

ARGENTINA’S PATH TO LEGALIZING ABORTION: A COMPARATIVE ANALYSIS OF IRELAND, THE UNITED STATES, AND ARGENTINA

Andrea F. Noguera*

INTRODUCTION		357
I. ABORTION IN THE UNITED STATES AND ARGENTINA		360
A. <i>The Extent to Which the United States and Argentine Supreme Court Decisions Recognize a Woman’s Right to Abortion</i>		360
1. The United States: <i>Roe v. Wade</i> and its Progeny		360
2. Argentina: F.A.L. s/ medida autosatisfactiva		363
B. <i>The Argentine Supreme Court’s Approach, Unlike the United States’, Recognizes a State Obligation to Assist Women in Obtaining an Abortion</i>		369
C. <i>Rights and Remedies as Two Sides of the Same Coin: Positive and Negative Duties</i>		372
II. ARGENTINA’S 2018 CONGRESSIONAL DEBATE: THE POINT OF NORETURN		373
A. <i>The Effect of the Language Used in the Opposing Sides’ Slogans: “Pro-Choice” Versus “Pro-Life”</i>		374
1. The Main Arguments Discussed During the 2018 Debate		375
a. The Right to Abortion as a Human Right		376
b. The Proportionality Test		378
c. Abortion as a Central Issue of Public Health		380

* Andrea Noguera graduated from Universidad Nacional de Tucumán, Argentina, and earned an LL.M. in Civil Liberties and Human Rights in May 2019 at Southwestern Law School, Los Angeles, California. The author would like to thank Sabrina Frydman, a Human Rights Argentinian lawyer, for being an inspiration and providing ideas, comments, and confidence; Professors Jonathan Miller and Alexandra D’Italia, for providing guidelines and useful suggestions; and Sharrel Gerlach, Southwestern Law School librarian for providing research tools.

	d. Individual Versus Institutional Conscientious Objection.....	381
III.	UNDERSTANDING WHY ARGENTINA DID NOT PASS THE LAW: WHAT IS THE MAIN OBSTACLE TO LEGALIZING ABORTION?	383
	A. <i>The Power and Role of the Catholic Church: Pressure from Conservative Groups</i>	383
	B. <i>The Next Step Moving Forward: The Irish Referendum as a Model for Argentina</i>	384
	1. Religion in the Constitution	385
	2. The Catholic Church's Role.....	386
	3. Constitutional Reform Process.....	386
	4. Abortion Rights Before 2018.....	387
	5. Social Mobilizations and Geographic Position	388
	6. Consequences of Illegal Abortion.....	390
IV.	CONCLUSION	391

INTRODUCTION

Argentina portrays itself as a country that offers tourists a destination to drink mate, eat delicious steak, and listen to tango. What the outside observers probably do not know is that despite its carefree reputation, Argentina allows its women, specifically poor women, to die because of clandestine abortions. Abortion is illegal in Argentina and low-income women specifically suffer the consequences from this lack of access to safe abortion services. As a result, low-income women disproportionately die due to botched at-home abortions.¹ As René Favaloro² famously stated, “the rich defend illegal abortion to keep it

1. CODIGO PENAL [COD. PEN.] [CRIMINAL CODE] art. 85 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/15000-19999/16546/norma.htm>.

2. Dr. René Favaloro was a famous cardiac surgeon from Argentina who is best remembered for conducting the first planned coronary artery bypass surgery, using a technique he invented himself. He was also the first surgeon in Argentina to perform successful heart- transplant surgery. He was a highly prominent personality in the Argentine medical fraternity. After spending a long time working in Ohio in the United States, he returned to Argentina and realized there was a lack of an institution of similar excellence to the Cleveland Clinic, the place where he had worked in Ohio. Therefore, with the help of several collaborators, he finally founded the Favaloro Foundation in 1975. Favaloro was deeply concerned about the health of the general public and took many efforts to improve public health. See *Biografía*, FUNDACION FAVORO, HOSPITAL UNIVERSITARIO, <https://www.fundacionfavaloro.org/biografia/> (last visited Nov. 17, 2018).

secret and not [feel] ashamed.... [P]oor girls [are] dying in the slums because they do not have access to the clinics that [make] fortunes taking the shame out of the uterus of the rich.”³

Only two exceptions exist to make abortion legal in Argentina, both articulated in Article 86 of the National Criminal Code. The first exception applies when the woman’s life or health is at risk. The second exception is for cases in which an insane woman becomes pregnant from rape.⁴ Though the law initially only protected women with developmental disadvantages, the Argentine Supreme Court interpreted Article 86 in the 2012 *F.A.L.* case⁵ to extend the rape exception to include all women, not only “insane” women.

Argentina may put an end to clandestine abortions by passing a law of general application through the National Congress. Although the 1853 Argentine Constitution was modeled after the United States Constitution and United States case law contributes significantly to Argentine jurisprudence, a review of Argentine constitutionalism and history shows that Argentina should not follow the United States’ approach to reproductive rights. Unlike the United States, where the judiciary took the lead in abortion law, a judicial approach has not provided a solution in Argentina. A comparative analysis between the Argentine Supreme Court’s ruling in the *F.A.L.* case and the United States’ ruling in *Roe v. Wade*,⁶ demonstrates that the Argentine Supreme Court went beyond the right to privacy, instead recognizing abortion under some circumstances as a human right guaranteed by the State.

3. *Que opinaba Rene Favaloro sobre el aborto*, VILLEGAS NOTICIAS (June 12, 2018), <https://www.villegasnoticias.com/general/que-opinaba-rene-favaloro-sobre-el-aborto/>.

4. COD. PEN. art. 86 (Arg.). Article 86 states:

El aborto practicado por un médico diplomado con el consentimiento de la mujer encinta, no es punible:

1° Si se ha hecho con el fin de evitar un peligro para la vida o la salud de la madre y si este peligro no puede ser evitado por otros medios.

2° Si el embarazo proviene de una violación o de un atentado al pudor cometido sobre una mujer idiota o demente. En este caso, el consentimiento de su representante legal deberá ser requerido para el aborto.

(Translation: The abortion performed by a certified doctor with the pregnant woman’s consent is not punishable:

1° If it has been done in order to avoid a danger to the life or health of the mother and if this danger cannot be avoided by other means.

2° If the pregnancy comes from a rape or an attack on modesty committed on an idiot or insane woman. In this case, the consent of her legal representative must be required for the abortion.)

5. *F.A.L. s/ medida autosatisfactiva*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Mar. 13, 2012, Fallos 335:197 (2012) (Arg.).

6. *Roe v. Wade*, 410 U.S. 113 (1973), *overruled in part* by *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (establishing the “undue burden” test for abortion access).

However, even though the *F.A.L.* decision offers an excellent analysis and uses aspects of *Roe*, a legislative path offers a much better strategy for Argentine abortion advocates. In the United States, the judicial path to abortion rights faces serious resistance and in Argentina, the courts are politically weaker compared to U.S. courts. Noncompliance with the Supreme Court's ruling in *F.A.L.* demonstrates that Argentina's judiciary lacks enforcement power. Only a legislative path adequately focuses on positive State obligations to protect women.

The 2018 Congressional abortion debate demonstrated that the legislative path is the superior method for legalizing abortion. The fact that Argentina did not pass the abortion law in 2018, falling short by seven Senate votes, does not diminish the 2018 Congressional debate's powerful value. After months of receiving speakers in Congress from all different fields of study, today, the concept of abortion as a human right is no longer taboo, and it has become a common topic for Argentine families' and friends' discussions, a practice unheard of before 2018.⁷

While Argentina was unable to pass its abortion bill in May 2018, Ireland offers perhaps the best approach for Argentina to model its legislative approach to abortion rights. Irish legislation became an inspiration for the country to move forward in human and women's rights. Given the favorable results of its Constitutional Referendum, Ireland offers an example of how a Catholic-majority country—much like Argentina's faith-driven population—successfully passed legislation that satisfied both sides of the abortion debate.⁸ Ireland offers a blueprint for how, in Argentina, a referendum can ensure democratic forces prevail.

First, section I of this article compares *Roe* with *F.A.L.* and concludes that, although the Argentine Supreme Court recognized abortion as a human right, the Argentine Supreme Court lacks authority to enforce its precedents across the country. Section II explains that the process Argentina experienced in 2018 demonstrates that the country has the potential to mobilize society, but that Argentina must still follow a legislative path to establish abortion rights for its women-citizens. Finally, section III will compare Argentina's experience to Ireland's in 2018 to show that Ireland's approach, rather than the U.S. method, offers a workable and successful model for Argentina's legislature to follow.

7. Marina Franco, *La votación por el aborto en Argentina genera movilizaciones en todo el continente*, N.Y. TIMES (Aug. 7, 2018), <https://www.nytimes.com/es/2018/08/07/argentina-aborto-debate-mundo/>.

8. Yasmeeen Serhan, *Pro-Abortion-Rights Activists Won in Ireland, But Not Argentina*, ATLANTIC MAG. (Aug. 10, 2018), <https://www.theatlantic.com/international/archive/2018/08/abortion-vote-argentina-ireland/567200/>.

I. ABORTION IN THE UNITED STATES AND ARGENTINA

A. *The Extent to Which the United States and Argentine Supreme Court Decisions Recognize a Woman's Right to Abortion*

1. The United States: *Roe v. Wade* and its Progeny

The case law approach has not produced a definitive resolution to the abortion issue in the U.S. despite the U.S. Supreme Court's enormous authority within the U.S. legal system. The Court's abortion decisions are subject to constant challenges by both state legislatures and lower courts.

In 1973, the U.S. Supreme Court acknowledged a woman's right to obtain an abortion in *Roe v. Wade*.⁹ The Court held that the fundamental right of privacy involves a woman's right to have an abortion free from state interference during the first trimester of pregnancy and with only limited interference during the second.¹⁰ In *Roe*, the Supreme Court concluded that the fetus is not a "person" within the meaning of the Fourteenth Amendment's due process and equal protection guarantees.¹¹ The Court explained that "person" did not include "the unborn," and, therefore, the Fourteenth Amendment does not provide constitutional protections prior to viability.¹² Although women's rights advocates considered the decision a big and early win, since its

9. *Roe*, 410 U.S. at 153 ("This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

10. *Id.* at 164-65. (In the opinion, Justice Blackmun states:
To summarize and to repeat:

1. A state criminal abortion statute of the current Texas type, that excepts from criminality only a lifesaving procedure on behalf of the mother, without regard to pregnancy stage and without recognition of the other interests involved, is violative of the Due Process Clause of the Fourteenth Amendment.

(a) For the stage prior to approximately the end of the first trimester, the abortion decision and its effectuation must be left to the medical judgment of the pregnant woman's attending physician.

(b) For the stage subsequent to approximately the end of the first trimester, the State, in promoting its interest in the health of the mother, may, if it chooses, regulate the abortion procedure in ways that are reasonably related to maternal health.

(c) For the stage subsequent to viability, the State in promoting its interest in the potentiality of human life may, if it chooses, regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother.)

11. *Id.* at 158.

12. *Id.* at 158, 162-64 (explaining that "the unborn have never been recognized in the law as persons in the whole sense.").

legalization, many states have created hurdles that make abortion more difficult to obtain for many women.

