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### Review of When Misfortune Becomes Injustice: Evolving Human Rights Struggles for Health and Social Equality by Alicia Ely Yamin

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whether there is an equivalence in the joy experienced across activists, martyrs, and perpetrators. He argues that there is, and that however uncomfortable this equivalence might be, it is critical for human rights scholars and practitioners to acknowledge it. Much like the work on rational choice and Nazism, to disavow the role for joy in atrocity risks a true belief in “monstrosity” and the potential that we are “always out of control.”<sup>32</sup>

Simmons concludes his assessment of joyful human rights through the lens of “human rights winners.”<sup>33</sup> For far too long the language of human rights victims and survivors has cast aside deep and significant dimensions of the human experience. Those who once were victims and who are now survivors are also winners, since through their survival they defy the very conditions of their oppression. In interpreting the experiences of Semere Kesete, who spent a year in solitary confinement in Eritrea and then escaped in 2002, Simmons argues “[b]y living, by being successful, he is defeating the regime that tried to destroy him.”<sup>34</sup> Such success does not come easily nor without trauma and recovery, but it does come and reminds us that in our work as human rights scholars, educators, and practitioners, we must recapture the role for joy and recognize the wholeness of the human experience in order to continue the fight for human dignity and human rights for all. *Joyful Human Rights* provides a strong case for doing so, and is a vital step in this direction. Simmons may well dwell in a gloomy place, but this book gives hope to us all.

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**Alicia Ely Yamin, *When Misfortune Becomes Injustice: Evolving Human Rights Struggles for Health and Social Equality* (Stanford University Press, 2020) ISBN 9781503611306, 312 pages; Alison Crosby & M. Brinton Lykes, *Beyond Repair?: Mayan Women’s Protagonism in the Aftermath of Genocidal Harm* (New Brunswick: Rutgers University Press, 2019) ISBN 9780813598963, 268 pages.**

“When is a disaster a misfortune and when is it an injustice?” begins Judith Shklar in her Storrs Lecture from 1988:

Intuitively the answer seems quite obvious. If the dreadful event is caused by the external forces of nature, it is a misfortune, and we must resign ourselves to our suffering. Should, however, some ill-intentioned agent . . . have brought it about, then it is an injustice and we may express indignation and outrage.<sup>1</sup>

It is injustice, not misfortune, that defines a human rights concern, and the authors of the books under review would no doubt agree. And yet as Shklar admits, the distinction between misfortune and injustice, however productive and generative it may be, is fundamentally unstable. In actual experience, the clung-to distinction does not mean very much. As is obvious to any observer of human

32. *Id.* at 166.

33. *Id.* at 195–238.

34. *Id.* at 201.

1. JUDITH SHKLAR, *THE FACES OF INJUSTICE* 1 (1990).

rights and their multiple infringements, from colonialism, long-standing repressions, foreseeable corporate calamities, the climate crisis, digital imperialism, and the current path of, and responses to, the Covid-19 pandemic, the line between misfortune and injustice shifts through history. What infringements are treated as misfortune—“unavoidable or natural”—and what are treated as injustice—“controllable and social”—is itself under our control. It is a matter “of technology and of ideology or interpretation” states Shklar.<sup>2</sup> Moreover, it is easier to conclude that adversity reflects misfortune rather than injustice when it happens to other people; not so when one must experience it directly oneself.<sup>3</sup>

Three decades ago, Shklar applied this distinction to a series of human sufferings, including those caused by gender and those caused by markets. Is being born a woman a misfortune or an injustice, she asked, and could this be rooted in the control of women’s reproductive functions?<sup>4</sup> What about being a loser in the invisible hand of the market?<sup>5</sup> Both configurations of injustice—but particularly gender—are addressed in these two important new books, one on health and social inequalities by Alicia Ely Yamin, and one on sexual and racial violence and its aftermath by Alison Crosby and M. Brinton Lykes.

Yamin, who frames her book around this distinction,<sup>6</sup> yields quite different conclusions to the ones reached by

Shklar. Yamin, Lecturer on Global Health and Population at the Harvard T.H. Chan School of Public Health, and Senior Fellow at the Petrie-Flom Center for Health Law Policy, Biotechnology and Bioethics at Harvard Law School, sets out to document the various successes and failures in feminist and human rights advocacy in sexual and reproductive health and rights (SRHR) over the last three decades. These are shifts that can be understood as occurring in technology as well as in ideology and interpretation, and Yamin’s book addresses each. Yet her book is very much focused on interpretation, particularly on efforts made to advance an understanding of human rights that includes women’s health rights and SRHR more explicitly.<sup>7</sup> Health, as she acknowledges, is perhaps the most “complex” subject to address through human rights law, given the way economic, political and scientific paradigms all put pressure on what should be treated as a societal responsibility by the state.<sup>8</sup> Nevertheless, health rights have yielded some advances, in some places; in the control that women have over their bodies and in the prospect for reducing the still-shocking statistics of maternal mortality.

