

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

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## INTRODUCTION

Argentina portrays itself as a country that that offers tourists a destination to mate, eat delicious steak, and listen a 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.<sup>1</sup> As René Favaloro<sup>2</sup> famously stated, “the rich defend illegal abortion to keep it secret and not be ashamed, while poor girls are dying in the slums because they do not have access to the clinics that are making fortunes taking the shame out of the uterus of the rich.”<sup>3</sup>

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1. CÓDIGO PENAL [CÓD. 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. A highly prominent personality in the Argentine medical fraternity. After spending a long time working in Ohio in the United States, when he returned to Argentina he realized that there was a lack of an institution of similar excellence to the Cleveland Clinic, the place where he had worked. 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*, FUNDACIÓN FAVALORO, HOSPITAL UNIVERSITARIO, <https://www.fundacionfavaloro.org/biografia/> (last visited Nov. 17, 2018).

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/>.

Only two exceptions exist to make abortion legal in Argentina, both articulated in Article 86 of the National Criminal Code. The first exemption applies when a risk to the woman's life or health exists. The second exemption exists for cases in which the rape of an insane woman results in pregnancy.<sup>4</sup> Though the law initially protected only women with developmental disadvantages, the Argentine Supreme Court interpreted Article 86 in the 2012 *F.A.L.* case,<sup>5</sup> to extend the rape exception to include all women, not only to the "insane."

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 the 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, this 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 United States' ruling in *Roe v. Wade*,<sup>6</sup> demonstrates that the Argentine Supreme Court went beyond the right to privacy, instead recognizing abortion as a human right that must be guaranteed by the State.

Even though the *F.A.L.* decision offers an excellent analysis and makes use of 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 comparatively weaker politically than U.S. courts. The lack of compliance

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

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

1º 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.

2º 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

(translated as "The abortion performed by a certified doctor with the consent of the pregnant woman is not punishable:

1º 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.

2º 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 your 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).

with the Supreme Court ruling in *F.A.L.* demonstrates that Argentina is a country where the judiciary lacks enforcement power. Only a legislative path adequately focuses on positive obligations of the state 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 seven votes short in the Senate, does not diminish the powerful value of the 2018 Congressional debate. 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 at Argentine family and friends' discussions, a practice unheard of before 2018.<sup>7</sup>

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 as the Ireland 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.<sup>8</sup> Ireland offers a blueprint for how, in Argentina, a referendum can ensure that 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 the authority to enforce its precedents across the country. In section II, an explanation of the process that 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.

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

8. Yasmeen 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 of the abortion issue in the U.S. despite the United States Supreme Court's enormous authority within the U.S. legal system. The Court's abortion decisions are subject to constant challenges to 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*.<sup>9</sup> The Court held that the fundamental right of privacy involves the right of a woman to have an abortion free from state interference during the first trimester of pregnancy and with only limited interference during the second.<sup>10</sup> 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.<sup>11</sup> The Court explained that "person" did not include "the unborn," and, therefore, was not afforded constitutional protections prior to viability.<sup>12</sup> Although women's rights advocates considered the decision a big and early

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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.

*Id.*

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.").

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

Nineteen years after the *Roe* decision, the Court decided *Planned Parenthood v. Casey*,<sup>13</sup> which represented a turning point in the abortion case law, because it established that states did 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.<sup>14</sup> 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*.<sup>15</sup>

In 2016, the Supreme Court’s *Whole Woman’s Health v. Hellerstedt*<sup>16</sup> 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.”<sup>17</sup>

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.<sup>18</sup> 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.<sup>19</sup> 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

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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.*

participate in abortions.<sup>20</sup> Seventeen states 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).<sup>21</sup> Moreover, twenty-seven states require a twenty-four-hour waiting periods between such counseling and the abortion procedure.<sup>22</sup> 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.<sup>23</sup>

Today, pro-choice advocates in the U.S. fear for the future of *Roe* given the new, more conservative composition of the Supreme Court.<sup>24</sup> As Professors Erwin Chemerinsky and Michele Goodwin point out, “[a]bortion rights in the United States are in serious jeopardy.”<sup>25</sup> President Trump expressed his position that *Roe* should be overturned.<sup>26</sup> 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.”<sup>27</sup>

Moreover, fear that *Roe* could be overturned with the new composition of the Supreme Court seems likely if cases like *Planned Parenthood of*

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20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. The three justices that composed the plurality in *Casey* whom 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. Following 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 the 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 American 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.

