

SEEKING JUSTICE FOR VICTIMS OF THE GUATEMALAN SEXUALLY TRANSMITTED DISEASE EXPERIMENTS 1946–1948

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Abstract

Between 1946 and 1948, researchers sponsored by the United States government intentionally exposed more than 1,300 Guatemalan men and women to sexually transmitted diseases without their informed consent. Many of the surviving victims and their descendants suffer from the effects of untreated syphilis, gonorrhea, and similar illnesses. But the general public did not become aware of these non-consensual human experiments for more than sixty years. After a researcher uncovered the experiments, the United States government apologized to the Guatemalan victims, but the victims received no compensation for their injuries. So far, the efforts of the victims to receive legal redress for their injuries have been unsuccessful.

This Article has two aims—one descriptive and the other conceptual. First, it seeks to bring awareness to the history and legacy of the Guatemalan sexually transmitted disease experiments. Second, it argues that litigation—even if unsuccessful—can play a role in amplifying the victims’ voices in a way that acknowledges their pain and helps to repair harm that was done. Even if the United States government is immune from formal legal liability, the government and the corporate interests that benefitted from the Guatemalan experiments, have a moral obligation to compensate the victims. The lens of reproductive justice makes clear this obligation. By critically investigating the Guatemalan sexually transmitted disease experiments and their legacy, one can better understand how gender, race, socioeconomic class, geopolitical power, and even geography informed the initial decision to conduct non-consensual human experimentation in that country and why the victims have been unable to obtain formal legal recognition for their suffering.

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INTRODUCTION

Between 1946 and 1948, researchers approved and funded by the United States government intentionally exposed over 1,300 people in Guatemala to sexually transmitted diseases without their informed consent.¹ The subjects of these unethical experiments were mostly prisoners, mental patients, sex workers, and members of the Guatemalan military. The United States researchers infected these patients with syphilis, gonorrhea, and chancroid without explaining to the patients what would happen to them, and in many cases, without offering treatment for the resulting diseases.² These sexually transmitted disease experiments came to light only in 2003, when a professor at Wellesley College presented the startling discovery she had made while conducting research on the infamous Tuskegee syphilis experiments.³ Professor Susan Reverby found copious records of the previously secret Guatemalan experiments among the papers of Dr. John Charles Cutler, one of principal investigators at the Tuskegee Institute.⁴ The Tuskegee experiments, which began in 1932, involved the intentional withholding of medical treatment for nearly thirty years—without the informed consent of the participants—from approximately 400 black, mostly poor men who were infected with syphilis.⁵ Professor Reverby presented her findings to the American Association for

¹ See Kayte Spector-Bagdady & Paul A. Lombardo, “*Something of an Adventure:*” *Postwar NIH Research Ethos and the Guatemala STD Experiments*, 41 J.L. MED. & ETHICS 697, 697 (2013).

² See Susan M. Reverby, *Restorative Justice and Restorative History for the Sexually Transmitted Disease Inoculation Experiments in Guatemala*, 106 AM. J. PUB. HEALTH 1163, 1163 (2016).

³ See SUSAN M. REVERBY, EXAMINING TUSKEGEE: THE INFAMOUS SYPHILIS STUDY AND ITS LEGACY (2009). Although some public health advocates began in the 1980s to advocate for the use of the less “serious” label of “sexually transmitted infections” to refer to a variety of infections, many leading medical groups consider the difference in the phrases to be semantic only. See, e.g., H. Hunter Handsfield, *Sexually Transmitted Diseases, Infections, and Disorders: What’s In a Name?*, 42 SEXUALLY TRANSMITTED DISEASES 169, 169 (2015) (“Today, STD and STI should be considered synonymous and interchangeable . . . Those who prefer either term should use it freely, with neither defensiveness nor pride in either one.”).

⁴ See Reverby, *supra* note 2, at 1163.

⁵ See CTRS. FOR DISEASE CONTROL AND PREVENTION, *Timeline, U.S. Public Health Service Syphilis Study at Tuskegee*, <https://www.cdc.gov/tuskegee/timeline.htm> [<https://perma.cc/NY9L-MV39>] [hereinafter *Timeline*]. In 1997, President Bill Clinton issued a public apology for the involvement of the United States government in these “morally wrong” experiments. CTRS. FOR DISEASE CONTROL AND PREVENTION, *Presidential Apology, U.S. Public Health Service Syphilis Study at Tuskegee*, <https://www.cdc.gov/tuskegee/clintonp.htm> [<https://perma.cc/9S67-F296>] [hereinafter *Presidential Apology*] (quoting President Clinton as saying, “The American people are sorry—for the loss, for the years of hurt. You did nothing wrong, but you were grievously wronged. I apologize and I am sorry that this apology has been so long in coming”).

the History of Medicine in 2003, and in 2010, President Obama issued a public apology to the President of Guatemala.⁶

This Article begins by exploring the background and significance of the Guatemalan sexually transmitted disease experiments. Part I places the research project in the context of the United States' relationship with Central American countries, and with Guatemala in particular, after World War II and during the beginning of the Cold War.⁷ This Part goes on to describe the nature of the non-consensual human experimentation conducted by the United States government in Guatemala, with the approval and cooperation of the host country.⁸ During this period, the United States government was conducting other non-consensual human medical experiments both domestically and abroad.⁹

Part II of this Article considers the ongoing efforts by victims of the Guatemalan sexually transmitted disease experiments (and their descendants) to access the United States legal system. Victims have brought two major lawsuits in United States courts, seeking financial compensation for physical harm that has been transmitted over several generations.¹⁰ A third case, a human rights claim, remains stalled before the Inter-American Commission of Human Rights Organization of American States.¹¹ But so far, justice remains elusive. Sovereign immunity and forum selection have presented challenges to those seeking restitution.

Part III of the Article frames the Guatemalan sexually transmitted disease experiments in the broader context of race and gender. It argues that the gross violations of Guatemalans' human rights remained out of the public record so long precisely because most of the subjects were of non-white, Latin American descent and since the

⁶ See Sushma Subramanian, *Worse Than Tuskegee*, SLATE (Feb. 26, 2017), http://www.slate.com/articles/health_and_science/cover_story/2017/02/guatemala_syphilis_experiments_worse_than_tuskegee.html [<https://perma.cc/2G7B-4A4N>] (providing a timeline graphic detailing the chronology of the Guatemalan experiments).

⁷ See *infra* Part I.A.

⁸ See *infra* Part I.B.

⁹ See *infra* Part I.C.

¹⁰ See *infra* Part II.A.–II.B.

¹¹ See *infra* Part II.C.

study involved a great number of women as vectors and victims of diseases.¹² The experimenters treated Guatemalan women as having “expendable” bodies (likely already diseased) that could be sacrificed for the allegedly greater “good” of finding a cure for a venereal disease common among male United States military personnel.¹³ Even when Guatemalan women were not directly the subject of the non-consensual experimentation, many were the wives or partners of men who were infected with sexually transmitted diseases during the experiments. Thus, the experiments should be understood as involving not only the subjects themselves, but also the intimate partners of those who were the subjects of the study.¹⁴ Further complicating any analysis of the Guatemalan experiments are questions about gender, geography, race, and socioeconomics.¹⁵

Part IV of the Article suggests reproductive justice as a helpful lens for evaluating the impact and legacy of the Guatemalan sexually transmitted disease experiments.¹⁶ The reproductive justice framework, with its focus on public resources, emphasizes that a crucial first step in accessing resources is ensuring that disadvantaged peoples’ voices are heard. The legal system is a proper venue for the victims of the Guatemalan experiments and their descendants to share their stories and have their suffering acknowledged by not only governments and private actors, but also by the public.¹⁷ In shedding light on the Guatemalan sexually transmitted disease experiments, this Article seeks to amplify the victims’ quest for justice and acknowledgment.

I. United States Involvement in Guatemala, the Sexually Transmitted Disease Experiments, and Other Non-consensual Medical Research

A. United States Political Involvement in Guatemala

In 1944, toward the end of World War II, Guatemala experienced a political revolution that led to the democratic election of a civilian president who was friendly to

¹² See *infra* Part III.

¹³ See *id.*

¹⁴ See *id.*

¹⁵ See *id.*

¹⁶ See *infra* Part IV.

¹⁷ See Reverby, *supra* note 2, at 1164.

the United States.¹⁸ Initially, the United States had not focused much of its foreign diplomacy efforts on Central America, but this changed as Cold War tensions grew quickly. George Kennan's "Long Telegram" warned that "peaceful coexistence" between capitalist nations and socialist nations would be impossible, and he predicted that the Soviet Union would venture to bring otherwise unstable countries within Soviet influence.¹⁹ In March 1947, President Truman announced to Congress what became known as the Truman Doctrine, which mandated the United States to "support free peoples who are resisting attempted subjugation by armed minorities or by outside pressures."²⁰

For these reasons, it is not surprising to learn that the United States Central Intelligence Agency kept a close watch over Guatemalan politics and began to monitor the country for communist influences. The United States' involvement in Guatemala in the 1940s was, in many ways, a precursor to later official pronouncements that the United States would act to protect countries in the Western Hemisphere from Soviet influence.²¹ Close ties with Guatemala were key to keeping that country free and democratic. The scientific experimentation supported and funded by the governments of both the United States and Guatemala strengthened these ties by enabling the formation of contacts between United States researchers and Guatemalan leaders of hospitals, prisons, and the military.²² Through these contacts, the United States gained firsthand information about the functions and operations of these Guatemalan institutions, and the institutions may have come to rely in turn on the expertise provided by United States contacts.

B. Non-consensual Medical Experimentation by the United States Government and United States Companies

Out of the atrocities of World War II and the subsequent Nuremberg Trials, there developed a clear international norm against non-consensual experimentation on human

¹⁸ See NICK CULLATHER, *SECRET HISTORY: THE CIA'S CLASSIFIED ACCOUNT OF ITS OPERATIONS IN GUATEMALA, 1952-1954* 10-14 (1st ed. 1999).

¹⁹ See, e.g., Michael F. Duggan, *The Open Hand: Moderate Realism and the Rule of Law*, 61 *HOW. L.J.* 271, 285 (2018) (describing Kennan's "Long Telegram").

²⁰ See, e.g., Michal R. Belknap, *The Warren Court and the Vietnam War: The Limits of Legal Liberalism*, 33 *GA. L. REV.* 65, 77 n.65 (1998) (describing the Truman Doctrine).

²¹ See John Foster Dulles, *Intervention of International Communism in Guatemala*, in *GUATEMALA IN REBELLION: UNFINISHED HISTORY* 78 (Jonathan L. Fried et al. eds., 1983).

²² See *id.*

subjects.²³ As early as 1767, the common law had recognized a doctor's liability for treating a patient without the patient's consent, except in cases of emergency.²⁴ In the Enlightenment Era of the eighteenth century, there emerged an increased emphasis on patient autonomy.²⁵ A Norwegian physician was found liable in 1880 for failing to obtain a patient's consent before he intentionally used a surgical instrument contaminated with leprosy on her in order to better understand the disease's transmission.²⁶ In 1931, Germany made binding a set of directives issued in 1900 that prohibited experimentation on nonconsenting patients.²⁷ So, although it may be true that "acceptance and application [of an individual's right to determine what shall be done with his or her body] . . . diffused slowly within the medical profession,"²⁸ United States government officials and medical professionals undoubtedly were aware of their ethical obligations and the negative attention that would accompany any non-consensual human experimentation.²⁹

²³ See, e.g., *Military Tribunals No. 1*, in 2 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 80–86 (1949) (setting forth ethical principles for human experimentation, including required "voluntary consent of the individual upon whom the experiment is to be performed," in response to physicians who had conducted experiments on nonconsenting individuals in concentration camps during World War II).

²⁴ See John I. Gallin, *A Historical Perspective on Clinical Research*, in PRINCIPLES AND PRACTICE OF CLINICAL RESEARCH 1, 6 (John I. Gallin & Frederick P. Ognibene eds., 3d ed. 2012) (discussing 1767 English case of *Slater v. Baker & Stapleton*).