As will be pointed out below, Yamin occupies a number of different vantage points, geographies, and methodologies in reviewing shifts in advocacy over three decades (between 1991–2019).<sup>9</sup> Over seven chapters, she covers several challenges confronting those struggling

2. *Id.*

3. *Id.* at 15.

4. *Id.* at 66

5. *Id.* at 76.

6. ALICIA ELY YAMIN, *WHEN MISFORTUNE BECOMES INJUSTICE: EVOLVING HUMAN RIGHTS STRUGGLES FOR HEALTH AND SOCIAL EQUALITY* (2020).

7. *Id.* at 7.

8. *Id.* at 55. For key texts on this point, that help to shed light on the present Covid-19 pandemic, see *HEALTH AND HUMAN RIGHTS: A READER* (Jonathan M. Mann et al., eds., 1999); PAUL FARMER, *INFECTIONS AND INEQUALITIES: THE MODERN PLAGUES* (1999).

9. YAMIN, *supra* note 6, at 4.

for human rights. For example, she moves from military authoritarianism in Latin America and the struggle for human rights in the 1970s, to the HIV/AIDS pandemic emerging in the 1980s and particularly its response in South Africa. She also includes an analysis of the social constitutionalism that arrived alongside transitions towards democracy and capitalism, as well as women's rights and health and human rights movements which gained increased traction in the 1990s. She then describes the challenges to human rights struggles presented by the financial crisis of 2008, and also describes the contemporary human rights challenges of displacement, economic inequality, populism, and conflict.

In the breadth of this approach, Yamin is able to entertain a widening set of categories that are used to assess the impact of the strategies of sexual and reproductive health and human rights advocates. As she acknowledges, these are messy, "context-specific questions about how rights are made real, how services are revised, and how policy makers and local authorities become convinced that their practices must change," and how affected persons are moved to act.<sup>10</sup> Drawing on a wide literature, she documents remedies, norm-setting and diffusion, institution and policy changes, mobilizations, programming, changing political discourses and changing understandings of agency.<sup>11</sup>

Court orders, for example, must be understood as catalysts for political action rather than the last resort line to damages or injunctions.<sup>12</sup> To keep all stances in mind goes far beyond traditional legal scholarship, just as it moves beyond public health scholarship, and Yamin is adept at keeping these different vantage points in view. There are challenges of human rights measurement, as well as human rights accountability, that call for the same deftness and flexibility.

Yamin also sets her sights on the accelerating integration of national economies. In this respect, she provides a good counterexample for those who criticize human rights advocates for their responsibility for, or at the very least failure to contend with, the expansion of neoliberal economic policy.<sup>13</sup> Yamin shows how the inequality caused by neoliberalism is linked to increasingly populist and polarized politics in the Global South and North, as well as to other instabilities in rights protections. As with her previous scholarship,<sup>14</sup> she demonstrates not only that the human rights movement is not monolithic, but also that human rights campaigns in the Global South, and evolving trends in health system analysis, have fundamentally engaged with economic inequality campaigns. Moreover, in focusing particularly on SRHR, she shows how the status inequality—of gender—is heavily intertwined with race

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10. *Id.* at 119, quoting Alice M. Miller, *Sexual Orientation as a Human Rights Issue*, in *LEARNING TO DANCE: CASE STUDIES ON ADVANCING WOMEN'S REPRODUCTIVE HEALTH AND WELLBEING FROM THE PERSPECTIVES OF PUBLIC HEALTH AND HUMAN RIGHTS* 159 (Alicia Ely Yamin ed., 2005).
  11. *Id.* at 119.
  12. On which I agree: KATHARINE G. YOUNG, *CONSTITUTING ECONOMIC AND SOCIAL RIGHTS* 167–91 (2012); see also the range of comments on this issue, from Sandra Liebenberg, César Rodríguez-Garavito, Roberto Gargarella, Malcolm Langford, David Landau & Rosalind Dixon, in *THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS* (Katharine G. Young ed., 2019).
  13. See, e.g., SAMUEL MOYN, *NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD* (2019).
  14. ALICIA ELY YAMIN, *POWER, SUFFERING, AND THE STRUGGLE FOR DIGNITY: HUMAN RIGHTS FRAMEWORKS FOR HEALTH AND WHY THEY MATTER* (2016).

