ensure free exercise of the right to legal recognition and to bodily and mental integrity, among other international human rights.[122]

To fill the legal void in the interstate gender recognition in the EU, first, a full faith and credit clause should be adopted to compel automatic mutual recognition. The clause's mandate would protect the individuals from uncertainty, confusion, and delay that result from the reexamination of judgments from another state.[123] The ECJ could then reinforce the principle of automatic and almost unconditional recognition of gender judgments from another Member State.

In the case of legal names and marital status, the ECJ has already declared that the inconvenience caused by the Member States' refusal to recognize the out-of-state judgment cannot inhibit the EU's fundamental right of freedom of movement and residence. Time for gender. After the long-awaited,[124] most recent *Coman* decision, same-sex marriage from another EU jurisdiction must be recognized in the EU Member State that has not legalized such unions.[125] A case addressing mutual gender recognition would maintain momentum for LGBTQ people's rights beyond the interstate gender status recognition.

Automatic gender recognition obtained in another EU Member State is a small step towards protecting transgender people's rights. It is much needed and may even be feasible, given the priorities in the EU LGBTIQ Equality Strategy 2020-2025.[126] Accessible self-determination—with no age, marital status, and other invasive or not, procedural barriers—in all EU Member

121. Kuipers, *supra* note 64, at 15.
122. *Yogyakarta Principles + 10*, *supra* note 4, at 10.
123. Terry, *supra* note 35, at 3107.
124. Frąckowiak-Adamska, *supra* note 45.
125. Case C-673/16, Coman v. Romania, ECLI:EU:C:2018:385 ¶ 36 (June 5, 2018).
126. *2020-25 Strategy*, *supra* note 8.

States is the ultimate goal, but its achievement might have to wait until the wave of the conservative shift in some of the EU countries recedes.

UPROOTING THE SOURCE OF NARCO-TERRORISM: DETERRING, PREVENTING, AND PUNISHING PRECURSOR CHEMICAL DIVERSION

Alexander Joshua Navi[*]

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I. INTRODUCTION

What if governments across the globe could meaningfully restrain drug manufacturing, drug trafficking, and terrorism by making simple edits to already existing legislation?

As state sponsorship of terrorism declines, terrorist organizations look for more creative, and often more sinister means of financing their operations.[1] Narcoterrorism is a term used to define the nexus between terrorist activity and drug trafficking.[2] The two most common types of narcoterrorists are terrorists that traffic and manufacture drugs to fund their operations, and drug cartels that use terrorist activity to support their drug dealing interests.[3]

The United Nations (UN) and Competent National Authorities (CNA) have addressed the growing issue of unlawfully diverting licit precursor chemicals for the purposes of illicit drug manufacturing.[4] Precursor chemicals are chemicals that are used, or likely to be used, to manufacture controlled substances. Acetic anhydride, a widely distributed and licit precursor chemical, and opium sap are the only two ingredients necessary to manufacture high-grade heroin.[5] A 324-dollar jug of acetic anhydride can manufacture 90,000 hits of high-quality heroin and could also be used to manufacture methamphetamine.[6] Four eighteen-liter jugs can produce eighty pounds of high-quality heroin, with a street value of at least 3.6 million dollars.[7]

It is impossible for drug cartels to make heroin and methamphetamine without acquiring the right chemicals.[8] Narcoterrorists use diverted precursors to manufacture a variety of illicit narcotics, ultimately destroying communities and providing financial support to organizations who engage in

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1. John E. Thomas, Jr., *Narco-Terrorism: Could the Legislative and Prosecutorial Responses Threaten Our Civil Liberties*, 66 WASH. & LEE L. REV. 1881, 1882-83 (2009).

2. *Id.* at 1886.

3. *See id.* at 1888

4. U.N. International Narcotics Control Board, *Precursors and Chemicals Frequently Used in the Illicit Manufacture of Narcotic Drugs and Psychotropic Substances*, at xiii, U.N. Doc. E/INCB/2019/4 (Feb. 27, 2020) [hereinafter *Precursors and Chemicals*].

5. Cam Simpson et al., *Heroin's Hidden Ingredient is a Chemical Made by U.S. Companies*, BLOOMBERG (Aug. 26, 2020, 2:00 AM), https://www.bloomberg.com/news/features/2020-08-26/u-s-drug-crisis-is-made-in-mexico-with-american-raw-materials.

6. *Id.*

7. *Id.*

8. *Id.*

terrorist activity. Narcoterrorism is the gravest national security threat that governments around the world currently face,[9] and it cannot be addressed without disciplined prosecutorial action.

To effectively restrain narcoterrorism, the law must recognize that the illicit diversion of precursor chemicals is the nexus between drug cartels, the means of financing of terrorism, and the use of terrorism to bulwark drug dealing interests. This Note will (1) critique the existing U.S. narcoterrorism statute; (2) address the due process issues that the critique may raise; (3) discuss safe-harbor rules for the chemical industry; and (4) discuss why the arguments presented herein should prevail.

In 2006, the United States Congress enacted 21 U.S.C. § 960a to address narcoterrorism:

> Whoever engages in [drug activity] that would be punishable under section 841(a) of this title if committed within the jurisdiction of the United States, or attempts or conspires to do so, knowing or intending to provide, directly or indirectly, anything of pecuniary value[10] to any person or organization that has engaged or engages in terrorist activity . . . or terrorism . . . shall be sentenced to a term of imprisonment of not less than twice the minimum punishment [otherwise required for the drug crime], and not more than life . . . .[11]

To thwart the drug-terror nexus, the law must include Table I (1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances)[12] and List II (Drug Enforcement Administration)[13] precursor chemicals in 21 U.S.C. § 841(a).[14] This would classify the precursor as a controlled substance—distributed without a license or from or to an unauthorized source. This would also double the punishment otherwise required for the crime under 21 U.S.C. § 960a if a transaction or a product thereof provides anything of pecuniary value, directly or indirectly, to entities engaged in terrorist activity.

Section 841(a) only lists substances that have already gone through the manufacturing process, such as heroin and cocaine,[15] but neglects to include

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9. *See id.*

10. "'[A]nything of pecuniary value' means anything in the value form of money, a negotiable instrument, a commercial interest, or anything else the primary significance of which is economic advantage," 18 U.S.C. § 1958(b)(1).

11. 21 U.S.C. § 960a.

12. United Nations Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances, *annex*, *opened for signature* Dec. 20, 1988, 1582 U.N.T.S. 95 [hereinafter 1988 Convention]. For further discussion on the 1988 Convention, see *infra* Part III.

13. 21 C.F.R. § 1310.02(b) (2022).

14. 21 U.S.C. § 841.

15. *Id.*

the immediate precursor chemicals necessary to produce the other illicit narcotics listed in the statute.[16]

The legislature should amend § 841(a) to explicitly include List II and Table I precursor chemicals because they are used to produce the substances listed in § 841(a). The result would criminalize the actions of one who provides precursor chemicals, or support from a transaction thereof, to an entity that they know engages or has engaged in terrorism under the current § 960a of the statute.

Further, the legislature should amend § 960a to include a mens rea requirement of recklessness. This would criminalize entities that recklessly provide direct or indirect support to an entity engaged in terrorism or terrorist activity. Therefore, an entity recklessly selling or distributing precursor chemicals, in violation of Drug Enforcement Administration (DEA) regulations and import-export prerequisites, could be criminalized under § 960a, if the precursors end up in the hands of those engaged in terrorist activity. Inserting recklessness as a mens rea requirement in § 960a will ensure more diligent corporate oversight within the U.S. chemical industry, deter corrupt transactions, and ensure DEA compliance, thus reducing precursor chemical diversion. It will also incentivize the U.S. chemical companies to effectively monitor all manufacturing, distribution, and sales of sensitive precursor chemicals to avoid criminal liability.

The legislature should then remove "conspiracy" and "attempt" from the language of § 960a because § 963 already criminalizes attempt or conspiracy to commit acts.[17] This will avoid due process issues by preventing the prosecution of multiple inchoate crimes,[18] something the courts have struggled with and are reluctant to accept as a valid criminal indictment.[19] Further, it will allow the recklessness mens rea in § 960a to flow logically,

16. Simpson et al., *supra* note 5.

17. 21 U.S.C. § 963.

18. The Code's drafters suggest that inchoate crimes all share the characteristic that the conduct they make criminal "is designed to culminate in the commission of a substantive offense, but has failed in the discrete case to do so or has not yet achieved its culmination because there is something that the actor or another still must do." MODEL PENAL CODE § 5 cmt. at 293 (AM. L. INST., Proposed Official Draft 1985).

19. *Compare* United States v. Murrell, No. 79-5368, 1980 LEXIS 13625, at *4 (6th Cir. Sept. 29, 1980) ("There is no such thing as an 'attempt to conspire'"), *and* United States v. Meacham, 626 F.2d 503, 509 n.7 (5th Cir. 1980) (calling certain double inchoate offenses "inane"), *with* United States v. Mowad, 641 F.2d 1067, 1074 (2d Cir. 1981) (affirming a "conspiracy to attempt" conviction by finding that "the Government's charge contains all elements necessary to prosecute a conspiracy). In *Meacham* the Fifth Circuit reasoned, "[i]t would be the height of absurdity to conspire to commit an attempt, an inchoate offense, and simultaneously conspire to fail at the effort. It would be even more inane to commit the other crime the government would have us recognize—attempt to conspire." *Meacham*, 626 F.2d at 509 n.7.

because conspiracy and attempt are both specific intent crimes, which require the mental state of at least knowledge or intent.[20]

Terrorist organizations and drug cartels are often the same people, if not closely related. The amendments to § 841(a) and § 960a will effectively deter the diversion of precursors to terrorist organizations, drug cartels engaging in terrorism, and suspect entities, because the punishment would be double the drug crime sentence. In addition to deterrent prosecutorial action, common sense and history demonstrate that the drug-terror threat can only be combatted with rigorous corporate and customs monitoring, public-private cooperation, and international partnership.

II. THE HISTORICAL CONTEXT OF CURRENT NARCOTERRORISM LEGISLATION

Modern-day narcoterrorism originated in Columbia when the Fuerzas Armadas Revolucionarias de Colombia (FARC) used illicit drug enterprise as a means of financing terror operations throughout the 1980s.[21] Terror organizations around the globe are intrinsically connected and cooperate on a regular basis to achieve their goals. For example, Afghani and Pakistani Taliban militants taught FARC and the Cali Cartel, a drug cartel engaged in terrorism, how to grow opium poppy in Colombia and have also developed contraband trafficking systems.[22] As foreign terrorist organizations increasingly engage in drug trafficking to fund their logistical and political objectives, hybrid organizations materialize as a one-part foreign terrorist organization and a one-part global drug cartel.[23] In addition to terrorist organizations trafficking drugs and other contraband to finance their aspirations, drug cartels that use terrorist activity to bolster their drug dealing interests are also of notable concern in the drug-terror battle.

Money is of critical importance to terrorist organizations, and without it, they would be unable to uphold the vast global infrastructure required to execute their operations.[24] For example, it is widely known within the intelligence community that the Taliban, which mainly operates in

20. Iannelli v. United States, 420 U.S. 770, 777 (1975) (inchoate crimes include conspiracy, attempt, and solicitation); Mizrahi v. Gonzales, 492 F.3d 156, 160 (2d Cir. 2007) (the statute in question specifically includes conspiracy and attempt). *See* 21 U.S.C. § 960a (punishing those who engage in specified conduct or "attempt[] or conspire[] to do so").

21. Thomas, *supra* note 1, at 1885.

22. FED. RSCH. DIV., LIBRARY OF CONG., A GLOBAL OVERVIEW OF NARCOTICS-FUNDED TERRORIST AND OTHER EXTREMIST GROUPS 60 (May 2002).

