

RESPONSE

History, Geography, and Rights: A Response to Chilton and Posner

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Professors Chilton and Posner argue that a major predictor of contemporary human rights practices can be found in states' own distant pasts. Countries that faced adverse geographic, demographic, or institutional conditions centuries ago tend to have worse human rights practices today than those that faced favorable conditions. These conditions can affect contemporary human rights practices regardless of modern-day interventions, such as international human rights treaties.

This claim is important, but it also leaves many questions unanswered. This response Essay focuses on two such unanswered questions. First, Professors Chilton and Posner do not theorize the mechanisms through which historical conditions affect contemporary human rights practices. This Essay draws on the development economics literature to articulate some preliminary hypotheses on how fixed geographic and historical factors can affect contemporary human rights. More generally, it suggests that, if we want to develop a research agenda that incorporates history into our understanding of contemporary human rights practices, we need theory to explain how fixed historical and geographic factors affect contemporary human rights.

Second, Chilton and Posner do not address whether historical trends can be reversed. This Essay focuses on this question by drawing on the concept of critical junctures. Critical junctures are transformative moments in a nation's history during which there exist opportunities to reverse deeply rooted historical trends. In the spirit of Chilton and Posner's article, it takes seriously the idea that history matters. But unlike Chilton and Posner, who focus on path dependence, the idea of critical junctures suggests that there exist opportunities for change. This Essay illustrates the potential importance of critical junctures by exploring the development of gay rights in Argentina and South Africa, two countries with long histories of conservative sexual norms and repressive anti-gay laws, which nonetheless became global trailblazers on gay rights. These case studies provide important insights into the pathways through which historical trends can be reversed. This Essay concludes that, if human rights scholarship is to take history seriously, it should include the study of critical junctures, and not just path dependence.

* I thank Adam Chilton, Kevin L. Cope, Genevieve Lakier, and Alec Knight for helpful comments and suggestions. I thank Alec Knight for exceptional research assistance, including conducting the bulk of the background research for the case studies. All errors are mine.

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I. INTRODUCTION

A major predictor of contemporary human rights practices can be found in states' own distant pasts. Countries that faced adverse geographic, demographic, or institutional conditions centuries ago tend to have worse human rights practices today than those that faced favorable conditions. These conditions can affect contemporary human rights practices regardless of modern-day interventions, such as international human rights law. That, in a nutshell, is the thesis of Professors Chilton and Posner's provocative article, published in this issue of the *Virginia Journal of International Law*.¹

Chilton and Posner's claim is disheartening for human rights advocates. If today's human rights practices are largely determined by history and geography, perhaps reformers can do little to promote rights. And yet, their story is intuitively appealing. After all, government repression remains widespread, notwithstanding decades of coordinated international efforts to end it. Indeed, the past few decades have seen many international initiatives to improve human rights. First, a transnational network of rule of law reformers has devoted substantial resources to building rule-of-law around the world,² which includes respect for human rights.³ Second, aid donors have conditioned development aid on respect for rights, providing governments with strong material incentives to improve rights practices.⁴

1. Adam Chilton & Eric Posner, *The Influence of History on States' Compliance with Human Rights Obligations*, 56 VA. J. INT'L L. 211, 216 (2016) [hereinafter Chilton & Posner].

2. See, e.g., Gillian Hadfield & Barry Weingast, *Microfoundations of the Rule of Law* 17 ANN. REV. POL. SCI. 21, 26 (2014) (stating that "billions of dollars in international aid" have been devoted to creating the rule of law); Daniel B. Rodriguez et al., *The Rule of Law Unplugged*, 59 EMORY L.J. 1455, 1460 (2010).

3. David Kennedy, *The 'Rule of Law,' Political Choices and Development Common Sense*, in THE NEW LAW AND ECONOMIC DEVELOPMENT 95, 122 (David M. Trubek & Alvaro Santos eds., 2006) (highlighting the link between rule-of-law reforms and human rights advocacy).

4. United States federal law prohibits giving aid "if the Secretary of State has credible information that such unit has committed a gross violation of human rights." 22 U.S.C. § 2378d(a). In practice, aid donors are inconsistent about human rights aid conditionality. See, e.g., Sabine C. Carey, *European Aid: Human Rights Versus Bureaucratic Inertia?*, 44 J. PEACE RES. 447 (2007) (finding that, among the United Kingdom, France, Germany, and the European Commission, only Germany consistently provides less

Finally, the post-WWII period has seen a dramatic increase in human rights *law*, in the form of a growing number of rights in national constitutions⁵ and the adoption of numerous international and regional human rights treaties.⁶

None of these efforts, of course, have come close to eradicating government repression. Chilton and Posner's claim comes on the heels of a series of empirical studies showing that human rights treaties bring about only small shifts in government behavior in a limited group of countries, an impact that is at best conditional.⁷ The claim, moreover, coincides with empirical articles (including some by Professor Chilton and this author) that show that only some constitutional rights change government behavior and that many bills of rights are simply shams.⁸ Finally, it follows the release of several high-profile books (including one by Professor Posner) that proclaim the "end times" or "twilight" of human rights.⁹ Does this mean that modern institutions and initiatives simply cannot fix human rights abuses? Maybe.

Chilton and Posner's claim that current human rights abuses have deep historical or fixed geographic roots is important and should be taken seriously by scholars and activists alike. It sets an agenda for further academic research, but the article also raises more questions than it answers. While Chilton and Posner's study serves as an important addition to a literature focused exclusively on contemporary determinants of rights, there are limits to what we can infer from it. Specifically, it is worth emphasizing that Chilton and Posner use only bivariate correlations to support their claims. Intuitively, this means that they show how closely associated contemporary human rights practices are with certain historical and geographic variables. As Chilton and Posner acknowledge, these relationships do not establish that these factors *caused* the modern practices. They also do not explore the possibility that other, unidentified phenomena may also have contributed significantly. Finally, these relationships alone say nothing about whether modern human rights institutions impact human

aid to repressive regimes); Eric Neumayer, *Do Human Rights Matter in Bilateral Aid Allocation? A Quantitative Analysis of 21 Donor Countries*, 84 SOC. SCI. Q. 650 (2003) (finding that donor countries are inconsistent in rewarding good human rights behavior with aid allocation).

5. David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CALIF. L. REV. 1163, 1194–98 (2011) (documenting rights creep).

6. Oona A. Hathaway et al., *Human Rights Abroad: When Do Human Rights Treaty Obligations Apply Extraterritorially?*, 43 ARIZ. ST. L.J. 389, 389 (2011).

7. See Kevin Cope & Cosette Creamer, *Disaggregating the Human Rights Treaty Regime*, 56 VA. J. INT'L L. 459 (2016) for a comprehensive overview; see also Emilie M. Hafner-Burton, *International Regimes for Human Rights*, 15 ANN. REV. POL. SCI. 265 (2012).

8. Adam Chilton & Mila Versteeg, *The Failure of Constitutional Torture Prohibitions*, 44 J. LEGAL STUD. 2, 417 (2015); Adam Chilton & Mila Versteeg, *Do Constitutional Rights Make a Difference?*, 60 AM. J. POL. SCI. 3 (2016); David S. Law & Mila Versteeg, *Sham Constitutions*, 101 CALIF. L. REV. 863, 865–66 (2013).

9. STEPHEN HOPGOOD, *THE ENDTIMES OF HUMAN RIGHTS* (2013); SAMUEL MOYN, *THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY* (2010); ERIC A. POSNER, *THE TWILIGHT OF HUMAN RIGHTS LAW* (2014).

rights practices. In essence, the correlations are insightful and constitute an important first step in exploring this topic, but leave numerous crucial questions unanswered.

This response focuses on two such unanswered questions. The first concerns the *mechanisms* through which history and geography affect contemporary human rights practices. Even though fixed geographic factors and historical events are probably exogenous to human rights practices, the correlations with those practices could be caused by intervening variables. For example, if historical factors cause economic development (as the development economics literature shows), and economic development affects respect for human rights (as the empirical repression literature shows), then history does not affect contemporary human rights directly but through an intervening mechanism—economic development. Part II of this response elaborates on this point and draws on the same development economics literature as Chilton and Posner to develop hypotheses for how fixed geographic and historical factors can affect rights. It suggests that, if we want to develop a research agenda that incorporates history into our understanding of contemporary human rights practices, we need theory to explain how fixed historic and geographic factors affects rights.

The second question raised by Chilton and Posner's article is whether historical trends can be reversed. One notable aspect of Chilton and Posner's findings is that the correlations, while in many cases statistically significant, are actually fairly low, meaning that natural and historical conditions explain only a small portion of the variation in contemporary human rights practices.¹⁰ This means that many other factors also shape contemporary rights. The empirical repression literature singles out many such factors, mostly contemporary in nature, such as democracy and civil war.¹¹ Part III of this response introduces another explanation: *critical junctures*. Critical junctures are transformative moments in a nation's history during which there exist opportunities to reverse deeply rooted historical trends. In the spirit of Chilton and Posner's article, this explanation takes seriously the idea that history matters. But unlike Chilton and Posner, who focus on path dependence, this approach identifies opportunities for change. Indeed, critical junctures are both a historically focused explanation of contemporary rights practices and a possible explanation for why

10. The statistically significant correlations range from -0.17 to 0.40. See Chilton & Posner, *supra* note 1, app; see also, Yonatan Lupu, *Explaining Human Rights Abuses: Comparing Contemporary Factors and Historical Factors*, 56 VA. J. INT'L L. 481, 496 (2016) (finding that most of the historical variables in Chilton & Posner's analysis do not independently explain human rights after controlling for contemporary variables, while singling out settler mortality and European share of the population as exceptions).