and class, and with the inability to access the goods and services necessary for economic and social rights realization.<sup>15</sup>

In addressing an enormous amount of developments over three decades Yamin employs an eclectic methodology. She writes at times as a “viewed from a distance”<sup>16</sup> witness, at times as a questioner, and at times as a participant-observer. She witnesses the suffering of young mother Latonya, for example, in Roxbury Massachusetts, seeking welfare support during the rise of personal responsibility ideology in the 1980s;<sup>17</sup> and the family of Elva in southern Malawi, HIV-positive from an abusive husband, and dying during the birth of her sixth child in 2012.<sup>18</sup> Yamin also interviews a former Ministry of Health official in Peru, responsible for organizing foreign financing for a family planning program which had sterilized over 250,000 largely indigenous, women in the 1990s, and swerving later to work on a religious conservative anti-abortion campaign.<sup>19</sup> Finally, Yamin is an observer of full-scale shifts in the global political economy—not merely from the relatively comfortable perch of the Global North—but from vantage points in Tanzania, Mexico, Peru and Argentina. From these locations, she is a close observer of the structural adjustment policies, new trade and investment laws, and the diminished space, thereafter, for policy changes.

Readers may quibble with the eclecticism of *When Misfortune Becomes*

*Injustice*, and wonder, at times, what to make of the source material. Nonetheless, the approach is consistent with Yamin’s context-sensitive, but globally attuned, aims. In this respect, the book serves as a useful contrast with the recent book by Alison Crosby and M. Brinton Lykes, who take a deeper look at feminist participatory action research (PAR) methodology, and the search for truth, justice and reparations in Guatemala. In particular, they document—while partly taking part in—the actions of fifty-four Mayan women, who experienced sexual and other harm at the hands of the Guatemalan state, particularly during the 1980s at the peak of the thirty-six-year armed conflict.

The task set in *Beyond Repair?*<sup>20</sup> is thus more finely grained, and differently focused, than in *When Misfortune Becomes Injustice*: namely, how to respond adequately to the atrocities that were perpetrated on the indigenous communities in Guatemala, and particularly on indigenous women, alongside the country’s long legacy of colonization, racial and gendered violence. Rather than misfortune or injustice, other human rights classifications are drawn: this harm is interpreted as genocidal, and the authors also mark the distinctions between the overt, direct and militarized violence and the ongoing structural violence—by impoverishment, and in everyday life—that predates the conflict, and persists

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15. On questioning the too-ready disconnection between status inequality and economic inequality, see Katharine G. Young, *Inequality and Human Rights*, 5 *INFERENCE: INT’L REV. SCIENCE* (2019), <https://inference-review.com/author/katharine-young> (reviewing MOYN, *supra* note 13).
  16. YAMIN, *WHEN MISFORTUNE BECOMES INJUSTICE*, *supra* note 6, at 12, 32, 93, 122, drawing on Amartya Sen, *Adam Smith and the Contemporary World*, 3 *ERASMUS J. FOR PHIL. & ECON.* 50 (2010).
  17. *Id.* at 52–55.
  18. *Id.* at 123–24.
  19. *Id.* at 102–03.
  20. ALISON CROSBY & M. BRINTON LYKES, *BEYOND REPAIR? MAYAN WOMEN’S PROTAGONISM IN THE AFTERMATH OF GENOCIDAL HARM* (2019).

after its end.<sup>21</sup> Importantly, the Q'eqchi', Kaqchikel, Chuj, and Mam women are credited with voice and agency in seeking repair for the harms that were experienced.

Alison Crosby is an associate professor in the School of Gender, Sexuality and Women's Studies at York University, Canada, and M. Brinton Lykes is a Professor of Community-Cultural Psychology at Boston College. Together, the authors spent eight years researching the "community of women"<sup>22</sup> who created space outside of their local communities, and within Western transitional justice mechanisms. This book provides an extensive reflection of the "women" being constructed and positioned within such activism, alongside intermediaries of lawyers, psychologists, and the researchers themselves. "Protagonism" is the concept Crosby and Lykes use to disrupt the constructions of women as "victims," "survivors," "selves," "individuals," and "subjects": it is the Mayan women themselves who are seeking redress for the harm they suffered, and while unfettered protagonism and agency may never be quite attainable, it is their orienting method for participation and assessment.