*Arkansas and Eastern Oklahoma v. Jegley*<sup>28</sup> find their way to the Supreme Court. In *Jegley*, Arkansas claimed that abortions by the use of medication, which uses pills to induce abortions in the first nine weeks of pregnancy, were unsafe and caused women health complications. Arkansas passed a law in 2015 that required contracts between those who provide the medication and the doctors who have privileges at a hospital in the state. Abortion clinics in Arkansas argued that they were not able to find any doctors that wanted to sign such contracts.<sup>29</sup> Their claim was medically unsupported, and the District Court applied the balancing test in *Whole Woman's Health* to decide 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* had determined that specific fact-finding was not required. In this Supreme Court precedent, 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.”<sup>30</sup>

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

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

While the Argentine Supreme Court has 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 that was a victim of rape, establishing an historic precedent. This decision suggested that Argentine judges had begun to consider the institutional perspective of abortion rights. The *F.A.L.* ruling puts forth the

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

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)).

idea that, in order to undermine informal practices, it is necessary to determine and to regulate the conditions that are required to make abortion, via public services, accessible.<sup>31</sup>

On December 3, 2009, A.F., on behalf of her fifteen-year-old daughter, 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 authorization from the Chubut's Court for her daughter to have a voluntary termination of pregnancy at eleven weeks.<sup>32</sup> The claim was made under Article 86 of the Criminal Code,<sup>33</sup> 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 idiot<sup>34</sup> or demented woman. In this case, her legal guardian's consent shall be required for the abortion.<sup>35</sup>

Despite the fact that the record showed the pregnancy would endanger 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) that this approach towards the interruption of the pregnancy was in accordance with constitutional law and international human rights.<sup>36</sup> On March 11, 2010, A.G. was finally authorized to obtain a legal abortion in safe conditions.<sup>37</sup> However, an official of the Public Prosecutor's office appealed the Superior Court's decision, in representation of the fetus.<sup>38</sup> He argued that Argentina protects life from conception, and that the situation of A.G. was not considered among the exceptions that are allowed under the National Criminal Code because the minor was not an "idiotic rape victim."<sup>39</sup> On

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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).

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 that dates from 1921.

35. CÓDIGO PENAL [CÓD. 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.*

March 13, 2012, the Supreme Court of Argentina<sup>40</sup> unanimously upheld the Provincial Court's decision.<sup>41</sup>

The Supreme Court in the *F.A.L.* ruling 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.<sup>42</sup> 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.<sup>43</sup> Under *Roe*, the United States Supreme Court applied an exception to mootness doctrine for cases capable of repetition with respect to the same party yet evading review.<sup>44</sup>

Moreover, after the last amendment to the Argentine Constitution in 1994, several international treaties became part of the Argentine constitutional law, and, in the *F.A.L.* case, the Court stated that the 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 a lack of compliance.<sup>45</sup>

In the *F.A.L.* case, the Supreme Court also developed new the 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 bodies precedents. Since Argentina's 1994 Constitutional reform, these international conventions on human rights are treated as supreme under

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40. *Id.* 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 decide in cases where there are constitutional discussions or that involve the interpretation of a federal law. The Court is not required to review all cases that reach the highest court. They decided in this case considering the fundamental rights involved and the interpretation of Article 86 of the National Criminal Code.

41. Fallos 335:197, ¶ 32.

42. Fallos 335:197, ¶ 5. The normal day 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, in order that the criterion of the Court be expressed and known for the solution of analogous cases that may arise in the future.

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.

Article 75 of the National Constitution, and therefore effectively form a critical part of the Argentine Constitution.<sup>46</sup> These ideas were not envisioned by the drafters of the National Criminal Code in 1921.<sup>47</sup>

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 if 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.<sup>48</sup> Under principles of equality and nondiscrimination, the Court held that limiting the right to abortion to cases of rape only of mentally disabled women would establish an unjustified distinction in treatment with respect to other women victims of rape and that there is no reasonable justification for allowing this narrow interpretation of Article 86 of the Criminal Code.<sup>49</sup>

However, in deciding the central issue in the case, it was also necessary for the Supreme Court to determine whether the right to choose of the pregnant woman must yield under the absolute protection of the right to life of the fetus. 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,<sup>50</sup> and in Articles 3

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46. CONSTITUCIÓN 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 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 Woman; 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.").

and 4 of the American Convention on Human Rights<sup>51</sup> were “expressly limited in their formulation so that the invalidity of an abortion like the one in this case could not be derived from them.”<sup>52</sup> Therefore, the right to prenatal life is not absolute, and must be interpreted together with of the right to liberty, equality and dignity of every person.