23. Thomas, *supra* note 1, at 1888.

24. Matthew Levitt & Michael Jacobson, *The Money Trail: Finding, Following, and Freezing Terrorist Finances*, 89 WASH. INST. FOR NEAR E. POL'Y 1 (Nov. 2008).

Afghanistan and Pakistan, cooperates and receives money from drug dealers and drug trafficking, sometimes in exchange for protection.[25] This is a double-edged sword because the money is used to acquire resources to carry out terror operations while also increasing drug activity in Western countries–damaging the health, and social and economic fabric of those societies.[26]

Baz Mohammed, a Taliban-linked narcotics kingpin extradited to the United States in 2005, rationalized his group's involvement in the drug trade, telling members of his organization that[27] selling heroin in the United States was a "jihad," because they were taking Americans' money and the heroin the Americans were paying for was simultaneously killing them.[28] According to the DEA's chief of operations, Michael Braun, "the Taliban and FARC (Revolutionary Armed Forces of Colombia–People's Army) are two perfect examples, and they are, in essence, the face of twenty-first century organized crime—and they are meaner and uglier than anything law enforcement or militaries have ever faced."[29]

Ninety percent of the world's opium can be traced back to drug trafficking in Afghanistan, which has fueled insurgent groups in the region and caused political destabilization, corrupt government officials, and a complete undermining of the rule of law.[30] Precursor chemicals are the reason Afghan opium is being synthesized into heroin, and it is infecting thousands of Americans. A new legislative and enforcement regimen is required to quash the drug manufacturing and terror financing instrumentalities that are destroying countless American communities across the nation.

Data demonstrates that there is a direct link between drug trafficking and terrorist organizations in Afghanistan.[31] The Taliban, Al Qaeda, and other destabilizing insurgent militias exploit the drug trade, mainly opium and poppy production, to orchestrate their tactical and political objectives.[32] This disrupts national stability and peace,[33] and creates a concern that these

25. Michael Chertoff, Sec'y, Dep't of Homeland Sc., Keynote Address at Chapman University School of Law (Jan. 29, 2010).

26. *Id.*

27. Levitt & Jacobson, *supra* note 24, at 5.

28. *Id.* at 4-5.

29. *Id.* at 10.

30. *Oversight of the Drug Enforcement Administration*: *Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Sec.*, 112th Cong. 4 (2012) (statement of Michele M. Leonhart, Administrator, Drug Enf't Admin.).

31. *See* Press Release, U.S. Drug Enf't Admin., U.S. Extradites Taliban-Linked Narco-Terrorist (Oct. 24, 2005).

32. *Id.*

33. *Id.*

criminal organizations, not the governments, will ultimately control the territories in which they operate.[34]

The DEA has concluded that up to sixty percent of terrorist organizations are in some way linked to illicit narcotics trafficking, and the UN estimates that the international drug trade produces 322 billion dollars in revenue annually.[35] This makes the illicit narcotics trade by far the most profitable illicit activity, overshadowing illicit arms trafficking and human trafficking.[36] "By targeting key nodes in the financing network, we can constrict the operating environment to the point that terrorists will not be able to obtain funds where and when they need them."[37]

In addition to health and safety, the impact of the drug trade on the national economy is astronomical.[38] Data from the National Institute on Drug Abuse indicates that total costs to offset the nation's drug abuse problem amounted to a staggering 600 billion dollars annually[39] and continues to increase.[40] This article's proposal initiates a new deterrent mechanism that can neutralize the 600 billion dollars spent on offsetting the drug abuse problem by preventing the drugs from being manufactured in the first place.

Rafael Perl, Senior Policy Analyst for International Terrorism and Narcotics at the Congressional Research Service of the Library of Congress, stated that although there is much data regarding the drug-terror nexus, the line between drug cartels and terrorist organizations is increasingly blurred.[41] Perl attributes it to, among other things, two major changes: (1) "an increasingly deregulated and interconnected global economy" and (2) the fact that "drugs have become an attractive and highly lucrative source of income for terrorists."[42]

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34. The Taliban has since taken control of almost all territories within Afghanistan following the U.S. Military withdrawal. Although they vowed to cease opium trafficking pursuant to Sharia Law, the sanctions and asset freezes they face will likely lead to a shortage of funds, and thus they will continue contraband trafficking to fund their objectives. *See* Jonathan Landay, *Profits and Poppy: Afghanistan's Illegal Drug Trade a Boon for Taliban,* REUTERS (Aug. 15, 2021, 10:02 AM), https://www.reuters.com/world/asia-pacific/profits-poppy-afghanistans-illegal-drug-trade-boon-taliban-2021-08-16/.

35. Levitt & Jacobson, *supra* note 24, at 10.

36. *Id.*

37. *Id.* at 3.

38. U.S. DEP'T OF HEALTH & HUM. SERVS., FACING ADDICTION IN AMERICA: THE SURGEON GENERAL'S REPORT ON ALCOHOL, DRUGS, AND HEALTH (2016).

39. NAT'L INST. ON DRUG ABUSE, PRINCIPLES OF DRUG ADDICTION TREATMENT: A RESEARCH-BASED GUIDE (THIRD EDITION) (2018), https://nida.nih.gov/download/675/principles-drug-addiction-treatment-research-based-guide-third-edition.pdf?v=74dad603627bab89b93193918330c223.

40. *See id.*

41. Thomas, *supra* note 1, at 1897.

42. *Id.*

Perl's first explanation for the increasingly blurred boundary between drugs and terror bolsters the argument that more regulation, monitoring, and deterrence by criminal prosecution is needed in the global economy, specifically regarding the precursor chemicals necessary to produce deadly narcotics. The 1988 Convention Against Illicit Traffic in Narcotic Drugs and Psychotropic Substances (1988 Convention) provides the international framework for countries to monitor and share information of diverted precursor chemical seizures, in order to identify diversion trends and new designer drugs that are being produced.[43] However, this international framework does not seem to have garnered the cooperation necessary to effectively combat precursor diversion pursuant to Article 12 of the 1988 Convention.[44]

III. INTERNATIONAL LEGISLATION AIMED AT COMBATING NARCO-TERRORISM

The 1988 Convention unified the world in their common pursuit against drug traffickers and others who profit from it, and it invoked international cooperation to develop legislation against drug trafficking, punishable under the domestic law of the parties to the 1988 Convention.[45] The Convention has developed three tables (Tables I-III) to classify precursor chemicals based on their value in illicit use. Table I-II lists the most vigorously regulated chemicals.[46] Under Table I, acetic anhydride is among the most strictly regulated precursor chemicals[47] because of its predisposition to diversion and prominent use in the production of illicit narcotics[48] and thus the financing of terrorism.

The essence of the 1988 Convention is international partnership and the voluntary disclosure of information regarding both licit and illicit precursor chemical commerce.

> Under article 12, paragraph 12, of the 1988 Convention, parties are required to submit annually to International Narcotics Control Board (INCB) information on: (a) the amounts seized of substances included in Tables I and II of that Convention and, when known, their origin; (b) any substance not included in Table I or Table II that is identified as having been used in the illicit manufacture of narcotic

43. *See Precursors and Chemicals supra* note 4, at 1.

44. *See id.* at 4.

45. Shane Heather McKenzie, Comment, *Narcotic Drugs and Psychotropic Substances: Preventing the Illicit Diversion of Exports*, 6 COLUM. J. EUR. L. 383, 384 (2000).

46. 1988 Convention, *supra* note 12, *annex*.

47. *Id.*

48. Simpson et al., *supra* note 5.

> drugs or psychotropic substances; and (c) methods of diversion and illicit manufacture.[49]

The International Narcotics Control Board (INCB) reported that only twenty-eight governments (or twenty-two percent of the 126 countries) provided information on methods of precursor diversion and illicit manufacture.[50] Information regarding the time and place of seized substances is imperative for spotting emerging patterns and trends; such information was rarely provided by parties to the 1988 Convention, resulting in an informational gap that enables illicit precursor diverters to evade law enforcement.[51] It is clear that each respective country's domestic law and international cooperation with the parties to the 1988 Convention is crucial in restraining the diversion of precursor chemicals, and thus disrupting the drug-terror nexus.[52]

The United States has an interest in ensuring that other countries, such as Mexico and Afghanistan, strengthen their regulation and monitoring of precursor chemicals' movement, because many of the drugs produced abroad end up in American neighborhoods.[53] The majority of illicit precursor diversion happens within the borders of a country, thus it is imperative to provide U.S. and foreign law enforcement with the resources and capabilities necessary to monitor and prosecute those engaging in the crime. Although Mexican cartels produce around ninety percent of meth used in the United States, around eighty percent of precursor chemicals used to make that meth come from China.[54] China evades counternarcotic enforcement by shipping precursors, which are usually mislabeled, into poorly monitored ports within Central America, before being transported to Mexico.[55]

Unfortunately, even small-scale precursor diversion, such as a pick-up truck load, can produce massive amounts of drugs. It only takes a diminutive amount of acetic anhydride for large-scale heroin production, and the same goes for monomethylamine in producing methamphetamine. This creates an enforcement issue for smaller scale diversion operations. However, it is

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49. *Precursors and Chemicals*, *supra* note 4, at 2.

50. *Id.* at 4.

51. *See id.*

52. *Id.* at 13.

53. *See generally* Press Release, Security Council, Concerned at Smuggling of Chemical Compounds in Afghanistan Used to Refine Heroine, Tightens Global, Regional Controls on Their International Trade, U.N. Press Release SC/9352 (June 11, 2008) (discussing concern of chemical precursors importing and exporting within Afghanistan) [hereinafter *Smuggling of Chemical Compounds*].

54. SEAN O'CONNOR, METH PRECURSOR CHEMICALS FROM CHINA: IMPLICATIONS FOR THE UNITED STATES 3 (2016).

55. *Id.*

widely acknowledged that import and export authorizations, and a licensing regime to issue the authorizations,[56] are critical in preventing and monitoring the diversion of precursors and the trafficking of controlled substances. Each administrative regime is a branch of a given competent national authority, which has the duty to authorize substances being imported or exported and provide pre-export notifications for precursors.[57] The procedures for authorizing imports and exports vary among governments and are consistent with their respective legal and administrative structures.[58] However, a global monitoring and information gathering body, with a uniform procedure, would identify diversion hotspots and prevent the misuse of precursors more efficiently in partnership with CNAs.

During a time where political uprisings are increasingly widespread, the danger of precursor chemicals being utilized to manufacture substances for purposes of population incapacitation and crowd control are a significant concern. One of the most sinister human rights violations in modern history resulted from the South African apartheid regime's Project Coast, which would not have occurred without having access to sensitive precursor chemicals.[59] Project Coast was a clandestine military project designed to develop drugs and other chemical and biological agents to control, poison, and kill those who opposed the regime's apartheid policies.[60] One of Project Coast's objectives was to produce drugs such as MDMA and Mandrax (methaqualone), as well as to administer infertility drugs disguised as vaccines to undermine the health of, and arguably, to entirely eliminate black populations on the other side of the apartheid fence.[61]

The precursors used to manufacture Mandrax, mainly N-acetyl anthranilic acid, came from China in exchange for illicitly poached abalone, a rare and endangered seafood delicacy.[62] Today, thousands of people living in lower-income areas within South Africa, mainly people of color, still

56. For precursors, the 1988 Convention requires State parties to monitor the international trade of substances listed in its Tables I and II and, in particular, to provide an advance notice of the export of substances listed in Table I to all parties that request such advance notice, *see* 1988 Convention, *supra* note 12, at 193.

57. In the United States, it is the Drug Enforcement Administration.

58. U.N. OFF. OF DRUGS & CRIME, INT'L NARCOTICS CONTROL BD., GUIDELINES FOR THE IMPORT AND EXPORT OF DRUG AND PRECURSOR REFERENCE STANDARDS, U.N. Sales No. Mult.08.XI.6 (2007) [Hereinafter INT'L NARCOTICS].