Over seven chapters, the book details the Mayan women's agency in documenting, recounting, and bringing their experiences to trial. The book begins with a Guatemalan special court's finding, in 2016, of crimes against humanity in the form of sexual violence and domestic and sexual slavery against the Maya Q'eqchi'

women, and the hashtags (e.g. #IamSepurZarco) accompanying that verdict.<sup>23</sup> It describes earlier truth-telling tribunals, like the precursor Tribunal of Conscience for Women Survivors of Sexual Violence in 2010, the recovery of historical memory project organized by the Catholic Church in 1995, and the United Nations-sponsored commission for historical clarification in 1997.<sup>24</sup> Like many other feminists, Crosby and Lykes are skeptical of the spectacle that such processes create, seeking instead to see how the Mayan women were able to resist the "ocular epistemology"<sup>25</sup> through using distinctive trial techniques and other strategies. An interesting component of the book is how varied and multiple these strategies are, including not only through using "curtains" to conceal the protagonists in giving their testimony in public, but other creative resources wholly outside of the judicial setting—image theatre, drawing, collages, storytelling, and the embodied practices of massage and role-playing.<sup>26</sup> The sharing of indigenous knowledge, and the Mayan cosmovision and other spiritual knowledge, also play a central role in such processes.<sup>27</sup>

*Beyond Repair* thus presents a valuable framework in which to understand how broader legal mechanisms can be deployed within transitional justice and human rights approaches. One example lies in criminal justice tools, where the authors emphasize forms of accountability beyond incarceration, including through requiring those found guilty to

21. *Id.* at 5–6. For analysis of the genocide term, see e.g., David Luban, *Calling Genocide by its Rightful Name: Lemkin's Word, Darfur, and the UN Report*, 7 *CHIC. J. OF INT'L L.* 308 (2006).

22. *Id.* at 3.

23. *Id.* at 1.

24. *Id.* at 4.

25. *Id.* at 8.

26. *Id.* at 41 The book reproduces a series of pictures and collages produced by the women protagonists. These can be seen at *id.* 47–49, 52–55.

27. *Id.* at 39, 41.

make payments or to face public recognition for particular acts. Like Yamin, Crosby and Lykes do not reject carceral approaches in full: nevertheless, both books express a sensitive criticism of the “turn to criminal law”;<sup>28</sup> Crosby and Lykes conclude that perpetrators within a community may require different treatment than perpetrators outside of it, particularly when customary laws and practices are recognized and historicized. Another example of broader legal mechanisms lies in property law, where the authors recognize that dispossessions and displacements create a series of other forms of violence and harm, and that land restitution forms a critical part in redress.

The two books represent and assess gendered and racialized suffering—and women’s rights advocacy—in interesting new ways. Partly, this is due to the fluid borrowing from neighboring fields, disciplines and literatures—social work, public health, transitional justice. But the choice to review the two books together lies in the exciting new steps taken towards envisioning remedies. It is, after all, the conversion of “a misfortune to be endured into an injustice to be remedied”<sup>29</sup> that Yamin acknowledges in her opening page, citing Albie Sachs, former Justice of the Constitutional Court of South Africa. (It is Sachs’s constitutional-legal response from 1999, and not Shklar’s political-philosophical one from 1988, on which

the title’s distinction is based). That court has taken clear steps towards connecting symbolic with material remedies (in, for example, health rights litigation), just as transitional justice mechanisms have increasingly sought to add material reparation to symbolic efforts.<sup>30</sup>

How do symbolic and material responses work together? Both books, for example, engage with the potentials, and pitfalls, of “symbolic” “mock” trials, in an evolving feminist human rights tradition.<sup>31</sup> They are also alert to the challenges of material repair. Yamin detects changes in the delivery and financing of health services and systems. Crosby and Lykes refer to land, housing, health care, and compensation as all part of a reparations strategy. A health center is requested for the community, as are acts to improve local schools, and the inclusion of the Mayan women’s story into middle school curricula.<sup>32</sup> But such economic issues introduce their own symbolic challenges: plaintiffs can’t be seen as paid off, or as somehow complicit, in the money or other material redress that are part of the repair, and such material reparations cannot stand in for a broader symbolic response.<sup>33</sup>

These two books introduce critical new assessments for human rights, transitional justice and feminist advocates, those crossing disciplines in law, psychology, public health, education, anthro-

28. *Id.* at 92; For Yamin’s assessment of the “anti-impunity turn,” see YAMIN, *WHEN MISFORTUNE BECOMES INJUSTICE*, *supra* note 6, at 91–93.

