

Notes:

Redefining LGBTQ and Abortion Rights in Latin America: A Transnational Toolkit

ABSTRACT

Throughout Latin America, the Lesbian, Gay, Bisexual, Trans, and Queer (LGBTQ) and abortion rights movements have progressed at divergent strengths and speeds, with significant variation among countries. The region is home to some of the most restrictive and discriminatory laws when it comes to these contentious issues. This Note explores some of the reasons behind the variation in LGBTQ and abortion rights throughout the region.

This Note traces the economic and political history of Latin America to illustrate the climate in which these social movements are operating. Further, this Note offers a brief snapshot of recent global developments in LGBTQ and abortion rights, paying close attention to how the United Nations and the Inter-American Court of Human Rights define and protect said rights. This Note provides a case study on the LGBTQ and abortion rights movements within Argentina, Uruguay, and El Salvador because these countries exemplify the immense variation in laws concerning LGBTQ rights and reproductive rights throughout Latin America. By extrapolating lessons from each country, this Note creates a “transnational toolkit” for law and policy change, which can be adopted and adapted to fit each country’s unique socioeconomic and political climate. If applied effectively, the toolkit can help bring abortion rights up to speed with LGBTQ rights in Latin America and establish uniformity in human rights across the region.

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I. INTRODUCTION

In 2015, a pregnant fourteen-year-old Argentinian girl was forced to take abortion-inducing medication following an alleged dispute with her boyfriend about the baby.¹ Her boyfriend and his mother then

1. Hinde Pomeraniec, *How Argentina Rose Up Against the Murder of Women*, *GUARDIAN* (June 8, 2015), <https://www.theguardian.com/lifeandstyle/2015/jun/08/argentina-murder-women-gender-violence-protest> [https://perma.cc/8D3B-7P5X] (archived Nov. 2, 2019).

buried her alive.² This was not an isolated act of violence.³ Each year, millions of women throughout Latin America are put in danger due to restrictive abortion laws.⁴ Similarly, many LGBTQ individuals throughout the region are denied fundamental rights and legal protections, leaving them vulnerable to discrimination and violence.

Latin America⁵ generally lags behind other regions in terms of abortion⁶ and LGBTQ rights.⁷ On the whole, Latin America is socially and religiously conservative, due in part to the enduring influence of authoritarian regimes throughout the region.⁸ LGBTQ rights and women's reproductive rights are often framed as social and moral issues, with conservatives generally arguing that legalizing same-sex marriage and abortion would "demoralize" society and disrupt the traditional notions of a "natural family."⁹

Across the region, LGBTQ rights have largely progressed with more strength and speed than abortion rights, particularly over the last decade.¹⁰ In 2009, Mexico City became the first Latin American jurisdiction to legalize same-sex marriage and adoption by same-sex

2. *Id.*

3. *Id.* (explaining that despite a lack of official reporting of gender-related violence in Argentina, some reports estimate that a woman is killed every 30 hours because of gender violence).

4. See generally SEBASTIÁN ESSAYAG, FROM COMMITMENT TO ACTION: POLICIES TO END VIOLENCE AGAINST WOMEN IN LATIN AMERICA AND THE CARIBBEAN (U.N. Dev. Programme & U.N. Women 2017) (discussing the increased rates of gender-based violence and female homicides ("femicide") in Latin America, due to a lack of effective laws and policies protecting women).

5. See *List of Countries in Latin America*, ENCYC. BRITANNICA (Mar. 10, 2017), <https://www.britannica.com/topic/list-of-countries-in-Latin-America-2061416> [<https://perma.cc/8D3B-7P5X>] (archived Nov. 2, 2019) (countries in Latin America span across North and Central America (Belize, Costa Rica, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Panama), South America (Argentina, Bolivia, Brazil, Chile, Colombia, Ecuador, Guyana, Paraguay, Peru, Suriname, Uruguay, Venezuela), and the Caribbean (Cuba, the Dominican Republic, Haiti)).

6. This Note uses the terms "women's rights," "reproductive rights," and "abortion rights" interchangeably, but recognizes that the terms are not synonymous.

7. See Omar G. Encarnación, *Latin America's Rights Riddle*, FOREIGN POL'Y (Aug. 27, 2018), <https://foreignpolicy.com/2018/08/27/latin-americas-rights-riddle/> [<https://perma.cc/7K39-5JBM>] (archived Nov. 2, 2019) [hereinafter Encarnación, *Rights Riddle*] (explaining that although Latin America recently shifted towards progressive LGBTQ rights, it continues to lag behind in terms of women's reproductive rights).

8. See CONSERVATIVE PARTIES, THE RIGHT, AND DEMOCRACY IN LATIN AMERICA 1–8 (Kevin J. Middlebrook ed., 2000) (noting most Latin American countries transitioned to democratic regimes in the 1970s and 1980s); Adriana Piatti-Crocker, *Diffusion of Same-Sex Policies in Latin America*, in SAME-SEX MARRIAGE IN LATIN AMERICA: PROMISE AND RESISTANCE 3, 3 (Jason Pierceson et al. eds., 2013) (stating that Latin America has a pervasive political culture characterized by machismo and religious conservatism).

9. Ana P. Morgenstern, *Morality and Contentious Politics in Latin America: Abortion and LGBT Rights in Argentina and Mexico* (June 18, 2012) (unpublished Ph.D. dissertation, Univ. of Miami) (open access).