11. For an overview, see LINDA CAMP KEITH, *POLITICAL REPRESSION: COURTS AND THE LAW* 29–53 (2012).

historical variables ultimately explain only a small portion of the variation in countries' rights records. What is more, the notion of critical junctures is central to the development economics literature on which Chilton and Posner rely to develop their hypotheses.¹² If human rights scholarship is to take history seriously (and I agree with Chilton and Posner that it should), it should include critical junctures, as well as path dependence.

The study of critical junctures can provide important insights into how deeply rooted historical and institutional obstacles can be overcome. Part III illustrates this point by exploring the development of gay rights in Argentina and South Africa, two countries with long histories of conservative sexual norms and repressive anti-gay laws, which nonetheless became global trailblazers on gay rights. Granted, these two cases were selected because they represent success stories, and thus they have limited external validity. Nonetheless, they provide important insights into the pathways through which historical trends can be reversed. Such insights can subsequently be tested in statistical cross-country studies like Chilton and Posner's. Moreover, they hold important lessons for reformers seeking to bring about change. Thus, it is through the study of critical junctures that we gain insight into how nations can overcome their histories.

II. HUMAN RIGHTS, HISTORY, AND MECHANISMS

In developing their hypotheses on the historical and geographic roots of contemporary human rights, Chilton and Posner draw on a body of literature generated by development economists.¹³ Because of this, for every historical, geographic, or other structural variable that Chilton and Posner say predicts contemporary human rights, economists have previously found that this variable also predicts contemporary economic development. Yet, while economists have done substantial work in theorizing the channels through which these variables impact current income levels, Chilton and Posner make only a limited attempt to do the same for human rights. To understand how historical and fixed geographic conditions affect rights, we need more theory.

The most likely mechanism implicated by Chilton and Posner's findings is economic development. Specifically, it seems plausible that natural and historical conditions shape current income levels, which in turn affect respect for rights. Such an explanation is consistent not only with the economics literature on which Chilton and Posner draw, but also with empirical studies on government repression, which have consistently shown

12. See, e.g., Daron Acemoglu et al., *Income and Democracy*, 98 AM. ECON. REV. 808, 836 (2008).

13. See Enrico Spolaore & Romain Wacziarg, *How Deep Are the Roots of Economic Development?*, 51 J. ECON. LITERATURE 325 (2013).

that GDP per capita is positively correlated with human rights.¹⁴ It is also consistent with Professor Posner's previous work, which has emphasized that economic development is conducive to rights.¹⁵ Although Chilton and Posner's concluding thoughts dismiss this explanation,¹⁶ their bivariate-correlation-structured research design does not allow them to rule it out empirically. What is more, the practical implications are significant: if the effect that Chilton and Posner find works through economic development, human rights practitioners can focus on promoting economic development. By contrast, if immutable features such as settler mortality or latitude affect human rights directly, there is much less hope for improving rights practices.

Of course, conceptualizing and testing the mechanisms through which historical factors affect contemporary economics and politics is a difficult task, as the economics literature illustrates. Take the example of geography (geography, of course, is not a historical factor, but Chilton and Posner include it because it is a fixed condition with potentially long-term effects). Theories on geography and economic development trace back at least to Enlightenment scholars like Montesquieu and Hume.¹⁷ In the early twentieth century, European and American scholars put forward climate as the dominant determinant of the "ranking of civilizations."¹⁸ While these early theories are now largely discredited, the link between the two remains a highly contested subject in contemporary development economics. Some economists believe that geography affects economic development directly: tropical countries, for example, have low agricultural productivity and a high burden of diseases, such as malaria, which hurts their economic performance.¹⁹ Others suggest that geographical conditions from prehistoric times gave the inhabitants of Eurasia important advantages ("guns, germs, and steel"), which boosted their economies and allowed them

14. See, e.g., Gerald J. Blasi & David Louis Cingranelli, *Do Constitutions and Institutions Help Protect Human Rights?*, in HUMAN RIGHTS AND DEVELOPING COUNTRIES 223, 225–26 (Stuart S. Nagel & David Louis Cingranelli eds., 1996); Adam Chilton & Mila Versteeg, *supra* note 8; Steven C. Poe & Neal Tate, *Repression of Human Rights to Personal Integrity in the 1980s: A Global Analysis*, 88 AM. POL. SCI. REV. 853, 866 (1994).

15. Eric A. Posner, *Human Welfare, Not Human Rights*, 108 COLUM. L. REV. 1758 (2008); see also POSNER, *supra* note 9.

16. Chilton & Posner, *supra* note 1, at 261.

17. See Mike Hulme, *Reducing the Future to Climate: A Story of Climate Determinism and Reductionism*, 26 OSIRIS 245, 250 (2011).

18. *Id.* at 246; see also OOI JIN BEE, NATURAL RESOURCES IN TROPICAL COUNTRIES 10 (1983). During this time, geographer Ellsworth Huntington advanced a deterministic theory that people who lived in unfavorable climates faced disadvantages in comparison with people who lived nearer to the "climatic optima." *Id.* While his theory was subject to criticism from a number of scholars in the 1920s and 1930s, it was a popular source of support for Western colonial policies that operated under the assumption that "nothing could be done" to stimulate economic growth in the colonies. *Id.* at 11.

19. Jeffrey D. Sachs, *Tropical Underdevelopment* (Nat'l Bureau of Econ. Research, Working Paper No. 8119, 2001); Jeffrey Sachs & Pia Malaney, *The Economic and Social Burden of Malaria*, 415 NATURE 680 (2002).

to rule other parts of the world.²⁰ Yet others suggest that geographic conditions influenced the timing of societies' transitions to agriculture, which led to population growth and gave societies that transitioned earlier a comparative advantage over those that transitioned later.²¹ A number of others have suggested that geographic conditions affect economic growth through institutions: European settlers introduced productivity-enhancing institutions in regions where they faced low mortality rates due to favorable geographic conditions, and they established extractive institutions in colonies with high mortality rates due to unfavorable geographic conditions.²² The variety of explanations illustrates that, although the economics literature has done substantial work in theorizing mechanisms, the exact channel through which geography affects growth remains heavily debated.²³

Chilton and Posner's approach to this issue is relatively a-theoretical. For the effect of latitude, they simply suggest that since development economists have found a correlation between more temperate climates and wealth, there may also be a correlation between temperate climates and human rights.²⁴ In an earlier version of their paper, they suggested an explanation for this relationship, which is that "people who live in more temperate climates with more abundant resources are less likely to fight over resources, and are therefore more likely to respect each other's interests."²⁵ The result is that "countries with geographic advantages should also have stronger human rights."²⁶

This explanation is unsatisfactory for a number of reasons. First, some tropical climates offer a variety of renewable resources, such as arable land, fresh water, forests, and fisheries.²⁷ Before the colonial era, traditional societies utilized renewable resources solely to produce enough to survive; they had little incentive to produce surpluses.²⁸ While a focus on subsistence might hamper economic growth, it is unlikely to hamper rights. If anything, plentiful resources mean that people do not have to fight over resources, thus casting doubt on Chilton and Posner's explanation. Second, while it

20. See JARED DIAMOND, GUNS, GERMS AND STEEL: THE FATES OF HUMAN SOCIETIES (1997).

21. Quamrul Ashraf & Oded Galor, *Dynamics and Stagnation in the Malthusian Epoch*, 101 AM. ECON. REV. 2003 (2011).

22. Daron Acemoglu et al., *The Colonial Origins of Comparative Development: An Empirical Investigation*, 91 AM. ECON. REV. 1369 (2001).

23. Spolaore & Wacziarg, *supra* note 13, at 325.

24. Chilton & Posner, *supra* note 1, at 234.

25. Adam Chilton & Eric Posner, *The Influence of History on States' Compliance with Human Rights Obligations* (unpublished manuscript) (on file with author).

26. *Id.*

27. OOI JIN BEE, *supra* note 18, at 32 (citing Mexico, Kenya, and Sri Lanka, among others, as examples of countries with significant areas with renewable resources).

28. *Id.* at 33.

has long been observed that countries with more temperate climates industrialized first, it is not clear that this produced an improvement in rights practices. On the contrary, industrialization initially led to massive rights violations, such as the displacement of agrarian laborers through enclosure²⁹ and the exploitation of children for cheap labor,³⁰ before rights records improved. It is possible that human rights and economic development display a similar pattern to the Kuznets curve, the hypothesis that income inequality and economic development have an inverted, U-shaped relationship.³¹ According to this hypothesis, low-income countries must first incur greater inequality in order to become middle-income countries before they achieve lower inequality as high-income countries.³² Likewise, it may be that human rights abuses initially increase with economic development but then decrease as countries achieve a high level of development. This idea is consistent with Chilton and Posner's findings, but it suggests a much more complex pathway than the one suggested in their article. Third, the idea that geography causes fighting over resources suggests that people violate each other's rights, which is conceptually distinct from a government itself violating rights. The data Chilton and Posner use capture rights violations by the government only and exclude private violations.³³ The mechanism they identify is therefore disconnected from the effect they measure.