Nineteen years after the *Roe* decision, the Court decided *Planned Parenthood v. Casey*,¹³ which represented a turning point in abortion case law because it established that states have the right to regulate abortion and pass “viewpoint” legislation favoring the rights of even a pre-viability fetus as long as the law did not place an undue burden on a woman’s access to abortions.¹⁴ From this decision on, state legislatures began to test the limits of *Casey* and the undue burden test, often intending to undermine the rights recognized in *Roe*.¹⁵

In 2016, the Supreme Court’s *Whole Woman’s Health v. Hellerstedt*¹⁶ decision established a balancing test that did not totally resolve the problem in *Casey*, but which clarified how the undue burden standard applied to health-justified abortion restrictions. Justice Ginsburg, in a concurring opinion, declared that “[s]o long as this Court adheres to *Roe v. Wade* and *Planned Parenthood v. Casey*, Targeted Regulation of Abortion Providers laws . . . that ‘do little or nothing for health, but rather strew impediments to abortion,’ cannot survive judicial inspection.”¹⁷

Since *Roe*, all states have passed laws regulating the circumstances and conditions for a woman to obtain an abortion, with sharp differences among them. According to the Guttmacher Institute’s 2018 report on abortion laws, forty-two states require that a licensed doctor perform abortions, and nineteen states demand that a second physician be involved after a certain stage.¹⁸ Regarding public funding, thirty-two states and the District of Columbia prohibit the use of state funds except in specific cases when federal funds are available and the woman’s life is in danger or the pregnancy is the result of rape or incest.¹⁹ Eleven states limit insurance coverage for abortion services to cases where the mother’s health is at risk, and forty-five states permit private insurance providers to refuse to participate in abortions.²⁰ Seventeen states

13. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992) (plurality).

14. *Id.* at 852.

15. Linda J. Wharton et al., *Preserving the Core of Roe: Reflections on Planned Parenthood v. Casey*, 18 *YALE J.L. & FEMINISM* 317, 353 (2006) (“[I]n a significant number of cases, federal courts have repudiated or misapplied the protections of *Casey*, manipulating the undue burden standard in an incremental undermining of *Roe*.”).

16. 136 S.Ct. 2292 (2016).

17. *Id.* at 2321 (Ginsburg, J., concurring) (quoting *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 921 (7th Cir. 2015)).

18. *An Overview of Abortion Laws*, GUTTMACHER INST., <https://www.guttmacher.org/state-policy/explore/overview-abortion-law> (last visited Oct. 14, 2018).

19. *Id.*

20. *Id.*

mandate that abortion providers give women counseling before an abortion that includes information on at least one of the following: the connection between abortion and breast cancer (five states), the ability of a fetus to feel pain (twelve states), and the long-term mental health consequences for the woman (eight states).²¹ Moreover, twenty-seven states require a twenty-four-hour waiting period between the aforementioned counseling and the abortion procedure.²² Regarding parental involvement, thirty-seven states require parental involvement in a minor's decision to access the procedure, twenty-six of which require the consent of one or both parents, while eleven demand that one or both parents be notified.²³

Today, U.S. pro-choice advocates fear for *Roe*'s future given the new, more conservative Supreme Court composition.²⁴ As Professors Erwin Chemerinsky and Michele Goodwin point out, “[a]bortion rights in the United States are in serious jeopardy.”²⁵ President Trump expressed his position that *Roe* should be overturned.²⁶ According to Chemerinsky, “Mr. Trump predicts that the Supreme Court will reverse itself on abortion rights . . . some states will ban the procedure and others may allow abortion services. Such a system would undoubtedly caus[e] significant health burdens for women . . . particularly for low-income women.”²⁷

Moreover, fear that *Roe* could be overturned with the new Supreme Court composition seems likely if cases like *Planned Parenthood of Arkansas and Eastern Oklahoma v. Jegley*²⁸ find their way to the Supreme Court. In *Jegley*, Arkansas claimed that medical abortions, which use pills to induce abortions

21. *Id.*

22. *Id.*

23. *Id.*

24. The three justices that composed the plurality in *Casey* who established the undue burden test – Sandra Day O’Connor, Anthony Kennedy and David Souter – no longer sat on the Court at the end of 2018. President Trump’s nomination and appointment of Justice Neil Gorsuch’s, replacing Justice Scalia, and Bret Kavanaugh, replacing Justice Kennedy, has raised questions about whether the Court will continue to follow abortion case law precedent. Jon O. Shimabukuro, *Abortion, Justice Kennedy, and Judge Kavanaugh*, CONG. RES. SERV. (Aug. 8, 2019), <https://fas.org/sgp/crs/misc/LSB10185.pdf>.

25. Erwin Chemerinsky & Michele Goodwin, *Abortion: A Woman’s Private Choice*, 95 TEX. L. REV. 1189, 1189 (2017).

26. See Hannah Smothers, *Trump Said He’d Probably Overturn Roe v. Wade*, COSMOPOLITAN (Oct. 20, 2016), <https://www.yahoo.com/entertainment/trump-said-hed-probably-overturn-155027221.html> (“When asked by debate moderator Chris Wallace if Trump wanted to see the Supreme Court overturn the case that makes abortion legal for U.S. women, Trump replied yes, he would, in fact, want that. ‘If we put another two or perhaps three justices on, that will happen,’ Trump said. ‘And that will happen automatically, in my opinion, because I’m putting pro-life justices on the court.’”).

27. Chemerinsky & Goodwin, *supra* note 25, at 1190.

28. *Planned Parenthood of Ark. & E. Okla. v. Jegley*, 864 F.3d 953 (8th Cir. 2017), *certiorari denied* 138 S. Ct. 2573 (2018).

within the first nine weeks of pregnancy, were unsafe and caused women health complications. Arkansas passed a law in 2015 that required contracts between medication providers and doctors with privileges at Arkansas hospitals. Arkansas abortion clinics argued they were not able to find any doctors that wanted to sign such contracts.²⁹ The District Court held that the law was medically unsupported, applied the balancing test from *Whole Woman's Health*, and decided that the requirements imposed an undue burden on women seeking abortions. However, on appeal, the Eighth Circuit replaced the balancing test and asked the plaintiffs to specify how many women would be affected, even though the Supreme Court in *Whole Woman's Health* determined that specific fact-finding was not required. Justice Ginsburg wrote in her concurrence opinion that, given the relative safety of modern abortions, state laws that “do little or nothing for health, but rather strew impediments to abortion,” cannot survive judicial inspection.”³⁰

The *Jegley* opinion not only shows that changes in Supreme Court rulings regarding abortion may be imminent, but also demonstrates that circuit courts may not follow Supreme Court precedent. Thus, the United States is facing a crucial moment for women's rights and activists must continue defending reproductive rights.

2. Argentina: F.A.L. s/ medida autosatisfactiva

While the Argentine Supreme Court produced a comparatively progressive abortion decision in the *F.A.L.* case, it has since faced even greater challenges by the lower courts than the U.S. Supreme Court, even though its position enjoys substantial public support. In 2012, the Argentine Supreme Court decided *F.A.L.*, which authorized an abortion for a minor who was a rape victim, establishing a historic precedent. The decision suggested that Argentine judges were beginning to consider the institutional perspective of abortion rights. The *F.A.L.* ruling furthers the idea that, in order to undermine informal practices, it is necessary to determine and regulate the conditions required to make abortion accessible via public services.³¹

On December 3, 2009, A.F., on behalf of her fifteen-year-old daughter,

29. Adam Liptak, *Supreme Court Allows Arkansas Abortion Restrictions to Stand*, N.Y. TIMES (May 29, 2018), <https://www.nytimes.com/2018/05/29/us/politics/supreme-court-wont-hear-challenge-to-restrictive-arkansas-abortion-law.html>.

30. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2321 (2016) (Ginsburg, J., concurring) (quoting *Planned Parenthood of Wis., Inc. v. Schimel*, 806 F.3d 908, 921 (7th Cir. 2015)).

31. Paolo Bergallo, *The Struggle Against Informal Rules on Abortion in Argentina*, in *ABORTION LAW IN TRANSNATIONAL PERSPECTIVE* 143, 154 (Rebecca J. Cook, Joanna N. Erdman, & Bernard M. Dickens eds., 2014).

A.G., reported to the Prosecutor of the Province of Chubut, Argentina, that her daughter had been raped by A.F.'s husband. On January 14, 2010, A.F. requested the Chubut's Court to authorize her daughter's voluntary termination of pregnancy at eleven weeks.³² The claim was made under Article 86 of the Criminal Code,³³ which provides that:

an abortion performed by a certified doctor with the consent of the pregnant woman is not punishable . . . [i]f the pregnancy is the result of a rape or indecent assault against an idiot³⁴ or demented woman. In this case, her legal guardian's consent shall be required for the abortion.³⁵

Despite the fact that the record showed the pregnancy endangered the minor's life, the trial court denied the request.

On March 8, 2010, the Superior Court of the Province of Chubut overturned the decision and held that: a) the case fell within the definition of non-punishable abortion of Article 86 of the Criminal Code, and b) this approach towards the interruption of the pregnancy was in accordance with constitutional law and international human rights.³⁶ On March 11, 2010, the court finally authorized A.G. to obtain a legal abortion in safe conditions.³⁷ However, an official of the Public Prosecutor's office appealed the Superior Court's decision, in representation of the fetus.³⁸ He argued that Argentina protects life from conception, and that A.G.'s situation was not considered among the exceptions that are allowed under the National Criminal Code because the minor was not an "idiotic rape victim."³⁹ On March 13, 2012, the Supreme Court of Argentina⁴⁰ unanimously upheld the Provincial Court's decision.⁴¹

32. *Argentina, High Court of Justice F.A. L. s/ self-executing measure – Gavel Award 2012 Nominee: Why it Matters*, WOMEN'S LINK WORLDWIDE (Mar. 13, 2012), <https://www.womenslinkworldwide.org/en/gender-justice-observatory/court-rulings-database/f-a-l-s-self-executing-measure>.

33. *F.A.L. s/ medida autosatisfactiva*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Mar. 13, 2012, Fallos 335:197, ¶ 1 (2012)(Arg.).

34. The word "idiot" currently appears in the Argentina Criminal Code and dates from 1921.

35. CODIGO PENAL [COD. PEN.] [CRIMINAL CODE] art. 86 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/15000-19999/16546/norma.htm>.

36. Fallos 335:197, ¶ 2.

37. *Id.*

38. *Id.* ¶ 3.