10. See Encarnación, *Rights Riddle*, *supra* note 7.

couples.¹¹ Argentina followed suit and in 2010 became the first Latin American country to legalize same-sex marriage.¹² Since then, LGBTQ rights have continued to develop at a relatively rapid pace, with numerous Latin American countries and subnational governments legalizing same-sex marriage¹³ or civil unions between homosexual couples.¹⁴

In November 2017, a noteworthy regional development in LGBTQ rights came when the Inter-American Court of Human Rights (Inter-American Court)¹⁵ ruled in an advisory opinion that same-sex couples should be recognized and guaranteed “all the rights that are derived from a family bond between people of the same sex” along with access “to all existing forms of domestic legal systems.”¹⁶ The Attorney General’s Office of Costa Rica (the requesting party) declared that the opinion is binding upon Costa Rican judges.¹⁷ Although advisory opinions are nonbinding as to other parties, they set binding precedent in future contentious cases¹⁸ and establish baseline human rights

11. See Rey Rodriguez, *Mexico City Legalizes Same-sex Marriages, Adoption*, CNN (Dec. 21, 2009), <http://www.cnn.com/2009/WORLD/americas/12/21/mexico.gay.marriage/index.html> [<https://perma.cc/8942-VB4B>] (archived Nov. 2, 2019) (law effective in 2010).

12. See CÓDIGO CIVIL [CÓD. CIV.] [CIVIL CODE] (2010) (Arg.) (modified by Law No. 26.618, July 21, 2010, Matrimonio Civil).

13. See Piatti-Crocker, *supra* note 8, at 3 (since 2010, Colombia, Brazil, Uruguay and several Mexican states have legalized same-sex marriage).

14. See Law No. 20.830, *Crea El Acuerdo De Unión Civil*, Apr. 21, 2015, DIARIO OFICIAL [D.O.] (Chile); CÓD. CIV. art. 68 (2008) (Ecuador) (Chile and Ecuador now permit civil unions).

15. In 1969, delegates of the member states of the Organization of the American States (OAS) adopted the American Convention on Human Rights, which became effective on July 18, 1978. To date, twenty-five American nations have ratified or adhered to the Convention, although two nations have denounced the Convention (Trinidad and Tobago, and Venezuela). The Convention created the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights to observe and prosecute human rights violations. The function of the court is to interpret and apply the Convention. For a contentious case to be brought against a state party, the party must recognize the court’s compulsory jurisdiction, but advisory opinions may be requested by any member state of the OAS. For history on the Inter-American Court on Human Rights, see *Introduction: The Inter-American Court of Human Rights*, ORG. AM. STATES, http://www.oas.org/en/iachr/mandate/Basics/intro.asp#_ftn15 [<https://perma.cc/3WZ3-WX7L>] (archived Nov. 2, 2019); *I/A Court History*, INTER-AM. CT. HUM. RTS., <http://www.corteidh.or.cr/index.php/en/about-us/historia-de-la-corteidh> [<https://perma.cc/J4CY-XTWL>] (archived Nov. 2, 2019).

16. State Obligations Concerning Change of Name, Gender Identity, and Rights Derived from a Relationship Between Same-Sex Couples (Interpretation and Scope of Articles 1(1), 3, 6, 11(2), 13, 17, 18, and 24, in relation to Article 1 of the American Convention on Human Rights), Advisory Opinion OC-24/17, Inter-Am. Ct. H.R. (ser. A) No. 24, ¶ 228 (Nov. 24, 2017).

17. See Laura Alvarado, *Costa Rica’s Attorney General Confirms Ruling of Inter-American Court Regarding Same Sex Marriage is Binding*, COSTA RICA STAR (May 13, 2018), <https://news.co.cr/costa-rica-lgbti-rights-gay-rights-costa-rica-marriage/73000/> [<https://perma.cc/WNH9-D339>] (archived Nov. 2, 2019).

18. See Rep. Inter-Am. Ct. H.R. 2017, 16–21; see also Julie Calidonio Schmid, Note, *Advisory Opinions on Human Rights: Moving Beyond a Pyrrhic Victory*, 16 DUKE

standards that can instruct domestic policy making. As of 2018, nineteen Latin American countries had accepted the compulsory jurisdiction of the Inter-American Court; thus, it can be expected that many of these countries will adopt measures in order to comply with the court's recent opinion.¹⁹

In contrast, abortion laws in Latin America remain among the most stringent worldwide. Abortion is banned under all circumstances in Nicaragua, Honduras, El Salvador, the Dominican Republic, Suriname, and Haiti.²⁰ Other countries permit abortion in limited circumstances, including: (1) in order to save the life of a woman,²¹ (2) to preserve the physical health of a woman,²² (3) to preserve the physical or mental health of a woman,²³ or (4) for socioeconomic reasons.²⁴ Some countries also allow abortions in cases of rape,²⁵ incest,²⁶ or fetal anomaly.²⁷ In only four countries are abortions permitted without restriction as to reason; thus elective abortions are only available to 3 percent of women in Latin America and the Caribbean.²⁸

Although they are illegal altogether or allowed with limited exceptions in most countries, abortions in Latin America are

J. COMP. & INT'L L. 415, 415–17, 421–24 (2006) (explaining that advisory opinions signal how the Inter-American Court will rule in future contentious cases, and all countries that have accepted the court's compulsory jurisdiction are bound to the court's decision in contentious cases).

19. See Rep. Inter-Am. Ct. H.R. 2018, 9 (these countries include Argentina, Bolivia, Brazil, Chile, Colombia, Costa Rica, the Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, and Uruguay).

20. *Abortion in Latin America and the Caribbean Fact Sheet*, GUTTMACHER INST. (Mar. 2018), <https://www.guttmacher.org/fact-sheet/abortion-latin-america-and-caribbean> [<https://perma.cc/N9LP-RM5D>] (archived Nov. 2, 2019) [hereinafter *Abortion Fact Sheet*].

21. *Id.* (Brazil, Chile, Guatemala, Panama, Paraguay, Venezuela and Mexico permit abortions to save the life of a woman. In Mexico, the legality of abortion is determined at the state level, so the data here reflects the status for the majority of women in Mexico.)