²⁵ Martin S. Pernick, *The Patient's Role in Medical Decisionmaking: A Social History of Informed Consent in Medical Therapy*, in MAKING HEALTH CARE DECISIONS: THE ETHICAL AND LEGAL IMPLICATIONS OF INFORMED CONSENT IN THE PATIENT-PRACTITIONER RELATIONSHIP VOL. 3, APP'X E 1, 5–6 (describing the President's Commission for the Study of Ethical Problems in Medical and Biomedical and Behavioral Research 1982 and explaining Benjamin Rush's theory that patient autonomy led to enhanced personal well-being and public health).

²⁶ See Siang Yong Tan & Connor Graham, *Armaeuer Hansen (1841-1912): Discoverer of the Cause of Leprosy*, 49 SING. MED. J. 520, 521 (2008) (discussing Dr. Hansen's unauthorized experimentation).

²⁷ See generally FRANCES R. FRANKENBURG, HUMAN MEDICAL EXPERIMENTATION: FROM SMALLPOX VACCINES TO SECRET GOVERNMENT PROGRAMS 54, 79–80 (2017) (discussing Prussian directives issued in 1900 in response to public outcry over doctor's intentional and non-consensual infection of prostitutes with syphilis and subsequent codification in 1931 of these directives in response to tuberculosis experiment carried out on children); Laurel Hattix, Comment, *Expanding Notions of Self-Determination: Int'l Customs of Informed Consent in Medical Experimentation Pre-1945*, 19 CHI. J. INT'L L. 145, 162–80 (2018) (surveying the development of consent as a foundational ethic for the medical profession).

²⁸ AMY GUTMANN & JAMES WAGNER, PRESIDENTIAL COMM'N FOR THE STUDY OF BIOETHICAL ISSUES, "ETHICALLY IMPOSSIBLE": STD RESEARCH IN GUATEMALA FROM 1946 TO 1948 97 (2011).

²⁹ See *infra* note 83 and accompanying text.

Notwithstanding these norms, the United States government and United States companies have been the primary architects of several non-consensual human experiments in the United States and abroad. The Tuskegee experiments are perhaps the most infamous, but they are not the only examples.³⁰ By way of illustration, when the Spanish-American War ended in 1900, a team of United States doctors led by Walter Reed intentionally infected human subjects in Cuba with yellow fever in order to study the disease's pathogenic mechanisms.³¹ Not all of the subjects may have fully appreciated the risks of their participation in the program, especially because "volunteers" received substantial payments for agreeing to be injected with the virus.³² United States researchers also conducted a failed gonorrhea experiment at a federal prison in Terre Haute, Indiana, in 1943, the purpose of which was to study the effectiveness of post-exposure treatments for gonorrhea.³³ Prisoners were paid for their participation and told that their involvement in the study would be considered by the parole board.³⁴ Scientists dabbed the tips of the prisoners' penises with gonorrheal bacteria.³⁵ These attempts did not produce consistent infections, however, and in any event, the human subjects of the study received some medical treatment.³⁶ Ultimately the experiment was discontinued.³⁷

³⁰ See *supra* notes 3–5 and accompanying text (providing overview of Tuskegee experiments).

³¹ See, e.g., Akil Mehral, *Politics of Participation: Walter Reed's Yellow-Fever Experiments*, 11 *AMA J. ETHICS* 326 (2009), <https://journalofethics.ama-assn.org/article/politics-participation-walter-reeds-yellow-fever-experiments/2009-04> [<https://perma.cc/S6FU-AR9L>].

³² *Id.*

³³ The Executive Officer of the United States Army Medical Corps urged "that the National Research Council undertake an investigation in search of an effective prophylaxis and improved treatment for gonorrheal infections, using selected human volunteers." Letter from John A. Rogers, Exec. Officer of the U.S. Army Med. Corps, to Lewis H. Weed, Chairman of Div. of Med. Sci. of the Nat'l Res. Coun. (Dec. 4, 1942), *cited in* GUTMANN & WAGNER, *supra* note 28, at 14 n.65.

³⁴ See Letter from James V. Bennett to Joseph E. Moore (Feb. 26, 1943) (on file with PCSBI HSPI Archives, NARA-II_0000188), *cited in* GUTMANN & WAGNER, *supra* note 28, at 18 nn.113, 115 [hereinafter Bennett-Moore Letter].

³⁵ See GUTMANN & WAGNER, *supra* note 28, at 13.

³⁶ See Subcomm. on Venereal Diseases, Meeting Minutes 21 (Nov. 11, 1943) (on file with PCSBI HSPI Archives, NAS_0002782), *cited in* GUTMANN & WAGNER, *supra* note 28, at 21 n.149; Reports to a Conference Held Under the Auspices of the Subcomm. on Venereal Diseases on the Chemical Prophylaxis of Venereal Disease (Feb. 9, 1944) (on file with PCSBI HSPI Archives, NAS_0003114-17), *cited in* GUTMANN & WAGNER, *supra* note 28, at 21 n.149.

³⁷ See GUTMANN & WAGNER, *supra* note 28, at 21–22.

A draft report about the Terre Haute experiments explained that “[e]fforts were made to produce experimental gonorrhoea in these volunteers by almost every conceivable expedient except by the intraurethral inoculation of pus taken directly from the cervix or urethra of infected females or by the natural method of infection—sexual intercourse.”³⁸ The United States Office of Scientific Research and Development approved the experiment and the United States Attorney General had opined that it met applicable legal requirements.³⁹

More recently, in 2009, a United States court allowed a lawsuit to proceed against the drug company Pfizer on account of its failure to obtain the informed consent for the use of an experimental oral antibiotic on Nigerian children in 2006.⁴⁰ The case later settled out of court.⁴¹ In 2009, the Bill and Melinda Gates Foundation financed an India-based trial of a vaccination against the human papilloma virus.⁴² The human subjects were girls ages ten to fourteen; a large number had parents who were illiterate and unable to consent.⁴³ After seven girls died, the Indian Parliament launched an investigation and

³⁸ Memorandum from E. Cowles Andrus, Chief, Division of Med., Office of Sci. Research and Dev. Comm. on Med. Research to Chester S. Keefer (Feb. 25, 1946) (on file with PCSBI HSPI Archives, NARA-II_0000419), *quoted in* GUTMANN & WAGNER, *supra* note 28, at 22.

³⁹ See GUTMANN & WAGNER, *supra* note 28, at 17–18 (describing discussion between U.S. Assistant Solicitor General Oscar Cox and Attorney General Francis Biddle that experiments were legal). *But see* Bennett-Moore Letter, *supra* note 34, at 18 nn.113, 115 (expressing concerns about legality of experiments).

⁴⁰ *Abdullahi v. Pfizer, Inc.*, 562 F.3d 163, 169 (2d Cir. 2009) (allowing plaintiffs’ claim under Alien Tort Statute to go forward).

⁴¹ See Donald G. McNeil, Jr., *Nigerians Receive First Payments for Child Who Died in 1996 Meningitis Drug Trial*, N.Y. TIMES (Aug. 11, 2011), <https://nyti.ms/2kTwn5P> [<https://perma.cc/LS8E-5X5P>] (describing the creation of a \$35 million settlement fund and payment of \$175,000 to each of four families from that fund).

⁴² See, e.g., Mark Barnes et al., *The Evolving Regulatory Landscape for Clinical Trials in India*, 73 FOOD & DRUG L.J. 601, 602 (describing the Gates Foundation’s sponsorship of Indian HPV vaccine trials); see also Press Release, Bill and Melinda Gates Found., Decade of Vaccines (2010) (on file with the Bill and Melinda Gates Foundation), [https://www.gatesfoundation.org/Media-Center/Press-Releases/2010/01/Bill-and-Melinda-Gates-Pledge-\\$10-Billion-in-Call-for-Decade-of-Vaccines](https://www.gatesfoundation.org/Media-Center/Press-Releases/2010/01/Bill-and-Melinda-Gates-Pledge-$10-Billion-in-Call-for-Decade-of-Vaccines) [<https://perma.cc/CZJ9-EULB>] (describing \$10 million campaign to increase global vaccine access).

⁴³ See PARLIAMENT OF INDIA RAJYA SABHA DEPARTMENT-RELATED PARLIAMENTARY STANDING COMMITTEE ON HEALTH AND FAMILY WELFARE, SEVENTY SECOND REPORT: ALLEGED IRREGULARITIES IN THE CONDUCT OF STUDIES USING HUMAN PAPILLOMA VIRUS (HPV) VACCINE BY PATH IN INDIA (DEPARTMENT OF HEALTH RESEARCH, MINISTRY OF HEALTH AND FAMILY WELFARE) 1, 11 (2013), <http://164.100.47.5/newcommittee/reports/EnglishCommittees/Committee%20on%20Health%20and%20Family%20Welfare/72.pdf> [<https://perma.cc/JJP5-ZNGG>].

found that the study had violated informed consent procedures, among other standards.⁴⁴ In 2010, the Gates Foundation provided grants for African trials for malaria and meningitis vaccines.⁴⁵ That work, too, was dogged by claims of uninformed consent, although the claims were not substantiated as in India.⁴⁶ Medical experimentation—whether by the United States government or by United States companies—with the specter of uninformed consent lurking in the background has been and remains an issue fraught with ethical concerns.

C. The Guatemalan Sexually Transmitted Disease Experiments

Dr. John Charles Cutler was one of the investigators of the failed Terre Haute gonorrhea experiments.⁴⁷ Cutler and his colleagues had been frustrated by the results and sought to improve the study's methodology.⁴⁸ In the 1940s, at the height of World War II, there was concern that sexually transmitted diseases presented a threat to United States military readiness.⁴⁹ For example, beginning in 1941, roughly coinciding with the entrance of the United States into war, rates of gonorrhea infection in the United States gradually increased and did not start declining until 1947.⁵⁰ Infections could leave

⁴⁴ See *id.* at 12–13; see also Sharmeen Ahmed, *Accountability of International NGOs: Human Rights Violations in Healthcare Provision in Developing Countries and the Effectiveness of Current Measures*, 22 ANN. SURV. INT'L & COMP. L. 33, 37–50 (2017) (discussing history and implementation of two of the Gates Foundation's vaccination campaigns).

⁴⁵ See, e.g., *First Results of Phase 3 Trial of RTS,S/AS01 Malaria Vaccine in African Children*, 365 NEW ENG. J. MED. 1863 (2011).

⁴⁶ See, e.g., Ahmed, *supra* note 44, at 50 (“While claims of human rights abuses resulting from these trials across Africa may be unsupported, the trials had the same potential for abuse as in India because of the weak legal regime governing trials in these countries.”).

⁴⁷ See GUTMANN & WAGNER, *supra* note 28, at 12–23 (“The experiments in Terre Haute . . . provided a scientific impetus for the experiments in Guatemala; the inability to develop a reliable method for gonorrheal infection in Terre Haute left the researchers unable to address their primary research goal, more effective prophylaxis, and wondering about alternative infection strategies.”).

⁴⁸ See J. F. Mahoney et al., *Experimental Gonococcal Urethritis in Human Volunteers*, 30 AM. J. SYPHILIS, GONORRHEA & VENEREAL DISEASE 1, 32 (1946), cited in GUTMANN & WAGNER, *supra* note 28, at 22 n.165 (reporting that, in their own words, the researchers evaluated their methods as incapable “of producing disease with a consistency considered to be adequate for a study of experimental prophylaxis.”).

⁴⁹ See *id.* at 22; GUTMANN & WAGNER, *supra* note 28, at 11.