The final, and perhaps most important, reason to doubt that geography directly affects rights is that geography is stable, while human rights violations are not. If geography directly impacts human behavior in a way that directly causes rights violations (e.g., fighting over resources), we would expect human rights practices to be somewhat stable, as geography (long-term climate change aside) does not change. If, by contrast, rights practices

29. See, e.g., J.M. NEESON, COMMONERS: COMMON RIGHT, ENCLOSURE AND SOCIAL CHANGE IN ENGLAND, 1700–1820 329 (1996) (observing that the English Parliament enclosed around thirty percent of all agricultural land in England between 1750 and 1820, which caused disruption in the employment of farm servants, laborers, and women); see also J.L. HAMMOND & BARBARA HAMMOND, THE VILLAGE LABOURER, 1760–1832: A STUDY IN THE GOVERNMENT OF ENGLAND BEFORE THE REFORM BILL 105 (1911).

30. Stuart N. Hart, *From Property to Person Status: Historical Perspective on Children's Rights*, 46 AM. PSYCHOLOGIST 53, 54 (1991); see also Clark Nardinelli, *Child Labor and the Factory Acts*, 40 J. ECON. HIST. 739, 739 (1980).

31. See generally Simon Kuznets, *Economic Growth and Inequality*, 45 AM. ECON. REV. 1 (1955). See also François Nielsen & Arthur S. Alderson, *The Kuznets Curve and the Great U-Turn: Income Inequality in U.S. Counties, 1970 to 1990*, 62 AM. SOC. REV. 12, 12 (1997).

32. Sailesh K. Jha, *The Kuznets Curve: A Reassessment*, 24 WORLD DEV. 773, 773 (1996).

33. DAVID L. CINGRANELLI ET AL., THE CINGRANELLI-RICHARDS (CIRI) HUMAN RIGHTS DATA PROJECT CODING MANUAL 4 (2014), available at <https://drive.google.com/file/d/0BxDpF6GQ-6fbWkpxTDZCQ01jYnc/edit> (“The CIRI Human Rights Data Project codes only the human rights *practices* of governments. Human rights practices are the human rights-related actions of a government and any and all of its agents, such as police or paramilitary forces.”).

change dramatically over time, geography might merely impact rights indirectly, or not at all. This is the insight from a study by Professors Acemoglu, Johnson, and Robinson, who suggest that remarkable “reversals of fortune” in economic wealth since the year 1500 indicate that geography does not affect economic growth directly.³⁴ We have likewise seen marked reversals of fortune in human rights. Some countries have seen radical improvements: South Africa, for example, transitioned from an abusive apartheid regime to one of the more rights-respecting countries in the region.³⁵ Conversely, attitudes towards same-sex sexual activity were much more permissive in the Ancient Roman Empire than in High Medieval Europe, even though geography remained unchanged.³⁶ Similarly, the Ottoman Empire’s millet system allowed tolerance between religious groups to flourish for centuries,³⁷ but some of the Empire’s descendants, such as Bosnia-Herzegovina³⁸ and Israel/Palestine,³⁹ were sites of violent religious conflict during the past century. Likewise, women’s rights deteriorated after the fall of communism,⁴⁰ especially in places where Islamic regimes replaced communist governments.⁴¹ While these are mere anecdotes, history suggests that human rights practices are anything but static. It is no surprise, then, that Professor Lupu’s empirical analysis presented in this same issue of the

34. Daron Acemoglu et al., *Reversal of Fortune: Geography and Institutions in the Making of the Modern World Income Distribution*, 117 Q. J. ECON. 1231, 1231 (2002) (finding that “[a]mong countries colonized by European powers during the past 500 years, those that were relatively rich in 1500 are now relatively poor” and that “[t]his reversal weighs against a view that links economic development to geographic factors”).

35. See FREEDOM HOUSE, FREEDOM IN THE WORLD 21–25 (2015), available at https://freedomhouse.org/sites/default/files/01152015_FIW_2015_final.pdf (rating South Africa as the greatest respecter of political rights and civil liberties in Southern Africa); SUSAN BOOYSEN, FREEDOM HOUSE, TWENTY YEARS OF SOUTH AFRICAN DEMOCRACY: CITIZEN VIEWS OF HUMAN RIGHTS, GOVERNANCE AND THE POLITICAL SYSTEM 11 (2014).

36. According to historian John Boswell, Roman society generally viewed homosexuality “as an ordinary part of the range of human eroticism.” JOHN BOSWELL, CHRISTIANITY, SOCIAL TOLERANCE, AND HOMOSEXUALITY: GAY PEOPLE IN WESTERN EUROPE FROM THE BEGINNING OF THE CHRISTIAN ERA TO THE FOURTEENTH CENTURY 333 (1980). Tolerance for homosexuality began to disappear during the decline of the Roman Empire. *Id.* Acceptance of homosexuality reappeared to a significant extent during the early Middle Ages, but eventually disappeared again and was replaced by “virulent hostility” during the High Middle Ages. *Id.* at 334.

37. See Will Kymlicka, *Two Models of Pluralism and Tolerance*, in TOLERATION: AN ELUSIVE VALUE 81, 85 (David Heyd ed., 1996); Karen Barkey, *Islam and Toleration: Studying the Ottoman Imperial Model*, 19 INT’L J. POL. CULTURE & SOC’Y 5, 8 (2005).

38. See, e.g., MITJA VELIKONJA, RELIGIOUS SEPARATION AND POLITICAL INTOLERANCE IN BOSNIA-HERZEGOVINA 288 (Rang’ichi Ng’inja trans., 2003).

39. See, e.g., NEIL CAPLAN, THE ISRAEL-PALESTINE CONFLICT: CONTESTED HISTORIES 39 (2009).

40. See, e.g., Janet Elise Johnson & Aino Saarinen, *Twenty-First-Century Feminisms Under Repression: Gender Regime Change and the Women’s Crisis Center Movement in Russia*, 38 SIGNS 543, 543 (2013); Vesna Nikolic-Ristanovic, *Post-Communism: Women’s Lives in Transition*, 76 FEMINIST REV. 2, 2 (2004).

41. Huma Ahmed-Ghosh, *A History of Women in Afghanistan: Lessons Learnt for the Future or Yesterdays and Tomorrow: Women in Afghanistan*, 4 J. INT’L WOMEN’S STUD. 1, 6–7 (2003) (describing the case of Afghanistan).

Virginia Journal of International Law confirms that geography affects contemporary human rights indirectly at best.⁴² Thus, to the extent that Chilton and Posner suggest that geography affects human rights directly, this is not corroborated by the evidence. We need significantly more theory and more fine-grained empirical analysis before we can conclude that geography is linked to rights.

Similar conceptual confusion surrounds the claim that the share of European settlers in ancestor populations affects rights. Economists have proposed different explanations for why countries with a larger share of European settlers around the year 1500 have better economic performance today.⁴³ First, when faced with smaller indigenous populations, colonizers cannot simply exploit the indigenous population, but rather must work the land themselves, which leads to relative economic equality.⁴⁴ Second, Europeans brought with them knowledge and experience.⁴⁵ A study by Easterly and Levine finds that European ancestry matters, even after controlling for institutions in general, suggesting that Europeans brought particular human capital, which gave their societies a comparative advantage.⁴⁶ Yet, here again, relatively little is known about the exact mechanisms. As the authors acknowledge, “there are many other things that Europeans carried with them besides general education, scientific and technological knowledge, access to international markets, and human capital creating institutions.”⁴⁷ According to Easterly and Levine, “They also brought ideologies, values, social norms and so on [and] [i]t is difficult for us to evaluate which of these were crucial either alone or in combination.”⁴⁸

This brings to the fore the question of how European settlers in the year 1500 might have affected contemporary rights (other than through contemporary economic development). Whatever these settlers brought with them, it was not a tradition of respect for rights. In Europe at the end of the medieval period, absolutism was on the rise, gradually replacing the

42. Lupu, *supra* note 10, at 496 (finding that, of the various variables used by Chilton and Posner, only settler mortality and European share of population during colonization independently explain current human rights practices, while all other variables, including geography, have an impact through contemporary factors).

43. Louis Putterman & David Weil, *Post-1500 Population Flows and the Long-Run Determinants of Economic Growth and Inequality*, 125 Q. J. ECON. 1627 (2010); William Easterly & Ross Levine, *The European Origins of Economic Development* (Nat'l Bureau of Econ. Research, Working Paper No. 18162, 2012).

44. See DARON ACEMOGLU & JAMES ROBINSON, *WHY NATIONS FAIL* 25–26 (2013).

45. Spolaore & Wacziarg, *supra* note 13, at 338.

46. Easterly & Levine, *supra* note 43; see also Edward L. Glaeser et al., *Do Institutions Cause Growth?*, 9 J. ECON. GROWTH 271 (2004).