22. *Id.* (abortion permitted to save the life of a woman/preserve physical health in Argentina, Bolivia, Costa Rica, Ecuador, and Peru).

23. *Id.* (abortion permitted to save the life of a woman/preserve physical or mental health in Colombia).

24. *Id.* (abortion permitted to save the life of a woman/preserve physical or mental health and for socioeconomic reasons in Belize).

25. *Id.* (abortion permitted for cases of rape in Brazil, Chile, Mexico, Panama, Argentina, Bolivia, and Colombia).

26. *Id.* (abortion permitted in cases of incest in Bolivia and Colombia).

27. *Id.* (abortion permitted in cases of fetal anomaly in Chile, Mexico, Panama, and Colombia).

28. See *id.* (abortion permitted without restriction as to reason in Cuba, Guyana, Puerto Rico, and Uruguay); see also *Argentina Moves Closer to Legalising Abortion*, ECONOMIST (June 9, 2018), <https://www.economist.com/the-americas/2018/06/09/argentina-moves-closer-to-legalising-abortion> [<https://perma.cc/569V-NU3K>] (archived Nov. 2, 2019) (discussing the availability of abortion services region-wide).

commonplace.²⁹ From 2010–2014, an estimated 6.5 million induced abortions occurred each year in Latin America and the Caribbean³⁰—up from 4.4 million between 1990 and 1994.³¹ Latin America has the highest unsafe abortion rate of any region.³² From 2010–2014, only one in four abortions in Latin America and the Caribbean were considered “safe,” and nearly 760,000 women in the region are treated annually for unsafe abortion complications.³³ Unsafe abortions and their related complications are evolving into public health crises. Developing countries, in particular, must address these crises quickly and effectively, so that economic and social growth is not stunted.³⁴ Further, in several Latin American countries, abortion is in practice criminalized, and women seeking abortions and their doctors face significant prison sentences.³⁵

Despite the fact that there is “significant overlap and ideological affinity between the struggles for LGBT[Q] rights and women’s rights in most places,” the two movements have actually progressed at considerably divergent speeds and strengths.³⁶ This Note will analyze why abortion rights have lagged behind LGBTQ rights in Latin America. Through evaluating the successes and failures of each movement, this Note will offer suggestions as to how the abortion rights movement can gain momentum and match the successes of the LGBTQ movement. Part II will define the “rights” at issue within each movement. It will also provide a generalized description of Latin America’s political and economic history and an overview of some pivotal international developments relating to LGBTQ and abortion rights. Specifically, this Note traces the influence of key institutions on

29. See *Abortion Fact Sheet*, *supra* note 20, at 1 (discussing high rates of clandestine abortions in the region).

30. See ENCYC. BRITANNICA, *supra* note 5 (Caribbean countries considered to be part of Latin America include Cuba, the Dominican Republic, and Haiti).

31. *Abortion Fact Sheet*, *supra* note 20 (defining a medically “safe” abortion under criteria established by the World Health Organization).

32. WORLD HEALTH ORGANIZATION, UNSAFE ABORTION INCIDENCE AND MORTALITY (2012) (defining an “unsafe abortion” as a “procedure for terminating an unintended pregnancy carried out either by persons lacking the necessary skills or in an environment that does not conform to minimal medical standards, or both”).

33. *Abortion Fact Sheet*, *supra* note 20, at 1.

34. See COUNCIL ON FOREIGN RELATIONS, THE EMERGING GLOBAL HEALTH CRISIS: NONCOMMUNICABLE DISEASES IN LOW-AND MIDDLE-INCOME COUNTRIES ix, 11 (2014).

35. Michelle Oberman, *What Happens When Abortion is Banned?*, N.Y. TIMES (May 31, 2018), <https://www.nytimes.com/2018/05/31/opinion/sunday/abortion-banned-latin-america.html> [<https://perma.cc/6L7T-WMNX>] (archived Nov. 2, 2019) (noting that in Chile, abortion prosecutions typically target doctors, whereas in El Salvador, prosecution targets women).

36. See Encarnación, *Rights Riddle*, *supra* note 7 (noting that women’s rights movements have historically anticipated and augmented LGBTQ rights advancements).

domestic policies, such as the Catholic Church,³⁷ the United Nations (UN), and the Inter-American Court.

Although this Note paints a broad picture of law and policy throughout the region, it will focus narrowly on the laws of three select countries to evaluate the underlying issues promoting or hindering progress within these movements. Part III will first evaluate the role of public opinion in social policy making at a regional level and then provide an in-depth evaluation of the laws, social groups, and political dynamics in Argentina, Uruguay, and El Salvador. This Note will appraise the strategies of key activist groups in these three countries, paying great attention to how each issue is framed (e.g., human health and safety, justice, and legal equality). Part IV will focus not only on what the reproductive rights movement can learn from the LGBTQ rights movement within Latin America but also on what lessons both movements can adopt from other countries across the globe. Ultimately, this Note will provide a “transnational toolkit” for social and legal change that can be adopted and adapted to fit each country’s unique socioeconomic and political climate, with the end goal of establishing some uniformity in human rights across the region.

II. BACKGROUND

A. *What are the “rights” at issue?*

While the focus of this Note is to compare the legality of same-sex marriage and civil unions to the legal status of abortion in Latin America, the terms “LGBTQ rights” and “abortion rights” and their respective social movements are multifaceted. Besides relationship rights, the LGBTQ community also advocates for other fundamental human rights, such as decriminalization of sexual activity, adoption rights, the ability to openly serve in the military, antidiscrimination, gender identity privileges, and protection from hate crimes.³⁸ The term “abortion rights” generally concerns access to legal abortion services,³⁹ but the term also encompasses a woman’s right to healthcare, privacy, safety, and autonomy.⁴⁰ Activists and policymakers within each

37. When using the term “Catholic Church,” this Note is solely referring to the Roman Catholic Church.

38. See JAVIER CORRALES, *LGBT RIGHTS AND REPRESENTATION IN LATIN AMERICA AND THE CARIBBEAN* 31 (Univ. N.C., Chapel Hill 2015).