⁵⁰ See, e.g., Rebecca Kreston, *Sex, War & Revolution: The Epidemiology of Gonorrhea in the USA*, DISCOVER MAG. (Sept. 24, 2012) (citing C.E. Cornelius, *Seasonality of Gonorrhea in the United States*, 86

patients unable to work or permanently disabled, and even cause death.⁵¹ The United States military was the first to test antibiotics as a possible way to prevent gonorrhea and to use penicillin to treat the disease.⁵² Given the quantifiable cost of sexually transmitted diseases affecting military personnel, it is no wonder that the government sought to understand the diseases better and to find more effective treatments for them. Because there were so many more men than women enrolled in the United States Armed Forces during World War II, with men exclusively serving in combat roles, it seems reasonable to say that the research experiments were designed to find cures for these sexually transmitted diseases as they manifested in men.⁵³

After the Terre Haute experiments, United States researchers sought a place where it would be possible to do what they could not in the Indiana prison: spread the disease by human vectors (through sexual contact) or by direct injection.⁵⁴ The place the researchers chose was Guatemala.⁵⁵ Although there is no concrete proof, it may be that in selecting the location for the experiments, the researchers took into account Guatemala's geographic separation from the United States, the fact that most of its citizens did not speak English, and that most Guatemalans are indigenous or have a Spanish or mixed-heritage background. The researchers did not consistently inform the Guatemalans, if at all, that they were exposed to sexually transmitted diseases, and gave less than half of the

HSMHA HEALTH REP. 157 (1971)), <http://blogs.discovermagazine.com/bodyhorrors/2012/09/24/epidemiology-of-gonorrhea-usa/#.XciYWDJKhQI> [<https://perma.cc/6QF6-LTRH>].

⁵¹ See Mark S. Rasnake et al., *History of U.S. Military Contributions of the Study of Sexually Transmitted Diseases*, 170 MIL. MED. 61, 61 (2005) (citing JH Greenberg, *Venereal Disease in the Armed Forces*, 6 MED. ASPECTS HUM. SEXUALITY 165 (1972)) (describing the military's "lost person-days, disabilities, and even deaths before penicillin became available in the middle 1940s").

⁵² See *id.* at 62.

⁵³ During World War II, of approximately sixteen million members of the Armed Forces, only about 350,000 were women. See History.com Editors, *American Women in World War II*, HISTORY (Aug. 21, 2018), <https://www.history.com/topics/world-war-ii/american-women-in-world-war-ii-1> [<https://perma.cc/Y2VM-T73F>] (providing a figure for women's military service during that time); RESEARCH A VETERAN GUIDE: HOW TO LOCATE SOMEONE WHO FOUGHT IN WORLD WAR II, <https://www.nationalww2museum.org/war/research-veteran> [<https://perma.cc/KW4V-ZD7C>] (stating that more than sixteen million men and women served in the Armed Forces during World War II).

⁵⁴ See *supra* notes 33–36 and accompanying text (describing methods the Terre Haute experiments).

⁵⁵ See *infra* notes 70–80 and accompanying text (summarizing principal aims and methods of Dr. Cutler's human experimentation in Guatemala).

subjects any documented medical treatment.⁵⁶ Consequently, the Guatemalan experiments departed even further from acceptable medical ethics than did the Terre Haute experiments.

Dr. John Charles Cutler and other researchers encountered a politically friendly climate in Guatemala in August 1946.⁵⁷ Dr. Cutler quickly laid the groundwork for live human experimentations.⁵⁸ The Pan American Sanitary Bureau, now known as the Pan American Health Bureau, sponsored Dr. Cutler's research with a grant from the United States National Institutes of Health, which itself was funded by the United States Public Health Service, and the Public Health Service's Venereal Disease Division.⁵⁹ Several members of Dr. Cutler's research staff were also affiliated with or employed by the Public Health Service (which later became part of the Centers for Disease Control) and the National Institutes of Health.⁶⁰ The Committee on Medical Research of the United States Office of Scientific Research and Development, established by President Franklin Roosevelt, approved the Guatemalan experiments.⁶¹ Members of the approving committee included employees of Johns Hopkins University, Harvard University, and Columbia University, as well as the Director of the National Institutes of Health and representatives of the United States Navy and the United States Army.⁶²

The Guatemalan government both financially and practically supported Dr. Cutler's sexually transmitted disease research by providing access to Guatemalan prisoners and to medical facilities.⁶³ The Guatemalan Ministry of Public Health approved Dr. Cutler's studies and officials of the National Orphanage of Guatemala, the Central Penitentiary in Guatemala City, the Guatemala National Army of the Revolution, and the Guatemala National Army of the Revolution Military Hospital all provided Dr. Cutler with access

⁵⁶ See GUTMANN & WAGNER, *supra* note 28, at 6; see also *infra* note 92 and accompanying text.

⁵⁷ See GUTMANN & WAGNER, *supra* note 28, at 28–29.

⁵⁸ See *id.* at 31–32.

⁵⁹ See *id.* at 4–6, 122.

⁶⁰ See *id.* at 6, 112–15 (“Table 2: Individuals Involved in the STD Experiments in Guatemala”).

⁶¹ See *id.* at 12, 120 (“Organizational Chart of the Office of Scientific Research and Development”).

⁶² See *id.*

⁶³ See GUTMANN & WAGNER, *supra* note 28, at 32–33.

and support.⁶⁴ Notably, however, after the sexually transmitted diseases became widespread public information⁶⁵ and President Obama apologized for the United States government's involvement,⁶⁶ the government of Guatemala did not acknowledge its own role in supporting the experiments; instead, the Guatemalan government denounced the experiments as racist and discriminatory on the part of the United States.⁶⁷

In the 1940s, research on sexually transmitted diseases was a top priority for the United States military. One government official estimated that each year there were "approximately 350,000 fresh infections with gonorrhea [in the Armed Forces], [which] will account for 7,000,000 lost man days per year, the equivalent of putting out of action for a full year the entire strength of two full armored divisions or of ten aircraft carriers."⁶⁸ At the time, syphilis in particular could be treated with penicillin, but Dr. Cutler and the sponsors of the Guatemalan experiments were seeking prophylactic cures, or post-exposure treatment that would prevent the development of sexually transmitted diseases.⁶⁹

Through his work with Guatemalan subjects, Dr. Cutler intended to do what the Terre Haute experiments could not: make infected sex workers available for intercourse with test subjects.⁷⁰ At the time, sex work was legal in Guatemala, as long as sex workers were over the age of eighteen and were checked twice a week by a government clinic for sexually transmitted diseases.⁷¹ Some of the sex workers Dr. Cutler engaged received \$25

⁶⁴ See *id.* at 112–15 ("Table 2: Individuals Involved in the STD Experiments in Guatemala").

⁶⁵ See REVERBY, *supra* note 3, and accompanying text (discussing publication of Reverby's findings).

⁶⁶ See Subramanian, *supra* note 6, and accompanying text (reporting apology by President Obama).

⁶⁷ See generally Comisión Presidencial para el Esclarecimiento de los Experimentos Practicados con Humanos en Guatemala, *Recomendaciones del Gobierno de Guatemala de los Experimentos Practicados con Humanos en Guatemala*, CITY PROJECT BLOG (11 de Julio 2012), <http://www.cityprojectca.org/blog/archives/14922> [https://perma.cc/5RYG-U6PJ].

⁶⁸ GUTMANN & WAGNER, *supra* note 28, at 12 (quoting correspondence of Dr. Joseph Earle Moore, chairman of the National Research Council's Subcommittee on Venereal Diseases).

⁶⁹ See Letter from J. F. Mahoney, Chairman, Nat'l Research Council Subcomm. on Venereal Diseases, to A. N. Richards, Chairman, Nat'l Research Council Comm. on Med. Research (Feb. 1, 1943), *cited in* GUTMANN & WAGNER, *supra* note 28, at 12.

⁷⁰ See GUTMANN & WAGNER, *supra* note 28, at 28–29.

⁷¹ See *id.* at 28, 45 (describing the legal status and regulation of sex work in Guatemala at the time).

to have their cervixes swabbed with gonorrheal pus obtained from a previously infected male.⁷² There is no documentation to suggest that these women knew that they were being infected with sexually transmitted diseases or that they consented to participation in the experiment.⁷³ The sex workers were then instructed to have intercourse with specified prisoners.⁷⁴

In Guatemala, Dr. Cutler became frustrated by the relatively slow spread of sexually transmitted diseases among the prisoners via sex workers.⁷⁵ Dr. Cutler therefore shifted his focus to psychiatric patients and intentionally infected them with syphilis by artificial means.⁷⁶ This was done by having health workers either inject a needle containing syphilis into a man's foreskin or deposit syphilitic material onto an open sore they had created by scratching or abrading the penis.⁷⁷ Dr. Cutler also injected syphilis directly into the cerebral spinal fluid of other psychiatric patients.⁷⁸ Dr. Cutler personally documented several cases in which psychiatric patients clearly objected to participating in the experiments (by fleeing the room or by resisting physical examination), yet he continued with his activities.⁷⁹ The sores that developed on psychiatric patients were documented by several disturbing photographs that are now included in the National Archives' collection of Dr. Cutler's papers.⁸⁰

⁷² See Clinical Notes of John C. Cutler, Experiment No. 2 Gonorrhea Prophylaxis (Mar. 15, 1947) (on file with the National Archives), <https://nara-media-001.s3.amazonaws.com/arcmedia/research/health/cdc-cutler-records/folder-31-gonorrheal-experiment.pdf> [<https://perma.cc/YT7T-5R7K>].

⁷³ See GUTMANN & WAGNER, *supra* note 28, 45–46.

⁷⁴ See *id.*

⁷⁵ Letter from John C. Cutler, Senior Assistant Surgeon and Dir., Guatemalan STD Studies, U.S. Pub. Health Serv., to John F. Mahoney, Head, Pub. Health Venereal Disease Research Lab. (June 22, 1947) (on file with the National Archives), <https://nara-media-001.s3.amazonaws.com/arcmedia/research/health/cdc-cutler-records/folder-11-cutler-1947-correspondence.pdf> [<https://perma.cc/RF3N-CNHP>].

⁷⁶ See GUTMANN & WAGNER, *supra* note 28, at 56–61 (describing experimentation on psychiatric patients).

⁷⁷ See *id.* at 61–66 (describing injection method and “scarification and abrasion” method).

⁷⁸ See *id.* at 66–68.

⁷⁹ See *id.* at 61.

⁸⁰ NAT'L ARCHIVES, PRISON AND INSANE ASYLUM PHOTOGRAPHS TO ACCOMPANY FINAL REPORT IN THE RECORDS OF DR. JOHN C. CUTLER (May 17, 2017), <https://www.archives.gov/research/health/cdc-cutler-records> [<https://perma.cc/5ZG5-KE6V>] [hereinafter PHOTOGRAPHS].

Dr. Cutler left Guatemala in December 1948 when funding for the project concluded,⁸¹ although a small staff remained to continue taking blood samples through the early 1950s.⁸² Dr. Cutler never published final reports or public papers about his experiments in Guatemala, and it seems that he went to significant lengths to keep his work a secret. An article in the *New York Times*, published in May 1947, opined that injecting humans with syphilis bacteria, as had been done in animal experiments, would be “ethically impossible.”⁸³ Less than a decade after leaving Guatemala, Dr. Cutler wrote in a draft report that “it was deemed advisable, from the point of view of public and personnel relations, to work so that as few people as possible know the experimental procedure.”⁸⁴ Regardless of whether Dr. Cutler or those involved in the Guatemalan experiments knew of the specific *New York Times* article, fear of negative publicity may have caused those involved to keep quiet about their work.⁸⁵ In the 1960s, Dr. Cutler took on the role of lead investigator in the ongoing Tuskegee syphilis experiments and later became the Acting Dean of the Graduate School of Public Health at the University of

⁸¹ See Kayte Spector-Bagdady & Paul A. Lombardo, *U.S. Public Health Service STD Experiments in Guatemala (1946-1948) and Their Aftermath*, 41 ETHICS & HUM. RES. 29, 31 (2019) (describing how some United States health workers stayed in Guatemala after Cutler’s departure, continuing to collect specimens from the intentionally infected Guatemalan patients).

⁸² See GUTMANN & WAGNER, *supra* note 28, at 6 (stating diagnostic testing continued through 1953); *id.* at 70–71, 81–83 (stating that Genevieve Stout, a researcher with the United States-sponsored Pan American Sanitary Bureau, remained in Guatemala until 1951 to continue work similar to Dr. Cutler’s).