59. *See Hamilton's Pharmacopeia*: *The Story of the South African Quaalude* (VICE Media Group 2016) https://www.vicetv.com/en_us/video/the-story-of-the-south-african-quaalude/58069a24384d80472bbbca53.

60. Chandré Gould & Peter Folb, U.N. Institute for Disarmament Research, Project Coast: Apartheid's Chemical and Biological Warfare Programme, at vii, UNIDIR/2002/12 (2002).

61. *See id.* at 230.

62. *Hamilton's Pharmacopeia*: *The Story of the South African Quaalude*, *supra* note 59.

suffer from addiction to Mandrax.[63] After the dissolution of the apartheid regime, forensic chemists found enough precursor chemicals in their labs to make over 3.5 million tablets of Mandrax.[64] Mandrax is particularly dangerous because of its potential use as a crowd control weapon to incapacitate protesters by making them docile—as illustrated by its use on anti-apartheid protesters dependent on Mandrax.[65] Proper regulation, monitoring, and vetting of precursor movement by an international body could have potentially prevented this atrocious misuse of precursors to create weapons, drugs, and agents that were used to ethnically cleanse an entire population. It is imperative that the international community places uniform safeguards to prevent authoritarian regimes from improper utilizations of precursors against dissenters. Ultimately, this would provide a safer environment for democratic spirit to thrive and spread across the globe.

IV. THE PRECURSOR BATTLE AGAINST NARCO-TERRORISM ON A NATIONAL LEVEL

In 1988, Congress passed the Chemical Diversion and Trafficking Act (CDTA), placing forty-one chemicals under control because of their high risk for illicit uses.[66] These laws provide a series of regulations and criminal sanctions to address both national and international diversion of sensitive precursor chemicals, without restricting access to precursor chemicals used for legitimate commerce.[67] The DEA classifies and regulates sensitive chemicals and solvents that are likely to be used in illicit drug and controlled substance manufacturing.[68] These precursors are categorized on two DEA lists, List I for precursor reagents, and List II for precursors that can be used to synthesize and purify controlled substances, such as illicit narcotics.[69]

Including List II precursor chemicals in § 841(a) would effectively ensnare people who knowingly provide precursor chemicals to any person or organization that they know engages or has engaged in terrorism under § 960a. As written, § 960a effectively doubles the sentence of someone engaging in drug crimes, who knows or intends that the transaction supports

63. *Id.*

64. *Id.*

65. *Id.*

66. Chemical Diversion and Trafficking Act, 21 C.F.R. §1310.02(a)-(b) (1988).

67. *See id.* at 153-54.

68. *Overview of Controlled Substances and Precursor Chemicals*, USC ENV'T HEALTH & SAFETY (2020), https://ehs.usc.edu/research/cspc/chemicals/ [Hereinafter *Overview of Controlled Substances*].

69. *Id.*

terrorism.[70] However, under my proposal to § 960a, those who recklessly sell or distribute precursors would also be criminalized under the statute. This aims to incentivize corporations to increase monitoring of distribution and sales, to comply with DEA regulations, and to reduce executive's temptation to turn a blind eye to corrupt dealings that yield large returns.

The U.S. Drug Enforcement Administration (DEA) is the executive agency that combats drug trafficking, as it issues authorizations for controlled substances and precursors to be imported and exported to and from the United States. However, many of their operations are not restricted domestically, as the agency often combats foreign and global drug cartels and terrorist organizations.

Section 811(e) provides that the Attorney General may place an immediate precursor in the same schedule as the drug it is likely used to produce.[71] An immediate precursor is a substance the Attorney General has found to be the primary substance used, or likely to be used, to manufacture a drug.[72] Therefore, the Attorney General may choose to classify acetic anhydride in the same schedule as the heroin it is used to produce and the same would apply to scheduling monomethylamine in the same category as the methamphetamine.[73]

The Attorney General's discretion to schedule a precursor in the same class as the immediate drug it produces would show to be a powerful tool in combating illicit precursor diversion. As in § 811(e), there are fewer procedural hurdles for the DEA to overcome when controlling a precursor chemical as opposed to controlling a drug.[74] This is because drug cartels are finding new ways to utilize different chemicals to synthesize drugs since some new ones are more potent and easier to make.[75] Therefore, the legislature has deemed it necessary to empower the Attorney General to take immediate action to control precursors that are being utilized to produce controlled substances in novel ways.

Former head of the Drug Enforcement Agency, Donnie Marshall, noted that the crime and violence associated with terrorism and drug dealing are inextricably linked. [76] Terrorists and drug traffickers are usually the same people, if not closely associated.[77] Marshall asserts that they are linked

70. Thomas, *supra* note 1, at 1914.

71. 21 U.S.C. § 811(e).

72. *Id.*

73. *See id.*

74. *See id.*

75. *See Smuggling of Chemical Compounds*, *supra* note 53, ¶ 2.

76. Donnie Marshall, *Narco-Terrorism: The New Discovery of an Old Connection*, 35 CORNELL INT'L L.J. 599, 603 (2002).

77. *Id.*

because drug trafficking finances terrorism, and that they both use the same strategies to evade law enforcement.[78] Therefore, there is no way to meaningfully restrain terrorism without restraining drug trafficking and abuse.

Another tool that competent national authorities use is testing kits to test imported and exported goods that are at risk of being diverted or controlled substances or precursors. Forensic laboratories test seized materials suspected of being precursors, narcotics, or psychotropic substances. However, access to these laboratories and skilled individuals able to identify these substances are not readily available to all competent national authorities.[79] The availability of functioning laboratories and individuals skilled in this area is critical in ensuring that the test results produced correctly identify emerging trends and distinguish the guilty from the innocent.[80]

A. Due Process and Legislative Intent Regarding § 960a

Only four individuals have been successfully prosecuted under § 960a and understanding the nature of these cases is necessary to predict how similar future cases will be handled.[81] Each case has demonstrated a direct and clear drug-terror nexus[82] without multiple-inchoate charges.[83] However, the precedent is not dispositive, so not all future cases must be prosecuted under the same direct-nexus circumstances to stay within the bounds of legislative intent.

The legislature intentionally drafted § 960a in a manner that allows prosecutors to ensnare drug criminals with even a remote connection to terrorist organizations under the statute. Legislative intent has been clearly displayed in congressional hearings, debates, and within the statute's language to demonstrate the seriousness of the drug-terror issue at hand. Section 960a explicitly requires that an individual commits a drug offense or *attempt* or *conspire* to do so.[84] The statute does not require the actor to execute the substantive crime to be prosecuted, indicating the legislative

78. *Id.*

79. INT'L NARCOTICS, *supra* note 58, at 3.

80. *Id.*

81. Thomas, *supra* note 1, at 1888.

82. *Id.* at 1889.

83. *Id.* Each case involved a charge of directly violating 21 U.S.C. § 960a, not 21 U.S.C. § 963 (conspiracy to commit an offense proscribed in § 960a).

84. *See* 21 U.S.C. § 963a (emphasis added) (punishing those who engage in specified conduct or "conspire[] to do so").

intent to ensnare individuals that are even remotely involved in the drug-terror nexus.

A corresponding 21 U.S.C. § 963 states, "[a]ny person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy."[85] Effectively, the legislature has gone so far as to convict an individual under § 963 for attempt or conspiracy to commit a § 960a offense, the substantive offense being conspiracy or attempt to commit a drug crime in support of terrorism. This results in a combination of double inchoate crime possibilities: *attempt to attempt*, *attempt to conspire*, *conspiracy to attempt*, or *conspiracy to conspire*.[86]

Admittedly, this has confused courts and sparked criticism regarding the potential for due process violations when prosecuting multiple inchoate criminals.[87] The possible violation of due process rests in the statute itself. As written, it is unclear, and that vagueness could implicate the statute as unconstitutional.[88] However, the explicit effort by the legislature to convict even the farthest removed actor engaging in drug-terror crimes remains.

There is a possibility that those engaged in drug activity, not connected to terrorism, are found guilty under § 960a, because the statute does not explicitly emphasize the drug-terror nexus.[89] Drug and terror crimes are intrinsically connected, and bureaucratic and legal compartmentalization has

85. 21 U.S.C. § 963.

86. *See supra* note 18.

87. Thomas, *supra* note 1, at 1904-05.

88. The Fifth Circuit called both 21 U.S.C. §§ 846, 943 "unclear … to prosecute a conspiracy to attempt." *See* United States v. Meacham, 626 F.2d 503, 509 (5th Cir. 1980). This lack of clarity (as applied) suggests that the statute could be unconstitutional. *See* Coates v. City of Cincinnati, 91 S. Ct. 1686, 1688 (1971) (finding an ordinance improperly vague because "men of common intelligence must necessarily guess at its meaning" (quoting Connally v. Gen. Const. Co., 269 U.S. 385, 391 (1926)). The Supreme Court held that "the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties" and called this standard "a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law." *Id.* Ultimately, such a vague statute "violates the first essential of due process of law. *Id.* The "void-for vagueness" doctrine is couched in terms of the Due Process Clause of the Fifth Amendment for federal statutes and the Fourteenth Amendment for state actions. *See* United States v. Mena, 863 F.2d 1522, 1527 (11th Cir. 1989) (quoting *Connally*, 269 U.S. at 391); State v. Reed, 618 N.W.2d 327, 332 (Iowa 2000) ("Under the Due Process Clause of the Fourteenth Amendment . . . 'the void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement.'" (quoting Kolender v. Lawson, 461 U.S. 352, 357 (1983)).

89. Thomas, *supra* note 1, at 1893.

made it difficult for law enforcement to effectively combat narcoterrorism.[90] The reluctancy to treat drug organizations as terrorists, and terrorist organizations as drug traffickers, has come at a substantial cost to American public health, safety, and stability.[91] Therefore, the congressional intent when drafting § 960a, correctly indicates that there is almost always a connection, direct or indirect, between drug crimes and supporting terrorism.

John E. Thomas argues that the removal of the phrase "that such activity"[92] effectively diminishes a clear drug-terror nexus and raises concerns that a careless or malicious prosecutor can unjustifiably ensnare an individual not connected to terrorism under the narcoterrorism statute.[93] However, § 960a in its essence addresses the drug-terror nexus; the legislature intended to broadly deter such behavior by giving prosecutors vast discretion in prosecuting drug-terror actors. Although § 960a does not seem to necessitate a direct drug-terror link with clear and express language,[94] the legislative intent when drafting § 960a was not to draw a clear link, but rather to "raise the penalties under the material support-for-terrorism statute to reflect the seriousness of this offense."[95]

Thomas provides a hypothetical differentiating a terrorist using proceeds from drug sales to support terrorism and a drug dealer using terrorism to scare away law enforcement.[96] Ultimately, Thomas argues that only individuals using proceeds from drug sales to fund terrorism should be prosecuted under § 960a, exempting those who use terrorism to protect their drug business.[97] This reasoning is futile because terrorists and drug traffickers are often the same people, or at least closely related.[98] Drug traffickers' criminal methodology is applicable to terrorists, and vice-versa. There cannot be meaningful restraint of terrorism without meaningful restraint of drug abuse and drug trafficking.[99] Congress recognized the nexus when drafting § 960a,

90. Marshall, *supra* note 76, at 599.

91. *Id.*

92. Thomas, *supra* note 1, at 1900 ("Whoever . . . manufactures, distributes, imports, exports, or possesses with intent to distribute or manufacture a controlled substance, . . . knowing or intending *that such activity*, directly or indirectly, aids or provides support, resources, or anything of pecuniary value to [terrorism]…" (quoting 151 CONG. REC. H6207 (daily ed. July 21, 2005) (statement of Rep. Hyde) (offering the amendment))).

93. *Id.* at 1903-04.

94. *Id*. at 1899.

95. *See* 151 CONG. REC. 11090 (2005) (statement of Rep. Hyde (introducing the Narco-Terrorism Enforcement Act of 2005)).

96. Thomas, *supra* note 1, at 1912-13.

97. *Id.* at 1911-13.