39. See Andrzej Kulczycki, *Abortion in Latin America: Changes in Practice, Growing Conflict, and Recent Policy Developments*, 42 *STUD. FAMILY PLAN.* 199, 206 (describing the wide span of abortion access and restriction policies across Latin America, such as permitting access to abortion when the mother’s health is in danger or in cases of rape or incest).

40. See Laurie Stage, *How to Talk About Abortion*, *N.Y. TIMES* (Mar. 19, 2018), <https://www.nytimes.com/2018/03/19/opinion/abortion-arguments-morality-policy.html>

country may have a different end goal; therefore, no singular path or model for shaping law and policy will be successful throughout the entire region. However, broad strategies for law and policy reform can be extrapolated from the successes and failures of individual countries.

B. Country Selection

This Note focuses on Argentina, Uruguay, and El Salvador because these nations' laws demonstrate the wide variation across Latin America.

For example, Uruguay was the first Latin American country to regulate same-sex relationships nationally by legalizing civil unions in 2008, and later same-sex marriage in 2013.⁴¹ In 2012, Uruguay decriminalized abortion, permitting women to undergo voluntary abortions following a consultation and medical examination process.⁴²

Argentina legalized same-sex marriage in 2010, but subnational recognition of same-sex relationships began eight years earlier when the autonomous city of Buenos Aires legalized civil unions.⁴³ The advancement of progressive abortion legislation has not been as successful.⁴⁴ Currently, abortion is criminalized in Argentina except for when the life of the mother is in danger, or the pregnancy is a result of rape or an attack on a mentally disabled woman.⁴⁵ In 2018, the Argentinian legislature narrowly defeated a bill which would have legalized abortion through the first fourteen weeks of pregnancy, subject to various medical counseling procedures.⁴⁶ Thus, while paving the way as far as LGBTQ rights, Argentina has lagged behind other countries with respect to legalizing abortion services.

On the other end of the spectrum, El Salvador has long disfavored granting LGBTQ individuals any legal protections. Same-sex marriage and civil unions are illegal in El Salvador, and the legislature has routinely tried to pass constitutional amendments banning same-sex

[<https://perma.cc/BL9T-4E3N>] (archived Nov. 2, 2019) (discussing how issues should be framed in the abortion debate).

41. See Law No. 18.246, Unión Concubinaria, Jan. 1, 2008, DIARIO OFICIAL [D.O.] (Uru.); Law No. 19.075, Matrimonio Igualitario, May 9, 2013, DIARIO OFICIAL [D.O.] (Uru.).

42. See Law No. 18.987, Interrupción Voluntaria del Embarazo, Oct. 30, 2012, DIARIO OFICIAL [D.O.] (Uru.).

43. See CÓD CIV. (2010) (Arg.) (modified by Law No. 26.618, July 21, 2010, Matrimonio Civil); Law No. 1.004, C.A.B.A., Dec. 12, 2002, B.O. (Arg.) (Reconócense las Uniones Civiles en la C.A.B.A.).

44. See Julia Maria Rubio, *This Is Why Argentina Did Not Legalize Abortion This Week*, WASH. POST (Aug. 11, 2018), https://www.washingtonpost.com/news/monkey-cage/wp/2018/08/11/this-is-why-argentina-did-not-legalize-abortion-this-week/?utm_term=.99ea8d6d1e44 [<https://perma.cc/5J64-HP6P>] (archived Nov. 2, 2019).

45. See *id.*

46. See *id.*

marriage.⁴⁷ In early 2018, El Salvador's Supreme Court stopped a constitutional amendment banning the ratification of same-sex marriage, but solely on procedural grounds.⁴⁸ Additionally, LGBTQ individuals in El Salvador are at a high risk of being subject to hate crimes or murder by gangs, forcing many to flee the country.⁴⁹

El Salvador has enforced a complete prohibition on abortion since 1998.⁵⁰ Under the complete abortion ban, a woman charged with the crime of abortion can face a penalty of two to eight years in prison, and a medical professional assisting in the procedure can face a six to twelve year sentence.⁵¹ Further, El Salvador's Constitution was amended in 1999 to establish that human life begins, and is therefore protected, from the moment of conception.⁵² As a result, women charged with the crime of unlawful abortion may also be convicted of aggravated homicide, which carries a thirty to fifty year prison sentence.⁵³ El Salvador is, unsurprisingly, viewed as one of the least progressive countries when it comes to LGBTQ and abortion rights.⁵⁴

47. See CONST. POL. REPUB. EL SAL. [C.P.] tit. I, cap. II, art. 32 (1983); see also HARVARD LAW SCHOOL, *THE VIOLATION OF THE RIGHTS OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PERSONS IN EL SALVADOR* 13 (2010) [hereinafter HARVARD LGBTQ SHADOW REPORT] (describing the 2006–2009 attempt to constitutionally ban same-sex marriage).

48. See Associated Press, *El Salvador: Constitutional Ban on Same-sex Marriage Blocked*, N.Y. DAILY NEWS (Jan. 31, 2018), <http://www.nydailynews.com/news/wires/news/world/el-salvador-constitutional-ban-same-sex-marriage-blocked-article-1.3791958> [<https://perma.cc/A2SP-QU2B>] (archived Nov. 2, 2019) [hereinafter *El Salvador: Constitutional Ban*]; Jorge Rodriguez-Jimenez, *The El Salvador Supreme Court Denied a Measure That Would Have Banned Marriage Equality*, MITÚ (Feb. 1, 2018), <https://wearemitu.com/things-that-matter/el-salvador-same-sex-marriage/> [<https://perma.cc/LB89-CL69>] (archived Nov. 2, 2019) (noting that the Supreme Court blocked the amendment because it was fast-tracked through the assembly and voted on “urgently” with just days left in the session, giving the public no opportunity to weigh in).