47. Easterly & Levine, *supra* note 43, at 27.

48. *Id.*

feudalist systems of the Middle Ages.⁴⁹ Most people suffered from poverty,⁵⁰ illiteracy,⁵¹ disease,⁵² and oppression under the landed elites.⁵³ Although historians stand somewhat divided on the issue,⁵⁴ many believe that the modern notion of individual human rights had not yet emerged.⁵⁵ In pre-enlightenment Europe, life was “poor, nasty, brutish and short”⁵⁶ (to use Hobbes’s famous description of societies without social contracts).

Chilton and Posner’s explanation for how European settlers in 1500 affected contemporary rights is that they brought “institutions” that were conducive to rights.⁵⁷ They specifically point to “independent judiciaries” and “legislative veto players” as institutions that improve rights.⁵⁸ There is reason to doubt this explanation: First, the economics literature suggests an effect of European settlers on development, even after controlling for institutions, which suggests that Europeans brought something else of value, which many believe is human capital. The question, then, is whether this human capital also affected contemporary human rights. Second, even if Europeans did introduce rights-conducive institutions, the kind of institutions that Chilton and Posner envision promoting respect for human rights—-independent judiciaries and veto players—can hardly have been carried to the new world by European settlers, as these institutions were not then common in Europe. In England, for example, judicial independence and a quasi-independent parliament emerged as a byproduct of the Glorious

49. See Frantisek Graus, *From Resistance to Revolt: The Late Medieval Peasant Wars in the Context of Social Crisis*, in, *THE GERMAN PEASANT WAR OF 1525* 1, 9 (Janos Bak ed., 1976); THOMAS ERTMAN, *BIRTH OF THE LEVIATHAN: BUILDING STATES AND REGIMES IN MEDIEVAL AND EARLY MODERN EUROPE* 90 (1997) (“It was during the century and a half between the French invasion of Italy in 1494 and the Peace of the Pyrenees in 1659 that . . . absolutism . . . became firmly entrenched across [Western Europe].”); NICHOLAS HENSHALL, *THE MYTH OF ABSOLUTISM: CHANGE & CONTINUITY IN EARLY MODERN EUROPEAN MONARCHY* 124 (1992).

50. See H.G. KOENIGSBERGER ET AL., *EUROPE IN THE SIXTEENTH CENTURY* 93 (2d. ed. 1999) (by 1500 “half the population of nearly every European city” lived on the poverty line); J.L. Van Zanden, *Tracing the Beginning of the Kuznets Curve: Western Europe During the Early Modern Period*, 48 *ECON. HIST. REV.* 643, 645 (1995).

51. See R.A. HOUSTON, *LITERACY IN EARLY MODERN EUROPE: ITS GROWTH, USES AND IMPACT, 1500-1800* 141 (2d ed. 2002).

52. KOENIGSBERGER ET AL., *supra* note 50, at 87–88.

53. *Id.*, at 2–3.

54. Devin O. Pendas, *Toward a New Politics? On the Recent Historiography of Human Rights*, 21 *CONTEMP. EUR. HIST.* 95, 95 (2012) (discussing why historians have a difficult time deciding when human rights “emerged”).

55. See MICHELINE R. ISHAY, *THE HISTORY OF HUMAN RIGHTS: FROM ANCIENT TIMES TO THE GLOBALIZATION ERA* 7 (2004) (“[T]he legacy of the European Enlightenment, for our current understanding of human rights, supersedes other influences.”); LYNN HUNT, *INVENTING HUMAN RIGHTS: A HISTORY* 17 (2008) (arguing that for “nearly two centuries . . . the Declaration of the Rights of Man and Citizen incarnated the promise of universal human rights”).

56. THOMAS HOBBS, *LEVIATHAN* 149 (Edwin Curley ed., Hackett Publishing 1994) (1668).

57. Chilton & Posner, *supra* note 1, at 239 (“European settlers created institutions in the areas they colonized” and “larger European populations created more substantial institutions.”).

58. *Id.* at 240.

Revolution, which occurred two centuries after the events reflected in the settler data used by Chilton and Posner.⁵⁹

This observation raises a broader point on institutions. The idea that history affects human rights through institutions appears throughout Chilton and Posner's article. In discussing the relationship between settler mortality and rights, Chilton and Posner offer institutions as an explanation for contemporary rights practices.⁶⁰ The concept of institutions, however, is notoriously imprecise. Douglas North's famous definition—"humanly devised constraints that structure political, economic and social interaction"—is broad enough to encompass laws, practices, and norms of very different natures.⁶¹ Chilton and Posner's explanations focus on political institutions: independent judiciaries and veto players.⁶² The economics literature that motivates Chilton and Posner's paper, however, focuses not on political institutions but on *economic* institutions.⁶³ The empirical measures of institutions used in this literature nearly always capture the protection of private property rights and private contracts.⁶⁴ The theoretical literature likewise focuses on economic institutions. The core idea is that where colonizers encountered adverse geographic conditions or large indigenous populations, instead of incentivizing native peoples to accept work

59. See, e.g., Edward L. Glaeser & Andrei Shleifer, *Legal Origins*, 117 Q. J. ECON. 1193, 1193–97 (2002) (noting that only after the abolition of the Star Chamber in 1641 and the Act of Settlement of 1701, “judicial independence was an undisputed element of the English legal system”); see also FRIEDRICH HAYEK, *THE CONSTITUTION OF LIBERTY* 143 (1960); Daniel M. Klerman & Paul G. Mahoney, *The Value of Judicial Independence: Evidence from Eighteenth Century England*, 7 AM. L. & ECON. REV. 1, 6 (2005); Douglass C. North & Barry R. Weingast, *Constitutions and Commitment: The Evolution of Institutions Governing Public Choice in Seventeenth-Century England*, 49 J. ECON. HIST. 803 (1989). Some observe that judicial independence emerges even later. See James Hyre, *The United Kingdom's Declaration of Judicial Independence: Creating a Supreme Court to Secure Individual Rights Under the Human Rights Act of 1998*, 73 FORDHAM L. REV. 423 (2004); Irving R. Kaufman, *The Essence of Judicial Independence*, 80 COLUM. L. REV. 671, 678 (1980); Martin Shapiro, *Judicial Independence: The English Experience*, 55 N.C. L. REV. 577, 622 (1976). A body of literature suggests that such judicial independence did not emerge to the same extent in civil law countries. See, e.g., Glaeser & Shleifer, *supra* note 59. But see JOHN HENRY MERRYMAN & ROGELIO PEREZ-PERDOMO, *THE CIVIL LAW TRADITION: AN INTRODUCTION TO THE LEGAL SYSTEMS OF EUROPE AND LATIN AMERICA* (3d ed. 2007) (suggesting that civil law judges were too independent prior to the Enlightenment era, which is why the French revolution changed their fortune).

60. Chilton & Posner, *supra* note 1, at 240. Chilton and Posner also offer it as an explanation for why the share of European settlers matters and as a possibility for why geography matters. *Id.* at 235, 241.

61. Douglass C. North, *Institutions*, 5 J. ECON. PERSP. 97, 97 (1991).

62. Chilton & Posner, *supra* note 1, at 241–42.

63. ACEMOGLU & ROBINSON, *supra* note 44, *passim* (generally referring to “economic institutions and incentives,” including “secure property rights”).

64. Stephan Haggard et al., *The Rule of Law and Economic Development*, 29 ANN. REV. POL. SCI. 205, 206 (2008) (reviewing the literature and noting that studies on “the institutional underpinnings of long-run growth” focus on “property rights and the security of contract”).

voluntarily, colonizers obtained labor capital by coercing the native groups.⁶⁵ By contrast, where colonizers encountered more favorable conditions or small indigenous populations, the colonizers worked the land themselves, which meant that they protected private contracts and created strong property rights and other economic institutions that incentivized settlers to work.⁶⁶ According to economists, then, the resulting “good” institutions were economic in nature.

This raises the question of how such *economic* institutions affect contemporary rights. It is worth mentioning that the contemporary human rights movement has an uneasy relationship with private property. While the Universal Declaration of Human Rights protects the right to property, private property rights are notoriously excluded from both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social, and Cultural Rights.⁶⁷ Private property is often seen as an instrument of “privilege” that excludes the masses that do not possess it;⁶⁸ accordingly, there is some resistance to accepting the right to property as a human right.⁶⁹ One conjecture raised by Chilton and Posner’s analysis is that human rights advocates are simply wrong about their aversion to private property and that private property is the foundation for contemporary human rights. This conjecture, indeed, seems somewhat plausible: without private property rights, people do not own the land they work on, cannot get a loan to start a business, will not have the resources to send their children to school, and might be insufficiently empowered to rally against their government in the face of repression.⁷⁰ To my knowledge, the empirical literature on government repression has not explored the effect of

65. See, e.g., ACEMOGLU & ROBINSON, *supra* note 44, at 19 (observing that the Spanish created “a web of institutions designed to exploit the indigenous peoples” in the regions of the Americas with large indigenous populations); *id.* at 248 (stating that the Dutch colonizers took over the system of forced labor that already existed in Ambon in order to extract resources from the island).

66. *Id.* at 23–26 (observing that the Virginia Company decided to grant incentives to colonists to work the land only after it realized that it could coerce neither the local indigenous population nor the colonists); *id.* at 281–82.