29. *S. v. Baloyi* [1999] ZACC 19; 2000 (2) SA 425 (CC) (South Africa) ¶ 12.

30. Katharine G. Young, *The Right-Remedy Gap in Economic and Social Rights Adjudication: Holism versus Separability*, 69 *U. TORONTO L. J.* 124 (2019).

31. YAMIN, *WHEN MISFORTUNE BECOMES INJUSTICE*, *supra* note 6, at 99; CROSBY & LYKES, *supra* note 20, at 70. Crosby and Lykes were two of the approximately fifty invited national and international honorary witnesses during the Guatemalan Tribunal of Conscience in March 2010; with judges being women survivors and activists from Guatemala, Peru, Uganda, and Japan. Yamin participated as a judge in a Symbolic Tribunal on Maternal Mortality and Obstetric Violence in Mexico City.

32. CROSBY & LYKES, *supra* note 20, at 122–23.

33. For analysis of such limits, see Julieta Lemaitre & Kristin Bergtora Sandvik, *Structural Remedies and the One Million Pesos: On the Limits of Court-Ordered Social Change for Internally Displaced Women in Colombia*, in *THE PUBLIC LAW OF GENDER* 99 (Kim Rubenstein & Katharine G. Young eds., 2016).



pology and social work, and for those who generally seek greater resources in participant-observer methodologies and community based advocacy.

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**Annie Isabel Fukushima, *Migrant Crossings: Witnessing Human Trafficking in the U.S.* (Stanford University Press, 2019) ISBN 978-1-5036-0949-5, 261 pages.**

In *Migrant Crossings*, as the title might suggest, Dr. Annie Isabel Fukushima sets the reader out to experience multiple crossings. In the literal sense, this work

crosses through an impressive range of disciplines, including women's and feminist studies, critical race and ethnic studies, sexuality studies, labor studies, legal studies, and sociology.<sup>1</sup> In the figurative sense, Fukushima has the reader cross from this world into the spooky, abstract world through her "unsettled witnessing" of "ghosts" to her discussions of the "living dead."<sup>2</sup> By focusing on Asians and Latinx in the United States, Fukushima asks the reader to contemplate how migrants, and specifically victims of human trafficking, "cross into visibility legally, through frames of citizenship, and through narratives of victimhood."<sup>3</sup>

Fukushima's work is a significant contribution, especially as migration continues to be a hotly debated political and social issue—not only in the United States but worldwide. How immigrants are treated in the twenty-first century is inextricably tied to narratives of migrants as economic, social, and political threats to the nation-state. In response, Fukushima provides real cases to highlight the impact of such narratives on the lives of migrants who experience violence—a violence some would call human trafficking.<sup>4</sup> Human trafficking is "a story that the public is called to witness"<sup>5</sup> through a broad range of mediums.<sup>6</sup> There are different kinds of witnesses<sup>7</sup> who play an

1. Considering Dr. Fukushima's credentials, it is unsurprising that her work touches on so many disciplines. She holds a Bachelor of Arts degree in American Studies and in English Literature from the University of Hawaii, Manoa. She earned a Master of Arts degree, and eventual Ph.D., in Ethnic Studies and Designated Emphasis in Women, Gender and Sexuality Studies from the University of California, Berkeley. She is an Assistant Professor for the Ethnic Studies Division in the School for Cultural and Social Transformation at the University of Utah. Additionally, Fukushima is an Affiliated Faculty Member for both Asian Studies and the Center for Research on Migration and Refugee Integration at the University of Utah.
2. ANNIE ISABEL FUKUSHIMA, *MIGRANT CROSSINGS: WITNESSING HUMAN TRAFFICKING IN THE U.S.* (2019).
3. *Id.* at 3.
4. *Id.* at 5.
5. *Id.*
6. *Id.* Dr. Fukushima provides an impressive bibliography, citing to: published works, films (documentaries and dramas), news articles, press releases, and culture representations (cartoons, floral collages, museum exhibits, painters, photography, performances, public exhibits, literature, memoirs, and journalist publications).
7. Witnesses can include law enforcement officers, social workers, medical professionals, advocates, community members, attorneys, educators, and many more.