49. See Anastasia Moloney, *Terrorized at Home*, *Central America's LGBT People to Flee for Their Lives: Report*, REUTERS, Nov. 27, 2017, <https://www.reuters.com/article/us-latam-lgbt-rights/terrorized-at-home-central-americas-lgbt-people-to-flee-for-their-lives-report-idUSKBN1DR280> [<https://perma.cc/WUP4-M4AP>] (archived Nov. 2, 2019).

50. See CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] ch. 2 (El Sal.); Alyson Zureick et al., *Physicians' Challenges Under El Salvador's Criminal Abortion Prohibition*, 143 INT'L J. GYNECOLOGY & OBSTETRICS 121, 121 (2018) (the 1997 revision of the penal code removed existing exceptions for cases of rape, fetal anomaly, and threat to a woman's life).

51. See CÓD. PEN. arts. 133–35 (El Sal.).

52. See CONST. POL. REPUB. EL SAL. [C.P.] art. 1 (amended by Legislative Decree No. 541 of 3 Feb. 1999).

53. CÓD. PEN. art. 129 (El Sal.).

54. See Jordan Strickler, *Variation in Latin American LGBT Rights* 18 (2017) (published M.A. thesis, University of Miami) (on file with Univ. of Miami Scholarly Repository) (El Salvador ranks at the bottom of the Latin American LGBT Rights Index); Christine Wade, *From Argentina to El Salvador, Restrictive Abortion Laws are a Public Health Crisis*, WORLD POL. REV. (Aug. 30, 2018), <https://www.worldpoliticsreview.com/articles/25711/from-argentina-to-el-salvador-restrictive-abortion-laws-are-a-public-health-crisis> [<https://perma.cc/AWM8-D3D3>]

C. Regional Political Climate

In evaluating the strength of a nation's laws or social policies, it is important to recognize that political history can strongly influence how law and policy is shaped within the country. This subpart will provide a broad overview of the political history and current political dynamics of the Latin American region at large.

Under great influence from the American and French Revolutions, most Latin American countries gained independence from their European rulers in the late eighteenth century and early nineteenth century.⁵⁵ With newfound independence, many Latin American nations struggled to establish politically and economically stable and independent regimes.⁵⁶ The region ultimately became a host for various authoritarian regimes, such as national dictatorships, oligarchies, monarchies, and communism.⁵⁷ Several countries also experienced periods of military dictatorships, including Uruguay and Argentina.⁵⁸

Apart from Cuba, most countries in Latin America transitioned from authoritarian regimes in the late twentieth century.⁵⁹ This post-Cold War shift from often violent, authoritarian regimes to more democratic structures is considered the "third wave" of democratization.⁶⁰ Although most democracies in Latin America remain "imperfect" or "partly free," the region is far more progressive than it was in the 1980s.⁶¹ However, the trend towards

(archived Nov. 2, 2019) (describing El Salvador's abortion law as one of the "most draconian" in the world).

55. See VICTOR BULMER-THOMAS, *THE ECONOMIC HISTORY OF LATIN AMERICA SINCE INDEPENDENCE 2* (Herbert S. Klein ed., 2d ed. 2003).

56. See ANDRÉ A. HOFMAN, *THE ECONOMIC DEVELOPMENT OF LATIN AMERICA IN THE TWENTIETH CENTURY 10* (Edward Elgar Publishing 2000); PAUL H. LEWIS, *AUTHORITARIAN REGIMES IN LATIN AMERICA: DICTATORS, DESPOTS, AND TYRANTS 29* (Rowman & Littlefield 2006) (following independence, many Latin American countries were under the control of violent *caudillos* (regional "bosses"), which brought some order through despotism, similar to how monarchies grew from feudalism in Europe).

57. See LEWIS, *supra* note 56, at 3–5. For example, Mexico and Venezuela fell under national dictatorships, Chile was ruled by an oligarchy, Brazil became a monarchy, and Cuba fell under a communist regime.

58. See *id.* at 4 (other countries which experienced military dictatorships include Brazil and Chile).

59. See *Latin America's Wavering Democracies*, FREEDOM HOUSE: FREEDOM AT ISSUE BLOG (Sept. 6, 2012), <https://freedomhouse.org/blog/latin-america%E2%80%99s-wavering-democracies> [<https://perma.cc/7JSK-RAQE>] (archived Nov. 2, 2019); Roger A. Kittleson et al., *History of Latin America*, ENCYC. BRITANNICA (Jan. 23, 2019), <https://www.britannica.com/place/Latin-America/Latin-America-since-the-mid-20th-century> [<https://perma.cc/7JN3-ZS5H>] (archived Nov. 2, 2019) (noting that this transition period was marked by an upsurge in rural guerilla conflict and urban terrorism in response to the political oppression and social injustice across the region).