67. See THEO R.G. VAN BANNING, *THE HUMAN RIGHT TO PROPERTY* 46 (2001) (noting a general lack of agreement during the drafting process regarding “almost every aspect of the right to property”).

68. See Ioana Cismas, *The Intersection of Economic, Social, and Cultural Rights and Civil and Political Rights*, in *ECONOMIC, SOCIAL, AND CULTURAL RIGHTS IN INTERNATIONAL LAW: CONTEMPORARY ISSUES AND CHALLENGES* 448, 467 (Eibe Riedel et al., eds., 2014).

69. See, e.g., A.J.M. MILNE, *HUMAN RIGHTS AND HUMAN DIVERSITY: AN ESSAY IN THE PHILOSOPHY OF HUMAN RIGHTS* 147 (arguing that there are “no grounds for regarding ‘private’ property as a human right”); VAN BANNING, *supra* note 67, at 44 (noting that Denmark objected to the inclusion of the right to property in the ICCPR because it was not a “fundamental” human right). *But see* Tim Wilson, *Property Rights Are Human Rights*, 67 *INST. PUB. AFF. REV.* 28 (2015).

70. See HERNANDO DE SOTO, *THE MYSTERY OF CAPITAL: WHY CAPITALISM TRIUMPHS IN THE WEST AND FAILS EVERYWHERE ELSE* 74–75 (2000).

private property rights on government repression.⁷¹ If it turns out that property rights cause respect for human rights, this would not only upset conventional understandings in the human rights movement but also suggest a mechanism through which history affects contemporary human rights: historical forces create property rights, which in turn improve human rights.

III. HISTORY, HUMAN RIGHTS, AND CRITICAL JUNCTURES

Chilton and Posner rely on the methodological assumptions of a recent wave of development economics, which holds that the “[i]nstitutional pathways extending into the distant past” determine economic development today.⁷² More generally, this literature suggests that i) institutions matter, and ii) institutions are not a product of contemporary rational design but instead result from historical events that have become path dependent. These assumptions not only characterize a recent wave of scholarship in development economics but also an entire school of thought in the social sciences, often referred to as “historical institutionalism.”⁷³

Historical institutionalists believe that history matters and that initial conditions can become path dependent. Importantly, however, they also emphasize *critical junctures*, which do not feature in Chilton and Posner’s analysis. A critical juncture is “a crisis, or a serendipitous confluence of events or social pressures, that produces a new way of doing things.”⁷⁴ The notion of a critical juncture is important because it suggests that historical trends and patterns can be disrupted and that there exist opportunities for change. If current human rights practices indeed have deep historical roots, then critical junctures are tremendously important because they imply that society can uproot and reverse historical forces.

71. Indeed, the historical explanations provide an exogenous source of variation that allows researchers to causally identify the effect of private property rights.

72. Chilton & Posner, *supra* note 1, at 216.

73. See Elizabeth Sanders, *Historical Institutionalism*, in THE OXFORD HANDBOOK OF POLITICAL INSTITUTIONS 39, 39 (Rhodes et al., eds., 2008). Often attributed to the foundational work by March and Olsen, this literature first and foremost suggests that institutions matter in structuring human behavior as well as, according to development economists, economic growth. See J. G. March & J.P. Olson, *The New Institutionalism: Organizational Factors in Political Life*, 78 AM. POL. SCI. REV. 734 (1984). Historical institutionalists often contrast themselves with “rational choice” institutionalists. While they agree with rational choice institutionalists that institutions are important, they do not believe that institutions are rationally designed. Instead, they claim that institutions are developed through historical circumstances that can then become path dependent.

74. Sanders, *supra* note 73, at 39.

The idea of a critical juncture has been conceptualized in different ways.⁷⁵ One influential account, developed by Professor Paul Pierson, emphasizes that long-term patterns of social and economic development can build up tensions and conflicts, which can create transformative moments that political actors or advocacy groups can seize upon to place a country on a different path.⁷⁶ Much of the development economics literature that Chilton and Posner rely on regards critical junctures in this way: a confluence of geographic and demographic factors that caused colonizers to opt for a certain colonial strategy.⁷⁷ The moment of colonization, thus, was itself a critical juncture that put countries on different paths with long-term economic consequences. Other accounts de-emphasize the importance of long-term structural patterns in creating transformative moments and see critical junctures “as exogenous shocks that disrupt established patterns.”⁷⁸ One study by Acemoglu and co-authors, for example, shows that radical institutional reform imposed from the outside can have long-term positive effects. The study shows how the French Revolution, followed by the invasion of much of Europe by the French revolutionary armies in the 1790s, led to the imposition of a set of institutional reforms, such as the civil code, which had long-term positive effects on economic growth. In this case, the French Revolution and the conquest that followed were an exogenous shock that created a critical juncture and brought about lasting change.⁷⁹

These accounts are not mutually exclusive: long-term social and economic factors can invite exogenous shocks or fruitfully collide with such shocks to bring about change.⁸⁰ The important lesson is that long-term historical trends can be reversed during such transformative moments. At a critical juncture, many different paths of development are open and it is possible for countries to set out a new course. History reveals numerous examples of countries that have seen marked reversals in government repression.⁸¹ What is more, the empirical analysis in Professor Lupu’s

75. See Roger M. Smith, *Historical Institutionalism and the Study of Law*, in *THE OXFORD HANDBOOK OF LAW AND POLITICS* 46 (Keith E. Whittington et al. eds., 2008) (describing different types of historical institutionalism). This section relies on Smith’s classification.

76. PAUL PIERSON, *POLITICS IN TIME* (2004).

77. Acemoglu et al., *supra* note 12, at 813 (conceptualizing initial colonial policies as “critical junctures”).

78. Smith, *supra* note 75, at 50–51 (quoting KARREN ORREN & STEPHEN SKOWRONKEK, *THE SEARCH FOR AMERICAN POLITICAL DEVELOPMENT* 103 (2004)).

79. Daron Acemoglu et al., *The Consequences of Radical Reform: The French Revolution*, 101 *AM. ECON. REV.* 3286, 3304 (2011).

80. Smith, *supra* note 75, at 52 (describing the differences in emphasis of Pierson and Orren and Skowronkek, and concluding that “[t]hese differences in emphasis are no great chasm”).

81. Notably, Professor Lupu, in his contribution to this issue, finds that there is a substantial portion of countries that have much stronger human rights records than their history would suggest. See Lupu, *supra* note 10, at 489.

response essay shows that history is a poor predictor for the group of countries with the strongest human rights records.⁸² Specifically, he shows that there is a group of countries that perform much better than their history alone would suggest, meaning that they were somehow able to take a different path. Thus, if it is the case that historical forces affect contemporary human rights, then arguably the most important question is whether historical trends can be reversed.

In the remainder of this response, I will illustrate this question through two case studies that explain how South Africa and Argentina became global leaders on gay rights. In both cases, the history of these countries appears to be firmly set against recognition of gay rights. And yet, in 1993, South Africa became one of the first countries to constitutionally protect equality regardless of sexual orientation.⁸³ In 2010, Argentina became the first country in Latin America and the tenth country in the world to legalize gay marriage.⁸⁴ In both cases, it was the combination of democratic transition and advocacy efforts strategically using human rights discourse that caused these countries to take a different track. In South Africa, the end of apartheid and the re-writing of the constitution formed a critical juncture. The re-writing of the constitution alone was insufficient: an important factor that led South Africa's constitution-writers to protect gay right was the African National Congress's (ANC) acceptance of gay rights during the final years of apartheid—the direct result of advocacy efforts by gay and lesbian groups. In Argentina, the end of the military regime formed a critical juncture, which opened up a new space for human rights organizations. Unlike in South Africa, there were no thriving gay rights groups that could seize on this moment to bring about immediate change. Once democracy was established, such groups formed and used the nascent human rights discourse to build alliances with other human rights groups, allowing them to successfully push for legal reforms.

Of course, both cases are selected because they represent success stories. Thus, their insights might not generalize to other cases.⁸⁵ Yet, in

82. Lupu, *supra* note 10, at 490–92.

83. CHRIS DUNTON & MAI PALMBERG, HUMAN RIGHTS AND HOMOSEXUALITY IN SOUTHERN AFRICA 42 (1996); Eric C. Christiansen, *Ending the Apartheid of the Closet: Sexual Orientation in the South African Constitutional Process*, 32 INT'L L. & POL. 997, 997 (2000); Mark F. Massoud, *The Evolution of Gay Rights in South Africa*, 15 PEACE REV. 301, 301 (2003); Mwanawina Ilyayambwa, *Homosexual Rights and the Law: A South African Constitutional Metamorphosis*, 2 INT'L J. HUM. & SOC. SCI. 50, 51 (2012).

84. Omar G. Encarnación, *Latin America's Gay Rights Revolution*, 104 J. DEMOCRACY 104, 104 (2011); JORDI DíEZ, THE POLITICS OF GAY MARRIAGE IN LATIN AMERICA: ARGENTINA, CHILE, AND MEXICO 111 (2015); Jordi Díez, *Argentina: A Queer Tango Between the Lesbian and Gay Movement and the State*, in THE LESBIAN AND GAY MOVEMENT AND THE STATE: COMPARATIVE INSIGHTS INTO A TRANSFORMED RELATIONSHIP 13, 13 (Manon Tremblay et al. eds., 2011); Karalena McLean, *"Queerly Beloved, We Are Gathered Here Today . . .": An Examination of the Extension of Rights to Sexual Minorities in Latin America*, 6 MAPPING POL. 54, 54 (2014).