39. *Id.*

40. The *F.A.L.* case found its way to the Supreme Court through an extraordinary appeal by the Defender of the Nation in representation of the fetus, who alleged that the Superior Court of the Province of Chubut's ruling was against the right to life from the conception recognized by the Argentine constitution and international treaties. The Supreme Court decides cases discussing constitutional law or that involve federal law interpretation. The

In *F.A.L.*, the Supreme Court cited *Roe* to explain why the case was not moot, even though the minor had already exercised her right to an abortion and was no longer pregnant.⁴² The judges established that it was necessary to decide this case in order to generate precedents for similar future cases, even though the minor had already exercised her right to a legal abortion.⁴³ Under *Roe*, the United States Supreme Court applied an exception to the mootness doctrine for cases capable of repetition with respect to the same party, yet evading review.⁴⁴

Moreover, after the last amendment to the Argentine Constitution in 1994, several international treaties became part of Argentine constitutional law, and, in the *F.A.L.* case, the Court stated that interpretation of Article 86 of the Criminal Code had to harmonize with international obligations. If not, Argentina could be held responsible before international organizations for noncompliance.⁴⁵

In the *F.A.L.* case, the Supreme Court also developed new interpretations of the National Criminal Code, considering principles such as dignity, equality and nondiscrimination. The new Supreme Court guidelines were not only in accordance with the Argentine National Constitution but were also formed in light of international human rights precedent. Since Argentina's 1994 Constitutional reform, international conventions on human rights are treated as supreme under Article 75 of the National Constitution, and, therefore, effectively form a critical part of the Argentine Constitution.⁴⁶ These

Court is not required to review all cases that reach the highest court. They decided in this case because of the fundamental rights involved and the interpretation of Article 86 of the National Criminal Code. *Id.*

41. Fallos 335:197, ¶ 32.

42. The normal gestation period is so short that pregnancy will come to term before the usual appellate process is complete. Consequently, it becomes necessary to decide the proposed issues, even without utility for the case, in which the pronouncement falls. The decision is necessary for the Court's criterion to be expressed and known for analogous cases that may arise in the future. Fallos 335:197, ¶ 5.

43. *Id.*

44. *Roe v. Wade*, 410 U.S. 113, 125 (1973) (first citing *S. Pac. Terminal Co. v. ICC*, 219 U.S. 498, 515 (1911); and then citing *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969); *Carroll v. Princess Anne*, 393 U.S. 175, 178-179 (1968); and *United States v. W. T. Grant Co.*, 345 U.S. 629, 632-633 (1953)), *overruled in part by Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992).

45. Fallos 335:197, ¶ 6.

46. CONSTITUCION NACIONAL [CONST. NAC.] art. 75, ¶ 22 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/804/norma.htm>.

Congress is empowered to . . . approve or reject treaties concluded with other nations and international organizations, and concordats with the Holy See. Treaties and concordats have a higher hierarchy than laws. The American Declaration of the Rights and Duties of Man; the Universal Declaration of Human Rights; the American Convention on Human Rights; the International Pact on Economic, Social and

ideas were not envisioned by the drafters of the National Criminal Code in 1921.⁴⁷

On the key issue in the *F.A.L.* case, the Argentine Supreme Court held that, under Article 86 of the National Criminal Code, abortion is legal both to prevent danger to the life or health of the mother and when the pregnancy is a result of a rape or an indecent assault on a mentally retarded or insane women. The non-punishable abortions contemplated in Article 86 of the Criminal Code include all cases of pregnancy that are the result of rape, regardless of the mental capacity of the woman.⁴⁸ Under principles of equality and nondiscrimination, the Court held that limiting abortion rights to rape of only mentally disabled women would establish an unjustified distinction in treatment with respect to other women rape victims and that there is no reasonable justification for allowing this narrow interpretation of Article 86 of the Criminal Code.⁴⁹

However, in deciding the central issue in the case, it was also necessary for the Supreme Court to determine whether a woman's right to choose must yield under the absolute protection of the fetus' right to life. The Court held that a balancing test should be applied, and that no absolute right to prenatal life exists. The Court, rather than relying on case law, relied on international human rights conventions. In particular, the justices established that the right to life—recognized in Article 1 of the American Declaration of the Rights and Duties of Man,⁵⁰ and in Articles 3 and 4 of the American Convention on Human Rights⁵¹—was “expressly limited in their formulation so that the

Cultural Rights; the International Pact on Civil and Political Rights and its empowering Protocol; the Convention on the Prevention and Punishment of Genocide; the International Convention on the Elimination of all Forms of Racial Discrimination; the Convention on the Elimination of all Forms of Discrimination against Women; the Convention against Torture and other Cruel, Inhuman or Degrading Treatments or Punishments; the Convention on the Rights of the Child; in the full force of their provisions, they have constitutional hierarchy, do not repeal any section of the First Part of this Constitution and are to be understood as complementing the rights and guarantees recognized herein. They shall only be denounced, in such event, by the National Executive Power after the approval of two-thirds of all the members of each House. In order to attain constitutional hierarchy, the other treaties and conventions on human rights shall require the vote of two-thirds of all the members of each House, after their approval by Congress. *Id.* (translated from Spanish).

47. Bergallo, *supra* note 31, at 154.

48. Fallos 335:197, ¶ 18.

49. Fallos 335:197, ¶ 15.

50. American Declaration of the Rights and Duties of Man, 181 L.N.T.S. 443, art. 1 (“Every human being has the right to life, liberty and the security of his person.”).

51. American Convention on Human Rights, 1144 U.N.T.S. 123, arts. 3, 4 (“Every person has the right to recognition as a person before the law.”) (“Every person has the right

invalidity of an abortion like the one in this case could not be derived from them.”⁵² Therefore, the right to prenatal life is not absolute, and must be interpreted together with of the right to liberty, equality, and dignity.

The Supreme Court also mentioned Articles 3 and 6 of the Universal Declaration on Human Rights, which protect the right to life and the right to recognition before the law.⁵³ The Supreme Court explained that these articles should be read in light of Article 1 of the Universal Declaration on Human Rights, which provides that “all human beings are born free and equal in dignity and rights, they are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.”⁵⁴

In the *F.A.L.* case, the justices concluded that no absolute protection of the right to life was established in the international conventions on human rights, and explained that, under Article 75 of the National Constitution,⁵⁵ the legislators have the duty to promote positive measures to guarantee the protection of women’s rights during and after pregnancy.⁵⁶ It affirmed that criminal sanctions should be the last alternative for the State because women have a right to human dignity. Human dignity “does not allow the State to require heroic measures by women, such as making a woman who has been raped take the pregnancy to term.”⁵⁷ The Supreme Court further held that state governments must take positive measures to provide abortion access. The Court emphasized that mere decriminalization of abortion in rape cases was not enough and certainly should not require a judicial order. Instead, it indicated that provincial and national authorities need to implement protocols to remove

to have his life respected. This right shall be protected by law and, in general, from the moment of conception. No one shall be arbitrarily deprived of his life.”).

52. Fallos 335:197, ¶ 10.

53. Universal Declaration on Human Rights 590 U.N.T.S. 71, arts. 3, 6 (“Everyone has the right to life, liberty and security of person.”) (“Everyone has the right to recognition everywhere as a person before the law.”).

54. Fallos 335:197, ¶ 9.

55. CONSTITUCION NACIONAL [CONST. NAC.] art. 75, ¶ 23 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/804/norma.htm> (“Congress is empowered . . . [t]o legislate and promote positive measures guaranteeing true equal opportunities and treatment, the full benefit and exercise of the rights recognized by this Constitution and by the international treaties on human rights in force, particularly referring to children, women, the aged, and disabled persons. To issue a special and integral social security system to protect children from abandonment, since pregnancy up to the end of elementary education, and to protect the mother during pregnancy and the period of lactation.”).

56. Senado Argentina, *A Favor: Aida Kemelmajer De Carlucci Abogada*, YOUTUBE (July 12, 2018), https://www.youtube.com/watch?v=Dl_VHUw1mQM.

57. Fallos 335:197, ¶ 16.

burdens on abortion access and guarantee public hospitals effectively provide abortions.⁵⁸

Unfortunately, after the *F.A.L.* decision, legal abortion services remain unavailable in many provinces of Argentina. The Supreme Court's broad interpretation of Article 86 of the Criminal Code is more like an illusion than a reality. In eight provinces, abortion is unavailable, seven other provinces place unjustified burdens on safe and legal abortions, and only nine jurisdictions have adopted the hospital protocols that the Supreme Court mandated in *F.A.L.*⁵⁹ The absence of political determination to comply with the Supreme Court's ruling became clear within hours of the *F.A.L.* decision publication when the National Ministry of Justice announced that the government had no plans to discuss abortion reform.⁶⁰ And, as recently as March 2019, doctors who performed a legal abortion on an eleven-year-old rape victim were prosecuted for homicide in the north of Argentina.⁶¹

Although the *F.A.L.* decision led to legislative deliberations and public discussions regarding abortion between scholars from diverse disciplines, the decision and subsequent events illustrate the need for stronger political steps to decriminalize abortion in Argentina. Conservative groups, especially members of the Catholic Church with strong political influence, have frustrated many of the initiatives the *F.A.L.* decision mandated.⁶² The Supreme Court's enforcement power has also been limited in other cases. Ten years after the Supreme Court ordered the clean-up of the Riachuelo river, there has been no compliance with the decision.⁶³ The lack of enforcement power of the Supreme Court and the deficiencies of the *F.A.L.* decision implementation, together with its unworkability in practice, reinforce the normative claims for the decriminalization of abortion. Apparently, however, the Supreme Court's enforcement power and public image still remains weak.

58. Fallos 335:197, ¶ 29.

59. *Qué provincias cuentan con un protocolo no punible para abortar?*, TELAM SOCIEDAD (Mar. 21, 2018), <http://www.telam.com.ar/notas/201803/262182-protocolo-aborto-no-punible-provincias.html>.

60. Bergallo, *supra* note 31, at 162.

61. *Denunciaron por homicidio a los médicos tucumanos que le hicieron una cesárea a la niña que había sido violada*, INFOBAE (Mar. 12, 2019), <https://www.infobae.com/sociedad/2019/03/12/denunciaron-por-homicidio-a-los-medicos-tucumanos-que-le-hicieron-una-cesarea-a-la-nina-que-habia-sido-violada/>.

62. Bergallo, *supra* note 31, at 156.

63. María Belén Etchenique, *Riachuelo: a diez años del fallo que obliga a limpiarlo, aun no saben ni cuándo lo podrán cumplir*, CLARIN (Mar. 14, 2018, 8:41 PM), https://www.clarin.com/ciudades/riachuelo-anos-fallo-obliga-limpiarlo-saben-podran-cumplir_0_ryAopzwFz.html.

B. *The Argentine Supreme Court's Approach, Unlike the United States', Recognizes a State Obligation to Assist Women in Obtaining an Abortion*

While United States constitutional law is almost always expressed in terms of individual rights that must not be interfered with by the State, Argentine Constitutional law often places obligations on the State, modeling itself after international human rights law. The abortion context is not an exception. While the *F.A.L.* decision does not protect a woman's right to choose an abortion outside of the rape context and other limited situations, the decision was phrased in terms of positive obligations of the State so it has the potential to protect women in some situations that *Roe* does not, and this protection necessarily involves the legislative process.