60. Jørgen Møller & Svend-Erik Skaaning, *The Third Wave: Inside the Numbers*, 24 J. DEMOCRACY 97, 97 (2013).

61. *Latin America's Wavering Democracies*, *supra* note 59.

democratization has slowed in the twenty-first century, and some scholars have considered the danger of a “reverse wave” that will threaten future democratization.⁶² Democratization across Latin America is further stunted because many countries are stuck in gray areas,⁶³ often characterized as “hybrid regimes,” which have a mix of democratic and autocratic features.⁶⁴ This hybrid structure may affect the progression of law and social policy because political and judicial institutions in these systems may not have clearly defined roles with concrete lawmaking and enforcement powers. If judicial and legislative systems do not have clearly defined roles, advocacy coalitions may not be able to develop targeted strategies. While a chronological view of the political history of each country in Latin America is beyond the scope of this Note, it is important to observe that the long history of authoritarian governance and the decreased pace of democratization in the region play a critical role in the current states of the LGBTQ and reproductive rights movements. Social movements often flourish in democratic societies and political instability often distracts from the progression of human rights.⁶⁵

D. Regional Economic Growth

Economic growth is often connected to the progression of human rights.⁶⁶ After World War II, many Latin American countries focused on economic development and democratic consolidation.⁶⁷

62. *Id.*; Møller & Skaaning, *supra* note 60, at 97, 101 (Some scholars believe that Venezuela, Honduras, and Nicaragua are in a “reverse wave” of democratization because they have moved toward multiparty autocracies. Factors contributing to this “reverse wave” are the global financial crisis that began in 2008, the wars in Iraq and Afghanistan, the economic success of authoritarian China, and an overall dissatisfaction with the performance of these newfound democratic regimes.).

63. *See Latin America Stagnates in the Democracy Index*, ECONOMIST (Jan. 30, 2017), <http://country.eiu.com/article.aspx?articleid=195066403&Country=Suriname&topic=Politics> [<https://perma.cc/5PFK-RGUZ>] (archived Nov. 2, 2019) (noting that the “full consolidation of democracy continues to be held back by issues regarding political effectiveness and culture, reflecting a lack of institutional consolidation, and low participation in the political party structure and turnout at elections”).

64. *See id.* The Economist Intelligence Unit’s Democracy Index denotes Honduras, Guatemala, Ecuador, Bolivia, Nicaragua, Venezuela, and Haiti as “hybrid regimes.”

65. *See* TED PICCONE, DEMOCRACY AND DISORDER: LATIN AMERICA’S STRUGGLE WITH DEMOCRATIC BACKSLIDING 2 (Brookings Inst. 2019) (stating that “democratic deconsolidation . . . has upset the region’s formal consensus that liberal democracy, human rights, and the rule of law are essential characteristics of state legitimacy”).

66. *See generally* GHK CONSULTING LTD., HUMAN RIGHTS AND ECONOMICS: TENSIONS AND POSITIVE RELATIONSHIPS (Nordic Trust Fund, World Bank 2012).

67. *See* HOFMAN, *supra* note 56, at 7–11, 135; Kittleson et al., *supra* note 59. For example, many countries advanced internal structural reform, land reform, and economic integration among Latin American nations. The more successful countries pursued export diversification and natural resource endowment.

Independence from European countries created an opportunity for economic development through greater access to international trade.⁶⁸ Following the Great Depression, unlike Europe and the United States, many Latin American countries turned away from international trade and implemented an import substitution industrialization strategy; however, this manifested into import dependency.⁶⁹

The region's import dependency became a real issue during the debt crisis of the 1980s, triggered by the rapid increase of interest rates in the international market.⁷⁰ During the second half of the twentieth century, Latin American countries experienced a much slower economic growth rate compared to that of Europe, Asia, and other developing countries, largely in part due to export restrictions and limited capital development.⁷¹ Limited economic growth contributed greatly to stark inequalities in income distribution and political and social instability.⁷² As a result, socioeconomic issues have become a more important political agenda item. Since socioeconomics and politics are interrelated, the political divide between income classes has hindered progressive social policy making in many countries.⁷³

E. *The World Stage on LGBTQ Rights*

The international development of laws and norms protecting human rights influences the establishment of protections implemented nationally and regionally. The Inter-American Court is an organ of the Organization of American States (OAS)⁷⁴ with the role of interpreting and enforcing human rights throughout the Americas.⁷⁵ The Inter-

68. See HOFMAN, *supra* note 56, at 10.

69. See *id.* at 23, 26. (noting that the import substitution industrialization strategy creates dependency on imports by strengthening industrialists and large multinational corporations at the expense of low-income citizens, especially in rural communities).

70. See *id.* at 34; see also Manuel Pastor, Jr., *Latin America, the Debt Crisis and the International Monetary Fund*, 60 *LATIN AM. PERSP.* 79, 79–110 (discussing the factors causing the international rise in interest rates and the effect on debt in Latin America).

71. See HOFMAN, *supra* note 56, at 29–35 (from 1950–1973, per capita growth in Latin America averaged at 2.6 percent per year, whereas per capita growth averaged at 5.7 percent in Asia and 4.7 percent in advanced Europe).

72. See *id.* at 15, 24.

73. See *id.* at 27 (noting that in the 1990s more socioeconomic issues were added to political agendas throughout Latin America).

74. See *Who We Are: About the OAS*, *ORG. AM. STS.*, http://www.oas.org/en/about/who_we_are.asp [<https://perma.cc/C25U-KV3Q>] (archived Nov. 2, 2019) (The OAS is the world's oldest regional organization, established in 1948. The organization was established to achieve among member states "an order of peace and justice, to promote their solidarity, to strengthen their collaboration, and to defend their sovereignty, their territorial integrity, and their independence." Today, thirty-five independent states of the Americas are official constituents of the OAS and sixty-nine states and the European Union have been granted permanent observer status. The Inter-American Court of Human Rights is an autonomous organ of the OAS.).