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.<sup>53</sup> 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 capable with reason and conscience and should act towards one another in a spirit of brotherhood.”<sup>54</sup>

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,<sup>55</sup> the legislators have the duty to promote positive measures to guarantee the protection of women’s rights during and after pregnancy.<sup>56</sup> It affirmed that criminal sanction 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.”<sup>57</sup> The Supreme Court further held that state governments must take positive measures to provide access to abortion. The Court emphasized that mere decriminalization of abortion in rape cases was not enough and should certainly not require a judicial order.

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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 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. CONSTITUCIÓN 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: Aída Kemelmajer De Carlucci Abogada*, YOUTUBE (July 12, 2018), [https://www.youtube.com/watch?v=Dl\\_VHUw1mQM](https://www.youtube.com/watch?v=Dl_VHUw1mQM).

57. Fallos 335:197, ¶ 16.

Instead, it indicated that provincial and national authorities need to implement protocols to remove burdens on the access to abortion and guarantee the effective provision of the practice by public hospitals.<sup>58</sup>

Unfortunately, after the *F.A.L.* decision, legal abortion services remain unavailable in many provinces of Argentina. The broad interpretation by the Supreme Court 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.*<sup>59</sup> The absence of political determination to comply with the Supreme Court ruling became clear within hours of the publication of the *F.A.L.* decision, when the National Ministry of Justice informed that the government had no plans to discuss abortion reform.<sup>60</sup> 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.<sup>61</sup>

Although the *F.A.L.* decision led to legislative deliberations and to public discussions regarding abortion between scholars from diverse disciplines, the decision and subsequent events illustrates 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.<sup>62</sup> The Supreme Court's enforcement power has also been limited in other cases. Ten years after the Supreme Court ordered to clean up the Riachuelo river, there has been no compliance with the decision.<sup>63</sup> The lack of enforcement power the Supreme Court, 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.

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58. Fallos 335:197, ¶ 29.

59. *Qué provincias cuentan con un protocolo no punible para abortar?*, TÉLAM 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*, CLARÍN (Mar. 14, 2018, 8:41 PM), [https://www.clarin.com/ciudades/riachuelo-anos-fallo-obliga-limpiarlo-saben-podran-cumplir\\_0\\_ryAopzwFz.html](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 an obligation of the State 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 states, 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, because it is also phrased in terms of positive obligations of the State 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 advantaged 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."<sup>64</sup> 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.<sup>65</sup>

While *Roe* recognized the right to privacy, in the *F.A.L.* ruling the justices considered the institutional dimension of abortion rights and recognized that abortion rights require government regulations of access to services in order to undermine informal obstructive practices.<sup>66</sup> *Roe* guaranteed the right to choose abortion by conceiving 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 or not to terminate her pregnancy.<sup>67</sup>

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

65. Fallos 335:197, ¶ 14.

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

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

The central case where the Supreme Court clarified the scope of *Roe*'s right to privacy as the non-intervention of the government in women's decisions is *Harris v. McRae* in 1981.<sup>68</sup> The Justices explained that this right to privacy did not mean that federal Medicaid programs had to fund medically necessary abortions. In *Harris*, an action was brought to challenge the constitutionality of the Hyde Amendment, a legislative provision which completely bans the use of federal funds to refund the cost of abortions under Medicaid program unless the woman's life or health was endangered.<sup>69</sup> 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.<sup>70</sup>

Justice White, in a concurring opinion, remarked that the constitutional right recognized in *Roe* was the right to choose and decide to take an abortion without the interference of the government. 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."<sup>71</sup>

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

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

A strong argument that pro-choice supporters bring to this discussion is that, in fact, the right to privacy is inexistent for those women with limited 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.<sup>73</sup> 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 real access to abortion practices, at least in the context of rape, the issue the case dealt with.