98. *See* Marshall, *supra* note 76.

99. *Id.* at 599.

and it correctly[100] reflects their legislative intent to ensnare those who, directly or indirectly, use terrorism to protect their drug dealing interests, as well as those who use drug trafficking proceeds to finance terrorism.

Further, Thomas raises concerns that a small dealer, who provides even minimal support to a terrorist organization,[101] can be prosecuted by an overzealous prosecutor under § 960a and serve a twenty-year statutory minimum sentence.[102] He argues that these are not the kind of people the legislature intended to criminalize under § 960a.[103] Thomas takes a theoretical approach by applying the law to a situation where one who is not morally culpable enough to be designated as a terrorist, is prosecuted under § 960a.

Thomas provides a hypothetical in which a twenty-two-year-old recent college graduate, *K*, supplied marijuana to friends at a fraternity reunion only once.[104] Officials discovered that *K* is an outspoken supporter of the Animal Liberation Front (ALF), which is a designated terrorist organization that has carried out numerous terrorist attacks in the name of animal rights.[105] *K* sends two checks for 500 dollars to ALF annually with the knowledge that the money will be used to finance terrorist activities.[106] Technically, *K* could be prosecuted under § 960a for selling drugs and then using the proceeds to provide support to a terrorist organization.

Thomas argues that *K* is not the type of individual the legislature intended to criminalize under § 960a, and such prosecution is allowed under the statute in a manner unintended by Congress. However, thus far, nobody has been prosecuted under the statute for the kind of conduct mentioned in Thomas's hypothetical. Looking at the precedent, the practical reality of prosecutions under § 960a should not raise concern as to prosecutors' misuse and abuse, rather it should be supported due to its deterrent effect on drug trafficking and financing of terrorism.

First, there are many safeguards ensuring the integrity of federal prosecutors, including presidential appointment and senate confirmation.[107] It is rare for a federal prosecutor's judgement to be overruled because of their intimate understanding of court precedent, local sentiment and perspective,

100. Thomas, *supra* note 1, at 1910.
101. *Id.* at 1913-14.
102. *Id.* at 1914.
103. *Id.*
104. *Id.* at 1913.
105. *Id.*
106. *Id.*
107. Robert H. Jackson, *The Federal Prosecutor,* 24 J. AM. JUDICATURE SOC'Y 18, 18 (1940).

and jurors' feelings.[108] Also, the establishment of standards of performance and administrative uniformity will lessen the chances of the prosecutor risking their reputation by unjustly pursuing statistics of success.[109] Thus, it is unlikely that a prosecutor will deviate from the precedent to serve some malicious or politically motivated interest.[110] Prosecutors are deterred from prosecuting individuals like the small dealer under § 960a, because it would damage their reputation[111] and impose undue judicial and administrative costs and burdens.[112] A prosecutor's greatest asset is to be recognized in their profession as one whose attitude towards those prosecuted has been reasonable, disinterested, and honorable.[113]

Second, individuals and organizations diverting precursors are sophisticated in the ways of drug trafficking and are usually trafficking immediate precursors at high quantities with the goal of mass-producing illicit narcotics. There is no situation where they can be categorized with the small dealer mentioned in Thomas's hypothetical, because they will always hold greater moral and economic culpability. A precursor diverter cannot find themselves in the situation of a casual drug user supporting terrorism because diverting precursor chemicals is never a casual or harmless transaction. Further, even a small transaction, a mere sixteen-liter jug of a precursor, can enable a large number of narcotics to be manufactured. Diverters of precursors are precisely the type of actor that Congress intended to hold criminally liable under § 960a and prosecuting them as such would accurately reflect congressional intent.[114]

Since narco-terrorism is the gravest national and international security threat, it cannot be addressed without disciplined prosecutorial action.[115] Legal and bureaucratic compartmentalization of these intertwined issues diminishes combative effectiveness,[116] thus, the benefits of enabling prosecutors to prosecute precursor diverters under § 960a outweigh the disadvantages.

108. *Id.*
109. *Id.* at 18-19.
110. Thomas, *supra* note 1, at 1911.
111. Jackson, *supra* note 107, at 19.
112. *Id.*
113. *Id.*
114. Thomas, *supra* note 1, at 1910, 1914.
115. *Precursors and Chemicals*, *supra* note 4, at xiii.
116. Marshall, *supra* note 76, at 599.

B. Hypothetical Situations that the Proposed Amendment to § 841(a) Criminalizes Diverters Under § 960a

The proposed amendment to § 841(a) would criminalize a new swath of individuals who are diverting precursors to organizations engaged in terrorism. Different hypothetical situations discussed below would criminalize a divertor of precursor chemicals § 960a.

1. Diverting Precursor Chemicals to a Terrorist Organization

The first hypothetical analyzes a situation in which a precursor diverter knowingly or intentionally diverts precursor chemicals directly to a terrorist organization to manufacture illicit narcotics. The diverter could be prosecuted under § 960a for providing something of pecuniary value to a terrorist organization. However, explicitly including precursors in § 841(a) would tie the sentencing for the crime to the controlled substance that particular precursor was used to produce. For example, if the prison sentence for heroin is twenty-five years, and acetic anhydride is used to make heroin, the sentence for diverting acetic anhydride to narcoterrorists would also be twenty-five years.

2. Diverting Precursors to a Drug Cartel Engaged in Terrorist Activity

The second hypothetical is a situation in which *A* is diverting precursor chemicals to a drug cartel that uses terrorist activity to bulwark drug dealing interests. *A* is not directly involved in the drug cartel, but he brokers deals, which he knows will ultimately deliver precursor chemicals to the drug cartel, disguised as a shell corporation. This drug cartel is also engaged in terrorist activity, which includes assassinations of public officials and law enforcement officers. As mentioned above, drug cartels and terrorist organizations are so entwined that it is often difficult to differentiate between them. *A* intends to indirectly provide drug cartels engaged in terrorist activity with the means necessary to manufacture the drugs that fuel their entire operation. Here, *A* would be criminalized under § 960a even though *A* is not part of the drug cartel and does not directly engage in terrorist activity.

3. Using Terrorism to Support Precursor Chemical Diversion

This hypothetical analyzes a scenario in which someone uses terrorism to support precursor chemical diversion for the purpose of producing controlled substances. Suppose *B*, a member of a designated terrorist organization, regularly ambushes law enforcement and attempts to assassinate high-ranking city officials in an effort to deter them from thwarting its drug operations. *B* controls a small militia that is directly

involved in the manufacture, distribution, and transportation of various drugs to fund its terrorist activities. The only source of funding for this organization are the proceeds from drug sales. *B*'s operation requires precursor chemicals to produce drugs in order to fund the organization, so it regularly raids ships importing precursor chemicals.

Section 960(a) criminalizes those who engage, or attempt, or conspire to engage in drug activity, knowing or intending to provide, directly or indirectly, anything of pecuniary value to any entity engaging in terrorist activity. Here, *B* raids ships to acquire precursors to manufacture drugs, of which the sale proceeds are used to finance terrorism. In accordance with my proposed amendment to § 841(a), *B* would be criminalized under § 960a, and the sentencing would be tied to the drug that precursor was used to produce.

Most controlled substances seized by the law enforcement cannot be manufactured without precursor chemicals. To prosecute precursor diversion only as one with drug trafficking makes sense because that transaction is likely only one of many in the process of drug manufacturing, and the earlier that process is undermined, the more lives will be saved.

Section 1182(a) lists aliens who are inadmissible to the United States, specifically those who have engaged in any form of terrorism or are connected to any terrorist organization. It provides the definition of a terrorist, which is any alien who has engaged in a terrorist activity; incited terrorist activity with the intention to cause serious bodily harm or death; is a representative of a terrorist organization or a political, social, or other group that endorses or espouses terrorist activity.[117] Any of the activity mentioned in § 1182(a), in conjunction with selling precursors to fund a terrorist organization, selling precursors to a terrorist organization, or using terrorism to bolster drug dealing or precursor diversion would criminalize individuals under § 960a by means of my proposed amendment to § 841(a).

However, aside from rogue individuals, drug cartels, and terrorist organizations diverting precursors, some justifiably raise concerns about chemical companies that are recklessly, and sometimes intentionally, selling precursors that end up in the hands of drug cartels and terrorist organizations. Lowering the mens rea to recklessness will criminalize companies irresponsibly selling precursors to terrorist organizations under § 960a.

V. CHEMICAL INDUSTRY SAFE HARBORS AND THE RECKLESSNESS MENS REA

The chemical industry is one of the largest industries worldwide and, especially in the United States, is one of the largest national producers of

117. 8 U.S.C. § 1182.

chemical products globally.[118] This industry is entwined with thousands of other industries. It is vital for the operation of the pharmaceutical and textile industries, and many commodity producing companies around the world.[119] Including the pharmaceutical industry, the United States chemical shipment value was more than 797 billion dollars just in 2019.[120] The total value of the chemical industry increased from 1.7 trillion dollars in 2001 to almost 4 trillion dollars in 2019.[121] It is as much expansive as it is sensitive, and the following will discuss the importance of effective monitoring, reporting, and enforcement.

The leading companies, based on their revenue, are Dow Chemical Inc., LyondellBasell Industries, Linde, and Ecolab.[122] Several of the top U.S. chemical companies were also among the 2020 top chemical companies ranking based on revenue. These companies are well versed in the regulatory processes of manufacturing, importing, and exporting listed precursor chemicals, and they will likely not be criminalized under this note's proposed amendment to § 960a because they ordinarily follow standard corporate procedures in conformity with DEA regulations. My proposal aims to target those who divert precursors on a smaller scale, against which it is more difficult to enforce the provisions of the code, because a small quantity of precursors can produce a substantial amount of a drug. The chemical industry is projected to increase by 12.3 percent in 2021, 4 percent in 2022, and 2 percent in 2023.[123] This is a vast and growing industry, one with many liabilities and regulations. Nevertheless, U.S. chemical companies face few legal risks relative to the gravity of precursors ending up in the wrong hands, and drug cartels and terrorist organizations are taking advantage of it.[124]

Taminco U.S. Inc., a subsidiary of Eastman Chemical Co., knowingly violated federal narcotics laws by illegally selling more than 22,000 gallons of monomethylamine (MMA) to two unauthorized Mexican companies

118. Lucia Fernandez, *U.S. Chemical Industry – Statistics & Facts*, STATISTA (Oct. 21, 2021), https://www.statista.com/topics/1526/chemical-industry-in-the-us/#topicHeader__wrapper.

119. *Industries Supported by Chemical Industry*, PON PURE CHEMICALS GROUP (Aug. 12, 2015), https://www.pure-chemical.com/blog/industries-supported-by-chemical-industry/.

120. Fernandez, *supra* note 118.

121. Lucia Fernandez, *Value of Global Chemical Shipments 2001-2019*, STATISTA (Aug. 5, 2021), https://www.statista.com/statistics/258996/total-global-chemical-shipments-value-since-2001/.

122. *Id.*

123. Lucia Fernandez, *Forecast on U.S. Annual Chemical Industry Production Growth 2020-2025*, STATISTA (July 6, 2021), https://www.statista.com/statistics/407803/forecast-for-annual-growth-in-chemical-industry-in-the-us/.