⁸³ Walter Kaempffert, *Notes on Science: Syphilis Prevention*, N.Y. TIMES (Apr. 27, 1947), <https://timesmachine.nytimes.com/timesmachine/1947/04/27/87741906/html?pageNumber=115> [<https://perma.cc/FMM2-SL3J>] (describing successful syphilis tests on rabbits but noting that “[t]o settle the human issue quickly, it would be necessary to shoot living syphilis germs into human bodies . . . Since this is ethically impossible, it may take years to gather the information needed.”); *see also* GUTMANN & WAGNER, *supra* note 28, at 57 (referring to an article in which the New York Times science editor described the injection of live syphilis germs into humans as “ethically impossible”).

⁸⁴ John C. Cutler, [Draft] Final Syphilis Report (Feb. 24, 1955) (unpublished manuscript) (on file with PCSBI HSPI Archives), *cited in* GUTMANN & WAGNER, *supra* note 28, at 74 n.580.

⁸⁵ See GUTMANN & WAGNER, *supra* note 28, at 103.

Pittsburgh.⁸⁶ He died in 2003 without public knowledge of his involvement in the Guatemalan sexually transmitted disease experiments.⁸⁷

After Professor Reverby discovered the trove of Dr. Cutler's archived papers,⁸⁸ President Obama asked Amy Gutmann, the Chair of the Presidential Commission for the Study of Bioethics (and President of the University of Pennsylvania) to "oversee a thorough fact-finding investigation into the specifics of the U.S. Public Health Service Sexually Transmitted Diseases Inoculation Study," including Dr. Cutler's work in Guatemala.⁸⁹ The Presidential Commission concluded that 1,308 people from three principal populations—prisoners, soldiers, and psychiatric patients—had been intentionally exposed to a sexually transmitted disease, whether syphilis, gonorrhea, or chancroid.⁹⁰ This number does not seem to include the professional sex workers who were used in the experiments in order to transmit the disease.⁹¹ Of those 1,308 exposed to a sexually transmitted disease, only about half of them—678 people—received any kind of documented treatment.⁹² Separate and apart from the 1,308 people intentionally infected, an additional 5,128 people—soldiers, prisoners, psychiatric patients, children, leprosy patients, and United States Air Force personnel—were the subjects of diagnostic

⁸⁶ See Stephen Smith, *Wellesley Professor Unearths a Horror: Syphilis Experiments in Guatemala*, BOSTON.COM (Oct. 2, 2010), http://archive.boston.com/news/local/massachusetts/articles/2010/10/02/wellesley_professor_unearts_a_horror_syphilis_experiments_in_guatemala/ [https://perma.cc/CSS5-K2RT] (recounting historian Susan Reverby's discovery of Dr. Cutler's involvement in the Guatemalan experiments); Jan Ackerman, *Obituary, John Charles Cutler / Pioneer in Preventing Sexual Diseases*, PITT. POST-GAZETTE (Feb. 12, 2003), <https://www.bitss.org/wp-content/uploads/2014/06/obituary-john-charles-cutler1.pdf> [https://perma.cc/2CYE-QHQK] (providing details about Dr. Cutler's career).

⁸⁷ See Ackerman, *supra* note 86; see also Smith, *supra* note 86 (quoting Susan Reverby as saying, "[t]wo years after the [Guatemalan] experiment began, it was ended. The final report was secreted away in Cutler's papers"). Until the discoveries by Dr. Reverby, the staff of Centers for Disease Control and Prevention apparently was not aware of the contents of Dr. Cutler's papers nor the Guatemalan experiments. See *id.*

⁸⁸ See REVERBY, *supra* note 3, and accompanying text.

⁸⁹ Letter from Barack Obama, President, United States, to Amy Gutmann, Chair, Presidential Comm'n for the Study of Bioethical Issues (Nov. 24, 2010), reprinted in GUTMANN & WAGNER, *supra* note 28, at vi.

⁹⁰ See GUTMANN & WAGNER, *supra* note 28, at 6.

⁹¹ See *id.* (seemingly treating female sex workers as outside the count of research subjects, even though they were intentionally infected with syphilis in order to transmit the disease).

⁹² See *id.*

testing, including blood draws.⁹³ Many of those who were infected in the 1940s transmitted the disease to their partners or children.⁹⁴ Over 840 living victims or their descendants have self-identified.⁹⁵ Many suffer the long-term consequences of untreated sexually transmitted diseases, such as burning during urination, pain or aching in the bones, infertility, and blindness.⁹⁶ Most of these survivors or their descendants live in “extreme poverty,” in poor and rural areas without easy access to any medical care.⁹⁷ The next Part of the Article explores how the United States legal system has failed to provide adequate remedies for victims of the Guatemalan sexually transmitted disease experiments, and then goes on to examine whether race, nationality, economic inequality, and physical geography may make justice elusive in this case.

II. Legal Attempts to Redress Harm Suffered by Guatemalan Victims of Non-consensual Human Experimentation

Despite President Obama’s public apology in 2010 to Guatemalan President Alvaro Colom and the people affected by the non-consensual experimentation conducted by the United States government in Guatemala, and despite the finding by the United States Presidential Commission for the Study of Bioethical Issues that the Guatemalan experiments were morally wrong,⁹⁸ little to no effort has been put forth to gain justice for the victims of these horrid experiments.⁹⁹ The victims of the Guatemalan experiments and

⁹³ See *id.*; see also Presidential Commission for the Study of Bioethical Issues, Guatemala Subject Data Spreadsheet (on file with the Georgetown Bioethics Archive), <https://bioethicsarchive.georgetown.edu/pcsbj/node/650.html> [<https://perma.cc/2KE4-PTHG>].

⁹⁴ See Subramanian, *supra* note 6.

⁹⁵ See *id.*

⁹⁶ See *id.* (describing symptoms experienced by former subjects of Dr. Cutler or descendants of subjects who suffer from the consequences of untreated sexually transmitted diseases).

⁹⁷ *Id.*

⁹⁸ See, e.g., *US Apologizes for Infecting Guatemalans with STDs in the 1940s*, CNN.COM (Oct. 1, 2010), <http://www.cnn.com/2010/WORLD/americas/10/01/us.guatemala.apology/index.html> [<https://perma.cc/7ANT-LJNV>] (quoting Guatemalan President Alvaro Colom saying that President Obama had called him “offering profound apologies and asking pardon for the deeds of the 1940s”); GUTMANN & WAGNER, *supra* note 28, at v (“[T]he Commission has concluded that the Guatemala experiments involved gross violations of ethics as judged against both the standards of today and the researchers’ own understanding of applicable contemporaneous practices.”).

⁹⁹ See Michael A. Rodriguez & Robert Garcia, *First, Do No Harm: The US Sexually Transmitted Disease*

their families have yet to be compensated for their injuries, so they took matters into their own hands by turning to the courts in 2011.¹⁰⁰

A. *Garcia v. Sebelius*: United States Rejects First Guatemalan Class Action Lawsuit

On March 14, 2011, a plaintiff class comprised of surviving victims or legal heirs of victims of the Guatemalan sexually transmitted disease experiments sued eight named sitting federal officials and the then-acting Director of the Pan-American Health Organization, the successor to the Pan-American Sanitary Bureau, for injuries originating from a non-consensual medical experimentation program conducted in Guatemala from 1946–1953.¹⁰¹ In the United States District Court for the District of Columbia, the plaintiffs asserted four claims for relief: first, violation of the Alien Tort Statute (ATS)¹⁰² for medical experimentation on non-consenting human subjects; second, violations under the ATS for cruel, inhuman, or degrading treatment; third, violations of their Fifth Amendment rights to substantive due process; and fourth, violations of their Eighth Amendment rights against cruel and unusual punishment.¹⁰³ Although the plaintiffs acknowledged that none of the named defendants had any personal responsibility for or

Experiments in Guatemala, 103 AM. J. PUB. HEALTH 2122, 2122 (2013).

¹⁰⁰ See *supra* Part I.

¹⁰¹ *Garcia v. Sebelius*, 867 F. Supp. 2d 125 (D.D.C. 2012), *vacated in part*, 919 F. Supp. 2d 43 (D.D.C. 2013), *dismissed* (June 5, 2013). Eight of the nine federal defendants were current federal government officials under the then-current Obama administration: (1) Kathleen Sebelius, Secretary of the United States Department of Health & Human Services (HHS); (2) Howard Koh, Assistant Secretary of HHS; (3) Vice Admiral Regina Benjamin, Surgeon General of the United States Public Health Service; (4) Thomas Frieden, Director of the United States Centers for Disease Control and Prevention (CDC); (5) Rima Khabbaz, Director of the Office of Infectious Diseases at the CDC; (6) Kevin Fenton, Director of the National Center for HIV/AIDS, Viral Hepatitis, STDs, and Tuberculosis Prevention at the CDC; (7) Gail Bolan, Director of the Division of STD Prevention at the CDC; and (8) Harold Varmus, Director of the National Cancer Institute at HHS. *Garcia*, 867 F. Supp. 2d at 131. Mirta Roses Periago, Director of the Pan-American Health Organization, formerly the Pan-American Sanitary Bureau, was the ninth defendant. *Id.* The plaintiffs also named a variety of “David Doe” defendants, to be determined. *Id.*

¹⁰² 28 U.S.C. § 1350 (2006).

¹⁰³ Plaintiffs’ First Amended Complaint ¶¶ 133–40, *Garcia v. Sebelius*, 867 F. Supp. 2d 125 (D.D.C. 2012) (alleging medical experimentation on non-consensual human subjects); *id.* at ¶¶ 141–47 (alleging cruel, inhuman or degrading treatment); *id.* at ¶¶ 148–56 (alleging a violation of Fifth Amendment rights); *id.* at ¶¶ 148–56 (alleging a violation of Eighth Amendment rights). The plaintiffs filed their suit before the Presidential Commission for the Study of Bioethics had issued its report; the court permitted the plaintiffs to amend their complaint after the report’s issuance. *Garcia*, 867 F. Supp. 2d at 131.

involvement in the Guatemalan experiments, they were liable under a successor liability theory for the acts of those who preceded them in office.¹⁰⁴

The court granted the federal government's motion to substitute itself in the place of the eight named federal officials under the Westfall Act.¹⁰⁵ This law provides that the federal government shall be substituted in the place of federal employees when the employees "were acting within the scope of their federal office or employment at the time of the incidents out of which the plaintiffs' claims arose."¹⁰⁶ Because none of the named federal defendants had been in office at the time of the experiments and because federal employees have absolute immunity from tort claims arising from actions taken within the employee's scope of employment,¹⁰⁷ the District Court then granted the federal government's motions to dismiss plaintiffs' ATS claims.¹⁰⁸ Once the United States has been substituted as a party in the place of a federal employee acting within the scope of office or employment, the Federal Tort Claims Act—not the ATS—governs the suit.¹⁰⁹

¹⁰⁴ Plaintiffs' First Amended Complaint ¶ 45, *Garcia v. Sebelius*, 867 F. Supp. 2d 125 (D.D.C. 2012) (claiming defendants were "liable under principles of successor liability for the acts of their predecessor office-holders").

¹⁰⁵ *Garcia*, 867 F. Supp. 2d at 134–36. The government relied on *Osborn v. Haley*, 549 U.S. 225 (2007), in which the Supreme Court ruled that a "Westfall Act certification is proper [even] when a federal officer charged with misconduct asserts, and the Government determines, that the incident or episode in suit never occurred." *Id.* at 247. The *Osborn* Court reasoned that "it would make scant sense to read the Act as leaving an employee charged with an intentional tort to fend for himself when he denies wrongdoing and asserts he 'engaged only in proper behavior occurring wholly within the scope of his office or employment.'" *Id.* at 248 (internal citation omitted).

¹⁰⁶ *Garcia*, 867 F. Supp. 2d at 134.

¹⁰⁷ 28 U.S.C. § 2679(b)(1) (2006).

¹⁰⁸ *Garcia*, 867 F. Supp. 2d at 136. The ATS provides that, "The district courts shall have original jurisdiction of any civil action by an alien for a tort only, committed in violation of the law of nations or a treaty of the United States." 28 U.S.C. § 1350 (2006). Thus, a successful litigant must prove three separate elements: that the plaintiff is an "alien," that a "tort" has been committed against the plaintiff by the defendant, and that such tort was "committed in violation of the law of nations or a treaty of the United States." 13D CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 3585 (3d ed. 2009); see also Dennis M. Coyne, Note, *International Pharmaceutical Mistrials: Existing Law for the Protection of Human Subjects and a Proposal for Reform*, 29 B.U. INT'L L.J. 427, 431–32 (2011) (providing an overview of satisfaction of claims under ATS).