In the United States, there is also a lack of compliance with the Supreme Court decisions. In *Casey*, the Supreme Court allowed the states to enact regulations that restrict abortion rights before fetal viability. The Court established a new framework different than the *Roe*'s trimester period. The *Casey* Court also established limits on the right of women to choose an abortion only to the stage of pregnancy before the fetus is considered viable. The Supreme Court further held in *Casey* that the states have legitimacy to protect the life of the woman and the fetus during the pregnancy.<sup>74</sup>

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 control the regulations allowed to the states in *Casey*. Cathren Cohen explained that, "Where empirical evidence does not support the health justification, courts must strike down the law as violating the undue burden standard."<sup>75</sup> In other words, the State cannot pass a law that purports to protect women, but which actually imposes an unjustified and undue burden on a woman's access to abortion procedures, thereby making obtaining such procedures more dangerous and complicated for a woman.<sup>76</sup> 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."<sup>77</sup>

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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).

Despite the case law precedent established by the Supreme Court, “anti-women’s health state legislators” continue to test the efficacy of the undue burden standard by passing seemingly benign regulations that nonetheless aim to restrict access to abortion procedures.<sup>78</sup> It seems, then, that in the United States something similar has occurred in the case of *Roe* and its progeny as occurred with Argentine compliance, or lack compliance, with the *F.A.L.* decision, and in both instances the failure to implement Supreme Court case law occurred when state legislators remained free to 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 the right of women to seek an abortion and stated that the State was required to provide this right. As women rights activists sustained during the 2018 abortion Congressional debate, the government must not only adopt an attitude of respect towards the decisions that each person makes (in other words, the right to privacy), but must also,

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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. Ct. 2292, 2300 (2016). The second provision, the “surgical-center requirement” required that abortion facilities 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” 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 which 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 the added cost, transportation and clinic time, and physical invasiveness of surgical abortions).

as part of its public health policy, provide the necessary access to abortion.<sup>79</sup>

*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.<sup>80</sup> The main reason why the Argentine Supreme Court went beyond than recognizing the right to privacy is that the Court recognized both the negative and positive duties of the government regarding women's abortion rights. Paola Bergallo, a leading Argentine legal sociologist argued that, "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 just two sides of the same coin."<sup>81</sup> 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.<sup>82</sup>

However, according to Bergallo the Argentine Court's decision can also be read to include positive duties on the state, 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;<sup>83</sup> and 3) and obligation to regulate the right to conscientious objection of physicians to prevent and protect women's health, so that their abortion rights not be at risk. 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

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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. CONSTITUCIÓN 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 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.

positive right to have access to abortion practices funded by the government.

However, although the broad scope of the Argentine Supreme Court ruling in the *F.A.L.*, the lack of compliance 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 NO RETURN

The Congressional abortion debate show 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 the history of the country that the topic was 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.

The green and blue scarfs divided the 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 are installed in most spaces of society, either blue or green tide, creating a promise of conciliation to positions that were formerly staged as deeply antagonistic. 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 Slogans of Opposing Sides: “Pro-Choice” Versus “Pro-Life”*

Throughout the 2018 Argentina's public and Congressional abortion debate, the terminology used by the blue and the green scarfs movements became an important strategy. Being pro-choice in opposition to being pro-life seems to have an implicit statement against life, one important device that Argentina's pro-life groups used.<sup>84</sup> Although in the United States young abortion rights activists have noticed this and shifted the pro-choice

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84. Analia 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>.

language into a reproductive justice approach, the expression pro-life still seems to have a more powerful effect.<sup>85</sup>

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.<sup>86</sup> Soledad Deza, a leader feminist activist, said during her presentation in the Argentine Congress that “those who are against the legalization of abortion are not in favor of the protection of life, they are supporting clandestine abortions.”<sup>87</sup>

### 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 points of all sort, for and against the bill.<sup>88</sup> Carlos Nino explained

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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/>.

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.

that “rights are one of the greatest inventions of humanity, they are our creation. Therefore, we have a duty to discuss rights.”<sup>89</sup>

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 Argentinian 2018 process was a victory in the fight towards the recognition of reproductive rights, becoming the first time that the Argentine society speaks 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 was regarding the right to abortion in relation to the right of women 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 to the Argentine State that it decriminalize abortion in order to guarantee the rights of women and to prevent deaths that result from clandestine practices.<sup>90</sup>

Although the Argentine Congress did not pass the abortion bill, after months of public deliberations there is a social agreement that women who

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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>.

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. RIGHTS (OHCHR) (Nov. 21, 2016), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=20901&LangID=E>.