75. See *I/A Court History*, *supra* note 15.

American Court exercises three distinct roles: (1) a contentious function,⁷⁶ (2) a provisional function,⁷⁷ and (3) an advisory function.⁷⁸ Any member state⁷⁹ of the OAS can consult the court for an advisory opinion regarding interpretation of the Inter-American Convention of Human Rights (Inter-American Convention) or any applicable human rights treaty or related domestic law that falls under the purview of the Inter-American Court's jurisdiction.⁸⁰ In November 2017, the Inter-American Court issued an advisory opinion in response to Costa Rica's request to interpret the Inter-American Convention and Costa Rican domestic law in regards to various issues including recognition of name changes in accordance with gender identity and recognition of patrimonial rights derived from a same-sex relationship.⁸¹

With respect to the rights of same-sex couples, the Inter-American Court asserted that it does not protect one particular model of family; therefore, patrimonial rights derived from same-sex relationships should be protected.⁸² The Inter-American Court went even further to hold that states have the obligation to afford to homosexual couples the same rights recognized to heterosexual couples indiscriminately—even marriage.⁸³ While this advisory opinion is not binding, Costa Rica's

76. Rep. Inter-Am. Ct. H.R. 2017, 16; *Introduction: The Inter-American Court of Human Rights*, *supra* note 15 (The contentious function of the Inter-American Court is to determine “whether a State has incurred international responsibility for the violation of any rights recognized in the American Convention or in other human rights treaties applicable to the inter-American system” and “order the necessary measures to redress the consequences of the violation of such rights.” Only the Inter-American Commission of Human Rights or state parties to the American Convention on Human Rights can bring a contentious case to the Inter-American Court, and they can only bring a case against a State that has recognized the Inter-American Court's compulsory jurisdiction.).

77. Rep. Inter-Am. Ct. H.R. 2017, 23 (The Inter-American Court can issue provisional measures of protection to “guarantee the rights of specific individuals or groups of individuals who are in a situation of: (a) extreme gravity and (b) urgency, and (c) risk of suffering irreparable harm.” These measures can be ordered at any time, even if a case has not yet been submitted to the jurisdiction of the Inter-American Court.).

78. *Id.* (The purpose of advisory opinions is to “help the States and organs comply with and apply human rights treaties, without subjecting them to the formalities and the system of sanctions that characterize contentious proceedings.”).

79. For a list of the independent states of the Americas who have ratified the OAS Charter and are current members of the organization, *see* Member States, ORG. AM. STS., http://www.oas.org/en/member_states/default.asp [<https://perma.cc/2GBJ-AA26>] (archived Nov. 2, 2019).

80. *Introduction: The Inter-American Court of Human Rights*, *supra* note 15.

81. *See* Advisory Opinion OC-24/17, *supra* note 16, at ¶¶ 1, 160; Rep. Inter-Am. Ct. H.R. 2017, 116 (in response to the question on gender identity, holding that the right to name and sex/gender changes in public records is protected by the Inter-American Convention).

82. *See* Advisory Opinion OC-24/17, *supra* note 16, at ¶ 199; Rep. Inter-Am. Ct. H.R. 2017, 117.

83. Advisory Opinion OC-24/17, *supra* note 16, at ¶¶ 223–25; Rep. Inter-Am. Ct. H.R. 2017, 117–18 (The Inter-American Court said that only permitting a different kind of union for homosexual couples, such as civil unions, creates a “distinction based on an individual's sexual orientation that would be discriminatory and, therefore, incompatible with the American Convention.” Therefore, the right to marry shall be afforded

Attorney General's Office mandated that it is binding on Costa Rican judges.⁸⁴ The advisory opinion likewise sends a message for how the Inter-American Court will rule in future cases, which would be binding in a contentious case.⁸⁵

The UN is also becoming more conscious of its role in protecting LGBTQ individuals.⁸⁶ Over the last decade, the UN restored references to killings based on sexual orientation from a resolution condemning extrajudicial and arbitrary execution,⁸⁷ enacted two resolutions on Human Rights, Sexual Orientation, and Gender Identity,⁸⁸ and established the Free & Equal Campaign under the UN Human Rights Commissioner.⁸⁹ In 2015, the UN Security Council put sexual minorities on its agenda for the first time to address the human rights of LGBTQ people under the Islamic State of Iraq and the Levant.⁹⁰ The UN also appointed an "Independent Expert" on protection against violence and discrimination based on sexual orientation and gender identity, pursuant to a 2016 resolution.⁹¹ However, the UN has not formally addressed same-sex relationship rights aside from internal staff policies.⁹²

On a global scale, homosexual activity between consenting adults is still illegal in seventy-three countries, and homosexuality is punishable by death in eight countries.⁹³ As of May 2019, thirty-one

indiscriminately to homosexual and heterosexual couples in order to recognize equal dignity and autonomy for all persons.).

84. See Alvarado, *supra* note 17.

85. See Rep. Inter-Am. Ct. H.R. 2017, 20–21.

86. See *Ten Ways the United Nations has Protected LGBTQ Human Rights*, HUM. RTS. CAMPAIGN (Sept. 18, 2017), <https://www.hrc.org/blog/ten-ways-the-united-nations-has-protected-lgbtq-human-rights> [<https://perma.cc/C7LR-QBAF>] (archived Nov. 2, 2019).

87. Louis Charbonneau, *U.N. Restores Gay Reference to Violence Measure*, REUTERS (Dec. 21, 2010), <https://www.reuters.com/article/us-un-gays/u-n-restores-gay-reference-to-violence-measure-idUSTRE6BK6UW20101221> [<https://perma.cc/7G4D-5BK9>] (archived Nov. 2, 2019).

88. Human Rights Council Res. 27/32, U.N. Doc. A/HRC/RES/27/32 (Sept. 26, 2014); Human Rights Council Res. 17/19, U.N. Doc. A/HRC/RES/17/19 (June 17, 2011).

89. *About UN Free and Equal*, U.N. OFFICE OF THE HIGH COMM'R FOR HUMAN RIGHTS <https://www.unfe.org/about/> [<https://perma.cc/7FM9-DNVQ>] (archived Nov. 2, 2019) (Established in 2013, Free & Equal is a "global UN public information campaign aimed at promoting equal rights and fair treatment of LGBTI people.").