¹⁰⁹ 28 U.S.C. § 1346 (2013).

The Federal Tort Claims Act (FTCA) generally permits private parties to bring tort actions against the federal government for actions taken by persons acting on its behalf, but a number of exceptions apply.¹¹⁰ One of those exceptions is the “foreign country exception,” which, in effect, bars claims arising in foreign countries.¹¹¹ Although the plaintiffs tried to argue that treating their claims as barred would “work an injustice in this case,”¹¹² the court granted the federal government’s motion to dismiss because the activities that form the basis for the suit took place in Guatemala.¹¹³ When the District Court dismissed this lawsuit brought by the victims of the Guatemalan sexually transmitted disease experiments, it effectively ended their quest to hold the United States government responsible for the actions taken by employees and agencies under its supervision and influence.

In dicta, Judge Reggie B. Walton called the Guatemalan experiments “a deeply troubling chapter in our Nation’s history,” but he also stated that the court could not provide the plaintiffs with any redress.¹¹⁴ Judge Walton recognized the real harm suffered by the victims but doubted that the court system could provide a remedy.¹¹⁵ He instead suggested that the plaintiffs would be better served by directing their “pleas . . . to the

¹¹⁰ 28 U.S.C. §§ 1291, 1346, 1402, 2401, 2402, 2411, 2412, 2671–2680.

¹¹¹ See *Sosa v. Alvarez-Machain*, 542 U.S. 692, 701, 712 (2004) (“[T]he FTCA’s foreign country exception bars all claims based on any injury suffered in a foreign country, regardless of where the tortious act or omission occurred.”).

¹¹² *Garcia*, 867 F. Supp. 2d at 137.

¹¹³ In evaluating the federal government’s motion to dismiss the plaintiffs’ claims, the court noted that the Supreme Court’s 1971 decision in *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971), requires that a claim arising out of the actions of any individual federal defendant may succeed only when that defendant was “personally involved in the illegal conduct.” *Id.* (citing *Simpkins v. District of Columbia*, 108 F.3d 366, 369 (D.C. Cir. 1997)). Because the plaintiffs in this case asserted a successor liability theory, they had conceded that the named federal defendants had no personal involvement in the Guatemalan studies. *Garcia*, 867 F. Supp. 2d at 138. Therefore, the court dismissed the plaintiffs’ constitutional claims. *Id.* The court also granted the motion to dismiss filed by Mirta Roses Periago—the ninth named defendant (and only named defendant who was not a federal employee)—but on different grounds. *Id.* at 140–44. As the current Director of the Pan-American Health Organization, the successor to the Pan-American Sanitation Bureau, Roses Periago asserted immunity under the International Organizations Immunities Act of 1945, 22 U.S.C. § 288a(b) (2006). *Id.* The court agreed with Roses and dismissed the case against her. *Id.*

¹¹⁴ *Garcia*, 867 F. Supp. 2d at 144.

¹¹⁵ *Id.*

political branches of the government who, if they choose, have the ability to grant some modicum of relief to those affected by the Guatemala study.”¹¹⁶

Some modicum of relief did, in fact, arrive while the *Garcia* matter was pending.¹¹⁷ The United States Department of Health and Human Services announced its \$1.8 billion investment to aid the treatment and prevention of HIV and other sexually transmitted diseases in Guatemala, accompanied by promises to strengthen ethical training on human research protections.¹¹⁸ Similarly, in 2012, the Centers for Disease Control and Prevention stated it would increase funding to Guatemala by \$775,000 over three years to help monitor and control the spread of sexually transmitted diseases.¹¹⁹

These funds, plus President Obama’s apology, most certainly will help some survivors. But the financial investments are not nearly enough to address the tangible harm inflicted on more than 5,000 people by non-consensual human experimentation, including intentional exposure to sexually transmitted diseases that were left untreated in many cases.¹²⁰ Judge Walton’s exhortation to the plaintiffs to exert influence on other branches of government may be technically sound, but such exertion is not likely to occur, given that many of the victims are poor people in rural areas of Guatemala, have never traveled outside their native country, and do not speak English, and all of whom have been ignored by the United States government for over sixty years.¹²¹

B. *Estate of Alvarez v. Johns Hopkins University*: The Emerging Hope for Justice

Shortly after the dismissal of their case in the United States District Court for the District of Columbia, the *Garcia* plaintiffs joined a separate lawsuit brought in the United

¹¹⁶ *Id.*; see also Richard Monastersky, *Court Dismisses Suit Over Unethical US Experiments*, NATURE: NEWS BLOG (June 15, 2012, 19:45 GMT), <http://blogs.nature.com/news/2012/06/court-dismisses-suit-over-unethical-us-experiments.html> [<https://perma.cc/6SS2-DZBY>].

¹¹⁷ See Mariano Castillo, *U.S. Rejects Guatemalans’ STD Lawsuit, Offers Aid*, CNN (Jan. 10, 2012), <https://www.cnn.com/2012/01/10/world/americas/us-guatemala-std-experiments/index.html> [<https://perma.cc/T5ZE-FQQC>].

¹¹⁸ See *id.*

¹¹⁹ See *id.*

¹²⁰ See *supra* notes 95–97 and accompanying text.

¹²¹ See *supra* note 116 and accompanying text (reporting Judge Walton’s advice to the plaintiffs).

States District Court for the District of Maryland.¹²² That group of plaintiffs asserted multiple claims against the Rockefeller Foundation, Bristol-Myers Squibb Company, and a variety of institutions affiliated with Johns Hopkins University, including its hospital, medical school, and school of public health.¹²³ The theory of liability applied to the Rockefeller Foundation and Johns Hopkins was that their agents or employees “designed, developed, participated in, approved, encouraged, directed, and aided and abetted non-consensual, non-therapeutic, human subject experiments in Guatemala.”¹²⁴ The theory of liability applied to the Bristol-Meyers Squibb company was that its employees participated in “critical meetings” that designed the Guatemalan experiments as a “continuation and progression of their existing research into penicillin, to test various forms of penicillin that they had manufactured and their efficacy on a large population of controlled human subjects,” and that its agents or employees actively concealed the “unethical, immoral, and tortious nature” of the experiments in Guatemala.¹²⁵

¹²² Estate of Alvarez v. Johns Hopkins Univ., 205 F. Supp. 3d 681 (D. Md. 2016).

¹²³ Plaintiffs’ Second Amended Complaint, Estate of Alvarez v. Johns Hopkins Univ., 205 F. Supp. 3d 681 (D. Md. 2016). The plaintiffs had an initial complaint that was removed to federal court. *Alvarez*, 205 F. Supp. 3d at 685 (providing procedural history of the case). The plaintiffs then filed an eleven-count amended complaint to include additional claims. *Id.* The court dismissed most of the claims but allowed the claims under the ATS and the claims for punitive damages to go forward. *Id.* The plaintiffs then filed the Second Amended Complaint asserting claims under Guatemalan law and Maryland law and seeking to hold liable the named defendant organizations. *Id.*

¹²⁴ Plaintiffs’ Second Amended Complaint ¶ 1, Estate of Alvarez v. Johns Hopkins Univ., 205 F. Supp. 3d 681 (D. Md. 2016). Recall, for example, that Dr. Lewis H. Weed of Johns Hopkins University served as the Vice-Chairman of the Office of Scientific Research and Development’s Committee on Medical Research, the entity that approved the Guatemalan experiments. *See supra* note 33 and accompanying text. Five additional senior physicians “served on the Syphilis Study Section, an advisory panel to the United States Public Health Service that authorized and oversaw the Guatemalan experiments.” Estate of Alvarez v. Johns Hopkins Univ., 275 F. Supp. 3d 670, 680 (D. Md. 2017). Dr. Hugo Muench of the Rockefeller Foundation’s International Health Division was part of the Subcommittee on Venereal Diseases of the National Research Council and thus contributed to the design of the Guatemalan experiments. *See GUTMANN & WAGNER, supra* note 28, at 15 n.72, 121. In addition to Dr. Weed, four additional doctors affiliated with Johns Hopkins were “involved” in the Guatemalan experiments: Dr. J. Earle Moore, Dr. Lowell Reed, Dr. Thomas Turner, and Dr. Harry Eagle. *See Alvarez*, 275 F. Supp. 3d at 680. The Third Amended Complaint established that the Rockefeller Foundation had “funded and carried out several public health projects throughout Central and Latin America,” and Rockefeller employees or board members, including Dr. Thomas Parran, Dr. Frederick Soper, and Dr. George Strode “were involved in” the Guatemalan experiments. *Id.* at 681. For instance, Dr. Parran was a member of the Public Health Service and employed as the United States Surgeon General from the 1930s to 1949. *Id.* Dr. Soper was the Director of the Pan-American Sanitary Board and assigned as the “Responsible Investigator” during the Guatemalan experiments. *Id.*

¹²⁵ Plaintiffs’ Second Amended Complaint ¶¶ 6–7, Estate of Alvarez v. Johns Hopkins Univ., 205 F. Supp. 3d 681 (D. Md. 2016).

The *Alvarez* plaintiffs asserted multiple claims for harms caused by the Guatemalan sexually transmitted disease experiments' use of non-consensual human subjects as well as crimes against humanity.¹²⁶ The plaintiffs requested compensatory and punitive damages.¹²⁷ The court dismissed the plaintiffs' Second Amended Complaint for failure to present adequate factual allegations, failure to plead a claim under the ATS, and failure to present allegations on which any of the named defendants could be found liable.¹²⁸ The court did, however, grant the plaintiffs leave to file a Third Amended Complaint and provided extensive guidance on what foundational allegations the plaintiffs would need to include in order to survive a motion to dismiss.¹²⁹ Approximately three months later, the *Alvarez* plaintiffs did file a Third Amended Complaint.¹³⁰ The defendants moved to dismiss all claims asserted against them.¹³¹

In an opinion more than forty pages long, Judge Marvin J. Garbis addressed every aspect of the defendants' motion to dismiss the plaintiffs' Third Amended Complaint,

¹²⁶ *Id.*

¹²⁷ *Alvarez*, 205 F. Supp. 3d at 685 (summarizing twenty counts raised in the Plaintiffs' Second Amended Complaint).

¹²⁸ *Id.* (reciting shortcomings of Plaintiffs' Second Amendment Complaint).

¹²⁹ *Id.* at 688–94.

¹³⁰ *Id.* at 679.

¹³¹ *Id.* As directed by the court in its dismissal of the Second Amended Complaint to “provide adequate foundational allegations for at least one Plaintiff” in six different categories, the Third Amended Complaint divided the 842 plaintiffs into six categories. *Alvarez*, 205 F. Supp. 3d at 679–80. The first category was “direct plaintiffs,” namely, Guatemalans who were unknowingly infected with syphilis as part of the experiments without their consent. *Id.* The second category was “spouses,” namely, Guatemalans who did not have syphilis before he or she married or had sexual contact with a direct plaintiff, and who was infected with syphilis through sexual contact with the direct plaintiff. *Id.* at 680. The third category was “children,” namely, the sons and daughters of a direct plaintiff or of the spouse of a direct plaintiff. *Id.* The fourth category was “grandchildren,” namely, the grandchildren or great-grandchildren of a direct plaintiff. *Id.* The fifth category was “wrongful death plaintiffs” who were either the parent, spouse, or child of a deceased plaintiff who died as a result of syphilis acquired as a result of the Guatemalan experiments. *Id.* The sixth category was “estate plaintiffs,” namely, the estates of Guatemalans who died as a result of syphilis acquired from the Guatemalan experiments, but who did not have other status in other categories; the claims of all “estate plaintiffs” were brought by their heirs, next of kin, or personal representatives. *Alvarez*, 205 F. Supp. 3d at 680. Within each category, the *Alvarez* plaintiffs specified the type of sexually transmitted disease they each have, their experience as subjects of the experiments, when they first noticed the symptoms of syphilis, when they received a syphilis diagnosis, when they knew the cause of their disease, and the dates of the deaths of relevant decedents. *Id.*

granting the motion in part and denying it in part.¹³² The court permitted the plaintiffs' claims to proceed under the ATS, finding that the Third Amended Complaint was not time-barred.¹³³ The Third Amended Complaint also alleged facts adequate to support a theory of corporate liability for the acts of defendants' agents or employees,¹³⁴ that the

¹³² *Alvarez*, 275 F. Supp. 3d. at 711.