85. See, Ran Hirschl, *The Question of Case Selection in Comparative Constitutional Law*, 53 AM. J. COMP. LAW 125, 153 (2005).

order to understand whether and how historical trends can be reversed and to explore critical junctures, it is necessary to study cases where there was a clear break from the past. It is these kinds of studies that can provide insights into the forces that create critical junctures and bring about change. Insights from such case studies can subsequently be tested using statistical approaches. One conjecture from the South African and Argentinian case, which can be tested in quantitative research, is that democratic transitions combined with strategic advocacy efforts can bring about change. Importantly, however, even if these findings do not generalize, they nonetheless provide important insights into strategies that can be successfully utilized to create and use critical junctures. For example, both the South African and Argentinian cases suggest that advocacy efforts by gay and lesbian groups who strategically use human rights discourse and form alliances with other progressive forces in society might be the key to uprooting historical trends.

A. South Africa

Judged by its history, South Africa was an unlikely candidate to become a global leader on gay rights. The history of South Africa, particularly since the colonial era, appeared to be firmly set against such a development. Pre-colonial African society was patriarchal, with “cultural imperatives toward heterosexual marriage” and “social disapproval” of same-sex sexual relations beyond adolescence.⁸⁶ Colonial rule brought outright condemnation and criminalization of same-sex sexual activities and relationships.⁸⁷ When the Dutch colonizers arrived in southern Africa in the seventeenth century, they introduced the Roman Dutch common law, which criminalized sodomy.⁸⁸ The Dutch colonial authorities commonly used these laws to prosecute people,⁸⁹ a practice that continued under British rule and after independence.⁹⁰ From the 1950s to the 1970s, the first three decades of apartheid, the police regularly used the sodomy laws to

86. Marc Epprecht, “Unnatural Vice” in *South Africa: The 1907 Commission of Enquiry*, 34 INT’L J. AFR. HIST. STUD. 121, 121 (2001). *But see* MARC EPPRECHT, HUNGOCHANI: THE HISTORY OF A DISSIDENT SEXUALITY IN SOUTHERN AFRICA 224 (2d. ed. 2013).

87. EPPRECHT, *supra* note 86, at 225.

88. Ryan Goodman, *Beyond the Enforcement Principle: Sodomy Laws, Social Norms, and Social Panoptics*, 89 CALIF. L. REV. 643, 676 (2001).

89. Between 1705 and 1792, the Cape Town Court of Justice conducted around 150 sodomy trials against over 200 men. Jan Oosterhoff, *Sodomy at Sea and at the Cape of Good Hope During the Eighteenth Century*, in THE PURSUIT OF SODOMY: MALE HOMOSEXUALITY IN RENAISSANCE AND ENLIGHTENMENT EUROPE 229, 230 (Kent Gerard & Gert Hekma eds., 1989). Note, however, that the crime of sodomy included a broader set of sexual practices than its contemporary equivalent, including bestiality and masturbation. Goodman, *supra* note 88, at 676.

90. Goodman, *supra* note 88, at 678–79.

harass gay people.⁹¹ The ruling National Party viewed homosexuality as a “threat to white civilization”⁹² and even attempted to criminalize it as a “condition.”⁹³ While the enforcement of these laws declined after the 1970s,⁹⁴ the laws continued to make gay men and women “unapprehended felons” and legitimated violence against them.⁹⁵ Moreover, the development of gay organizations in the townships in the 1980s led to a backlash from black nationalists in the liberation movements who asserted that “homosex is not in black culture.”⁹⁶ In 1987, a London newspaper quoted Ruth Mompoti, a high-profile member of the ANC, as stating that homosexuals are “not normal” and that she could not “even begin to understand why people want lesbian and gay rights.”⁹⁷ This did not change during the final years of apartheid, and popular attitudes towards homosexuality in South Africa remained hostile.⁹⁸ While there were a number of groups that promoted rights for gays and lesbians, they enjoyed little popular support.⁹⁹

The end of apartheid formed a critical juncture—an exogenous shock to the development of gay rights. During this transformative moment, South Africa adopted a new constitution that sought to remedy and reverse the gross inequality that characterized the apartheid era. While it was clear that the new constitution would be heavily focused on human rights, it was far from clear that it would include gay rights, as popular opinion was firmly set against these rights. The reason why it ultimately did so was because other, longer-term, social forces were also at work. Specifically, in the final years of apartheid, the ANC had come to accept gay rights as part of its agenda for equality. The specifics of the drafting process then allowed the ANC to insert a provision into the interim constitution requiring equality regardless

91. *Id.* at 679.

92. Graeme Reid & Teresa Dirsuweit, *Understanding Systemic Violence: Homophobic Attacks in Johannesburg and its Surrounds*, 13 URBAN F. 99, 104 (2002).

93. Epprecht, *supra* note 86, at 122.

94. Goodman, *supra* note 88, at 679. *But see* Christiansen, *supra* note 83, at 1021 n.94 (sodomy prosecutions and convictions “occurred at a rate of hundreds each year” into the 1990s).

95. Edwin Cameron, ‘Unapprehended Felons’: *Gays and Lesbians and the Law in South Africa*, in *DEFIANT DESIRE: GAY AND LESBIAN LIVES IN SOUTH AFRICA* 89, 92 (Mark Gevisser & Edwin Cameron eds., 1995).

96. Mark Gevisser, *A Different Fight for Freedom: A History of South African Lesbian and Gay Organisation from the 1950s to the 1990s*, in *DEFIANT DESIRE: GAY AND LESBIAN LIVES IN SOUTH AFRICA*, *supra* note 95, at 14, 68–69. According to these nationalists, colonial forces imported homosexuality into black communities by “inhuman labour systems, perverse priests, and white gay activists looking to expand their constituency and the validity of their cause.” *Id.* at 69. This backlash is part of a larger tradition of African leaders claiming that homosexuality is “[u]n-African, inhuman and ultimately devastating for the African states.” Stephanie Rudwick, *Defying a Myth: A Gay Sub-Culture in Contemporary South Africa*, 20 NORDIC J. AFR. STUD. 90, 93 (2011).

97. Christiansen, *supra* note 83, at 1025.

98. *See id.* at 1000 (citing a 1987 survey of Cape Town residents that found that seventy-one percent believed that homosexuality was “morally wrong”).

99. *See id.* at 999–1000.

of sexual orientation, even though the majority of South Africans opposed this provision.¹⁰⁰ The remainder of this section describes these dynamics in greater detail.

In 1987, the controversy over Ruth Mompati's statements and the backlash they created from international anti-apartheid groups¹⁰¹ forced the ANC to address the rights of gays and lesbians.¹⁰² At the same time, gay and lesbian rights organizations with a "liberation-oriented" approach began to emerge.¹⁰³ Unlike earlier gay and lesbian groups, the new organizations explicitly denounced apartheid and linked gay rights to racial equality.¹⁰⁴ In 1988, Simon Nkoli, a black anti-apartheid activist, member of the ANC, and one of the most prominent gay activists in South Africa, founded the Gay Lesbian Organization of the Witwatersrand (GLOW) to focus specifically on the needs of black gays and lesbians.¹⁰⁵ Nkoli was imprisoned with high-ranking members of the United Democratic Front, a coalition of groups that led anti-apartheid efforts in the 1980s.¹⁰⁶ The anti-apartheid activities of activists like Nkoli helped to legitimize the movement for gay rights within the liberation movement.¹⁰⁷ Another factor that contributed to the ANC's acceptance of gay rights was its ideology of "non-racialism," which required a state in which "all the artificial barriers and assumption which kept people apart and maintained domination are removed."¹⁰⁸ The burden did not fall on gays and lesbians to morally justify their inclusion; rather, the burden was on anyone who argued for discrimination.¹⁰⁹ Gay rights activists in the liberation movement explicitly argued that anti-gay rhetoric and racist attitudes were comparable, in that they made some South Africans less than full citizens.¹¹⁰ Calls for the exclusion of gay rights in the constitution from religious authorities rang hollow in the face of "the vision of South Africa

100. Reid & Dirsuweit, *supra* note 92, at 103–04 (citing a 1995 national survey that found a plurality of South Africans were "anti-gay" and opposed to giving homosexuals equal rights in the constitution).

101. Mompati's comments immediately drew criticism from anti-apartheid groups in England, the Netherlands, and Scandinavia, some of which threatened to withdraw their support unless the ANC released an official retraction. Christiansen, *supra* note 83, at 1025.

102. *Id.* at 1044.

103. *Id.* at 1023; see also Thomas Brown, *South Africa's Gay Revolution: The Development of Gay and Lesbian Rights in South Africa's Constitution and the Lingering Societal Stigma Towards the Country's Homosexuals*, 6 ELON L. REV. 455, 463 (2014).

104. Christiansen, *supra* note 83, at 1023.

105. *Id.* at 1025.