124. Cam Simpson, *U.S. Chemical Companies Face Few Legal Risks, and the Cartels Bank on It*, BLOOMBERG (Dec. 2, 2020, 2:00 AM), https://www.bloomberg.com/news/features/2020-12-01/u-s-chemical-companies-face-few-legal-risks-cartels-bank-on-it.

without conducting even basic checks of their background.[125] In just the first half of 2010, Taminco sold the two Mexican companies enough MMA to produce about 100,000 kilograms of meth, which is more than eleven times the total amount of meth seized by U.S. law enforcement that whole year.[126] It is possible that one of the Mexican companies may never have existed at all.[127]

Federal drug laws impose penalties on the U.S. chemical companies that fail to monitor the sale and distribution of every liter of substances they produce. The requirements include verifying the legitimacy of a customer, confirming that each shipment reached its intended consumer, and immediately notifying the DEA if something went wrong.[128] Taminco's Mexico sales representative sold the MMA to himself, then resold it to unknown buyers.[129] Presently, Taminco would not be criminalized under the current enactment of § 960a, because, although they recklessly sold precursors to an unverified customer, they did not provide precursors to an organization that they knew was engaged in terrorist activity. However, if the sale representative knowingly or intentionally resold the precursors to a drug cartel or an organization that engages in terrorist activity, he could be criminalized under § 960a.

Under proposal presented herein, Taminco and the sales representative may be prosecuted under § 960a, because they recklessly sold precursor chemicals to non-existent, unverified entities in a country rampant with narcoterrorism. If the Mexican entities, which Taminco provided the MMA to, directly provided support to an entity engaged in terrorism, Taminco and the sales representative would be liable under the proposed modifications to § 960a. However, if Taminco had sold the precursors to a verified source, and then that source diverted the precursors to be illicitly trafficked, Taminco would not be criminalized under the proposed version of § 960a provisions. Nonetheless, Taminco displayed a conscious disregard of a substantial and unjustifiable risk by selling 22,000 gallons of MMA to unverified entities in a country rampant with narcoterrorism, and its executives and directors responsible for the trade should be held criminally liable.

A company that recklessly disregards the possibility that their precursors will end up in the hands of drug cartels or terrorist organizations should be held to the same standard as one who does so with intent or knowledge. Limiting the § 960a mens rea to intent and knowledge creates prosecution

125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*

hurdles. Lowering the mens rea to recklessness will enable prosecutors to establish criminal responsibility at a higher rate, ensure DEA regulatory compliance, incentivize chemical companies to execute diligent monitoring and vetting, and ultimately protect the health and safety of Americans and people abroad.

Despite the three decades of international drug laws aimed at preventing the diversion of precursors, drug cartels and terror organizations continue to use American made chemicals to keep heroin, meth, and cocaine labs running at full capacity.[130] Eastman paid only a total of 1.3 million dollars for illegally selling the 22,000 gallons of MMA, which is enough to produce about 3.2 billion dollars' worth of methamphetamine.[131] This is a result of a corporate culture that puts sales above all else,[132] which is dangerous, especially when sensitive precursors are being distributed.

Taminco's parent company, a private equity fund called CVC Capital Partners, ramped up the sale of chemicals between 2007 and 2010 by fourteen percent in anticipation of selling the company or a public stock offering. The imminent sale of Taminco was the motive for the parent company to sell as many chemicals as possible, even in an irresponsible, reckless, and even illicit manner.

The negligible penalty for a crime that can potentially devastate thousands of communities provides virtually no deterrent effect. It will allow chemical companies to continue illegally selling billions of dollars' worth of precursors to unverified consumers, and only pay fines that are a small fraction of their profit. To them, it is just the price of doing business, and American citizens are paying for it with their lives.

Furthermore, the Taminco prosecution is "likely to be the only one of its kind in the past decade."[133] While aiding and abetting the production or distribution of just fifty grams of methamphetamine holds a federal sentence of at least ten years in prison, nobody implicated in the Taminco case was imprisoned, despite their sale amounting to two million times over the fifty-gram threshold.[134] Moreover, none of Taminco's executives who were responsible for the crimes were in the courtroom at the time of Eastman's guilty plea. The Department of Justice focuses on prosecuting money launderers and drug dealers rather than big chemical companies; chemical company prosecutions are almost unheard of.[135]

130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*

This case demonstrates how a lack of deterrent prosecutorial action and ineffective monitoring led to the illegal sale of 22,000 gallons of MMA to a potentially non-existent company, and possibly into the hands of Mexican drug cartels that use terrorism to support their drug trafficking interests. If prosecutors went after big chemical companies and their executives for this kind of misconduct, it would deter the misconduct and urge companies to establish thorough monitoring systems.

If the Justice Department prosecutes these crimes, the cost-benefit analysis for companies weighing the benefits of illegally selling precursors against the gravity of the punishment would likely incentivize them to yield to the rule of law and comply with DEA regulations. It would also send a chilling message to drug cartels and terrorist organizations that rely on illicitly sold precursors through backdoor transactions with chemical companies or their agents, as seen in the Taminco case. This requires the Justice Department to recognize that precursors are the root and nexus of the drug issue at hand, and as such, their illicit distribution should be investigated and prosecuted accordingly.

In May 2019, a counter-narcotics squad operating in Sinaloa, Mexico, was led to an open-air heroin producing factory after being struck by a strong chemical odor.[136] They discovered four eighteen-liter jugs of the precursor acetic anhydride, which was bottled, branded and sold in Mexico by Avantor Inc., a publicly traded U.S. company valued at 12.3 billion dollars.[137] This further evidences that U.S. chemical companies are selling precursors that end up in the hands of drug cartels, and subsequently in the American neighborhoods as the immediate narcotics. It emphasizes the need for more rigorous monitoring and due diligence when selling sensitive precursors to customers in places where there is a strong drug cartel presence and where government officials may be prone to coercion or corruption.

It is apparent from the soaring methamphetamine and heroin overdoses that the U.S. and international laws aimed at holding chemical companies accountable for their global sales have failed to even minimally prevent the production of the world's most dangerous drugs.[138] Although the successful prosecution of Taminco is a step in the right direction, it is not nearly enough to invoke a sense of accountability and diligent monitoring among other chemical companies that sell precursors. This note's proposal to amend § 841(a) to list the precursors and to lower the mens rea to recklessness in § 960a will create major implications on the operations, liabilities, and investments of chemical companies dealing with sensitive precursors. It may

136. Simpson et al., *supra* note 5.

137. *Id.*

138. *Id.*

also call for an increased spending toward extensive monitoring, research, and reporting.

A. DEA Prerequisites for Transporting Precursors

The Drug Enforcement Administration has already developed a series of regulations to provide a safe harbor for companies that are mass importing and exporting controlled precursors. If the chemical industry abides by these confines, they should not find themselves liable to criminal sanctions. Title 21 of the Code of Federal Regulations, Sections 1309, 1313, and 1314 provide the regulatory confines within which chemical manufacturers, retailers, importers, exporters, and distributors must conduct business.[139] Through a combination of industry outreach and voluntary compliance measures, the DEA strives to control chemical diversion in partnership with the industry and the public.

All businesses, research organizations and individuals seeking to handle any controlled chemical are required to apply for an individual DEA registration, and this registration allows the entities to purchase, store, and use precursor chemicals.[140] The Environmental Health & Safety agency conducts an onsite visit with the DEA registrant to ensure all storage and security measures have been met prior to the DEA's scheduled appointment.[141]

First, Section 1300.02 provides definitions relating to listed chemicals and parties involved in brokering, selling, manufacturing, and distributing precursor chemicals. A broker or trader of a precursor chemical means any individual, corporation, corporate division, partnership, association, or other legal entity which assists in arranging an international transaction in a listed chemical by negotiating contracts; serving as an agent or intermediary; or fulfilling a formal obligation to complete the transaction by bringing together a buyer and seller, a buyer and transporter, or a seller and transporter, or by receiving any form of compensation for doing so.[142]

Bulk chemical manufactures are subject to chemical import and export declarations, in which they must send the DEA a detailed report of the chemicals being imported or exported.[143] The rule provides that a quantity of a chemical listed in Section 1310.02, which is either equivalent or exceeds

139. 21 C.F.R. § 1309 (2012); 21 C.F.R. § 1313 (2020); 21 C.F.R. § 1314 (2020).

140. *Overview of Controlled Substances*, *supra* note 68.

141. *Id.*

142. 21 C.F.R. § 1300.02 (2020).

143. Revision of Import and Export Requirements for Controlled Substances, 81 Fed. Reg. 96,992 (Dec. 30, 2016).

the threshold reporting requirements found in Section 1310.04(f), may be imported into the United States for transshipment, provided that advance written notice is given to the Regulatory Section, Diversion Control Division, Drug Enforcement Administration. The chemical must be reported no later than fifteen calendar days prior to the proposed date it will transship or transfer through the United States. The written notification must contain detailed information including dates, descriptions, weights, contact information, imports and exports, identification, and shipping routes.[144]

If these prerequisites are followed, the chemical industry will not be liable under this note's proposal regarding § 960a because being thoroughly informed about precursor transactions negates the possibility of establishing even a reckless mens rea. Only entities that intentionally, knowingly, or recklessly divert precursor chemicals to organizations engaging in terrorism will be in violation of § 960a under this note's proposal. It will not disrupt the chemical industry's legitimate precursor business dealings, although it may have implications on the chemical industry's ability to export precursor chemicals to countries designated by the State Department as state-sponsors of terrorism, such as the Islamic Republic of Iran.

B. Pre-Export Notification Online (PEN)

Governments party to the 1988 Convention are obligated to give pre-export notifications of precursor-importing countries and territories that have officially requested it to the governments, pursuant to Article 12, paragraph 10(a) of the 1988 Convention.[145] PEN was developed by the INCB to establish this exchange of information between National Competent Authorities and is used as a fundamental tool for preventing the diversion of precursors in the international trade.[146]

Public-private partnerships between the U.S. government and the chemical industry are vital to ensure international cooperation, and they can also provide a safe harbor for bulk chemical manufacturers as a uniform means for compliance.[147] The INCB has repeatedly emphasized the role of

144. 21 C.F.R. § 1313.31 (2016).

145. *Governments That Have Requested Pre-Export Notifications Pursuant to Article 12, Paragraph 10(a), of the 1988 Convention*, INT'L NARCOTICS CONTROL BD., https://www.incb.org/incb/en/precursors/precursors/annex_vi.html (last visited Nov. 13, 2021).

146. *Toolkit for Competent National Authorities*, INT'L NARCOTICS CONTROL BD., https://www.incb.org/incb/en/precursors/precursors/tools_and_kits.html (last visited Nov. 13, 2021) [hereinafter *Toolkit*].

147. *Public-Private Partnerships: Preventing Trafficking and Diversion Through Public-Private Partnerships*, INT'L NARCOTICS CONTROL BD., https://www.incb.org/incb/en/precursors/global_project/partnerships/main.html (last visited Nov. 13, 2021).

public-private partnerships and voluntary cooperation by the chemical industry as an effective strategy to thwart the diversion of precursors as well as their use in illicit drug manufacturing.[148]

The aspects of accessibility and real-time notification provide an effective way for companies and National Competent Authorities to monitor the whereabouts of exported and imported precursors, as well as crucial information regarding where, when, and how precursor chemicals are diverted. The Precursor Incident Communication System (PICS) also bolsters National Competent Authorities' ability to monitor and notify one another about precursor incidents, as it provides real-time communication and information between national authorities.[149]

The engagement of the industry in utilizing these tools will provide a safe harbor for them because it will provide notice to all parties involved in the transaction, and if a precursor shipment does get diverted, the liability will not fall on the company involved in the transaction. The INCB recognizes the vital role that chemicals play in the processing and manufacture of illicit drugs.[150] On the other hand, these same chemicals are also vital to many different industries that play an important role in our daily lives, as they are the foundation for countless commodities upon which the modern world relies.[151]

VI. CONCLUSION

For law enforcement to effectively disrupt the drug-terror nexus, it must uproot the life-source of terrorism: precursor chemicals. Thus, § 960a should explicitly target those who engage in the diversion of precursor chemicals because precursor diverters are precisely the type of individuals that Congress intended to criminalize under § 960a, so prosecuting them as such would accurately reflect congressional legislative intent.[152]

Amending § 841(a) to include List I and List II precursors will expressly make illicit precursor transactions that support terrorism criminal under § 960a, which will enable prosecutors to bring precursor diverters tied to terrorism to justice. As discussed, drug cartels and terrorist organizations are merged into hybrid organizations that rely on each other to support each other's interests, and the law cannot ignore it.