¹³³ The defendants argued that claims under the ATS were time-barred by a ten-year statute of limitations that ran from the date of the experiments. *Id.* at 683–87. The court disagreed, finding that “an ATS claim [did] not accrue and the limitations period [did] not commence when a plaintiff, through no fault of his or her own, [was] unaware of an injury’s existence or factual cause.” *Id.* at 685. In order to appreciate Judge Garbis’ careful opinion, consider his detailed discussion of the statute of limitations issue. The court stated that the relevant inquiry was whether a person in a plaintiff’s position would have been able to discover a critical fact. *Id.* The court found that the *Alvarez* plaintiffs adequately alleged a “plausible contention that they could not have discovered the cause of their injuries if they had exercised due diligence.” *Id.* at 686. The *Alvarez* plaintiffs had alluded to the fact that the Guatemalan experiment researchers targeted the test subjects of the experiments because they were poor and uneducated, likely unable to know what was happening to them. *Id.* In the court’s view, even when plaintiffs had consulted with a doctor about their condition, it is plausible that they would not have been able to trace the origin of their infections to the Guatemalan experiments. *Alvarez*, 275 F. Supp. 3d at 686. Second, the spouses of nonconsenting human subjects of the experiments would not have known the “critical fact” that the experiments were the cause of their spouses’ syphilis. *Id.* Therefore, the court reasoned, “the limitations period did not commence until they discovered the cause of their injuries”—i.e., the infection of syphilis by the researchers. *Id.*

¹³⁴ For the corporate liability argument, the *Alvarez* plaintiffs alleged that the defendants could be held vicariously liable for the acts taken by the primary perpetrators, or that the defendants aided and abetted or conspired with the primary perpetrators in experimenting on non-consenting human subjects. 275 F. Supp. 3d at 687. The court had to determine the correct standard for corporate liability under the ATS and whether the individuals involved in the Guatemalan experiments were acting within the scope of their employment or were agents of the defendants between 1946 and the early 1950s. Looking to the Ninth Circuit’s analysis on the standard for corporate liability under the ATS, the court looked to federal common law and domestic tort law for guidance on the correct standard. *Id.* at 689. Federal courts have considered “general agency principles, elements of control, and knowledge by a corporation’s executives or managers” when dealing with ATS claims against corporate defendants. *Id.* at 690.

Following this guidance, the court relied on *Doe v. Exxon Mobil Corp.*, 654 F.3d 11 (D.C. Cir. 2011), *vacated*, 527 F. App’x 7 (D.C. Cir. 2013), a federal case in which the United States District Court for the District of Columbia held that the plaintiffs had sufficiently stated a claim of aiding and abetting a violation of the law of nations under the ATS. In this case, the plaintiffs alleged that the corporate defendants’ facilities, supplies, and vehicles were used to commit human rights abuses; that the corporate executives had received reports that their employees were committing human rights violations on their property; and that the corporate executives planned and approved the catalyst for the human rights violations. *Id.*; *Alvarez*, 275 F. Supp. 3d at 691. In the *Alvarez* case, Judge Garbis reasoned that the complaint adequately alleged a plausible contention that the defendants’ doctors and officers were “decisionmakers who engaged in a multi-year practice of wrongdoing.” 275 F. Supp. 3d at 693. In particular, the actions of the primary perpetrators were “known, directed, and encouraged” by high-ranking individuals with decision-making authority in Johns Hopkins, the Rockefeller Foundation, and Bristol-Myers Squibb. *Id.* at 692.

defendants aided and abetted violations of international law (and conspired to do so), and to extend possible standing under the ATS to children and descendants of victims of the Guatemalan sexually transmitted disease experiments—even if not conceived at the time of the experiments—if the injuries to the children and descendants were foreseeable and expected.¹³⁵ The court dismissed the *Alvarez* plaintiffs' Guatemalan law claims on the grounds that Guatemala's 1933 Civil Code did not provide for vicarious liability for employers in scenarios like the one presented in this case.¹³⁶

The day after the court's decision, the press reported that a judge had ruled that the claims of the Guatemalan plaintiffs could go forward.¹³⁷ As the *Alvarez* suit continued to progress, the Supreme Court of the United States issued a significant decision under the ATS. In *Jesner v. Arab Bank, PLC*, the Court ruled that the ATS does not subject foreign corporations to suits brought in United States courts for alleged human rights violations.¹³⁸ Even though the defendants in the *Alvarez* case—the Rockefeller Foundation, Bristol-Myers Squibb Company, and the variety of institutions affiliated with Johns Hopkins University—acknowledged that *Jesner*'s holding was limited to foreign corporations, the defendants nevertheless moved for a Judgment on the Pleadings, arguing that the ATS does not permit claims against a corporation.¹³⁹ That motion was denied.¹⁴⁰

One month later, the defendants moved to have certified for appeal that decision of the United States District Court of the District of Maryland.¹⁴¹ The Fourth Circuit granted

¹³⁵ *Alvarez*, 275 F. Supp. 3d at 705–06.

¹³⁶ *Id.* at 709.

¹³⁷ See Colin Campbell, *Judge Allows \$1 Billion 'Guatemala Experiment' Suit Against Hopkins and Others to Move Forward*, BALTIMORE SUN (Aug. 31, 2017), <https://www.baltimoresun.com/health/bs-md-hopkins-guatemala-suit-20170831-story.html> [<https://perma.cc/STS3-XNM5>].

¹³⁸ *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1403 (2018) (“[A]bsent further action from Congress it would be inappropriate for courts to extend ATS liability to foreign corporations.”).

¹³⁹ *Estate of Alvarez v. Johns Hopkins Univ.*, 373 F. Supp. 3d 639, 646 (2019).

¹⁴⁰ *Id.*; see also Rafael Azul, *US Federal Judge Allows Lawsuit Over Illegal Experimentation On Guatemalan Subjects*, WORLD SOCIALIST WEB SITE (Jan 21, 2019), <https://www.wsws.org/en/articles/2019/01/21/guat-j21.html?view=print> [<https://perma.cc/K5KV-QPZ2>].

¹⁴¹ See *Estate of Alvarez v. Johns Hopkins Univ.*, No. CV TDC-15-0950, 2019 WL 1779339 (D. Md., Apr. 23, 2019) (describing defendants' interlocutory appeal). The corporate defendants are represented by major law firms including DLA Piper US LLP, Hogan Lovells US LLP, King and Spalding LLP, and Patterson

that motion, in light of a conflict between the United States Courts of Appeals on the question of whether the ATS allows for corporate liability.¹⁴² If the Fourth Circuit reverses the District Court's decision, the case will almost certainly be dismissed. In the meantime, the *Alvarez* case continues to proceed toward trial.¹⁴³ The *Alvarez* plaintiffs continue to hope for redress for their injuries.

C. *Petition on Behalf of Oficina de Derechos Humanos del Arzobispado de Guatemala v. Guatemala and the United States of America*

In December 2015, the Office of Human Rights for the Archdiocese of Guatemala, acting on behalf of the victims of the Guatemalan sexually transmitted disease experiments, filed a petition with the Inter-American Commission on Human Rights (IACHR), a body within the Organization of American States.¹⁴⁴ The UC Irvine School of Law International Human Rights Clinic and the City Project of Los Angeles serve as counsel for the petitioner, which is one of Guatemala's leading non-governmental human

Belknap Webb and Tyler LLP. *Id.* (listing DLA Piper US LLP and Hogan Lovells US LLP, Baltimore, MD, as among the counsel for The Johns Hopkins University, The Johns Hopkins University School of Medicine, The Johns Hopkins Hospital, The Johns Hopkins Bloomberg School of Public Health, and The Johns Hopkins Health Systems Corporation; DLA Piper US LLP and Patterson Belknap Webb and Tyler LLP, New York, NY, among the counsel for The Rockefeller Foundation; and DLA Piper US LLP and King and Spalding LLP among the counsel for the Bristol-Myers Squibb Company).

¹⁴² *Id.*

¹⁴³ The most recent filing in the case is a request by the defendants for the imposition of sanctions on all plaintiffs' counsel for alleged abuse of the litigation process, namely, presenting "manufactured evidence, false sworn statements, and unsupportable allegations that even a cursory investigation would have shown," and exhibiting "bad faith and vexatious conduct." *Alvarez v. Johns Hopkins Univ.*, No. CV TDC-15-950, 2019 WL 4038562 at *1, *9 (D. Md. Aug. 27, 2019) (summarizing substantive content of the Defendants' Motion for Discovery and Sanctions). If the allegations in that motion are true, then the named plaintiffs in the case may not, in fact, have had any connection to the Guatemalan sexually transmitted disease experiments. *See id.* at *2. In August 2019, Chief United States Magistrate Judge Beth P. Gesner denied the defendants' motion, finding that the defendants had not met the requisite burden of proof. *Id.* Yet even if the behavior of plaintiffs' counsel as alleged in the defendants' motion did not rise to the level of meriting sanctions, the glimpse the motion provides into the pre-trial discovery process suggests that this will be a highly disputed case.

¹⁴⁴ *Petition, Oficina de Derechos Humanos del Arzobispado de Guat. v. Guat. and the U.S., Inter-Am. Comm'n H.R.* (2015), <https://www.law.uci.edu/academics/real-life-learning/clinics/IHRC-GuatemalaPetition.pdf> [<https://perma.cc/D6V5-RE8F>] [hereinafter *Petition*]; *see also* Press Release, The City Project, Overdue Justice for Guatemalan Victims of Venereal Disease Experiments (Dec. 14, 2015), <http://www.law.uci.edu/news/press-releases/IHRC-GuatemalaHumanRights-121415.pdf> [<https://perma.cc/TV63-YD7A>] [hereinafter *Press Release, Overdue Justice*].

rights organizations.¹⁴⁵ The petition seeks a declaration that the non-consensual human experimentation conducted by Dr. Cutler and others violated customary international law and a variety of international agreements.¹⁴⁶ Specifically, the petition urges findings of “violations of the rights to life, health, freedom from torture and crimes against humanity under the American Declaration of the Rights and Duty of Man¹⁴⁷ and the American Convention on Human Rights.”¹⁴⁸ Both the United States and Guatemala are signatories to the American Declaration; Guatemala (but not the United States) is a signatory to the American Convention.¹⁴⁹ The purpose of the petition is to establish “truth and justice for the Guatemalan victims’ families of these experiments through comprehensive and dignified reparations.”¹⁵⁰ The petition reveals the agonizing suffering of the direct victims of the Guatemala experiments, as well as the devastating physical consequences and psychological effects on their children and grandchildren, some of whom have suffered from blindness, paralysis, and still-births.¹⁵¹

¹⁴⁵ *Id.* The authors have attempted on multiple occasions (most recently in March 2019) to contact counsel for an update on the case. To date, the authors have not received any response to their inquiries. *See, e.g.*, E-mail from Bridget Crawford to Catherine Sweetser (May 31, 2017) (on file with author).

¹⁴⁶ *Id.*

¹⁴⁷ The petition alleges that the United States and Guatemala violated the Declaration’s Article I (right to life, liberty, and personal security), Article VI (right to a family and to protection thereof), and Article XI (right to preservation of health and to well-being). *Id.*

¹⁴⁸ The petition alleges that Guatemala violated the American Convention’s Articles 1 (right to “free and full exercise of . . . rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition”); 4 (“Every person has the right to have his life respected.”); 5 (“Every person has the right to have his physical, mental, and moral integrity respected.”); 11 (“Everyone has the right to have his honor respected and his dignity recognized.”); and 17 (“The family is the natural and fundamental group unit of society and is entitled to protection by society and the state.”). Organization of American States, American Convention on Human Rights arts. 1, 4, 5, 11, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

¹⁴⁹ *See* American Declaration of the Rights and Duties of Man, Inter-Am. Comm’n H.R., O.A.S. Off. Rec. OEA/Ser. LV/I.4 Rev. (1965), <https://www.cidh.oas.org/Basicos/English/Basic2.american%20Declaration.htm> [<https://perma.cc/Z3ZD-XZ3G>]; Organization of American States, American Convention on Human Rights, *supra* note 148 (showing that Guatemala ratified the Convention in 1978 and the United States signed the Convention in 1977, but it has not been ratified by the United States Congress).