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, there was a “social decriminalization of abortion.”<sup>91</sup> In this sense, if the State does not criminally prosecute women who abort, it must also guarantee their right to safe abortion.<sup>92</sup>

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.”<sup>93</sup>

*Belén*, a recent case from the Supreme Court of Tucumán, shows that, before the Congress debate, women were still being imprisoned if found guilty of homicide aggravated by the relationship. According to the Argentina’s National Criminal Code, a woman who abort was considered guilty of homicide and subject to life imprisonment based on their parental relationship with the fetus.<sup>94</sup> This was the *Belén*’s case. In 2014, Belén went to a Tucumán public hospital because of a serious vaginal hemorrhage. However, she ended up accused of having thrown a 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 a lack of evidence of the crime charged, though the decision came after Belén had spent more than two years in prison and following a massive social campaign across the country.<sup>95</sup>

This is just one of the 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

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91. Agustina Ramón Michel, *Tras el rechazo en el Senado el aborto ya está despenalizado socialmente*, CLARÍN (Aug. 10, 2018), [https://www.clarin.com/sociedad/aborto-despenalizado-socialmente\\_0\\_SJ2ObVeSQ.html](https://www.clarin.com/sociedad/aborto-despenalizado-socialmente_0_SJ2ObVeSQ.html).

92. Juliet Roffo, *Un informe que menciona a la Argentina. La ONU recomendó garantizar la práctica segura del aborto para las menores*, CLARÍN (June 6, 2018), [https://www.clarin.com/sociedad/onu-recomendo-garantizar-practica-segura-aborto-menores\\_0\\_HkhZBlxQ.html](https://www.clarin.com/sociedad/onu-recomendo-garantizar-practica-segura-aborto-menores_0_HkhZBlxQ.html).

93. Deza, *supra* note 87.

94. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 80 (Arg.) (“life imprisonment will be imposed . . . to those who kill his ascendant [or] descendant.”), <http://servicios.infoleg.gob.ar/infolegInternet/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/>.

states. Several recent cases in Argentina, which denied victims of rape 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 exceptions when abortion is legal, this was not an isolated case.<sup>96</sup> In March 2019, an eleven-year-old girl from Tucumán was admitted into 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.<sup>97</sup>

*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 can be explained as the need to balance rights in dispute between the interest in protecting unborn life and the various women's rights that could clash with it based on considerations of equality, autonomy and dignity.<sup>98</sup>

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

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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), <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.COM (July 11, 2018), <http://www.parlamentario.com/noticia-111273.html>.

in relation to the rights of the pregnant woman. The fetus has a moral status different from a child, and this is also revealed in the treatment that the Argentine criminal law gives to the figure of abortion in relation to that of infanticide that is more severely punished.<sup>99</sup>

This way of interpreting the right to intrauterine life was reflected in the regional human rights system, where the Inter-American Court of Human Rights, in *Artavia Murillo v. Costa Rica*,<sup>100</sup> concluded that there is no absolute right to intrauterine life but that this right is gradual and incremental.<sup>101</sup> 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.”<sup>102</sup> According to the Court, the drafters of the American Convention added the clause “in general,” when referring to the right to life 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.<sup>103</sup> *Artavia Murillo* confirms that an embryo cannot enjoy the same rights as a person, and that the right to life protected by Article 4 of the American Convention on Human Rights 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.<sup>104</sup>

This interpretation was included in the 2018 abortion proposed bill that was discussed at the Argentinian Congress. The proposed bill contemplated the possibility of voluntarily interrupting pregnancy until fourteen weeks of gestation in the understanding that, until that time, the right of women to choose was considered as more valuable.<sup>105</sup>

The European Court of Human Rights has shown some reluctance to impose a single European-wide standard to many aspects of abortion rights

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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).

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. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] (2018) (proposed modifications) (Arg.), [https://www.senado.gov.ar/bundles/senadomicrositios/pdf/despenalizacion-aborto/CD22\\_18PL.pdf](https://www.senado.gov.ar/bundles/senadomicrositios/pdf/despenalizacion-aborto/CD22_18PL.pdf).

using the approach “at a margin of appreciation” for the member State’s interests when it considers the issue. While the concern of the “margin of appreciation”<sup>106</sup> 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.<sup>107</sup>

During the Congressional debate, the discussion of the constitutionality of the proposed bill was to determine if our 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.<sup>108</sup> While the Argentine Supreme Court in the *F.A.L.* case adopted the most liberal reading possible of the Criminal Code,<sup>109</sup> the Inter-American Court in *Artavia Murillo* established that the comparative law does not lead us to consider that the embryo should be treated in the same way as a person born.<sup>110</sup> It is important to underline that the Inter-American Court of Human Rights decides very few cases, trying to enunciate the principles that it commits to continue applying in future cases and that define the rights in the entire region.<sup>111</sup> Argentinians were discussing issues like the

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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>.