Argentina adopted much of the United State Constitution in 1853, but, especially since 1994, has looked much more towards international human rights case law. In 1877, the Argentine Supreme Court offered its most explicit statement regarding the importance of the constitutional law, including case law, asserting that "the system of government which governs us is not of our own creation. We found it in action, tested by long years of experience, and we have appropriated it. And it has been correctly stated that one of the best advantages of this adoption has been to find a vast body of doctrine, practice, and case law which illustrate and complete its fundamental principles, and which we can and should use in everything which we have not decided to change with specific constitutional provisions."⁶⁴ Today the use of United States case law is much weaker, particularly as the United States Supreme Court has grown more conservative. Since the 1994 Argentine Constitutional reform, citations to the Inter-American Court and the Inter-American Commission are much more common than citations to U.S. Supreme Court decisions.⁶⁵

While *Roe* recognized the right to privacy, *F.A.L.* considered the institutional dimension of abortion rights and recognized that abortion rights require government regulation of access to services in order to undermine informal obstructive practices.⁶⁶ *Roe* guaranteed the right to choose abortion by interpreting it as a private choice included in the constitutional and fundamental right to privacy. In *Roe*, the right to privacy was found broad enough to encompass a woman's decision whether to terminate her pregnancy.⁶⁷

64. de la Torre, 19 Fallos 231, 236 (1877).

65. Fallos 335:197, ¶ 14.

66. Bergallo, *supra* note 31, at 154.

67. *Roe v. Wade*, 410 U.S. 113, 153 (1973).

Harris v. McRae, in 1981, is the central Supreme Court case which clarified the scope of *Roe*'s right to privacy as preventing the government from interfering with women's decisions.⁶⁸ In *Harris*, the Hyde Amendment's constitutionality was challenged. The Hyde Amendment is a legislative provision which completely bans using federal funds to refund abortion costs under the Medicaid program unless the woman's life or health was endangered.⁶⁹ In *Harris*, the Justices explained that *Roe*'s right to privacy did not mean that federal Medicaid programs had to fund medically necessary abortions. The Court, in an opinion written by Justice Stewart, stated that:

[A] State that participates in the Medicaid program is not obligated under Title XIX to continue to fund those medically necessary abortions for which federal reimbursement is unavailable under the Hyde Amendment. We further hold that the funding restrictions of the Hyde Amendment violate neither the Fifth Amendment nor the Establishment Clause of the First Amendment. It is also our view that the appellees lack standing to raise a challenge to the Hyde Amendment under the Free Exercise Clause of the First Amendment. Accordingly, the judgment of the District Court is reversed, and the case is remanded to that court for further proceedings consistent with this opinion.⁷⁰

Justice White, in a concurring opinion, remarked that the constitutional right recognized in *Roe* was the right to choose and decide to have an abortion without government interference. He stated, "As the Court points out, *Roe* did not purport to adjudicate a right to have abortions funded by the government, but only to be free from unreasonable official interference with private choice."⁷¹

In *Harris*, the Supreme Court held that women's abortion rights are not considered a public right to access government-funded abortion practices. Women only have the right to not have the government interfere with their private choice. However, according to Catherine MacKinnon, in an essay analyzing case law in the U.S., women in *Harris* claimed something more than just the right to decide without government intrusion. Women "needed something else to make their privacy effective."⁷²

A strong argument that pro-choice supporters bring to this discussion is that, in fact, the right to privacy is nonexistent for women with limited

68. *Harris v. McRae*, 448 U.S. 297, 327-28 (1981).

69. Cora McRae, a pregnant Medicaid recipient, challenged the amendment, and took action against Patricia R. Harris, Secretary of Health and Human Services.

70. *Harris*, 448 U.S. at 326-27.

71. *Id.* at 63 (White, J., concurring).

72. CATHERINE A. MACKINNON, *Privacy v. Equality: Beyond Roe v. Wade*, in *FEMINISM UNMODIFIED* 93, 101 (1988).

resources. If the right to privacy is only recognized as a negative right against government intervention, without positive support, only wealthy women will be able to have access to a legal and safe procedure.⁷³ In contrast with *Harris*, the Argentine *F.A.L.* decision held that abortion rights must be guaranteed and provided by the government, removing the barriers to access abortion, at least in the context of rape, the issue the case dealt with.

In the United States, there is also noncompliance with Supreme Court decisions. In *Casey*, the Court established a new framework that differed from *Roe*'s trimester period. The new framework allowed states to enact regulations restricting abortions prior to fetal viability. The Supreme Court further held in *Casey* that states have a legitimate interest in protecting the life of the woman and the fetus during the pregnancy.⁷⁴

Moreover, in the last United States Supreme Court decision regarding abortion rights, *Whole Woman's Health*, the justices provided a new standard that courts must use to control the state regulations allowed in *Casey*. Cathren Cohen explained: "Where empirical evidence does not support the health justification, courts must strike down the law as violating the undue burden standard."⁷⁵ In other words, the State cannot pass a law that purports to protect women, but actually imposes an unjustified and undue burden on a woman's access to abortion procedures, thereby making obtaining such procedures more dangerous and complicated.⁷⁶ Justice Ginsburg, in a concurring opinion, remarked that "when a State severely limits access to safe and legal procedures, women in desperate circumstances may resort to unlicensed rogue practitioners, *faute de mieux*, at great risk to their health and safety."⁷⁷

Despite Supreme Court precedent, "anti-women's health state legislators" continue to test the undue burden standard by passing seemingly benign regulations that nonetheless aim to restrict access to abortion procedures.⁷⁸

73. Rebecca L. Rausch, *Reframing Roe: Property Over Privacy*, 27 BERKELEY J. GENDER, L. & JUST. 46-47 (Seattle Univ. Sch. of Law Research Paper No. 12-21, 2012), <https://ssrn.com/abstract=1911452>.

74. Cathren Cohen, "Beyond Rational Belief": *Evaluating Abortion Restrictions After Whole Woman's Health*, 42 N.Y.U. REV. L. & SOC. CHANGE 177 (2018) (citing Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992)).

75. *Id.* at 220

76. *Id.*

77. *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292, 2321 (2016) (Ginsburg, J., concurring).

78. Chemerinsky & Goodwin, *supra* note 25, at 1193-94. Numerous examples exist of State legislation that is designed in effect to ban abortion, though not clearly prohibiting abortions by the text alone. In *Whole Woman's Health*, for example, the Texas legislature passed a bill that contained two provisions the Supreme Court ultimately struck down as unduly burdensome. The first provision, the "admitting-privileges requirement," required that a physician performing an abortion must have "active admitting privileges at a hospital within thirty miles of the abortion facility." *Whole Woman's Health v. Hellerstedt*, 136 S.

Similar to *Roe* and its progeny, *F.A.L.* is not complied with when state legislators remain free to both interpret and implement the Supreme Court decisions.

C. Rights and Remedies as Two Sides of the Same Coin: Positive and Negative Duties

The *F.A.L.* decision recognized women's right to seek an abortion and stated that the State was required to provide this right. As women's rights activists insisted during the 2018 abortion Congressional debate, the government must not only adopt a respectful attitude towards an individual's decisions (in other words, the right to privacy), but must also, as part of its public health policy, provide the necessary access to abortion.⁷⁹

Roe's recognition of a woman's right to privacy is already contemplated in the Argentine Constitution in Article 19, which protects the private actions of people from state intervention when they do not affect third parties.⁸⁰ The

Ct. 2292, 2300 (2016). The second provision, the "surgical-center requirement," required abortion facilities to meet the standards required of ambulatory surgical centers. These standards included, among other requirements, "detailed specifications" regarding the size, availability, and training of the nursing staff, as well as specific room and hallway dimensions, and advanced piping, heating, and ventilation systems. *Id.* at 2314 (agreeing with the District Court that the seven or eight facilities that could meet these specifications "could not possibly meet the demand of the entire State."). See *Stenberg v. Carhart*, 530 U.S. 914 (2000) (concluding that a Nebraska law criminalizing all partial-birth abortions "unless such procedure is *necessary* to save the life of the mother whose life is endangered by a physical disorder, physical illness, or physical injury . . . *caused by or arising from* the pregnancy itself" is unconstitutional because the law lacked a health exemption as required by *Casey*) (emphasis added); *Hodgson v. Minn.*, 497 U.S. 417 (1990) (striking down a Minnesota law requiring minors to give notice to two parents by certified mail or personal delivery, unless the minor successfully obtained a court order, and contained no exceptions to the two parent requirement for divorced parents, non-custodial parents, or absent parents); *Planned Parenthood Ariz., Inc. v. Humble*, 753 F.3d 905 (9th Cir. 2014) (concluding that Arizona's law requiring women undergo surgical abortion procedures rather than medication induced procedures after seven weeks of pregnancy effectively banned medication abortions altogether and imposed an undue burden because of the added cost, transportation and clinic time, and physical invasiveness of surgical abortions).

79. Telephone interview with Casas Laura, Professor of Constitutional Law, Gender and Diversity, National University of Tucumán (Oct. 2018) (on file with the author). Casas Laura is a specialist in criminal law at Universidad del Litoral, Argentina, and a specialist in forced child pregnancy at Universidad de Uruguay y el Comité de América Latina y El Caribe para la Defensa de los Derechos de la Mujer (CLADEM). She was one of the speakers invited to present her position at the Argentine National Congress during the abortion debate in 2018.

80. CONSTITUCION NACIONAL [CONST. NAC.] art. 19 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/804/norma.htm> ("The private actions of men which in no way offend public order or morality, nor injure a third party, are only reserved to God and are exempted from the authority of judges. No inhabitant of the

Argentine Supreme Court went beyond recognizing the right to privacy mainly because the Court recognized both the government's negative and positive duties regarding women's abortion rights. Paola Bergallo, a leading Argentine legal sociologist, argued: "The second part of the majority's opinion showed a Court aware of the practical and institutional obstacles hindering access to Article 86 abortions. The Court demonstrated its understanding of the close relationship between rights and remedies, as two sides of the same coin."⁸¹ According to Bergallo, the negative duties of the State include: 1) the exclusion of demanding prior judicial authorization; 2) the prohibition of requiring more than a simple affidavit of the rape victim with respect to the rape; and 3) the duty not to impose any further conditions by committees with the purpose of delaying or diminishing the safety of the abortion.⁸²

However, according to Bergallo, the Argentine Court's decision can also be read to include positive State duties, in particular: 1) the duty to provide health care services for legal and safe abortions; 2) the responsibility "to make available all the medical and sanitary requirements necessary to carry out the abortions in a rapid, accessible, and safe way" without disproportionately burdening women; and 3) the obligation to regulate the right to conscientious objection of physicians to prevent and protect women's health, so that women's abortion rights are not at risk.⁸³ In contrast, the United States Supreme Court in *Harris v. McRae* clarified the scope of *Roe* and held that women's abortion rights do not include a positive right to have access to abortion practices funded by the government.

However, regardless of the broad scope of the Argentine Supreme Court ruling in *F.A.L.*, the noncompliance with the decision is one of the reasons why Argentina is still fighting towards the recognition of abortion rights through the legislative branch.

II. ARGENTINA'S 2018 CONGRESSIONAL DEBATE: THE POINT OF NORETURN

The Congressional abortion debate shows how legislative debate is the superior method for legalizing abortion. The National Campaign for the Right to Legal, Safe and Free Abortion in Argentina ("Campaña Nacional por el Derecho al Aborto Legal, Seguro y Gratuito") gained a special momentum in 2018, since it was the first time in Argentina's history that the topic was

Nation shall be obliged to perform what the law does not demand nor deprived of what it does not prohibit.").

81. Bergallo, *supra* note 31, at 161.

82. *Id.*

83. *Id.* at 162.

discussed in the National Congress. The social mobilization around it makes the Congressional debate a point of no return and the legislative path the best strategy for abortion rights in the country.