¹⁵⁰ Press Release, Overdue Justice, *supra* note 144.

¹⁵¹ *Id.*

The petition filed with the IACHR includes facts similar to those contained in the pleadings in *Garcia* and *Alvarez*.¹⁵² The human rights petition focuses on both countries knowingly endorsing and conducting non-consensual medical experimentation on humans from the most vulnerable populations in Guatemala, on account of the victims' poverty and lack of education.¹⁵³ The petition attempts to emphasize the victims' personal stories. It tells the story of Celso Ramirez Reyes, for example, who served in Guatemala's "Guardia de Honor" from 1948 to 1950; he was injected with sexually transmitted diseases by United States scientists over a six-month period.¹⁵⁴ As a consequence, Mr. Reyes experienced sores, poor vision, gonorrhea, and extreme lethargy.¹⁵⁵ His untreated disease caused his daughter to be born with poor vision; she went completely blind at age fifteen.¹⁵⁶ Mr. Reyes' granddaughter suffers from canker sores on her head and related hair loss.¹⁵⁷ The petition also tells the stories of multiple untreated mothers whose children were born blind or paralyzed, or both; mothers who had still-births; and mothers who gave birth to dangerously low-weight and premature babies.¹⁵⁸ The widespread prevalence of symptoms associated with syphilis and gonorrhea among the descendants of the victims of the study reveal the magnitude of ongoing suffering caused by Dr. Cutler's experiments.¹⁵⁹

Because filings in the IACHR are not public, it is difficult to discern the status of this case. It is not clear whether the petition has been admitted by the Commission and, if so, whether the Commission is preparing a report. Given that the *Garcia v. Sebelius* court has left the victims without a remedy against the United States government, this petition before the IACHR may be the only way to hold the governments of the United States and Guatemala accountable in the international community.¹⁶⁰

¹⁵² See *supra* Parts II.A. and II.B.

¹⁵³ Petition, *supra* note 144, at 3.

¹⁵⁴ *Id.* at 11; *Garcia*, 867 F. Supp. 2d at 125.

¹⁵⁵ Petition, *supra* note 144, at 11.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.*

¹⁵⁸ *Id.* at 10.

¹⁵⁹ *Id.* at 11.

¹⁶⁰ See *supra* Part II.A.

III. Identity, Law, and Politics in the Guatemalan Sexually Transmitted Disease Experiments

The primary purpose of the United States government's non-consensual human experiments in Tuskegee,¹⁶¹ Terre Haute,¹⁶² and Guatemala¹⁶³ was to better understand sexually transmitted diseases because of the underlying threat those diseases posed to the American public generally and the country's military readiness in particular.¹⁶⁴ One might think, then, that researchers would choose to conduct their experiments on United States military personnel. Instead, researchers in Guatemala intentionally infected both men and women in a country that was geographically distant from the United States, where the laws allowed women to be used as human vectors for the disease, where the government was cooperative, and where the human research subjects were racially and linguistically different from most Americans. Combined, these factors contributed to the decades-long secrecy about the activities of United States researchers in Guatemala in the 1940s.

A. Gender Matters: Women as Subjects and Principals in Non-consensual Experimentation

1. Women as Subjects

The Tuskegee experiments—initially called “The Tuskegee Study of Untreated Syphilis in the Male Negro”¹⁶⁵—famously followed the progression of untreated syphilis in black *men*,¹⁶⁶ without regard for the impact of any transmitted syphilis on the men's

¹⁶¹ See *supra* note 3 and accompanying text (linking to materials explaining the Tuskegee experiments).

¹⁶² See *supra* notes 33–40 and accompanying text (describing experiments in federal prison in Terre Haute, Indiana).

¹⁶³ See *supra* Part I.B. (discussing Guatemalan sexually transmitted disease experiments).

¹⁶⁴ See GUTMANN & WAGNER, *supra* note 28, at 12–13 (describing creation by President Franklin D. Roosevelt of the federal Office of Scientific Research and Development as providing “STD researchers an unprecedented opportunity to mobilize federal funds to mitigate these threats” to military readiness).

¹⁶⁵ R.A. Vonderlehr et al., *Untreated Syphilis in the Male Negro: A Comparative Study of Treated and Untreated Cases*, 107 JAMA 856 (1936). This was the first published study to come out of the Tuskegee experiments.

¹⁶⁶ See *Timeline*, *supra* note 5 and accompanying text (providing overview of Tuskegee experiments).

sexual partners.¹⁶⁷ The fact that the experiment had a direct effect on the men's sexual partners, most of whom were women, has not been part of most accounts of the atrocities of that study.¹⁶⁸ Similarly, governmental researchers conducted the Terre Haute experiments in an all-male prison, where 241 prisoners participated as "volunteers" who agreed to be exposed to the gonorrhea bacteria; the men received \$100 in cash and a promise that the parole board would likely take their participation in the study into account when they were eligible for parole.¹⁶⁹ No account of the Terre Haute study includes the number or names of the local women, some of whom were sex workers, from whom the researchers took vaginal swabs in order to study a variety of strains of gonorrhea they may have had.¹⁷⁰ Nor is there any account of any impact the gonorrhea studies had on the partners of the male participants in the study who perhaps did not respond to medication and then transmitted infections to their sexual partners after their release from prison.¹⁷¹ Women are largely absent from the narrative, except as unnamed and uncounted sources of additional specimens.

In its report on the Guatemalan sexually transmitted disease experiments, the Presidential Commission for the Study of Bioethics reported that there were 5,540 human subjects, but did not further break down the subjects by gender.¹⁷² It is not possible to know for certain whether men or women comprised the majority of the study's subjects. They were classified as commercial sex workers (fourteen, all female), soldiers (1,017,

¹⁶⁷ For a powerful discussion of the impact of the Tuskegee studies on women, who were not the direct subjects of the experiments, see DELESO A. ALFORD, *TUSKEGEE'S FORGOTTEN WOMEN: THE UNTOLD SIDE OF THE U.S. PUBLIC HEALTH SERVICE SYPHILIS STUDY* (2020). See also *TUSKEGEE'S FORGOTTEN WOMEN*, <https://www.abc-clio.com/ABC-CLIOCorporate/product.aspx?pc=A5354C> [<https://perma.cc/BM5E-XYKF>] (promoting Alford's book as acknowledging "the importance of women's voices, and especially black women's voices, in history" and drawing attention to the historic inattention paid to the impact of the Tuskegee studies on women).

¹⁶⁸ See Deleso A. Alford, *Examining the Stick of Accreditation for Medical Schools Through a Reproductive Justice Lens: A Transformative Remedy for Teaching the Tuskegee Study*, 26 J.C.R. & ECON. DEV. 153, 154 (2011) ("[The] omission of Black women in the legal, medical, and historical narratives of the Tuskegee Study illustrates the marginalization of Black women in medical research and education.").

¹⁶⁹ GUTMANN & WAGNER, *supra* note 28, at 18 (describing incentives for Terre Haute prisoners to participate in the study).

¹⁷⁰ See, e.g., *id.* at 21 (mentioning samples taken from local sex workers).

¹⁷¹ See, e.g., *id.* at 21–23 (failing to discuss the impact of untreated disease on post-prison transmission by prisoner participants in the Terre Haute study).

¹⁷² *Id.* at 188 ("Table 4: Subject and Population Specific Data").

all male), prisoners (976, all male), orphans and school children (1,384, sex unspecified), patients seeking treatment for specific blood-related illnesses (fifty-one, sex unspecified), psychiatric patients (716, sex unspecified), United States soldiers in Guatemala (twenty-three, all male), and other “unspecified” subjects (sex not reported).¹⁷³ The records of Dr. Cutler which were maintained by the National Archives include a list of “Female Insane Asylum Patients” (with names redacted).¹⁷⁴ The “Prison and Insane Asylum Photographs to Accompany Final Report” include images of female subjects.¹⁷⁵ Thus, unlike in the Tuskegee or Terre Haute experiments, it is certain that women were included in the Guatemalan study as formal human subjects. They also were used as key disease “vectors”—instruments of sorts—in the study. Commercial sex workers were paid to have sexual intercourse with prisoners (during one phase of the study) and soldiers (during another phase of the study).¹⁷⁶ The researchers did not inform the soldiers that they were part of a research study; the scientists supplied the soldiers with alcohol and sex workers infected with sexually transmitted diseases.¹⁷⁷

2. Women as Researchers

In terms of the researchers involved in the Tuskegee, Terre Haute, and Guatemalan experiments, it is well documented that the projects’ medical personnel overlapped to a large extent.¹⁷⁸ One detail from the report of the Presidential Commission for the Study of Bioethics is that of the twenty-six named individuals who were directly “involved” in the

¹⁷³ *Id.*

¹⁷⁴ FOLDER 18 - LIST OF FEMALE INSANE ASYLUM PATIENTS, <https://nara-media-001.s3.amazonaws.com/arcmedia/research/health/cdc-cutler-records/folder-18-female-patients.pdf> [<https://perma.cc/923H-XMHU>].

¹⁷⁵ PHOTOGRAPHS, *supra* note 80.

¹⁷⁶ *See supra* notes 70–74; *see also* GUTMANN & WAGNER, *supra* note 28, at 48 (describing how commercial sex workers were instructed to have intercourse with men multiple times a day or within short time periods, and reporting on one specific instance in which a commercial sex worker engaged in intercourse with eight different soldiers during a single seventy-one-minute time period).

¹⁷⁷ *See* Subramanian, *supra* note 6 (“Army men were often lubricated with alcohol, too, before being set up with the prostitutes . . . The soldiers were never informed that this was part of a medical experiment, obliterating any possibility that consent was obtained and making the experiments ethically unsound.”).

¹⁷⁸ *See supra* note 4 and accompanying text (reporting Dr. Cutler’s participation in Tuskegee experiments and Guatemalan experiments); GUTMANN & WAGNER, *supra* note 28, at 13–14 (noting participation of Dr. Cutler and others in Terre Haute experiments and noting many of the same personnel participated in the Guatemalan experiments).

Guatemalan experiments, three were women.¹⁷⁹ The three women were employed by the United States Public Health Service as either serologists or bacteriologists.¹⁸⁰ In the case of the Guatemalan experiments, women were both part of the group of scientists implementing non-consensual experimentation and among the subjects studied. To be sure, the experiments were designed and approved by male military and scientific leaders.¹⁸¹ But it would be inaccurate to characterize the Guatemalan experiments in simplistic gender terms—i.e., male scientists doing harm to both male and female human subjects. Instead, both male and female scientists actively participated in this non-consensual research. Thus, the history is not a simple story of men-as-perpetrators and women-as-victims. Rather, the Guatemalan sexually transmitted disease experiments invite consideration of the way that female scientists (representing three out of the twenty-six individuals named in the report of the Presidential Commission) participated in dehumanizing harm inflicted on other women.

In evaluating the harmful effects of the Guatemalan experiments, it is important to recognize that the victims of the study go well beyond the human subjects themselves, as Deleso Alford has done in her study of the impact of the Tuskegee experiments on the female partners of the men who were infected with syphilis.¹⁸² In Guatemala, both women and men were infected with sexually transmitted diseases, and any infected human subject also risked exposing his or her sexual partners to the disease and transmitting disease to future generations.¹⁸³ The circle of people harmed by the Guatemalan sexually transmitted disease experiments extends well beyond the subjects themselves.

¹⁷⁹ GUTMANN & WAGNER, *supra* note 28, at 112–15 (“Table 2: Individuals Involved in the STD Experiments in Guatemala”).

¹⁸⁰ *Id.* (listing among participants bacteriologist Virginia Lee Harding, serologist Genevieve Stout, and bacteriologist Alice Walker).