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.

constitutionality of the proposed abortion bill during months, and this is extremely valuable for our society as participants of our 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 a right to control their own bodies.<sup>112</sup> Non-governmental organizations and human rights groups estimate that around 500,000 clandestine abortions are carried out every year in Argentina.<sup>113</sup> According to official health ministry statistics, more than 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 abortion rates are higher. The more restrictive the legal setting, the higher the proportion of clandestine, unsafe abortions. Consequently, the riskiest abortions, those self-induced or performed by untrained providers, are higher among poor and rural women than among nonpoor and urban women.<sup>114</sup> In Argentina, abortion does not affect all women in the same way. Abortion is conditioned by social, cultural, educational and economic burdens. This is the real problem of abortion in Argentina and the danger of its criminalization: The illegality results in differentiated practices according to the economic condition of women, and the terrible consequences of deaths due to self-induced clandestine abortions.<sup>115</sup>

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

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112. Silvia Gabriela Lospenatto, *Encendido discurso de Silvia Lospennato 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>.

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](https://www.guttmacher.org/sites/default/files/report_pdf/abortion-worldwide-2017.pdf).

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

Spanish) was founded and supported since then 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 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.<sup>116</sup>

The argument of those who opposed the bill was that it should also include the right to institutional conscientious objection. Nonetheless, as Professor Marcelo Alegre, who also made his presentation during the Congressional debate, 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."<sup>117</sup> In other words, this right can only be exercised by a person.

The proposed abortion bill was consistent with the Supreme Court ruling in the *F.A.L.* case. 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 that 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.<sup>118</sup> In the hypothetical case that all the professionals of an institution object to perform abortions, the proposed bill determined that the institution needed to have a pre-agreement with another health establishment to be able to refer women.<sup>119</sup> 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

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116. Marcelo Alegre, *Conscious 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](https://digitalcommons.law.yale.edu/cgi/viewcontent.cgi?article=1064&context=yls_sela).

117. *Id.*

118. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] (2018) (proposed modifications) (Arg.), [https://www.senado.gov.ar/bundles/senadomicrositios/pdf/despenalizacion-aborto/CD22\\_18PL.pdf](https://www.senado.gov.ar/bundles/senadomicrositios/pdf/despenalizacion-aborto/CD22_18PL.pdf).

119. *Id.*

object should maintain this attitude in both, the public and the private health services where they work.<sup>120</sup> This provision seeks to eliminate the possibility that physicians performing abortions in private clinics but rejecting 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 the Congress debate regarding conscientious objection. On the one hand, those who defend personal and institutional objection without any limitation. On the other hand, those who reject 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.”<sup>121</sup>

### 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 active role of the Catholic Church, and the pressure of conservative groups. A comparative analysis between Argentina and Ireland shows how Ireland offered a model for Argentina to move forward. The basis to face the recognition of 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 to pressure the legislature to pass the law in the next intent. Moreover, the “apostacy” movement that was born after the Senate did not pass the law, shows how the Catholic Church is facing 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 made much more manifest the limits and political costs of the Catholic Church position. Nevertheless, in many conservative provinces social pressure still presents an obstacle, considering in Argentina the

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120. *Id.*

121. Soledad Vallejo, *Objeción a la objeción*, PÁGINA12 (July 26, 2018), <https://www.pagina12.com.ar/130851-objecion-a-la-objecion>.

Catholic Church represents the ninety-two percent of the population. 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, without taking into account the secular state that is Argentina.<sup>122</sup> 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.”<sup>123</sup> He compared abortion rights with the Nazi-era eugenics program.<sup>124</sup>

In the province of Tucumán, after the abortion debate, the legislature passed a resolution declaring Tucumán a “pro-life province.”<sup>125</sup> Moreover, some legislators intended to pass a law to prohibit abortions in all cases, including rape, an exception that is contemplated in the National Criminal Code since 1921. Under *González v. Provincia de Santiago del Estero*,<sup>126</sup> a bill like the one proposed in Tucumán would be held unconstitutional by the Supreme Court. That is a case using the Civil Code, but there is not much doubt that it is up to the Federal Government to write national codes in the area of both criminal and civil law.