Green and blue scarves divided Argentine society into pro and against abortion rights movements. However, after the debate, a variety of new common terminologies and ideas—such as the proportionality test, abortion as an issue of public health, and physician’s conscientious objection—have been installed in most spaces of society, either blue or green tide, creating a promise of conciliation to formerly deeply antagonistic positions. This proves the importance of public deliberation and the value of installing a topic that is *per se* controversial in the social and political arena.

A. *The Effect of the Language Used in the Opposing Sides’ Slogans: “Pro-Choice” Versus “Pro-Life”*

Throughout the 2018 public and Congressional abortion debate, the terminology used by the blue and the green scarves movements became an important strategy. The “pro-choice” term in opposition to “pro-life” seems to have an implicit statement against life which is one important device that Argentina’s pro-life groups used.⁸⁴ Although United States young abortion rights activists have noticed this and shifted the “pro-choice” language into a reproductive justice approach, the expression “pro-life” still seems to have a more powerful effect.⁸⁵

In Argentina, the anti-rights groups that were against the proposed bill, tried to take title of the word “life” and their slogan was “to protect the two lives” referring to the life of the pregnant woman and the fetus. However, Argentine feminist movements were able to fight against this terminology born in the United States, and those who are in favor of the legalization of abortion proved that they are also interested in protecting “life.” During the Congressional debate, feminist movements were able to expose the idea that being “pro-two-lives” was in fact being in favor of clandestine abortions and its terrible consequence in the country which is the death of women with fewer resources.⁸⁶ Soledad Deza, a feminist activist leader, said during her presentation in the Argentine Congress that “those who are against the

84. Analía Llorente, *Los que están en contra del aborto dicen que son ‘provida’ y dejan a todos los que están a favor en el lugar de la muerte o del asesinato*, BBC NEWS (June 5, 2018), <https://www.bbc.com/mundo/noticias-44116636>.

85. Kate Pickert, *What Choice?*, TIME (Jan. 14, 2013), <http://content.time.com/time/magazine/article/0,9171,2132761-7,00.html>.

86. Daniel Politti, *Entre polémicas y controversias, Argentina debate sobre el aborto*, N.Y. TIMES: ARGENTINA (Apr. 16, 2018), <https://www.nytimes.com/es/2018/04/16/aborto-argentina-macri/>.

legalization of abortion are not in favor of the protection of life, they are supporting clandestine abortions.”⁸⁷

1. The Main Arguments Discussed During the 2018 Debate

In the 2018 Congressional abortion debate, the proposed bill did not pass the Senate, and one of the reasons was the pressure of conservative groups. However, the debate was an enormous step forward that allowed full discussion of the abortion issue in Argentina for the first time. The process that the Argentine society went through constituted a great victory for those who fight towards the recognition of human rights, especially women's rights. Months of public debate inserted the term abortion as a human right into many Argentine dinner conversations, yet abortion as a human right was unimaginable before 2018.

During 2018, Argentina went through months of public debate regarding abortion rights before the bill was voted for in Congress. The parliamentary sessions were preceded by 730 citizens from different fields of study who had the opportunity to address parliamentary commissions and raise all sorts of points for and against the bill.⁸⁸ As Carlos Nino has explained: “rights are one of the greatest inventions of humanity, they are our creation. Therefore, we have a duty to discuss rights.”⁸⁹

The recent Congressional debate is a crucial stage of the process that Argentinians went through concerning the recognition of abortion rights because it engaged the Argentine public in a much wider series of arguments than mere commentary on a judicial decision. The main arguments presented during the 2018 Congressional debate were: a) the right to abortion as a human right; b) the proportionality test that explains why the right to life is not absolute whereas the right to seek an abortion is constitutional and in accordance with international conventions on human rights; c) abortion as a central issue of public health; and d) whether a physician or an institution can object to perform an abortion.

The importance of the topics discussed is another reason that explains why the best path to legalize abortion in Argentina is through Congress. The

87. Soledad Deza, *Debate por Aborto Legal en la Cámara de Diputado (Argentine Congressional Debate)*, YOUTUBE (Apr. 27, 2018), <https://www.youtube.com/watch?v=XkiV5jfwH3Y>.

88. This section places particular emphasis on the province of Tucumán, where the author was born. Tucumán is a small province in the north of Argentina where the Argentine declaration was signed. It is a highly conservative community.

89. Roberto Gargarella, *Presentación sobre el aborto en el Congreso*, SEMINARIO DE TEORÍA CONSTITUCIONAL Y FILOSOFÍA POLÍTICA (Apr. 12, 2018, 2:05 PM), <http://seminario.gargarella.blogspot.com/2018/04/presentacion-sobre-el-aborto-en-el.html>.

Argentinian 2018 process was a victory in the fight towards the recognition of reproductive rights, becoming the first time that Argentine society spoke openly about the topics exposed below.

a. The Right to Abortion as a Human Right

The Congressional debate was framed in the terms “abortion as a human right.” The discussion regarded the right to abortion in relation to the right of women’s autonomy, the right of equality and non-discrimination, the right to health, the right to privacy, and the right to dignity. It is a human right of women and girls because they have the right to choose. The Committees in charge of monitoring human rights instruments, for example, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) committee and the Committee on the Rights of the Child, recommended that the Argentine State decriminalize abortion in order to guarantee women’s rights and to prevent deaths that result from clandestine practices.⁹⁰

Although the Argentine Congress did not pass the abortion bill, after months of public deliberations, a social agreement emerged that women who abort do not have to go to prison. Even some people that are against the State providing the service understood that abortion is an action that should not be penalized and, thus, there was a “social decriminalization of abortion.”⁹¹ In this sense, if the State does not criminally prosecute women who abort, it must also guarantee their right to safe abortion.⁹²

Abortion proponents emphasized the many women prosecuted for abortion. Soledad Deza expressed during her presentation at Congress’ debate that “women are still being imprisoned if found guilty of an abortion, in the province of Tucumán, since the year 2000, 534 women have been prosecuted, and the State criminally prosecutes cases where abortion is legal since 1921.”⁹³

90. Dubravka Šimonović (Special Rapporteur on Violence Against Women), *Report on Violence Against Women, its Causes and Consequences*, ¶ 85, U.N. Doc. A/HRC/35/30/Add.3 (Apr. 12, 2017); see *NI UNA Menos Movement is Ahead of the Problem: The State Must Catch Up and Intensify Efforts to Prevent Femicide and Other Forms of Gender Based Violence Against Women and Girls*, U.N. OFFICE OF THE HIGH COMM’R ON HUM. (OHCHR) (Nov. 21, 2016), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20901&LangID=E>.

91. Agustina Ramón Michel, *Tras el rechazo en el Senado el aborto ya está despenalizado socialmente*, CLARIN (Aug. 10, 2018), https://www.clarin.com/sociedad/aborto-despenalizado-socialmente_0_SJ2ObVcSQ.html.

92. Juliet Roffo, *Un informe que menciona a la Argentina. La ONU recomendó garantizar la práctica segura del aborto para las menores*, CLARIN (June 6, 2018), https://www.clarin.com/sociedad/onu-recomendo-garantizar-practica-segura-aborto-menores_0_HkhZBIxQ.html.

93. Deza, *supra* note 87.

Belén, a recent case from the Tucumán Supreme Court, shows that before Congress' debate women were still being imprisoned if found guilty of homicide aggravated by the parental relationship. According to the Argentina's National Criminal Code, women who abort were considered guilty of homicide and subject to life imprisonment based on their parental relationship with the fetus.⁹⁴ In 2014, Belén went to a Tucumán public hospital with a serious vaginal hemorrhage. However, she ended up accused of throwing her fetus in the hospital washroom. Though the treating doctor determined Belén had suffered a spontaneous miscarriage, she was nonetheless sentenced to eight years in prison for aggravated homicide. In August 2016, the Tucumán Supreme Court overturned the Criminal Chamber decision and acquitted Belén because there was a lack of evidence of the crime charged but the decision came after Belén had spent more than two years in prison and following a massive social campaign across the country.⁹⁵

This is just one of many recent incidents that pregnant women experienced in Argentina that reinforces the idea discussed during Congress' debate: that abortion is a human right which must be recognized by the Provinces. Several recent cases in Argentina, which denied rape victims access to abortion procedures, further proves the urgency of an abortion law overhaul in the Argentina. In January 2019, for example, a twelve-year-old rape survivor who was twenty-four weeks pregnant, was denied her legal right to abortion and instead underwent an emergency caesarean in Jujuy, a province in the north of Argentina. Unfortunately, although rape is already contemplated by the Criminal Code and case law as an exception, this was not an isolated case.⁹⁶ In March 2019, an eleven-year-old girl from Tucumán was admitted into the hospital with a nineteen-week pregnancy that resulted from rape perpetrated by her grandmother's partner. Although the girl and her mother requested an abortion, the authorities refused the practice by delay tactics for almost five weeks trying to force her into carrying the pregnancy to term.⁹⁷

94. CODIGO PENAL [COD. PEN.] [CRIMINAL CODE] 80 (Arg.) ("life imprisonment will be imposed . . . to those who kill his ascendant [or] descendant."), <http://servicios.infoleg.gob.ar/infol egInternet/anexos/15000-19999/16546/norma.htm>.

95. Safe Abortion, *Argentina: "Belén" Acquitted: Tucumán Provincial Supreme Court Overturns Sentence for Aggravated Homicid[e]*, ABORTION-NEWS.INFO (Mar. 31, 2017), <http://abortion-news.info/argentina-belen-acquitted-tucuman-provincial-supreme-court-overturns-sentence-for-aggravated-homicid/>.

96. Erika Guevara-Rosas, *Latin America Must Stop Forcing Pregnant Girls into Deadly Situations*, AMNESTY INT'L (Arg.) (Mar. 5, 2019, 3:17 PM), <https://www.amnesty.org/en/latest/news/2019/03/latin-america-must-stop-forcing-pregnant-girls-into-deadly-situations/>.

97. Daniel Politi, *An Eleven-Year-Old in Argentina Was Raped. A Hospital Denied Her an Abortion*, N.Y. TIMES (Mar. 1, 2019),

b. *The Proportionality Test*

Another issue deliberated during the Argentine Congressional debate was the proportionality test and the inexistence of absolute rights. According to the jurist, Aida Kemelmajer de Carlucci, the proportionality test is the need to balance rights in dispute with the government's interest in protecting unborn life and whether various women's rights clash with the government's interest based on considerations of equality, autonomy and dignity.⁹⁸

"Ponderation," a term first used by Kemelmajer de Carlucci, is a principle that governs Argentine case law when there are no absolute rights. This means that whenever two rights are to be respected, the rights have to be weighed and harmonized according to that particular case's circumstances. There are situations in which certain rights carry more weight than others, and the question of prevalence is resolved by answering which rights prevail in a particular circumstance under reasonable grounds. For example, the right to a fetus' life in the first weeks loses weight when it collides with the woman's or girl's right to her health, her autonomy, her privacy and her physical integrity. In the case of abortions, Kemelmajer de Carlucci considers the right to intrauterine life as gradual and incremental, which, as it advances, acquires greater value in relation to the pregnant woman's rights. The fetus has a different moral status from a child, and, in Argentine criminal law, abortion is treated different than infanticide which is more severely punished.⁹⁹

The regional human rights system reflects a similar interpretation of the intrauterine right to life evidenced by the Inter-American Court of Human Rights' conclusion in *Artavia Murillo v. Costa Rica*¹⁰⁰ that there is no absolute right to intrauterine life but that this right is gradual and incremental.¹⁰¹ Article 4 of the American Convention on Human Rights establishes that the right to life "shall be protected by law and, in general, from the moment of conception."¹⁰² According to the Court, the drafters of the American Convention added the clause "in general," when referring to the right to life

<https://www.nytimes.com/2019/03/01/world/americas/11-year-old-argentina-rape-abortion.html>.