¹⁸¹ *See supra* Part I.B.

¹⁸² *See* Alford, *supra* note 168 (discussing importance of women’s role in the Tuskegee experiments, even though they were not technically the subject of the study).

¹⁸³ *See, e.g.*, Meghan O’Connor et al., *Syphilis in Pregnancy*, 53 J. MIDWIFERY & WOMEN’S HEALTH e17, e19 (2011) (reporting that women infected with syphilis can transmit the disease to a gestating fetus or to the infant through the birth canal at childbirth).

B. Law Matters: Legally Permitted Commercial Sex Work in Guatemala

The selection of Guatemala as the site for Dr. Cutler's experiments after the conclusion of the Terre Haute experiments was no coincidence. The formal law of Guatemala permitted researchers to do what they could not in the United States—use intentionally infected commercial sex workers to spread sexually transmitted diseases to uninformed human subjects.¹⁸⁴ Indeed, in correspondence with Dr. John F. Mahony of the National Research Council's Subcommittee on Venereal Diseases, Dr. Cutler reported that he and his colleagues working in Guatemala believed that they “should do all possible to keep knowledge of our project restricted,” because it was becoming the subject of gossip and rumors.¹⁸⁵ Mahoney replied that in the United States, the scientists on the National Research Council were “doing [the] utmost . . . to restrict our own conversations and those of others bearing upon the matter,” because Mahoney had become “aware of considerable conversation and discussion . . . being carried out in rather high places, much of which has not helped the work greatly.”¹⁸⁶ The non-consensual human experiments were facilitated by favorable laws.

C. Politics Matter: Government Cooperation Facilitated by Financial Aid

Another factor that likely informed the selection of Guatemala as the location for the sexually transmitted disease experiments was the predisposition of that country's leadership to be friendly to the United States, for reasons that no doubt included the vast amounts of financial aid the United States was supplying to Guatemala.¹⁸⁷ Not through physical colonization, but through political and financial interventions, the United States was able to develop a certain degree of dominance over Guatemala. The colonial-like relationship essentially meant that Dr. Cutler and his team were free to conduct their experiments without the Guatemalan government's intervention—and indeed with the government's active cooperation.

¹⁸⁴ See *supra* notes 70–74 and accompanying text.

¹⁸⁵ GUTMANN & WAGNER, *supra* note 28, at 78 (quoting letter of John C. Cutler to John Mahoney on June 22, 1947).

¹⁸⁶ *Id.* (quoting letter of John Mahoney to John C. Cutler on June 30, 1947).

¹⁸⁷ See *supra* Part I.A.; see also Eric Helleiner, *Central Bankers as Good Neighbours: US Money Doctors in Latin America During the 1940s*, 16 FIN. HIST. REV. 5 (2009) (describing financial interventions of the United States in Latin America during this period).

D. Geography Matters: Doing Harm Far Away

News of the experiments was able to be contained because of Guatemala's physical distance from the United States. In an era when long-distance travel and communications were uncommon, it was highly unlikely that any person from the United States would simply "happen" upon the Guatemalan experiments. The physical distance of the experiments from the continental United States facilitated these unethical experiments.

E. Race Matters: Othering Human Subjects

The colonialist mindset also helps illuminate race as a factor in the Guatemalan experiments. Dr. Cutler himself was highly race-conscious. He conducted serology on children he explicitly labeled as "Ladino" (441 children) and "Indian" (277 children).¹⁸⁸ Dr. Cutler's final report speculated that Guatemala's population was "85% Indian . . . [M]any of our patients had the classic, pure Indian features indicating little or no mixture [with other races]."¹⁸⁹ A colleague of Dr. Cutler, Dr. Joseph Spoto, advised that researchers did not have to explain the experiments to any "Indians" in the prisons, because "they are only confused by explanations and knowing what is happening."¹⁹⁰ Like many of his contemporaries, Dr. Cutler suspected that the symptoms and progress of a disease depended on the race of the infected person, but his own research failed to provide that Guatemalan "Indians" were immune to syphilis.¹⁹¹ At no point did the researchers consider how poverty, lack of geographic or social mobility, or gender might impact the spread or manifestation of the diseases with which they intentionally infected human beings. The researchers were eager to determine whether their subjects were (or were not) "Indians," but otherwise did not appear to take into account the subjects' personal characteristics or actual lives. The fact that the human subjects did not speak much or any English also meant that they would not be able to communicate easily with the American press, a fact that has otherwise escaped mention in other critiques of the Guatemalan sexually transmitted disease experiments.¹⁹²

¹⁸⁸ GUTMANN & WAGNER, *supra* note 28, at 118 ("Table 4: Subject and Population Specific Data").

¹⁸⁹ JOHN C. CUTLER, FINAL SYPHILIS REPORT (1955) (on file with PCSBI HSPI Archives).

¹⁹⁰ Letter from John C. Cutler to Richard Arnold (Apr. 10, 1947) (on file with the National Archives) (recounting advice of Dr. Spoto).

¹⁹¹ GUTMANN & WAGNER, *supra* note 28, at 74.

¹⁹² See, e.g., Rodriguez & Garcia, *supra* note 99 (lacking any mention of linguistic difference between researchers and human subjects).

IV. Medical Experimentation, Reproductive Justice, and Restorative Justice

Through a reproductive justice framework, it is possible to better understand the magnitude of harms suffered by the victims of the non-consensual human experimentation in Guatemala. Reproductive justice, as opposed to reproductive rights, is a movement grounded in the experience of women of color and the product of their organizing on their own behalf.¹⁹³ Reproductive justice “is about shifting resources—in addition to extending rights—to those who lack the information and means to achieve self-determination in reproduction.”¹⁹⁴ By intentionally infecting people with sexually transmitted diseases and then not treating them, the United States government-sponsored researchers denied their subjects self-determination. That is, if an individual were never informed that she (or her partner) had been infected with syphilis, she would not have been able to make a fully informed decision about whether to become pregnant and risk the possibility of giving birth to a child with severe congenital abnormalities. The reproductive choices were similarly limited for a woman who knew that she had syphilis but had no means of obtaining adequate medical treatment. Through litigation, the survivors and families of the non-consensual human research subjects are attempting to achieve not only compensation for pain and suffering, but redress for denied reproductive justice.

The next question is whether justice remains elusive if the litigation fails. The answer is that the litigation, even if unsuccessful, plays a role in a restorative justice project. Restorative justice—in contrast with a retributivist justice¹⁹⁵—seeks to repair harm that has been done.¹⁹⁶ Carrie Menkel-Meadow has explained, “there are four Rs of restorative justice: repair, restore, reconcile, and reintegrate the offenders and victims to each other and to their shared community.”¹⁹⁷ Practically speaking, litigation in United States courts is one venue for the victims of the Guatemalan sexually transmitted disease experiments to share what happened. But litigation, whether successful or not, is not enough. The

¹⁹³ See, e.g., Jael Silliman et al., *Undivided Rights, Women of Color Organize for Reproductive Justice* 35–236 (2004).

¹⁹⁴ Sarah London, *Reproductive Justice: Developing a Lawyering Model*, 13 *Berkeley J. Afr.-Am. L. & Pol’y* 71, 72 (2011).

¹⁹⁵ See, e.g., Alana Saulnier & Diane Sivasubramaniam, *Restorative Justice: Underlying Mechanisms and Future Directions*, 18 *New Crim. L. Rev.* 510, 512 (2015).

¹⁹⁶ Carrie Menkel-Meadow, *Restorative Justice: What Is It and Does It Work?*, 3 *Ann. Rev. L. & Soc. Sci.* 161, 162 (2007).

¹⁹⁷ *Id.*

United States government should hold public hearings and invite the victims and their descendants to testify as to what happened and what effects the experiments have had on them. Historians and ethics experts should be called to explain what is known about the Guatemalan experiments and how the research should be understood by reference to the scientific and ethical norms in the 1940s. Bringing greater public awareness to the non-consensual experiments in Guatemala is a necessary first step.

After victims have been able to share what happened to them, the restorative justice project continues to the next step: “[T]he perpetrator must both acknowledge that experience and atone for it.”¹⁹⁸ Upon learning about the Guatemalan sexually transmitted disease experiments, United States government officials publicly apologized for the “reprehensible research” that took place “under the guise of public health.”¹⁹⁹ The Director of the National Institutes of Health said that he found it “very difficult as a physician-researcher today [to imagine] that the participants in [these experiments] could have considered them ethical.”²⁰⁰ During the *Garcia* litigation, the United States government announced some funding for research and monitoring, but did not offer direct payments to the Guatemalan victims or their families.²⁰¹ In the case of the Tuskegee Syphilis Experiments, government officials entered into an informal \$10 million settlement to provide lifetime medical benefits for the Tuskegee human subjects, their spouses, surviving spouses, and descendants.²⁰² The United States government, the Guatemalan government, and the corporate interests that profited from the sexually transmitted disease experiments should contribute to a fund that will provide the same for the Guatemalan victims.

One of the goals of the pending litigation brought by the Guatemalan victims is to hold financially accountable the organizations or companies whose agents or officers

¹⁹⁸ Abigail Perkiss, *Public Accountability and the Tuskegee Syphilis Experiments: A Restorative Justice Approach*, 10 BERKELEY J. AFR.-AM. L & POL’Y 70, 86 (2008).

¹⁹⁹ See Scott Hensley, *U.S. Apologizes for Syphilis Experiments in Guatemala*, NPR (Oct. 1, 2010), <https://www.npr.org/sections/health-shots/2010/10/01/130266301/u-s-apologizes-for-medical-research-that-infected-guatemalans-with-syphilis> [https://perma.cc/ZG6S-UAVM] (quoting a statement of Secretary of State Hillary Clinton and Health and Human Services Secretary Kathleen Sebelius now unavailable on official government websites).

²⁰⁰ *Id.* (quoting a statement of NIH Director Dr. Francis Collins).

²⁰¹ See *supra* Part II.A.

²⁰² See *Timeline*, *supra* note 5.

were directly responsible for the Guatemalan experiments.²⁰³ Victory in litigation undoubtedly would increase the financial resources available for those denied self-determination in reproductive matters. When a woman's child is born with congenital injuries, she suffers again if she lacks financial or practical resources to address the child's special needs.²⁰⁴ If the litigation is unsuccessful, the United States government, Guatemalan government, and the corporate interests that benefited from the Guatemalan experiments should make voluntary payments to provide health care for all victims and their descendants.

Even if their voices are heard and resources are made available to them, restorative justice will not be achieved unless the governments of the United States and Guatemala make an effort to rebuild trust with the Guatemalan people. As one researcher has said of the Tuskegee Syphilis Experiments, one of the project's greatest legacies is a "loss of faith within the African-American community toward the federal government."²⁰⁵ To regain the faith of the Guatemalan people, it is necessary to not only acknowledge their suffering and provide financial reparations, but also take clear steps to make sure that such non-consensual human experimentation never happens again. The racial, socioeconomic, gender, geopolitical, and geographical features that permitted such violative medical experimentation to occur still exist. Preventing such experimentation in the future will require affirmative steps such as requiring community members to review and approve any experimentation before volunteers from vulnerable populations are sought. The people who are the intended subjects of any study should have an *ex ante* role in deciding whether to permit such study to go forward.

CONCLUSION

It is difficult to predict whether the victims of the Guatemalan experiments will achieve vindication in a court of law or before an international human rights organization. Access to excellent lawyers (who are willing to work for low or no fees) likely will be an important factor in litigation. The plaintiffs in the *Alvarez* case will need to present evidence that proves clearly that a particular victim suffered on account of the defendants' actions.²⁰⁶ The plaintiffs also can benefit from increased public attention to their case. Public opinion may inform the determination of a human rights tribunal to

²⁰³ See *supra* notes 118–16 and accompanying text.

²⁰⁴ See, e.g., *supra* note 94 and accompanying text.

²⁰⁵ Perkiss, *supra* note 198, at 88.

²⁰⁶ See *supra* Part II.B.

issue a report in the victims' case. What the victims seek and deserve is for the truth to be known, and to receive "treatment, compensation[,] and restorative justice."²⁰⁷

²⁰⁷ Press Release, Overdue Justice, *supra* note 144.