The power of the Catholic Church and the pressure of 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.”<sup>127</sup>

The Argentine debate revealed “how closely some sectors of the governing party agree with the position of the hierarchy of the Catholic

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

123. Associated Press, *Pope Calls Abortion ‘White Glove’ Equivalent of Nazi Crimes*, N.Y. TIMES (EUR.) (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>.

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 analyses 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.

Church.”<sup>128</sup> The results show the enduring power of the Catholic Church and how this institution was the key player that managed to stop the law.<sup>129</sup> 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 to abandon the Catholic Church through a proceeding called the “apostasy movement” in protest of the church’s campaign against efforts to legalize abortion in the country.

*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 through an abortion law. A referendum, according to the Ireland successful experience, could serve to focus the debate even 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 the separation of Church and State could be related with the legalization of abortion. Against Argentina’s backdrop, Ireland became an inspiration for Argentina 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 the recognition of abortion rights. 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 giving the pregnant woman and the unborn “equal right to life.”

Analyzing some similarities and differences between Ireland and Argentina provides some insight into the reasons for the opposing results that the 2018 abortion processes reached in each country and why the Irish referendum became a model for Argentina. The constitutional position of the Catholic Church and the role it played during the abortion debate in each country, show that while in Argentina the Catholic Church was able to pressure the Senate, in Ireland it was not able to influence the people. This

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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*, CLARÍN (Aug. 9, 2018, 3:15 PM), [https://www.clarin.com/sociedad/aborto-iglesia-actor-clave-logro-frenar-ley\\_0\\_rk1CDLuH7.html](https://www.clarin.com/sociedad/aborto-iglesia-actor-clave-logro-frenar-ley_0_rk1CDLuH7.html).

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 active religious practice.<sup>130</sup> In both countries, there are restrictive laws regarding abortion and there is a 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 position of the Catholic Church 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.<sup>131</sup> The 1994 reform of the Constitution removed the requirement for Argentina's presidents to be catholic. However, 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, removed the special position of 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."<sup>132</sup>

### 2. The Role of the Catholic Church

The Catholic Church played an active role during the 2018 Congress debate in Argentina, while it showed a passive role during the 2018 Constitutional Referendum in Ireland. In Argentina, during the Congress

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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. CONSTITUCIÓN 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.").

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

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.<sup>133</sup> By contrast, in Ireland religion is unpopular among young people because of public scandals that involve clerical child abuse. Consequently, it seems that the strategy of the Catholic Church during the Constitutional Referendum was to stay apart 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.”<sup>134</sup>

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

### 3. Constitutional Reform Process

The second constitutional difference between Ireland and Argentina, explains the reason why the decision to legalize abortion in Ireland was by a Constitutional Referendum, whereas in Argentina the vote was in Congress.<sup>137</sup> However, this constitutional dissimilitude does not infringe the Argentine House of Representatives to submit an abortion bill to popular consultation.

The Argentine Constitution in its Article 39 establishes that “bills referring to constitutional reform shall not originate in popular initiatives.”<sup>138</sup> According to Article 30 of the Argentine Constitution can only be amended by a previous law by Congress declaring “the necessity of the reform” with the vote of at least two-thirds of the members; but it shall not be carried out except by a Convention assembled to that effect.”<sup>139</sup> The Irish Constitution, in contrast, requires the consent of the Irish people

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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).

137. Serhan, *supra* note 8.

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

139. *Id.* art. 30 (Arg.).

before the Constitution can be amended. This means that reforms to the Irish Constitution can only be made by way of constitutional referendum.<sup>140</sup>

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.”<sup>141</sup>

#### 4. Abortion Rights Before 2018

Although women die due to clandestine abortions in Argentina, some people from conservative sectors questioned the need of an abortion law claiming that the 1921 Criminal Code already includes the exceptions in which abortion is legal. This put into evidence that a law that has more than one hundred years became obsolete and needs to be reformed through Congress to give solutions to the real situations that women are facing in Argentina.

While in Argentina the existing law since 1921 allows abortion in cases of rape, incest, and severe situations that put the mother’s life and health at risk, in Ireland abortion was permissible only when the woman’s life was at risk, but not in cases of rape, incest, and fatal unborn abnormality. Ireland had more restrictive abortion regulations than Argentina, and this is also a reason of the different results that the 2018 debates raised. Furthermore, in 1983 the Eighth Amendment to the Irish Constitution was enacted and established that the right to life of the unborn was considered equal to the right to life of the mother. In other words, “it constitutionalized fetal rights.”<sup>142</sup> So far, it seems that the Irish regulation was much more restrictive than the Argentinian.