98. *Aborto: Kemelmajer defendió la progresividad del derecho y se cruzó con Elías de Pérez*, PARLAMENTARIO (July 11, 2018), <http://www.parlamentario.com/noticia-111273.html>.

99. *Id.*

100. *Artavia Murillo et al. (Fertilization in Vitro) v. Costa Rica*, Preliminary Exceptions, Merits, Reparations and Costs, Inter-Am. Ct. H.R. (ser. C) No. 257 (Nov. 28, 2012).

101. *Id.* ¶ 256.

102. Organization of American States, American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 ("Every person has the right to have his life respected. This right shall be protected by law and, in general, *from the moment of conception*. No one shall be arbitrarily deprived of his life.") (emphasis added).

from the moment of conception, evidencing that the right to life was not meant to be absolute, providing a gradual or incremental protection to prenatal life, depending on the unborn child's physical stage of development.¹⁰³ *Artavia Murillo* confirms that an embryo cannot enjoy the same rights as a person, and that the right to life protected by Article 4 is not absolute. The Court also read the American Convention as giving only gradual or incremental protection to prenatal life, depending on the unborn child's physical stage of development. The *Artavia Murillo* decision was constantly cited during Argentina's Congressional debate.¹⁰⁴

The gradual protection to prenatal life interpretation was included in the proposed 2018 abortion bill that was discussed at the Argentinian Congress. The proposed bill contemplated the possibility of voluntarily interrupting pregnancy until fourteen weeks of gestation with the understanding that, until that time, women's rights to choose was considered more valuable.¹⁰⁵

The European Court of Human Rights has shown reluctance to impose a single European-wide standard for abortion rights using the "margin of appreciation" approach for the member States' interests when it considers the issue. While the concern of the "margin of appreciation"¹⁰⁶ is not to unduly restrain the member states in their own understanding of the right and societal needs, the discussion does not bear a relationship to the Inter-American Court's proportionality approach. Thus, in *A, B, & C v. Ireland*, the European Court of Human Rights reasoned that:

The question of when the right to life begins came within the States' margin of appreciation because there was no European consensus on the scientific and legal definition of the beginning of life... Since the rights claimed on behalf of the fetus and those of the mother are inextricably interconnected, the margin of appreciation accorded to a State's protection of the unborn necessarily translates into a margin of appreciation for that State as to how it balances the conflicting rights of the mother.¹⁰⁷

103. *Artavia Murillo*, (ser. C) No. 257, ¶ 188.

104. Roberto Gargarella, *Por qué votar a favor del aborto legal*. *Revista*, ANFIBIA, <http://revis.taanfibia.com/ensayo/votar-favor-del-aborto-legal/> (last visited Oct. 22, 2018).

105. CODIGO PENAL [COD. PEN.] [CRIMINAL CODE] (2018) (proposed modifications) (Arg.), https://www.senado.gov.ar/bundles/senadomicrositios/pdf/despenalizacion-aborto/CD22_18PL.pdf.

106. "Margin of appreciation" as used by the European Court of Human Rights refers to a degree of flexibility that states receive when interpreting human rights norms. It refers to a balancing of State interest against a particular understanding of a right.

107. *A, B, & C v. Ireland*, App. No. 25579/05, Eur. Ct. H.R. 237 (2010), <https://hudoc.echr.coe.int/eng#%7B%22dmdocnumber%22:%5B%222878721%22%5D,%22itemid%22:%5B%22001-102332%22%5D%7D>.

During the Congressional debate, the discussion of the proposed bill's constitutionality was to determine if Argentine courts would eventually invalidate an abortion law. It is not expected that the Argentine Court or the Inter-American Court of Human Rights will challenge an abortion law like the one being discussed in Argentina's 2018 Congressional debate.¹⁰⁸ While the Argentine Supreme Court in the *F.A.L.* case adopted the most liberal reading possible of the Criminal Code,¹⁰⁹ the Inter-American Court in *Artavia Murillo* established that comparative law does not lead us to consider that the embryo should be treated in the same way as a person born.¹¹⁰ It is important to underline that the Inter-American Court of Human Rights decides very few cases, trying to enunciate principles it commits to continue applying in future cases that define the rights in the entire region.¹¹¹ Argentinians were discussing issues like the proposed abortion bill's constitutionality for months which is extremely valuable for Argentine society as participants of Argentina's own history.

c. Abortion as a Central Issue of Public Health

The Congressional debate also worked to bring out the alarming number of women who die as a consequence of unsafe abortion practices because they cannot afford a clinic for a safe abortion. The debate showed that abortion rights are a matter of equality and public health for women, not just rights to control their own bodies.¹¹² Non-governmental organizations and human rights groups estimate that around 500,000 clandestine abortions are carried out every year in Argentina.¹¹³ According to official health ministry statistics, more than

108. *Id.*

109. *Id.*

110. *Artavia Murillo et al. v. Costa Rica*, Inter-Am. Ct. H.R. (ser. C) No. 257, ¶ 244 (Nov. 28, 2012). The Court concludes that the Constitutional Chamber based its decision on Article 4 of the American Convention, Article 3 of the Universal Declaration, Article 6 of the International Covenant on Civil and Political Rights, the Convention on the Rights of the Child and the 1959 Declaration on the Rights of the Child. However, it is not possible to use any of these articles or treaties to substantiate that the embryo can be considered a person in the terms of Article 4 of the Convention. Similarly, it is not possible to reach this conclusion from the preparatory work or from the systematic interpretation of the rights recognized in the American Convention or in the American Declaration. *Id.*

111. Gargarella, *supra* note 89.

112. Silvia Gabriela Lospenatto, *Encendido discurso de Silvia Lospenatto aplaudido por oficialistas y oposición*, YOUTUBE (June 15, 2018) (Congressional debate), <https://www.youtube.com/watch?v=kD5uacur3Lk>.

113. Megan Specia, *What to Know About Argentina's Vote on Abortion*, N.Y. TIMES (Aug. 8, 2018), <https://www.nytimes.com/2018/08/08/world/americas/argentina-abortion-explainer.html>.

seventeen percent of the 245 recorded deaths of pregnant women and girls in 2016 were due to unsafe abortions.

Women with fewer resources are the main victims of illegal and clandestine abortions. Most abortions are unsafe in places with restrictive abortion laws and higher abortion rates. The more restrictive the legal setting, the higher the proportion of clandestine, unsafe abortions. Consequently, the riskiest abortions, self-induced or performed by untrained providers, are higher among poor and rural women than among nonpoor and urban women.¹¹⁴ In Argentina, abortion does not affect all women in the same way. Abortion is conditioned by social, cultural, educational and economic burdens. This creates a real abortion problem in Argentina in addition to the dangers of its criminalization: the illegality results in different practices according to women's economic condition and the terrible deadly consequences of self-induced clandestine abortions.¹¹⁵

Under this backdrop, in 2005 a group of feminists, activists, and non-governmental organizations founded the National Campaign for the Right to Legal, Safe, and Free Abortion with the slogan "sexual education to decide, birth control not to abort, and legal abortion not to die." In 2015, a new feminist movement named "Not One Woman Less" (Ni una Menos in Spanish) was founded and supported as the National Campaign. The 2018 Congressional debate gave these groups a nationwide forum to be heard and offered an opportunity they likely would not have had otherwise to emphasize their points on a national scale.

d. Individual Versus Institutional Conscientious Objection

Argentina's 2018 Congressional debate also allowed discussion of the problem of conscientious objection, understood as the right not to be obliged to perform actions that contradict ethical or religious beliefs of "a person." This right has its basis in the constitutional protection of freedom of religion recognized in Article 14 of the Argentine Constitution.¹¹⁶

Those who opposed the bill argued it should also include the right to institutional conscientious objection. Nonetheless, as Professor Marcelo Alegre, who also made his presentation during the Congressional debate,

114. SUSHEELA SINGH ET AL., ABORTION WORLDWIDE 2017: UNEVEN PROGRESS AND UNEQUAL ACCESS, GUTTMACHER INST. (2017), https://www.guttmacher.org/sites/default/files/report_pdf/abortion-worldwide-2017.pdf.

115. Interview with Casas Laura, *supra* note 79.

116. Marcelo Alegre, *Conscientious Oppression: Conscientious Objection in the Sphere of Sexual and Reproductive Health* 65 YALE L. SCH. (Legal Scholarship Repository SELA (Seminario en Latinoamérica de Teoría Constitucional y Política) Papers, 2009), https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1064&context=yls_sela.

repeatedly stated, “conscientious objection is indissolubly linked to a mind, to a person of blood and flesh. Hospitals and pharmacies do not possess consciences and therefore cannot object.”¹¹⁷ In other words, the right of conscientious objection can only be exercised by a person.

The proposed abortion bill was consistent with the Supreme Court ruling in *F.A.L.* The Supreme Court established that an adequate system should allow health personnel to exercise their right of conscientious objection without delays that could compromise the effective practice of the abortion. For this purpose, health professionals must be required to express their objection at the time they start to work in the corresponding health establishment so that every institution has sufficient human resources to guarantee the exercise of the rights that the law confers on victims of sexual violence.¹¹⁸ In the hypothetical case that all the professionals of an institution object to perform abortions, the proposed bill determined that the institution needs to have a pre-agreement with another health establishment to be able to refer women.¹¹⁹ However, physicians have the obligation to assist in cases of emergency or when a timely referral is not possible. The proposed bill also indicates that those physicians who object should maintain this attitude in both the public and the private health institutions where they work.¹²⁰ This provision seeks to eliminate the possibility that physicians perform abortions in private clinics but reject women in a public hospital, where women who seek an abortion are, in many cases, in a state of poverty.

There were two contrary positions during Congress’ debate regarding conscientious objection. On the one hand, those who defended personal and institutional objection without any limitation. On the other hand, those who rejected institutional objection and demand that at least one physician in each institution must be a non-objector to guarantee access to the practice without delay. They considered “time” as a crucial factor when there is an emergency and a referral to another institution would put the pregnant woman at risk. In Soledad Deza’s words: “approving the institutional conscientious objection would mean to legislate without a gender focus. If this happens, our representatives will be promoting discrimination in access to public health.”¹²¹

117. *Id.*

118. CODIGO PENAL [COD. PEN.] [CRIMINAL CODE] (2018) (proposed modifications) (Arg.), https://www.senado.gov.ar/bundles/senadomicrositios/pdf/despenalizacion-aborto/CD22_18PL.pdf.

119. *Id.*

120. *Id.*

121. Soledad Vallejo, *Objeción a la objeción*, PAGINA12 (July 26, 2018), <https://www.pagina12.com.ar/130851-objecion-a-la-objecion>.