106. Brown, *supra* note 103, at 464.

107. See *id.*; Christiansen, *supra* note 83, at 1023.

108. See Christiansen, *supra* note 83, at 1047 (citing Constitutional Committee, African National Congress, *A Discussion Document on Structures and Principles of a Constitution for Democratic South Africa*, 13–14 (1991)).

109. *Id.* at 1047–48.

110. *Id.* at 1048.

as a new diverse nation united in its racial, political, and religious differences.”¹¹¹

In response to such calls for equality, the ANC’s draft Bill of Rights of 1990 included sexual orientation as a protected category.¹¹² The specifics of the constitutional drafting process then allowed the ANC to enshrine this same provision in the constitution. The South African constitution-making process proceeded in two stages: First, an interim constitution was drafted, which was the product of a series of closed-door negotiations between the various political parties, chief among which were the ANC and the National Party.¹¹³ Second, a democratically elected Constitutional Assembly drafted a final constitution in a highly participatory process with significant input from the population at large.¹¹⁴ This final constitution, however, had to conform with thirty-four “inviolable” principles from the carefully negotiated interim constitution. This was ensured by a procedure in which the newly established Constitutional Court certified the final Constitution’s compatibility with the principles.¹¹⁵

This two-stage transition to democracy reflected the bargain struck between the ruling government and the liberation movements.¹¹⁶ In exchange for a democratic constitution-making process in the second stage, the ANC conceded to the National Party’s negotiated interim constitution, which ensured a government of national unity during the transition.¹¹⁷ The drafting process of the interim constitution functioned in accordance with the National Party’s wishes, while the drafting of the final constitution was more in line with the demands of the ANC.¹¹⁸ The extensive negotiations that occurred in the first stage of the drafting process created a significant amount of path dependency, such that even modifications backed by a majority of the Constitutional Assembly were difficult to pass.¹¹⁹ Because of this path-dependent process, the inclusion of sexual orientation protections in the 1990 Bill of Rights effectively ensured its inclusion in the final constitution.¹²⁰ Moreover, the drafting process of the equality provisions of

111. *Id.* at 1050.

112. *Id.* at 1053.

113. *See id.* at 1052; HEINZ KLUG, THE CONSTITUTION OF SOUTH AFRICA: A CONTEXTUAL ANALYSIS 23 (2010); Hassen Ebrahim & Laurel E. Miller, *Creating the Birth Certificate of a New South Africa: Constitution Making After Apartheid*, in FRAMING THE STATE IN TIMES OF TRANSITION: CASE STUDIES IN CONSTITUTION MAKING 111, 123 (Laurel E. Miller ed., 2010); Jeremy Sarkin, *The Drafting of South Africa’s Final Constitution from a Human-Rights Perspective*, 47 AM. J. COMP. L. 67, 68 n.12 (1999).

114. KLUG, *supra* note 113, at 52; Christiansen, *supra* note 83, at 1007–08; Ebrahim & Miller, *supra* note 113, at 127; Sarkin, *supra* note 113, at 70–71.

115. Christiansen, *supra* note 83, at 1004; *see also* KLUG, *supra* note 113, at 28.

116. Sarkin, *supra* note 113, at 68; Ebrahim & Miller, *supra* note 113, at 112.

117. KLUG, *supra* note 113, at 28.

118. Ebrahim & Miller, *supra* note 113, at 116.

119. *See* Christiansen, *supra* note 83, at 1052.

120. *Id.*

the final Bill of Rights involved only a small group of drafters.¹²¹ This allowed the “personal biases” of the drafters, which bent toward the inclusion of sexual orientation protections, to successfully overcome popular discontent with the provision.¹²²

Seen in this light, the inclusion of protections for sexual orientation in the 1996 South African Constitution was far from the natural result of growing popular support for gay rights in the country. Instead, the particular historical context of the drafting of the constitution was of critical importance. The rise of gay and lesbian advocacy organizations in the preceding decade, the radical antidiscrimination ideology of the ANC, and the ability of the drafters to resist popular sentiment were all important determinants for the anti-discrimination provision.

This provision has not remained a dead letter: in 1998, the South African Constitutional Court struck down the country’s sodomy laws in *National Coalition for Gay and Lesbian Equality v. Minister of Justice*.¹²³ In that case, the Court also expanded the definition of “sexual orientation” to cover bisexual and transsexual individuals.¹²⁴ In the same year, the Court ruled that gay people could serve in the military.¹²⁵ In 2002, the Constitutional Court overturned a statute that prevented gay couples from becoming guardians of children.¹²⁶ In 2005, in *Minister of Home Affairs v. Fourie*,¹²⁷ the Court ruled unanimously that gay couples have the right to marry under the South African Constitution.¹²⁸ The Court gave the South African Parliament one year to pass the legislation needed to enshrine this right.¹²⁹ When the Parliament passed the Civil Union Act in 2006, South Africa became the fifth country in the world to recognize same-sex marriage.¹³⁰ While these legal victories for gay rights advocates did not lead to widespread acceptance of gays and lesbians,¹³¹ South Africans are more accepting of homosexuality than residents of other countries in sub-Saharan Africa.¹³²

121. *Id.*

122. *Id.* at 1053–54 (“Indeed, the early public response to the Bill of Rights was overwhelmingly in favor of removing sexual orientation, and yet it remained. Many accusations that popular will was ignored have been leveled against the Assembly.”); *see also* Brown, *supra* note 103, at 467.

123. 1999 (1) SA 6 (CC) (S. Afr.).

124. MARK S. KENDE, CONSTITUTIONAL RIGHTS IN TWO WORLDS: SOUTH AFRICA AND THE UNITED STATES 136 (2010).

125. Louise Vincent & Simon Howell, ‘Unnatural’, ‘Un-African’ and ‘Ungodly’: Homophobic Discourse in Democratic South Africa, 17 *SEXUALITIES* 472, 473 (2014).

126. KENDE, *supra* note 124, at 141.

127. 2006 (1) SA 524 (CC) (S. Afr.).

128. KENDE, *supra* note 124, at 142.

129. *Id.* at 145.

130. Vincent & Howell, *supra* note 125, at 472 (2014).

131. *Id.* at 473.

132. A 2013 survey by the Pew Research Center found that thirty-two percent of South Africans believe homosexuality should be accepted by society. *The Global Divide on Homosexuality: Greater*

B. *Argentina*

Judged by its history, Argentina was also an unlikely candidate to become a global leader on gay rights. While Argentina decriminalized sodomy in 1886,¹³³ popular attitudes were firmly opposed to homosexuality and same-sex sexual activities were viewed as abnormal and a cause for medicalization.¹³⁴ With the rise of nationalism in the 1930s, hostility toward same-sex sexual activity gained strength.¹³⁵ Beginning in the 1930s, the police forces of Buenos Aires and other municipalities issued “edicts” that introduced penalties for same-sex sexual activity.¹³⁶ The police utilized the Buenos Aires edicts, which remained on the books until the 1990s, to systematically “repress, and to extort money from, homosexuals.”¹³⁷ In 1943, Argentina passed an electoral law that prohibited gay people from voting, running for office, and holding public sector jobs.¹³⁸ While these laws led to initial attempts by gay rights activists to mobilize in the 1960s,¹³⁹ repressive tactics by Isabel Perón,¹⁴⁰ as well as the seven years of state terrorism under military rule that followed her ouster in 1976 (The Dirty War), made it virtually impossible to do so.¹⁴¹ During the Dirty War, military leaders, adherents of a “virulently intolerant version of Catholicism,”¹⁴² harassed, imprisoned, abused, and even murdered those that they identified as “subversives.”¹⁴³ In 1982, Comando Cóndor, a paramilitary group,

Acceptance in More Secular and Affluent Countries, PEW RESEARCH CTR., (June 4, 2013), <http://www.pewglobal.org/2013/06/04/the-global-divide-on-homosexuality/>. By contrast, only eight percent of citizens of Kenya, the sub-Saharan African country with the next highest support for homosexuality, said that homosexuality should be accepted by society. *Id.*

133. Spain’s decriminalization of sodomy in the first half of the nineteenth century led many of its former colonies, including Argentina, to follow suit. Pablo Ben, *Male Same-Sex Sexuality and the Argentine State, 1880–1930*, in *THE POLITICS OF SEXUALITY IN LATIN AMERICA: A READER ON LESBIAN, GAY, BISEXUAL, AND TRANSGENDER RIGHTS* 33, 34 (Javier Corrales & Mario Pecheny eds., 2010).

134. DíEZ, *supra* note 84, at 75–76; *see also* Jorge Salessi, *The Argentine Dissemination of Homosexuality, 1890–1914*, 4 J. HIST. SEXUALITY 337 (1994).

135. DíEZ, *supra* note 84, at 76.

136. *Id.*; Ben, *supra* note 133, at 36.

137. DíEZ, *supra* note 84, at 76.

138. *Id.* at 76 n.1.

139. *See* Stephen Brown, “*Con Discriminación y Represión No Hay Democracia*”: *The Lesbian and Gay Movement in Argentina*, 29 LATIN AM. PERSP. 119, 120 (2002).