On May 2018, the Irish people voted through a referendum to repeal the eighth amendment of their constitution. The government proposed to allow women to seek an abortion up to twelve weeks into a 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,

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

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

and decriminalized it after that point in cases of rape, health risks for the woman, and fetal malformation.<sup>143</sup>

It seems that the Irish more restrictive abortion regulations, was determinative to make people totally agree that the country needed a change. In contrast, as Argentina have the exceptions since 1921 in cases of rape and women's health risk, some people, generally from conservative groups questioned that the country already has abortion regulations, and thus, 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.<sup>144</sup> In Ireland, Savita Halappanavar was denied an abortion and died as a result of an infection during an extended miscarriage in 2012.<sup>145</sup> 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 that he was trying to abort her fetus through the beatings.<sup>146</sup>

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 have legalized abortion, whereas Argentina is part of South America, a region that still largely criminalizes abortion. Within Latin America and the Caribbean, the only exceptions are Cuba, Guyana, Mexico City, and Uruguay, which do allow abortions without restriction as to the reason.<sup>147</sup>

In 2010, the European Court of Human Rights held that Ireland restrictions on abortion violated the European Convention on Human Rights. On December 16, 2010, the European Court of Human Rights

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143. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 3 (2018) (proposed modifications) (Arg.), [https://www.senado.gov.ar/bundles/senadomicrositios/pdf/despenalizacion-aborto/CD22\\_18PL.pdf](https://www.senado.gov.ar/bundles/senadomicrositios/pdf/despenalizacion-aborto/CD22_18PL.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/>.

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

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 an abortion. They argued that the Irish law violated, among other rights, their right to private life and their right to be free from inhuman or degrading treatment. The Court held that 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.<sup>148</sup>

In *A, B, & C v. Ireland*, the European Court of Human Rights found that Ireland was the country in the European Union with the most restrictive prohibition on abortion. 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.<sup>149</sup> The Court found that Ireland had violated the European Convention on Human Rights by failing to provide access to abortion practices to a woman whose life was in danger due to her pregnancy. In its region, Ireland was behind most of the progressive European countries.<sup>150</sup>

In contrast, Argentina is considered a progressive country in its region, and has been admired for its human rights policy.<sup>151</sup> 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.<sup>152</sup> Nevertheless, abortion is still restrictive in Argentina only to the three cases stipulated in Article 86 of the National Criminal Code.

## 6. Consequences of Illegal Abortion

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

In Ireland, women had to travel to England for abortion services, and this often cause harm to their physical and mental health. Authors have

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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 & MÁIRÉAD ENRIGHT, REPEALING THE 8TH: REFORMING IRISH ABORTION LAW 16 (2018).

151. *Belski*, *supra* note 128.

152. *Id.*

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.”<sup>153</sup>

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.<sup>154</sup> President Mauricio Macri’s health minister, Adolfo Rubinstein, estimated that some 47,063 abortions were carried in Argentina in the last five years, and that seventy percent are in unsafe conditions.<sup>155</sup> Clandestine abortion statistics have been publicized by pro-choice groups for years, without achieving media visibility until 2018 Congress debate.

After comparing the similarities and differences between Argentina and Ireland, it seems that 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 supporter’s express frustration with the Catholic Church over its opposition to the recent legal abortion Congress debate and are abandoning the Catholic Church.<sup>156</sup>

## CONCLUSION

The way to protect women from the terrible consequences of clandestine abortions is by legalizing this practice through Congress. In *F.A.L.*, the Argentine Supreme Court recognized abortion as a human right. However, the deficiencies of compliance 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.

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

154. 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>; 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](https://www.huffingtonpost.com/entry/argentina-abortion-bill-woman-zadies_us_5b7504ece4b02b415d7548df).

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>.

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 through 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 in which 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 power of the Church in Argentina as the key actor that managed to stop the law. However, the apostasy movement took significant steps to show how even Catholics are expressing their rejection with the role the 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, as abortion is contemplated in the National Criminal Code, 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 abortion rights in Argentina to be recognized.<sup>157</sup>

The conquest of human rights in the word was generally reached through strong social mobilizations. Argentina is a clear example of this fight, and it is about time that Congress will finally recognize abortion rights. After the Congress debate, the huge number of people present in social mobilizations is a prove that the Argentine society reached at 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 not be more or fewer abortions, there will be fewer dead women. The rest is to educate, not to legislate."<sup>158</sup>

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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.*

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