III. UNDERSTANDING WHY ARGENTINA DID NOT PASS THE LAW: WHAT IS THE MAIN OBSTACLE TO LEGALIZING ABORTION?

The main reasons why Argentina did not pass the proposed bill are the Catholic Church's active role, and pressure from conservative groups. A comparative analysis between Argentina and Ireland shows how Ireland offered a referendum model which Argentina may use to move forward. The basis to recognizing abortion rights in Argentina in the short term are clearly framed. A referendum might show the social agreement that abortion is not a crime and would help pressure the legislature to pass the law in the future. Moreover, the "apostacy" movement born after the Senate did not pass the law shows how the Catholic Church faces a new stage after the abortion debate.

A. *The Power and Role of the Catholic Church: Pressure from Conservative Groups*

The Congressional debate forced the parties involved to draw clear lines and manifest the limits and political costs of the Catholic Church's position. Nevertheless, in many conservative provinces, social pressure is still an obstacle considering that ninety-two percent of the population belongs to the Catholic Church. Conservative sectors also created a lot of confusion. Some senators could not get away from their religious beliefs when voting and were persuaded by the slogan "save the two lives." They transferred their personal religious beliefs to the public scene, and legislated in accordance with their religious beliefs, without taking into account that Argentina is a secular state.¹²² The Catholic leader, Pope Francis, who is Argentinian, publicly stated that "Last century, the whole world was scandalized by what the Nazis did to purify the race. Today, we do the same thing but with white gloves."¹²³ He compared abortion rights to the Nazi-era eugenics program.¹²⁴

In the province of Tucumán, after the abortion debate, the legislature passed a resolution declaring Tucumán a "pro-life province."¹²⁵ Moreover, some legislators intended to pass a law to prohibit abortions in all cases, including rape, an exception contemplated in the National Criminal Code since

122. Interview with Casas Laura, *supra* note 79.

123. *Pope Calls Abortion 'White Glove' Equivalent of Nazi Crimes*, N.Y. TIMES (June 16, 2018) (quoting Pope Francis), <https://www.nytimes.com/2018/06/16/world/europe/pope-abortion-nazi-crimes.html>.

124. Serhan, *supra* note 8.

125. See Fabián López, *Tucumán se declaró como provincia "provida" mediante una resolución de la Legislatura*, LA NACION (Aug. 2, 2018, 11:35 PM), <https://www.lanacion.com.ar/politica/tucuman-se-declaro-como-provincia-provida-mediante-una-resolucion-de-la-legislatura-nid2158832>.

1921. Under *González v. Provincia de Santiago del Estero*,¹²⁶ a bill like the one proposed in Tucumán was held unconstitutional by the Supreme Court. That case involved the Civil Code, but there is not much doubt that it is up to the Federal Government to write national criminal and civil codes.

The power of the Catholic Church and pressure from conservative groups bring social and political costs. As Soledad Deza said in her presentation during the 2018 Congressional debate: “Tucumán is the only province in Argentina that still refuses to adhere to the National Law on Sexual Health and Responsible Reproduction. Moreover, Tucumán is a province where our children still have religious education at public schools, but they do not receive education according to the integral sexual education law.”¹²⁷

The Argentine debate revealed “how closely some sectors of the governing party agree with the position of the hierarchy of the Catholic Church.”¹²⁸ The results show the enduring power of the Catholic Church and how the institution was the key player that managed to stop the law.¹²⁹ This has a clear negative effect for the Catholic Church. After the proposed bill was rejected, thousands of Argentinians, most of them women, have started formal proceedings called the “apostasy movement” to abandon the Catholic Church in protest of the church’s campaign against legalizing abortion.

B. *The Next Step Moving Forward: The Irish Referendum as a Model for Argentina*

After the Irish experience, it seems that a referendum could be the best strategy in Argentina to move forward. After a full debate, democratic forces can prevail on passing an abortion law. A referendum, according to Ireland’s successful experience, could serve to focus the debate more efficiently than a legislative debate. In Argentina, it was a referendum and not a court decision that was necessary to produce changes on such a prominent issue.

The Irish experience also shows that separation of Church and State could be related to legalizing abortion. Against Argentina’s backdrop, Ireland should

126. *González v. Provincia de Santiago del Estero*, Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], Aug. 29, 2007, Fallos 159:326 (Arg.). In this case, the Argentine Supreme Court analyzed the constitutionality of a section of the Constitution of the province of Santiago del Estero, a north east state in Argentina.

127. Deza, *supra* note 87.

128. Mariela Belski, *El costo de no aprobar el aborto legal en Argentina*, AMNESTY INT’L (ARG.) (Aug. 3, 2018), <https://www.amnesty.org/en/latest/news/2018/08/the-cost-of-not-approving-legal-abortion-in-argentina/>.

129. Sergio Rubin, *Aborto: la Iglesia, el actor clave que logró frenar la ley*, CLARIN (Aug. 9, 2018, 3:15 PM), https://www.clarin.com/sociedad/aborto-iglesia-actor-clave-logro-frenar-ley_0_rk1CDLuH7.html.

become an inspiration as a Catholic country that was able to fight against restrictive abortion regulations through a constitutional referendum. In 2018, Argentina and Ireland went through two different processes towards the same objective: to expand abortion rights' recognition. In Argentina, the proposed bill only passed the House of Representatives and not the Senate; in Ireland, the Constitutional Referendum overruled the Eighth Amendment of the Irish Constitution that banned abortion rights and gave the pregnant woman and the unborn "equal right[s] to life."

Analyzing similarities and differences between Ireland and Argentina provides insight into the reasons for the opposing results that the 2018 abortion processes reached in each country and why the Irish referendum should become a model for Argentina. The constitutional position of the Catholic Church and the role it played during the abortion debate in each country shows that while the Catholic Church in Argentina was able to pressure the Senate, in Ireland it was not able to influence the people. This demonstrates that a referendum in Argentina could evidence the social agreement that abortion is not a crime and become the best path to legalize abortion.

1. Religion in the Constitution

Argentina and Ireland are both countries with Catholic-majority populations, but this does not necessarily mean the populations actively practice religion.¹³⁰ In both countries, there are restrictive abortion laws. In fact, there is a generally close relationship between Catholic countries and restrictive abortion laws. The role of the Catholic Church during the 2018 debates was different in each country. In Argentina the role was active whereas in Ireland it was passive. One first possible explanation is the Catholic Church's position in each national constitution.

On one hand, the Argentine Constitution, originally written in 1853, and last amended in 1994, invokes God in its preamble and guarantees the free exercise of religious practice and belief.¹³¹ The 1994 reform of the Constitution removed the requirement for Argentina's presidents to be Catholic. However,

130. See Lucila Espósito, *Creencias, cultura y sociedad en Argentina*, CONICET (Oct. 2, 2012), <https://www.conicet.gov.ar/creencias-cultura-y-sociedad-en-argentina/>.

131. CONSTITUCION NACIONAL [CONST. NAC.] preamble (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/804/norma.htm> ("We, the representatives of the people of the Argentine Nation, gathered in General Constituent Assembly by the will and election of the Provinces which compose it, in fulfillment of pre-existing pacts, in order to form a national union, guarantee justice, secure domestic peace, provide for the common defense, promote the general welfare and secure the blessings of liberty to ourselves, to our posterity, and to all men of the world who wish to dwell on argentine soil: invoking the protection of God, source of all reason and justice: do ordain, decree, and establish this Constitution for the Argentine Nation.").

the Constitution states that the Federal Government “sustains the apostolic Roman Catholic faith.” The government still funds the Catholic Church to a large extent.

On the other hand, the Irish Constitution ratified in 1937 and last amended in 2018 no longer has a special position for the Catholic Church. In 1972, the Fifth Amendment of the Irish Constitution “removed Section 44.1.2 which allowed the State to recognize the special position of the Catholic Church.”¹³²

2. The Catholic Church’s Role

The Catholic Church played an active role during the 2018 Congress debate in Argentina, but had a passive role during the 2018 Constitutional Referendum in Ireland. In Argentina, during Congress’ debate, the Church organized a “march for life” at the Buenos Aires Cathedral, and as mentioned above, the Pope compared abortion with Hitler and the Nazi extermination plan.¹³³ By contrast, in Ireland, religion is unpopular among young people because of public scandals that involve clerical child abuse. Consequently, it seems the Irish Catholic Church’s strategy during the Constitutional Referendum was to stay away from the public debate. As experts on the field have affirmed: “When Catholic bishops take a strong position on an issue, public opinion tends to move in the opposite direction in this European Country [Ireland].”¹³⁴

The Catholic Church is losing credibility around Western Europe. However, it seems to remain powerful elsewhere in the world, especially in South America.¹³⁵ More than 40% of the world’s 1.2 billion Catholics live in Latin America. In the United States, the percentage of Roman Catholics is only 20.8%; in Ireland, 78.3% of the population is Catholic; and in Argentina, the Catholic Church represents the 92% of the population.¹³⁶

3. Constitutional Reform Process

The second constitutional difference between Ireland and Argentina explains why the decision to legalize abortion in Ireland was by a

132. Constitution of Ireland 1937 art. 44.1.2, <https://assets.gov.ie/6523/5d90822b41e94532a63d955ca76fdc72.pdf>.

133. Harriet Sherwood, *Argentina Abortion Defeat Shows Enduring Power of Catholic Church*, GUARDIAN (Aug. 9, 2018, 6:30 PM), <https://www.theguardian.com/world/2018/aug/09/argentina-abortion-defeat-shows-enduring-power-of-catholic-church>.

134. *Id.*

135. *Id.*

136. *The World Factbook: Religion*, CENT. INTELLIGENCE AGENCY, <https://www.cia.gov/library/publications/the-world-factbook/fields/2122.html> (last visited Aug. 8, 2019).

Constitutional Referendum, whereas in Argentina, Congress voted.¹³⁷ However, this constitutional dissimilitude does not infringe on the Argentine House of Representatives ability to submit an abortion bill to popular consultation.

Article 39 of the Argentine Constitution establishes that “bills referring to constitutional reform shall not originate in popular initiatives.”¹³⁸ According to Article 30 of the Argentine Constitution, the Constitution can only be amended by a previous law by Congress declaring “the necessity of the reform” with at least a two-thirds vote of the members; but it shall not be carried out except by a Convention assembled to that effect.”¹³⁹ The Irish Constitution, in contrast, requires the consent of the Irish people before amending the Constitution. This means that reforms to the Irish Constitution can only be made by way of constitutional referendum.¹⁴⁰ Nevertheless, the right to abortion in Argentina is contemplated in the National Criminal Code, not in the Constitution. Therefore, a referendum regarding abortion, would be possible under Article 40 of the Argentine Constitution which states: “At the initiative of the House of Deputies, Congress may submit a bill to popular consultation. The law calling said consultation shall not be vetoed. With the affirmative vote of the people of the Nation, the bill shall become a law and its promulgation shall be automatic.”¹⁴¹

4. Abortion Rights Before 2018

Although women die from clandestine abortions in Argentina, some people from conservative sectors question the need of an abortion law claiming that the 1921 Criminal Code already includes the exceptions which allow abortion. This is evidence that a law written nearly one hundred years ago is obsolete and needs to be reformed through Congress to provide solutions to the real situations that women face in Argentina.