140. DíEZ, *supra* note 84, at 78.

141. *Id.* at 78–79; Brown, *supra* note 139, at 121.

142. Mark J. Osiel, *Constructing Subversion in Argentina’s Dirty War*, 75.1 REPRESENTATIONS 119, 128 (2001).

143. They primarily targeted leftists and intellectuals but directed their anti-subversive campaign toward gay people as well. DíEZ, *supra* note 84, at 79.

announced its intention to “wipe out” all gay people.¹⁴⁴ By the end of the conflict in 1983, over 400 gays and lesbians had been forcibly disappeared.¹⁴⁵

These developments might make it seem unlikely that Argentina would become a global trailblazer on gay rights. Here again, a critical juncture in the form of the end of a military dictatorship set in motion a new series of events that would alter the country’s historical trajectory. Unlike in South Africa, there were no strong existing gay advocacy groups that could immediately capitalize on the moment of change. Instead, the transition to democracy opened up a new space for advocacy groups that carefully built alliances with other human rights organizations, which helped them to press for legal protections. The remainder of this section elaborates on these developments.

The end of the military dictatorship and the reintroduction of democracy opened up a new space in Argentina for gay life and the gay rights movement.¹⁴⁶ The post-military dictatorship era in Argentina allowed the language of human rights and justice-seeking nongovernmental organizations (NGOs) to flourish.¹⁴⁷ Liberalization allowed many gay bars and clubs to open.¹⁴⁸ The repression of Argentinian gays and lesbians continued after democratization, but it led to a rebirth in gay activism.¹⁴⁹ In response to the arrest of fifty gay activists at a gay club in 1984, Argentinian gays and lesbians founded *Comunidad Homosexual Argentina* (the Homosexual Community, CHA).¹⁵⁰

The CHA, which would become the most visible gay organization in Argentina,¹⁵¹ built alliances with other groups that suffered under the repression of the military dictatorship during the Dirty War.¹⁵² The members of CHA explicitly linked gay rights to human rights and the consolidation of democracy.¹⁵³ Indeed, CHA’s inaugural motto was that the “free exercise of sexuality is a human right.”¹⁵⁴ Importantly, the CHA utilized lobbying and litigation to achieve its goals.¹⁵⁵ One of CHA’s first

144. Brown, *supra* note 139, at 121.

145. *Id.*

146. *Id.* at 123.

147. María García Andía, *Legal Mobilization and the Road to Same-Sex Marriage in Argentina*, in *SAME-SEX MARRIAGE IN LATIN AMERICA: PROMISE AND RESISTANCE* 131, 132 (Jason Pierceson et al. eds., 2012).

148. Brown, *supra* note 139, at 121.

149. *Id.*

150. *Id.*

151. DíEZ, *supra* note 84, at 80.

152. Brown, *supra* note 139, at 124.

153. DíEZ, *supra* note 84, at 82.

154. Encarnación, *supra* note 84, at 106. Unlike previous groups, which espoused a radical agenda of sexual liberation and the creation of a new order, the CHA sought recognition in and integration into mainstream Argentinian society. Brown, *supra* note 139, at 128.

155. Brown, *supra* note 139, at 128.

victories was its legal registration as an NGO in the early 1990s, which it achieved through lobbying then-president Carlos Menem following an unsuccessful case at the Argentinian Supreme Court.¹⁵⁶ By 1992, the gay rights movement in Argentina had sufficiently increased in strength and visibility that the first gay pride parade was held in Buenos Aires.¹⁵⁷

The gay rights movement achieved a series of progressive legal victories in the 1990s and 2000s, which paved the way for the legalization of gay marriage in 2010. In 1994, Argentina passed a constitutional amendment which added new provisions on nondiscrimination and socioeconomic rights, allowed for the use of *amparo* to bring claims before the courts, and provided for the devolution of policymaking powers to Buenos Aires.¹⁵⁸ These changes, especially the allocation of new powers to Buenos Aires, created new ways for activists to push for gay rights.¹⁵⁹ CHA immediately capitalized on Buenos Aires's newly granted autonomy by calling for a revision to the city's code and the repeal of the police edicts that allowed for the detention of gay people.¹⁶⁰ Following a two-year lobbying effort, the city's first legislature promulgated a new Contravention Code in 1998 that removed homosexuality as a cause for detention.¹⁶¹ Inspired by the adoption of same-sex civil unions in France and several regions in Spain, the CHA adopted as its next goal same-sex civil unions.¹⁶² CHA activists framed their demand for civil unions in the language of human rights and allied themselves with governmental organizations involved in human rights, such as the Deputy-Ministry of Human Rights, the Buenos Aires Human Rights Commission, and the Human Rights Ombudsperson's Office.¹⁶³ The CHA's framing of the civil union issue in human rights terms was effective in winning over hesitant legislators, largely because of the significance of human rights in post-transition Argentina.¹⁶⁴ Buenos Aires adopted same-sex civil unions in early 2002.¹⁶⁵ After these victories in Buenos Aires, the CHA initiated campaigns to adopt civil unions and remove police edicts in provinces and cities across the country. By 2012, all of the remaining Argentinian provinces had rescinded their police edicts.¹⁶⁶

156. DÍEZ, *supra* note 84, at 84.

157. *Id.*

158. *Id.* at 116; Andía, *supra* note 147, at 131.

159. DÍEZ, *supra* note 84, at 122 (observing that the politics of the city of Buenos Aires carry great weight in national conversations).

160. *Id.* at 116.

161. *Id.*

162. *Id.* at 118–19.

163. *Id.* at 120.

164. *Id.* at 120–21.

165. *Id.* at 122.

166. *Id.* at 124.

While initial efforts to expand civil unions outside of Buenos Aires were largely unsuccessful, the Spanish Social Party's approval of gay marriage in 2005 inspired activists to push for national recognition of gay marriage in Argentina.¹⁶⁷ In 2006, five gay and trans advocacy organizations created the LGBT Federation, which had gay marriage and adoption as its first objective.¹⁶⁸ The Federation decided to utilize the courts to achieve this goal, primarily through the use of *amparos* in which gay individuals demanded the right to be married. For each *amparo*, the Federation sought sympathetic couples from different cultural groups and prepared and coached them for dealing with the media.¹⁶⁹ Although these cases were ultimately unsuccessful in court, they had a substantial "media impact" and began a national debate on gay marriage.¹⁷⁰ In October 2009, two high-ranking members of the Argentinian House of Representatives each created a draft gay marriage law and placed them on the legislative agenda.¹⁷¹ The next year, a same-sex marriage bill was signed into law.¹⁷²

Argentina's adoption of same-sex marriage in 2010 likely would have seemed unfathomable only a few decades earlier. After a long history of police abuse and harassment in Argentina, gays and lesbians were the target of brutal repression under the military dictatorship. The return of democracy in 1983 marked a dramatic shift in Argentina's national trajectory and gave gays and lesbians the opportunity to organize and push for greater tolerance. Liberalization also allowed gay activists to link their claims to human rights and democratic consolidation, the watchwords of post-transition Argentina.¹⁷³ These claims helped gay rights activists achieve a series of victories in the 1990s and 2000s, which in turn served as critical precedents for the legalization of gay marriage in 2010. Not long after Argentina legalized gay marriage, the country adopted one of the most progressive transgender laws in the world.¹⁷⁴ Argentinians can now officially change their gender without the need for surgery or authorization from a physician or judge.¹⁷⁵ Most recently, Argentina lifted its ban on donations of blood from gay and bisexual men, which makes it one of the few countries in the world to assess blood donors based on personal risk.¹⁷⁶ And

167. *Id.* at 124, 127.

168. Andía, *supra* note 147, at 134.

169. *Id.* at 137–38.

170. *Id.* at 139–40.

171. *Id.* at 140.

172. *Id.* at 143.

173. Encarnación, *supra* note 84, at 108–09.

174. Omar G. Encarnación, *International Influence, Domestic Activism, and Gay Rights in Argentina*, 128 POL. SCI. Q. 687, 687 (2013).

175. *Id.*

176. Mark Joseph Stern, *Argentina Abolishes Gay Blood Ban*, SLATE (Sept. 17, 2015, 11:05AM), http://www.slate.com/blogs/outward/2015/09/17/argentina_gay_blood_ban_it_s_abolished.html.

seventy-four percent of the Argentinian public says that society should accept homosexuality, much higher than in the United States and closer to the levels of support seen in Western Europe.¹⁷⁷

IV. CONCLUSION

According to an old saying, “Those who ignore history are doomed to repeat it.”¹⁷⁸ Chilton and Posner draw our attention to history, which is an important corrective to a literature that almost exclusively concerns itself with temporary determinants of rights. As a first exploration of the subject, however, their study leaves many questions unanswered. This response has focused on two such questions: i) What are the mechanisms through which historical, geographic, and other structural forces affect contemporary rights practices? and ii) Is there anything that can be done to reverse long-standing historical trends? As the preceding discussion suggests, no single paper can answer all of these questions. Instead, these questions represent a research agenda aimed at understanding the historical determinants of human rights. It is my hope that future research will provide further insights into how history affects contemporary human rights, and how history can be overcome.

177. *The Global Divide on Homosexuality*, *supra* note 132.

178. Sanders, *supra* note 73, at 52.