148. *Toolkit*, *supra* note 145.

149. *Precursors Incident Communication System (PICS)*, INT'L NARCOTICS CONTROL BD., https://www.incb.org/pics/en/bi_home.html (last visited Nov. 13, 2021).

150. *Toolkit*, *supra* note 145.

151. *Id.*

152. Thomas, *supra* note 1, at 1910, 1914.

Amending § 960a to include recklessness as mens rea would criminalize individuals recklessly providing direct or indirect support to any entity engaging in any terrorist activity. This would criminalize chemical companies like Taminco that are recklessly selling or distributing precursor chemicals that end up in the hands of narcoterrorists.

Removing conspiracy and attempt from the language of § 960a would prevent multiple inchoate crime prosecutions under the statute, negating any due process or constitutionality issues raised by Thomas. The effect of ensnaring far removed actors will not be defeated, in line with the legislative intent, because § 963 already criminalizes attempt or conspiracy to commit the § 960a offense.[153]

This Note aimed to influence policy pursuant to disrupting the means of financing terrorism and drug trafficking for the ultimate purpose of preserving public health, safety, national sovereignty, and the global economy.

153. 21 U.S.C. § 963.

GERMANY'S DUTY-TO-RESCUE LAW SHOULD BE ADOPTED IN EVERY STATE

Mark H. Okumori [*]

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I. INTRODUCTION

In July 2017, five Florida teens taunted and filmed a drowning man, calling for help, as he struggled for his life in a pond in Cocoa, Florida.[1] The teens made no attempt to rescue the man or alert authorities at any time—even after the drowning man went underwater and failed to resurface.[2] At that point, one of the teens could even be heard laughing while saying "he

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1. Faith Karimi, *Teens Who Laughed and Recorded a Drowning Man in His Final Moments Won't Face Charges*, CNN, https://edition.cnn.com/2018/06/26/us/florida-teens-no-charges-drowning-man, (June 26, 2018, 10:27 PM).

2. *Id.*

just died."[3] Florida state attorney called the teens' actions a "callous disregard for human life" with "no moral justification."[4] Yet, none of the teens faced charges because, in the words of the Florida State Attorney, there is "no law that requires a person to provide emergency assistance."[5]

Despite "no moral justification" for such a "callous disregard for human life," legislation intended to address such situations failed to receive sufficient support to pass in Florida.[6] Florida is not alone in its failure to pass any statute requiring a bystander to rescue another in an emergency. Only five of fifty states in the United States have any type of enforceable duty-to-rescue statute.[7] Hawaii,[8] Minnesota,[9] and Rhode Island[10] have statutes explicitly requiring witnesses to an emergency to notify emergency services, while Vermont,[11] and Wisconsin[12] have statutes implicitly requiring witnesses to do so.[13] This picture is in stark contrast to laws in major European and Latin American countries that expressly provide for a general duty to rescue.[14]

This article will focus on Germany's version of duty-to-rescue law, and specifically discuss (1) how the duty-to-rescue law applies in Germany; (2) the arguments against duty-to-rescue laws in the United States; and (3) responses to arguments against the enactment of duty-to-rescue laws in the United States. I conclude that every state in the United States should follow Germany's lead and adopt a duty-to-rescue law.

II. GERMANY'S DUTY-TO-RESCUE LAW

The German duty-to-rescue statute states that a person "who does not provide help in the event of an accident, common danger, or emergency . . .

3. *Id.*

4. *Id.*; J.D. Gallop, *Teens Filmed, Mocked Drowning Man, Cocoa Police Say*, FLA. TODAY (July 21, 2017, 3:17 PM), https://www.floridatoday.com/story/news/crime/2017/07/20/teens-filmed-mocked-drowning-man-cocoa-police-say/495518001/.

5. *Id.*

6. *Id.*

7. Damien Schiff, *Samaritans: Good, Bad and Ugly: A Comparative Law Analysis*, 11 ROGER WILLIAMS U.L. REV. 77, 92 (2005).

8. HAW. REV. STAT. ANN. § 663-1.6 (West, Westlaw through 2021 Spec. Sess.).

9. MINN. STAT. ANN. § 604A.01(1) (West, Westlaw through 2021 Legis. Sess. and 1st Spec. Sess.).

10. 11 R.I. GEN. LAWS ANN. § 11-56-1 (West, Westlaw through Ch. 161 of 2021 Legis. Sess.).

11. VT. STAT. ANN. tit. 12, § 519 (West, Westlaw through Act 76 and M-6 of 2021-2022 Sess. of VT. Gen. Assemb.)

12. WIS. STAT. ANN. § 940.34 (West, Westlaw through 2021 Act 58).

13. *Id.* at 92-95.

14. *Id.* at 79.

without significant personal risk and without violating other important obligations, shall be punished with imprisonment for up to one year or with a fine."[15] This duty applies even if the victim dies, and it is determined that any rescue effort would have been in vain.[16]

German courts have held that a duty to rescue arises when a person is aware that a victim of an emergency situation, including an accident or criminal attack, needs rescue, and the person has the opportunity to rescue the victim without risking their own safety.[17] For instance, in judgment 2 StR 115/15 of Germany's Federal Court of Justice (BGH)[18] the court held that the defendant was aware that the victim needed rescue, when defendant's friends had physically battered the victim in the defendant's apartment while the defendant left to purchase beer, because the victim had visible bleeding wounds, swelling on his face, and missing teeth.[19] The court remanded the case to the lower court to determine if the defendant had an opportunity to intervene, and, therefore, a duty to rescue.[20]

Alternatively, in judgment 2 StR 345/16[21] the BGH held that although the defendant witnessed her tenants criminally abuse the victim and was aware of the victim's need for rescue, she might not have had the opportunity to stop the abuse because the abusers were intoxicated, had criminal records and a reputation for not tolerating dissent, and the defendant could have feared retaliation from the abusers had she attempted to intervene.[22]

Under the German law, to fulfill the duty to rescue, a witness to an emergency must (1) attempt to personally rescue, (2) provide the person in

15. Strafgesetzbuch [StGB] [Penal Code], § 323c(1), https://www.gesetze-im-internet.de/stgb/__323c.html (Ger.).

16. Bundesgerichtshof [BGH] [Federal Court of Justice] Sept. 15, 2015, 5 StR 363/15, juris (Ger.), https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2015-9-15&nr=72365&pos=13&anz=27; *Germans Fined over Man, 83, Left to Die in Bank Branch*, BBC NEWS (Sept. 18, 2017), https://www.bbc.com/news/world-europe-41305575.

17. Bundesgerichtshof [BGH] [Federal Court of Justice], Aug. 12, 2015, 2 StR 115/15, juris (Ger.), https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2015-8&Seite=2&nr=72619&pos=84&anz=136; Bundesgerichtshof [BGH] [Federal Court of Justice], May 14, 2013, VI ZR 255/11, juris (Ger.), https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2013-5&Seite=5&nr=64532&pos=169&anz=238.

18. BGH, 2 StR 115/15 (Ger.).

19. *Id.*

20. *Id.*

21. Bundesgerichtshof [BGH] [Federal Court of Justice], Apr. 11, 2017, 2 StR 345/16, juris (Ger.), https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2017-4&Seite=5&nr=78291&pos=173&anz=257.

22. *Id.*

peril with aid, or (3) notify rescuers.[23] However, the duty to rescue is limited by the reasonableness of each of these three actions under the circumstances of the situation—weighing the interests of the witness and the interests of the person in need of rescue.[24] In determining the reasonableness of a rescue, German courts consider the following factors: (1) the witness's own capabilities, (2) the person's distance from the scene of the accident, (3) the availability of aids, (4) the degree of danger faced by the person in peril, (5) the potential danger that the rescuer might face, (6) the extent of the potential damage, (7) the chances of a successful rescue, and (8) whether the parties in need of rescue are themselves responsible for the accident's occurrence.[25]

For example, if the witness is physically incapable of assisting, liability from failure to rescue will not be imposed.[26] However, a witness is obligated to rescue a drowning person in circumstances where the drowning person is within half the distance of a witness' own reach, or if appropriate rescue aids are easily accessible to the witness.[27] But, when a person is in peril as a result of their own conscious decision to expose themselves to the risk of harm, witnesses have a reduced duty to rescue and, under certain circumstances, may be completely absolved of liability.[28] Liability for failure to rescue is also unlikely if a person would risk personal injury to execute the rescue.[29] The law does not require immediate rescue, but rather allows witnesses time to process the situation before they must act.[30]

As a matter of practice, prosecutors are generally unlikely to prosecute a witness to an emergency if the witness alerts emergency services of the situation without personally attempting a rescue, regardless of circumstance.[31] A 2016 incident in Essen, Germany, illustrates how this law is actively enforced. When an eight-three-year-old man collapsed next to an

23. *Unterlassene Hilfeleistung nach § 323c Abs. 1 StGB bei in Seenot geratenen Personen* [*Failure to assist in accordance with Section 323c Paragraph 1 StGB for people in distress at sea*], DEUTSCHER BUNDESTAG WISSENSCHAFTLICHE DIENSTE 5 (2018) (Ger.) [hereinafter *Wissenschaftliche Dienste Report*].

24. *Id.*

25. *Id.*

26. *Id.* at 5.

27. *Id.* at 5-6.

28. *Id.*

29. *See id.* at 4-6.

30. *See id.* at 4.

31. *Ein Obdachloser? Staatsanwaltschaft vermutet Schutzbehauptung*, SÜDDEUTSCHE ZEITUNG (Sept. 17, 2017, 7:44 PM), https://www.sueddeutsche.de/panorama/sterbender-in-bankfiliale-in-essen-ich-habe-noch-nichts-vergleichbares-erlebt-1.3670785-2 [hereinafter SÜDDEUTSCHE ZEITUNG].

ATM,[32] for the next twenty minutes, four people stepped over and around the stricken man to access the ATM machine behind him.[33] None of the four passersby offered any assistance or summoned emergency services.[34] Despite the fifth passerby alerting emergency services, the man passed away one week later from head injuries sustained in the fall.[35] The medical examiner noted that the man would have succumbed to his injuries even if he had received medical assistance sooner.[36]

Nonetheless, three of the four passersby who failed to act, identified in closed circuit television (CCTV) footage, were prosecuted under Germany's duty-to-rescue law (one of the four passersby was not prosecuted due to medical reasons).[37] The prosecutor on the case argued that "the duty to help a fellow human being was blatantly violated" and that the court should give a clear signal that "we're not going in the direction of a society that looks away."[38] The court agreed with the prosecution, stating that the defendants were "completely indifferent" to the man's suffering and unwilling to help, and fined the three defendants between €2,400 to €3,600 each.[39]

In another case, in 2017, in Heidenheim, Germany, a man crashed his motorcycle into a lamp post and suffered fatal injuries.[40] A cyclist witnessed the accident and began filming the aftermath of the accident on his cell phone, instead of alerting authorities or attempting to rescue the dying

32. BBC NEWS, *supra* note 16; *Unterlassene Hilfeleistung für Rentner in Bank: Angeklagte müssen Geldstrafen zahlen*, SPIEGEL (Sept. 18, 2017, 3:58 PM), https://www.spiegel.de/panorama/justiz/rentner-in-bank-gericht-verhaengt-geldstrafen-wegen-unterlassener-hilfeleistung-a-1168518.html#:~:text=Unterlassene%20Hilfeleistung%20f%C3%BCr%20Rentner%20in,gleichg%C3%BCltig%20gewesen%2C%20sagte%20der%20Richter.

33. BBC NEWS, *supra* note 16.

34. *Id.*

35. *See* SPIEGEL, *supra* note 32.