While the existing 1921 law in Argentina allows abortion in cases of rape, incest, and severe situations that put the mother's life and health at risk, abortion was permissible in Ireland only when a woman's life was at risk, but not in cases of rape, incest, and fatal unborn abnormalities. Ireland had more restrictive abortion regulations than Argentina which is another reason the 2018

137. Serhan, *supra* note 8.

138. CONSTITUCION NACIONAL [CONST. NAC.] art. 39 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/804/norma.htm>.

139. *Id.* art. 30.

140. Fiona De Londras, *Constitutionalizing Fetal Rights: A Salutory Tale from Ireland*, 22 MICH. J. GENDER & L. 243, 281 (2015) (“[T]he general political consensus is that any reform whatsoever requires constitutional change.”).

141. CONSTITUCION NACIONAL [CONST. NAC.] art. 40 (Arg.), <http://servicios.infoleg.gob.ar/infolegInternet/anexos/0-4999/804/norma.htm>.

debates had different results. Furthermore, in 1983 the Eighth Amendment to the Irish Constitution was enacted and established that the unborn's right to life was considered equal to the mother's right to life. In other words, "it constitutionalized fetal rights."¹⁴² So far, it seems that the Irish regulation was much more restrictive than the Argentine regulation.

In May 2018, Irish people voted through a referendum to repeal the Eighth Amendment of their constitution. The government proposed allowing women to seek an abortion up to twelve weeks into pregnancy. In Argentina, the proposed bill that did not pass the Senate in August 2018, intended to legalize abortion during the first fourteen weeks of pregnancy, and decriminalize it after that point in cases of rape, health risks for the woman, and fetal malformation.¹⁴³

It seems that the more restrictive abortion regulations in Ireland was determinative in making people totally agree that the country needed a change. In contrast, since Argentina had abortion exceptions since 1921 in cases of rape and women's health risk, some people, generally conservative groups, questioned whether the country already has abortion regulations, and argued the debate was not necessary. This position did nothing but demonstrate the urgency of an abortion law in the country.

5. Social Mobilizations and Geographic Position

Historically, social mobilizations have preceded the conquest of human rights. Unfortunately, in the case of abortion movements, the mobilizations have been stimulated by tragedy.¹⁴⁴ In Ireland, Savita Halappanavar was denied an abortion and died as a result of an infection during an extended miscarriage in 2012.¹⁴⁵ In Argentina, Chiara Paez, a fourteen-year-old girl, was found dead in her boyfriend's backyard in 2015. She was eight weeks pregnant when she was beaten to death and buried by her boyfriend, who confessed to the police he was trying to abort her fetus through the beatings.¹⁴⁶

The geographic position of each country shows that Argentina is also probably fighting a more difficult battle since it lacks neighbors pushing in the same direction. Ireland is part of Europe, a continent where most countries

142. Londras, *supra* note 140, at 6.

143. CODIGO PENAL [COD. PEN.] [CRIMINAL CODE] art. 3 (2018) (proposed modifications) (Arg.), https://www.senado.gov.ar/bundles/senadomicrositios/pdf/despenalizacion-aborto/CD22_1_8PL.pdf.

144. *Id.*

145. Londras, *supra* note 140, at 14.

146. *Pregnant 14-Year-Old Girl, Murdered by Boyfriend, Sparks Mass 'Protests*, ABC 7 NEWS (June 5, 2015), <https://abc7ny.com/society/pregnant-14-year-old-girl-murdered-by-boyfriend-sparks-mass-protests/768382/>.

have legalized abortion, whereas Argentina is part of South America, a region that still largely criminalizes abortion. Within Latin America and the Caribbean, only Cuba, Guyana, Mexico City, and Uruguay allow abortions without restrictions.¹⁴⁷

In 2010, the European Court of Human Rights held that Irish restrictions on abortion violated the European Convention on Human Rights. On December 16, 2010, the European Court of Human Rights decided *A, B, & C v. Ireland*. In this case, three women challenged the Irish law on abortion after being forced to travel abroad to obtain abortions. They argued the Irish law violated, among other rights, their right to private life and their right to be free from inhumane or degrading treatment. The Court held there were significant limitations in Irish medical practice to protect a woman's life and that the State must legislate for abortion services when a woman's life is in danger.¹⁴⁸

In *A, B, & C v. Ireland*, the European Court of Human Rights found that Ireland had the most restriction abortion prohibition in the European Union. Ireland's abortion law was inconsistent with legal standards for abortion regulations in international human rights law. It is also against most European countries' abortion regulations.¹⁴⁹ The Court found that Ireland had violated the European Convention on Human Rights by failing to provide abortion access to women whose lives were in danger due to pregnancy. In its region, Ireland was behind most of the progressive European countries.¹⁵⁰

In contrast, Argentina is considered a progressive country in its region, and is admired for its human rights policies.¹⁵¹ Since the 1980s, the country has passed progressive laws in areas such as same sex marriage (Ireland passed the law five years after Argentina), gender identity, assisted reproduction, parental responsibility, and compensation for domestic workers.¹⁵² Nevertheless, abortion is still restricted in Argentina to only the three cases stipulated in Article 86 of the National Criminal Code.

147. GUTTMACHER INSTITUTE, FACT SHEET: ABORTION IN LATIN AMERICA AND THE CARIBBEAN 2 (2018), https://www.gutmacher.org/sites/default/files/factsheet/ib_aww-latin-america.pdf.

148. *A, B, & C v. Ireland*, App. No. 25579/05, Eur. Ct. H.R. (2010).

149. Press Release, Center for Reproductive Rights, European Court of Human Rights Rules that Ireland Abortion Ban Violates Human Rights, But Doesn't Go Far Enough (Dec. 16, 2010), <https://reproductiverights.org/press-room/european-court-of-human-rights-rules-that-ireland-abortion-ban-violates-human-rights-but->.

150. FIONA DE LONDRAS & MAIREAD ENRIGHT, REPEALING THE 8TH: REFORMING IRISH ABORTION LAW 16 (2018).

151. Belski, *supra* note 128.

152. *Id.*

6. Consequences of Illegal Abortion

Moreover, both in Argentina and Ireland, criminalizing abortion did not stop women from having abortions. Instead, women were forced to undergo clandestine and unsafe abortions. The consequences of prohibiting access to safe abortions in both countries also shows a clear difference between the Latin American and European country.

In Ireland, women had to travel to England for abortion services, which often caused harm to their physical and mental health. Authors have stated that “between 1980 and 2013, 158,252 women with Irish addresses accessed abortion in England, which leaves one to wonder how many women had no option but to attempt abortion by other means or to continue with an unwanted pregnancy.”¹⁵³

In Argentina, women are still dying from lack of access to safe abortion services. In fact, one week after the Senators rejected the bill in Argentina, a woman died due to a botched at-home abortion.¹⁵⁴ President Mauricio Macri’s health minister, Adolfo Rubinstein, estimated that some 47,063 abortions were carried out in Argentina in the last five years, and that seventy percent are in unsafe conditions.¹⁵⁵ Clandestine abortion statistics have been publicized by pro-choice groups for years, but did not achieve media visibility until the 2018 Congress debate.

After comparing the similarities and differences between Argentina and Ireland, it seems the pressure and active role of the Catholic Church in Argentina, where priests and bishops spoke against abortion in public, is one of the reasons why the proposed abortion bill did not pass the Senate. However, as previously mentioned, a growing number of apostasy supporters express frustration with the Catholic Church over its opposition to Congress’s recent abortion debate and are abandoning the Catholic Church.¹⁵⁶

153. LONDRAS & ENRIGHT, *supra* note 150.

154. Dominique Mosbergen, *Woman Dies From Botched At-Home Abortion Days After Argentina Rejects Abortion Bill*, HUFFINGTON POST (Aug. 16, 2018, 5:39 AM), https://www.huffingtonpost.com/entry/argentina-abortion-bill-woman-zadies_us_5b7504ece4b02b415d7548df; see Amanda Arnold, *Woman Dies From DIY Abortion a Week After Argentina’s Abortion Vote*, CUT (Aug. 15, 2018), <https://www.thecut.com/2018/08/one-woman-has-died-since-argentina-rejected-abortion-bill.html>.

155. Adolfo Rubinstein, *Ministro De Salud De La Nación*, YOUTUBE (July 24, 2018), <https://www.youtube.com/watch?v=yJ4Gg6fVhOY>.

156. Uki Goñi, *Argentiniens Formally Leave Catholic Church Over Stance on Abortion*, GUARDIAN (Sept. 9, 2018, 5:00 PM), <https://www.theguardian.com/world/2018/sep/09/argentina-catholic-church-legalize-abortion-apostacy>.

IV. CONCLUSION

The way to protect women from the terrible consequences of clandestine abortions is to legalize abortion through Congress. In *F.A.L.*, the Argentine Supreme Court recognized abortion as a human right. However, the noncompliance with the *F.A.L.* decision proves the lack of enforcement power of the judiciary and the poor institutional quality of the Argentine Supreme Court. This reinforces the normative claims for legalization through Congress, to obtain a law that arises from a democratic body, elected by the people.

Although the proposed bill did not pass the Senate, the Argentine 2018 Congress debate was a great victory in many significant ways. The abortion debate in Argentina, and the approval of the bill in the House of Representatives after seven previous attempts, gave rise to a significant process of open discussions and broad participation that has shattered the silence on an issue that has long been taboo.

The abortion debate is a public health issue and the Catholic Church is not supposed to pressure the Senate with its power. After comparing the Argentine and Irish abortion debates in 2018, it seems that the lack of separation between the Catholic Church and the State is an indicia of the Church's power in Argentina as a key actor that managed to stop the law. However, the apostasy movement took significant steps to show how even Catholics reject the role priests played during the abortion debate.

Even though Argentina's Constitution does not allow bills referring to constitutional reform to originate in popular initiatives like the Irish constitutional referendum, abortion is contemplated in the National Criminal Code so Congress may submit a bill to popular consultation. This might show the social agreement that abortion is not a crime, and, therefore, the promulgation of the abortion law shall be automatic. Congress is the best path for Argentine abortion rights to be recognized.¹⁵⁷

The conquest of human rights in the world was generally reached through strong social mobilization. Argentina is a clear example of this fight, and it is about time that Congress will finally recognize abortion rights. After Congress' debate, the huge number of people present in social mobilizations is proof that Argentine society reached a point of no return. Unfortunately, in the meantime, women are still dying in Argentina because of clandestine abortions. How long should we wait? As René Favalaro argued, "With legal abortion, there would

157. See Belski, *supra* note 128. In a survey conducted by Amnesty International, around 60% of respondents said they supported the legalization of abortion. In addition, more than 63% considered that the Church should stay out of the debate. The percentage of respondents holding this view exceeds 70% in key districts such as the City of Buenos Aires and Buenos Aires Province. *Id.*

not be more or fewer abortions, there will be fewer dead women. The rest is to educate, not to legislate.”¹⁵⁸

158. *Qué opinaba René Favaloro sobre el aborto*, VILLEGAS NOTICIAS (June 12, 2018), <https://www.villegasnoticias.com/general/que-opinaba-rene-favaloro-sobre-el-aborto/>.