36. *Id.*

37. *Id.*; Strafgesetzbuch [StGB] [Penal Code], § 323c(1), https://www.gesetze-im-internet.de/stgb/__323c.html (Ger.); Lotte Meurkens, *German Amtsgericht on the Duty to Rescue*, MAASTRICHT UNIV. (Oct. 11, 2017), https://www.maastrichtuniversity.nl/blog/2017/10/german-amtsgericht-duty-rescue.

38. BBC NEWS, *supra* note 16.

39. *Id.*; Meurkens, *supra* note 37; Rebecca Joseph, *Hefty Fines for Germans Who Appeared 'Completely Indifferent' to Senior in Medical Distress*, GLOBAL NEWS (Sept. 19, 2017, 2:42 PM), https://globalnews.ca/news/3754288/fines-germans-completely-indifferent-medical-distress/#:~:text=World-,Hefty%20fines%20for%20Germans%20who%20appeared%20'completely%20indifferent,to%20senior%20in%20medical%20distress&text=Three%20Germans%20were%20handed%20hefty,in%20hospital%2C%20the%20BBC%20reports; SPIEGEL, *supra* note 32.

40. Kate Connolly, *German Police Hunt Man Who Filmed Dying Biker Instead of Helping*, GUARDIAN (Sept. 18, 2017, 4:39 PM), https://www.theguardian.com/world/2017/sep/18/german-police-hunt-man-who-filmed-dying-biker-instead-of-helping.

motorist.[41] The motorist was pronounced dead at the scene by medical personnel upon their arrival.[42] Police have sought to identify the cyclist, using dashcam footage, to press charges against him for his failure to rescue the dying motorist.[43]

These examples of active enforcement of the duty-to-rescue law illustrate the emphasis that German law places on the overall public good—a characteristic absent in the United States. The United States has a no-duty-to-rescue approach, which was evident in the 2017 incident in Florida.[44] Nonetheless, a duty-to-rescue law continues to have its opponents in American law, as the following section illustrates.[45]

III. ARGUMENTS AGAINST DUTY-TO-RESCUE LAWS

In the seminal U.S. case on the subject, *L.S. Ayres & Co v. Hicks*, from 1942, Chief Justice Curtis Shake observed that "there is no general duty to go to the rescue of a person who is in peril," and it has remained the prevailing approach in the United States.[46] In the United States there is simply no duty to rescue a person who is in peril, sick, or injured, no matter how readily available a reasonable means of rescue may be.[47] Although, since 1942, inroads have been made in creating certain exceptions to the no-duty-to-rescue approach, this *general* no-duty-to-rescue rule still prevails in all but five states.[48] This rule is based on several arguments, posited in legal scholarship, that addresses both legal theory and public policy considerations.

A. Challenges of Enforcing a Duty-To-Rescue Law

Opponents of a duty-to-rescue law argue that challenges in enforcing such law may arise from (1) the difficulty in identifying offenders and (2)

41. *Id.*

42. *Id.*

43. *Id.*; Associated Press, *German Police Using Dashcam Footage to Find Accident Gawker*, SEATTLE TIMES (Sept. 19, 2017, 4:03 AM), https://www.seattletimes.com/nation-world/german-police-using-dashcam-footage-to-find-accident-gawker/.

44. *See* Karimi, *supra* note 1.

45. Marin Roger Scordato, *Understanding the Absence of a Duty to Reasonably Rescue in American Tort Law*, 82 TUL. L. REV. 1447, 1453 (2008).

46. *See* L.S. Ayres & Co. v. Hicks, 40 N.E.2d 334, 337 (Ind. 1942); Jennifer L. Groninger, *No Duty to Rescue: Can Americans Really Leave a Victim Lying in the Street - What Is Left of the American Rule, and Will It Survive Unabated?*, 26 PEPP. L. REV. 353, 353 (1999).

47. Groninger, *supra* note 46, at 356; Scordato, *supra* note 45, at 1459.

48. Schiff, *supra* note 7; Groninger, *supra* note 46, at 355.

already overwhelmed prosecutors.[49] According to these arguments, the person in need of rescue, and the police, will rarely be able to identify those who failed to rescue, diminishing the enforceability of any duty-to-rescue law.[50] Moreover, prosecutors in many jurisdictions are overburdened with caseloads, each handling more than one thousand felony cases annually.[51] Adding the burden of prosecuting duty-to-rescue law offenders would only exacerbate the current inefficiencies in the underfunded and understaffed American criminal justice system.[52] Overburdened prosecutors, who already lack the resources to handle their caseloads would likely decline to prosecute minor criminal infractions.[53] Because of the pre-existing American hesitance in punishing those who fail to rescue, duty-to-rescue violations will likely be categorized as minor criminal infractions and go unpunished.[54] Therefore, any duty-to-rescue law would likely fail to be enforced.

B. The Practical Impact of a Duty-To-Rescue Law

On a practical level, opponents of the duty-to-rescue law argue that such a law would (1) obligate rescuers to risk injury; (2) be exploited by criminals; and (3) disincentivize cooperation in accident or criminal investigations.

First, opponents of duty-to-rescue law argue that rescuers may put themselves in harm's way, in an attempt to execute a rescue, especially given the conventional wisdom across lifesaving professions that rescue efforts should be left to well trained personnel.[55] Obligating a person to risk their safety to rescue another would result in people involuntarily putting their own safety at risk, and at least some of these people would harm themselves as a result of fulfilling the obligation. [56]

Second, criminals could prey upon their victims by posing as someone in need of emergency aid, and then attack their would-be rescuers who come to their aid.[57] A duty to rescue rule would obligate people, who would not

49. *See* Scordato, *supra* note 45, at 1468; *see* Adam M. Gershowitz & Laura R. Killinger, *The State (Never) Rests: How Excessive Prosecutorial Caseloads Harm Criminal Defendants*, 105 NW. U.L. REV. 261, 262-63 (2011).

50. Scordato, *supra* note 45, at 1468.

51. Gershowitz & Killinger, *supra* note 49.

52. *Id.* at 263.

53. *Id.* at 298.

54. *See generally* Schiff, *supra* note 7, at 79 (The U.S. hesitance to adopt duty-to-rescue law can be inferred from the fact that only five out of the fifty states have adopted any duty-to-rescue law).

55. Scordato, *supra* note 45, at 1476.

56. *Id.* at 1476-77.

57. *Id.* at 1477.

otherwise stop to rescue another, to risk exposing themselves to criminal acts in the course of fulfilling a legal duty.[58]

Lastly, those who oppose a duty-of-rescue law posit that such a law disincentivizes people, who witness an emergency but choose not to rescue the person in peril, from cooperating in investigations surrounding the emergency in an effort to conceal their failure to rescue.[59] This would result in fewer witnesses to an emergency willing to cooperate with police in investigating the emergency.[60]

C. The General Effectiveness of a Duty-To-Rescue Law

Opponents of a duty-to-rescue also call into question the general effectiveness of such law. Some opponents argue that such a law would have little incremental effect on society because the majority of people who encounter a person in need of rescue would generally take steps to assist, regardless of a legal obligation.[61] Therefore, any legal duty to rescue would only marginally increase the number of rescues, if at all.[62]

Second, such opponents theorize that a person with the propensity to turn a blind eye to a person in peril, a "non-rescuer," is more likely to rescue another in peril in the presence of other bystanders, motivated primarily to avoid being identified by bystanders as a party who failed to act.[63] However, the need for a non-rescuer to rescue a person in peril is less necessary in the presence of other bystanders—who might be more willing and able to render aid.[64] Because a legal duty to rescue would produce a greater number of rescue efforts when it is least necessary, the effect of a duty-to-rescue law is diminished.[65]

Third, a duty-to-rescue law would deter people who initially fail to rescue a person in peril, but later change their minds out of fear of liability, from returning to the scene of the emergency to provide aid.[66] Such a person may feel that returning to the scene of the emergency, where witnesses identify them as a person who failed to help, would risk their exposure to liability for failure to assist the person in peril in the first instance.[67]

58. *Id.*
59. *Id.* at 1478.
60. *Id.*
61. *Id.* at 1464.
62. *Id.*
63. *Id.* at 1468.
64. *Id.*
65. *Id.*
66. *Id.* at 1479.
67. *Id.*

Fourth, an increased number of rescue efforts would also increase the likelihood that a rescuer inadvertently causes more harm to the person in peril, and decreases the quality of the rescue.[68] This argument is premised on the assertion that a duty-to-rescue law will only impact non-rescuers' propensity to rescue, and that such non-rescuers, who assist only out of legal obligation, are likely to provide a lower quality rescue effort than a voluntary rescuer and could harm the person in peril.[69]

This argument also presumes that the overwhelming majority of non-rescuers would change their behavior only from fear of liability, and that non-rescuers are therefore more likely to rescue a person in peril when they are most likely to be held liable by bystander identification[70] when bystanders are present.[71] Since bystanders are less inclined to rescue once someone else, the non-rescuer, has begun rescue efforts, the non-rescuer's lower quality rescue would effectively replace the higher quality rescue a voluntarily rescuer might have otherwise furnished.[72]

D. The Societal Impact of a Duty-To-Rescue Law

Opponents of a duty-to-rescue law also base their position on the impact that such law would have on society. Namely, (1) the obligatory risk rescuers would have to take, (2) the incompatibility of such law with American values, and (3) the decreased altruistic perception of rescue.

Because a civilian rescuer's actions will always be subject to the standard of reasonableness, such rescuers could be subject to liability if their efforts cause more harm to the person in peril. In that case, they would be deemed to have acted unreasonably during the rescue.[73] By being forced to act, the rescuers might be unable to choose whether to subject their actions to scrutiny under the reasonableness standard and expose themselves to potential liability.[74] Such an obligation is an infringement on a person's freedom to choose whether they want to risk being exposed to liability for failure to act reasonably.[75]

Such an affirmative duty to rescue also conflicts with the traditional American value of individualism—the welfare of the individual over

68. *Id.* at 1471.
69. *Id.* at 1472.
70. *Id.*
71. *Id.* at 1473.
72. *Id.*
73. *Id.* at 1475.
74. *Id.*
75. *Id.* at 1476.

society—and capitalism.[76] Under an individualistic view of society, individuals should look towards themselves, rather than to the state, to address their needs.[77] This view asserts that charity should only be encouraged, not mandated, by the state.[78] A rescue of another person is a form of charity to the victim, so any duty-to-rescue law amounts to mandated charity—an outcome inconsistent with American values of individualism and capitalism.[79]

Additionally, voluntary rescuers enjoy a higher sense of self-esteem and greater regard from others for their heroic actions.[80] If a legal duty to rescue is adopted, such heroic acts would be perceived as no more than a fulfillment of one's legal obligation.[81] This shift in perception diminishes the social recognition of desirable behavior and negatively impacts the self-esteem and regard from society that voluntary rescuers might otherwise receive.[82]

These arguments form the basic rationale behind the no-duty-to-rescue law in the United States.[83] However, as the following section demonstrates, in practice, Germany's federal duty-to-rescue law addresses each of these arguments.

IV. THE GERMAN DUTY-TO-RESCUE LAW WITHSTANDS THE ARGUMENTS AGAINST DUTY-TO-RESCUE LAWS

A. Challenges in Enforcing a Duty-To-Rescue Law

There may be instances when violators of a duty-to-rescue law may not be identified, like in the 2017 case in Heidenheim.[84] However, contrary to what opponents of a duty-to-rescue law argue, today's technological advancements enable video identification via CCTV and other video recording devices across most of the United States.[85] In fact, there were

76. Schiff, *supra* note 7, at 117-19.
77. *Id.* at 117.
78. *Id.*
79. *Id.* at 117-18, 120-21.
80. Scordato, *supra* note 45, at 1473-74.
81. *Id.* at 1474.
82. *Id.*
83. *Id.* at 1479-80.
84. Connolly, *supra* note 40.
85. Irina Ivanova, *Video Surveillance in U.S. Described as on Par with China*, CBS NEWS: MONEYWATCH (Dec. 10, 2019, 6:36 PM), https://www.cbsnews.com/news/the-u-s-uses-surveillance-cameras-just-as-much-as-china/#:~:text=When%20it%20comes%20to%20video,watching%2C%20not%20necessarily%20the%20government.

approximately seventy million surveillance cameras across the United States in 2019—more than one for every five people.[86]

Given the scope of video surveillance in the United States, video identification of people who fail to assist a person in peril would be no more challenging than identifying perpetrators of any other crime, who flee a crime scene. This is precisely the mechanism Germany authorities used to identify the three defendants in the 2016 case in Essen.[87]

Further, although the excessive caseloads that American prosecutors face is undoubtedly a strain on the American criminal justice system, Germany's duty-to-rescue law violations would be classified as misdemeanors if enforced in the United States.[88] Misdemeanors are generally less resource-intensive than felonies.[89] Furthermore, American prosecutors have the privilege of prosecutorial discretion and may choose the cases they prosecute.[90] Therefore, American prosecutors may follow the lead of Germany in only prosecuting cases where the witness to the emergency fails to at least alert emergency services.[91]

Prosecuting duty-to-rescue misdemeanors would pose a minimal impact on the available resources in the American criminal justice system. Further, any fiscal impact could be mitigated by fines collected from duty-to-rescue offenders.[92] The importance of saving a person's life in an emergency situation clearly outweighs such a minimal impact on state resources.

B. The Practical Impact of a Duty-To-Rescue Law

While the German duty-to-rescue law requires a person to rescue another in peril, the statute also provides that any rescue be attempted only if it can be executed "without personal risk."[93] Similar provisions also exist under

86. *Id.*

87. BBC NEWS, *supra* note 16.

88. Under Strafgesetzbuch [StGB] [Penal Code], § 323c(1) failure to rescue is punishable by "imprisonment for up to one year or… a fine." In the United States, offenses that are punishable by imprisonment of up to one year are classified as misdemeanors under 18 U.S.C.A. § 3559. Therefore, a duty-to-rescue offense would be classified as a misdemeanor in the United States.

89. Gershowitz & Killinger, *supra* note 49, at 266 (the fact that misdemeanors are less resource-intensive can be inferred from a national study stating that recommended caseloads for public defenders should not exceed 150 felonies *or* 400 misdemeanors per year).

90. Wayne R. LaFave, *The Prosecutor's Discretion in the United States*, 18 AM. J. COMPAR. L. 532, 532 (1970).

91. SÜDDEUTSCHE ZEITUNG, *supra* note 31.

92. Strafgesetzbuch [StGB] [Penal Code], § 323c(1), https://www.gesetze-im-internet.de/stgb/__323c.html (Ger.) (failure to rescue is punishable by "imprisonment for up to one year or… *a fine*") (emphasis added).

93. *Id.*

Hawaii, Minnesota, Rhode Island, Vermont, and Wisconsin duty-to-rescue laws.[94] German case law has further clarified that one of the considerations in determining if a failure to rescue is reasonable is the witness's own capabilities.[95] For example, the law would not hold a person liable for failing to jump into a lake to save a drowning man if the person was incapable of swimming. This interpretation was applied by the BGH in judgment 2 StR 345/16, where the defendant was found not guilty when the persons inflicting the harm on the victim could have retaliated against the defendant if the defendant had intervened.[96]

Further, even if a person is unsure of whether a situation is one that poses a risk to their safety, and whether they would be held liable for failing to rescue under the German law, the alternative of merely notifying emergency services would satisfy the legal obligation to rescue without posing any of these risks.[97] These provisions substantially, if not completely, alleviate the risk of harm to potential rescuers acting under an obligation to rescue.

With regard to instances where criminals might attempt to exploit duty-to-rescue laws by posing as victims of an emergency and then attacking their rescuer, such situations are unlikely to occur, considering that they are limited to the following two instances. First, where a criminal might attempt to employ this tactic in an area where other bystanders are present, the German duty-to-rescue law considers criminal attacks to be an emergency and would obligate those bystanders to assist the victim of the crime, thereby deterring the criminal conduct.[98] Second, when a criminal might attempt to employ this tactic in an isolated area, the criminal target need not personally assist the "victim," but they could alert emergency services. Considering that these scenarios cover all conceivable possibilities of criminal misuse of a duty-to-rescue law, the argument is not persuasive.

The duty-to-rescue law could initially deter people who witness an emergency and choose not to rescue from cooperating in the investigation

94. Schiff, *supra* note 7, at 92-94.

95. *Wissenschaftliche Dienste Report*, *supra* note 23.

96. Bundesgerichtshof [BGH] [Federal Court of Justice], Apr. 11, 2017, 2 StR 345/16, juris (Ger.), https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2017-4&Seite=5&nr=78291&pos=173&anz=257.

97. SÜDDEUTSCHE ZEITUNG, *supra* note 31.

98. Bundesgerichtshof [BGH] [Federal Court of Justice], Aug. 12, 2015, 2 StR 115/15, juris (Ger.), https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2015-8&Seite=2&nr=72619&pos=84&anz=136; Bundesgerichtshof [BGH] [Federal Court of Justice], May 14, 2013, VI ZR 255/11, juris (Ger.), https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2013-5&Seite=5&nr=64532&pos=169&anz=238.

surrounding the emergency for fear of their own culpability for failing to rescue coming to light.[99] However, there is a one-in-five chance that such people would be captured on surveillance cameras and placed at the scene regardless of whether the person cooperates in the investigation.[100] Therefore, the possibility that a person might be identified as a non-rescuer would have little to do with their decision to cooperate in investigations surrounding the emergency—because they would likely be identified either way. Further, the German duty-to-rescue law falls under its criminal code, and by adopting a duty-to-rescue provision in U.S. criminal code, prosecutors could exercise their prosecutorial discretion to offer the violator a plea deal in exchange for their cooperation.[101]Therefore, while not necessarily incentivizing initial cooperation with investigations, non-rescuers could later be sought out relatively easily and then persuaded to cooperate.

C. The General Effectiveness of a Duty-To-Rescue Law

There is insufficient evidence to draw a conclusion about the frequency in which a person would act to rescue another in peril.[102] Therefore, the assumption that the majority of people who would voluntarily rescue a person in peril is unfounded. Further, even if these assumptions were true, the argument fails to consider the stakes in every instance of rescue—life or death. Even if a duty-to-rescue law would only marginally increase the instances in which a rescue occurs, the societal cost of failing to save a life, at little cost to the rescuer, is significant no matter the number instances. Consider the feelings of the family of the man who drowned in Florida while being taunted by teens.[103]

There is also no support for the assertion that a non-rescuer is more likely to rescue another in peril in the presence of other bystanders. However, even if this assertion were factually based, the argument that a duty-to-rescue law is unnecessary, because it would predominantly encourage non-rescuers to rescue a person in peril when other bystanders would have voluntarily done so anyway, fails to consider situations where only the non-rescuer was present at the scene of an emergency. Under these circumstances, a non-rescuer, who would otherwise fail to rescue, would be motivated to attempt a rescue and could prove critical to the person in peril.

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99. Scordato, *supra* note 45, at 1478.

100. Ivanova, *supra* note 85 (inferred from the fact that there was more than one surveillance camera for every five people in the United States in 2019).

101. Scordato, *supra* note 45, at 1478; LaFave *supra* note 90.

102. Scordato, *supra* note 45, at 1464.

103. Karimi, *supra* note 1.

The German duty-to-rescue law also addresses the argument that the law would deter people who initially fail to rescue a person in peril, but later change their minds for the fear of liability.[104] As discussed above, the German duty-to-rescue law does not require a witness to an emergency to act immediately.[105] Rather, the law allows time to gather one's thoughts before acting. Such a "grace period" leaves more than enough time for a passerby witnessing an emergency to reconsider an initial decision not to seek or render assistance. This person could return to the scene of the emergency to either personally assist or merely notify emergency services, without the fear of liability for not acting immediately.

Although it may be true that bystanders are less inclined to rescue once someone else has begun rescue efforts, there is no evidence to support the assertion that a non-rescuer's rescue efforts would be of any lower quality than any other rescuer. Such assumptions cannot be the basis for a rationale that suggests that a law with the potential to save lives should not be enacted. Further, this argument would only apply to situations where bystanders are present. In the absence of any bystanders, the only chance a person in peril has of rescue would be the one administered by the person present, regardless of whether that person acted out of obligation to the law or voluntarily.

D. The Societal Impact of Duty-To-Rescue Law

While a rescuer is bound by the doctrine of reasonableness under the German duty-to-rescue law, and while a rescuer could risk liability, despite being obligated to rescue a person in need of rescue, the German law does not necessarily require a person to personally rescue a person in peril.[106] Mere notification of emergency services, as the fifth person in the 2016 Essen case did, is sufficient to satisfy the duty created by law.[107] Indeed, a rescuer would risk no potential liability in merely dialing 911 on his cell phone and notifying emergency services of the situation. State laws in Hawaii, Minnesota, and Wisconsin already explicitly articulate a "notification" requirement in their respective statutes.[108] There remains no reason why a similar provision fails to be adopted across all fifty states.

Although some may argue that a duty-to-rescue law is incompatible with American values, five states in the United States, Vermont, Minnesota, Wisconsin, Rhode Island, and Hawaii, have, nonetheless, already adopted

104. Scordato, *supra* note 45, at 1479.

105. *Wissenschaftliche Dienste Report*, *supra* note 23.

106. *Wissenschaftliche Dienste Report*, *supra* note 23; SÜDDEUTSCHE ZEITUNG, *supra* note 31.

107. SÜDDEUTSCHE ZEITUNG, *supra* note 31; BBC NEWS, *supra* note 16.

108. Schiff, *supra* note 7, at 92-95.

duty-to-rescue laws very similar to that in Germany.[109] The German law penalizes a person "who does not provide help in the event of an accident, common danger or an emergency, when the person is able to do so, without significant personal risk."[110] Similarly, Hawaii's statute requires a person to "obtain or attempt to obtain aid . . . if the person can do so without danger or peril to any person."[111] Minnesota's statute also requires "a person at the scene of an emergency . . . to give reasonable assistance to the exposed person" and only "to the extent that the person can do so without danger or peril to self or others."[112]

These U.S. state statutes are substantially similar to their German equivalent and have been enacted by democratically elected state legislators whose actions reflect the will of their constituents. These statutes have also been recognized in their respective state courts and have not been ruled to encroach on American freedoms.[113] Such examples indicate the compatibility of a duty-to-rescue law with the American values and set at least an aspirational ethical standard for the society—one where people do not look the other way when a fellow human being is in peril.

Further, the argument that social recognition of heroic rescue efforts would be diminished by a legal obligation to rescue, effectively places a higher importance on voluntary rescuers' self-esteem and social recognition than the lives that could potentially be saved. There should be no question that the potentially life-saving outcomes of a duty-to-rescue law should take precedence over boosting one's self-esteem and social recognition.

V. CONCLUSION

On balance, the arguments for adopting a law similar to the German duty-to-rescue law are persuasive. Therefore, legislators in all fifty states should seriously consider adopting similar legislation. Doing so would establish a clear enforcement policy that favors reasonable rescue efforts and might deter situations, such as the one in Florida in 2017, from occurring again.

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109. *Id.* at 92.

110. Strafgesetzbuch [StGB] [Penal Code], § 323c(1), https://www.gesetze-im-internet.de/stgb/__323c.html (Ger.).

111. HAW. REV. STAT. ANN. § 663-1.6 (West, Westlaw through 2021 Spec. Sess.).

112. MINN. STAT. ANN. § 604A.01(1) (West, Westlaw through 2021 Legis. Sess. and 1st Spec. Sess.).

113. State v. Cabral, 810 P.2d 672, 677 (Haw. Ct. App. 1991); Swenson v. Waseca Mut. Ins. Co., 653 N.W.2d 794, 797 (Minn. Ct. App. 2002).