90. *UN Security Council Holds First Meeting on LGBT Rights*, AL JAZEERA (Aug. 24, 2015), <https://www.aljazeera.com/news/2015/08/security-council-holds-meeting-lgbt-rights-150824201712751.html> [<https://perma.cc/LYS4-5GL9>] (archived Nov. 2, 2019).

91. Human Rights Council Res. 32/2, U.N. Doc. A/HRC/RES/32/2 (June 30, 2016).

92. *UN Widens its Same-sex Marriage Policy to Include All Legally-Married Staff*, U.N. NEWS (July 8, 2014), <https://news.un.org/en/story/2014/07/472572-un-widens-its-same-sex-marriage-policy-include-all-legally-married-staff> [<https://perma.cc/W58K-WRGP>] (archived Nov. 2, 2019).

93. Rosamund Hutt, *This is the State of LGBTI Rights Around the World in 2018*, WORLD ECON. F. (June 24, 2018), <https://www.weforum.org/agenda/2018/06/lgbti-rights-around-the-world-in-2018/> [<https://perma.cc/RTZ9-ED7V>] (archived Nov. 2, 2019).

countries have legalized same-sex marriage, only six of which are in Latin America.⁹⁴

F. *The World Stage on Abortion Rights*

The Inter-American Convention likewise addresses certain rights related to personal dignity and integrity, which in turn affect female reproductive rights.⁹⁵ Specifically, the Inter-American Convention protects the right to life (Article 4), the right to humane treatment (Article 5), and the right to privacy (Article 11).⁹⁶ The Inter-American Court interprets the rights to human life and humane treatment to be directly linked to human health care,⁹⁷ and holds that physicians should not be prosecuted for providing medical care to patients who are suspected of criminal activity, even when such criminal activity caused the patient's injuries.⁹⁸ Consequently, the Inter-American Convention generally protects a woman's rights to integrity, dignity, and access to healthcare, while also protecting the physician's right to indiscriminately provide care without fear of prosecution.⁹⁹ The Inter-American Convention further seeks to prevent violence against women, including obstetric violence.¹⁰⁰

94. *Gay Marriage Around the World*, PEW RESEARCH CTR. (Aug. 8, 2017), <http://www.pewforum.org/2017/08/08/gay-marriage-around-the-world-2013/> [<https://perma.cc/76SQ-K6HB>] (archived Nov. 2, 2019) (counting England and Wales separately, and counting Mexico as a country even though gay marriage is only legal in parts of Mexico).

95. *See* American Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

96. *Id.* arts. 4, 5, 11. Under Article 1 of the Convention, all state parties to the Convention must respect these rights "without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition."

97. *Albán-Cornejo et al. v. Ecuador*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 171, ¶ 117 (Nov. 22, 2007). The Court references the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural Rights which defined the right to health as the "enjoyment of the highest level of physical, mental, or social well-being," and classified health as a public good.

98. *De La Cruz-Flores v. Peru*, Merits, Reparations, and Costs, Judgment, Inter-Am. Ct. H.R. (ser. C) No. 115, ¶¶ 90–103 (Nov. 22, 2007).

99. *See* Inter-American Convention on the Prevention, Punishment and Eradication of Violence against Women (Convention of Belem do Para), arts. 2, 7; INTER-AM. COMM'N H.R., INDIGENOUS WOMEN AND THEIR HUMAN RIGHTS IN THE AMERICAS ¶ 80 (Apr. 1, 2017), <http://www.oas.org/en/iachr/reports/pdfs/indigenouswomen.pdf> [<https://perma.cc/CQ68-GD6H>] (archived Nov. 2, 2019) (Obstetrics violence "encompasses all situations of disrespectful, abusive, neglectful treatment or denial thereof that take place during the pregnancy, childbirth or postpartum period, in private or public health facilities.").

100. *Id.*

Additionally, various UN committees¹⁰¹ have issued general recommendations, comments, and concluding observations related to abortion.¹⁰² Through these committees, the UN advises member states to: (1) ensure comprehensive legal grounds for abortion; (2) implement programs and services for the planning and managing of safe abortion care; (3) eliminate regulatory, policy, and access barriers to reproductive health services; and (4) provide treatment for abortion complications.¹⁰³ The UN Convention on the Elimination of All Forms of Discrimination against Women protects the “right to reproductive choice” and is the only UN treaty to mention family planning.¹⁰⁴

Further, the World Health Organization (WHO) has provided extensive technical and policy guidelines for making abortions safer, which include consideration of the intersection between human rights and legal restrictions on access to reproductive health services.¹⁰⁵ The WHO condemns “the practice of extracting confessions from women seeking emergency medical care as a result of illegal abortion, and the legal requirement for doctors and other health-care personnel to report cases of women who have undergone abortion.”¹⁰⁶ Additionally, the WHO asserts that “states have an obligation to provide immediate and unconditional treatment to anyone seeking emergency medical care.”¹⁰⁷

Abortion laws and policies vary greatly across the globe. In 2013,¹⁰⁸ the UN Department of Economic and Social Affairs issued an

101. These UN committees include the Committee on the Elimination of Discrimination Against Women, the Human Rights Committee, the Committee on Economic, Social, and Cultural Rights, the Committee on the Rights of the Child, and the Committee against Torture. For the list of comments, recommendations, and observations, see WORLD HEALTH ORGANIZATION, SAFE ABORTIONS: TECHNICAL AND POLICY GUIDANCE FOR HEALTH SYSTEMS 89–90 (2d ed. 2012) [hereinafter WORLD HEALTH ORGANIZATION, SAFE ABORTIONS].

102. *See id.*

103. *Id.* at 89–90 (box 4.1 provides examples of international and regional human rights bodies applying human rights to safe abortions, within the context of comprehensive reproductive health care).

104. Convention on the Elimination of All Forms of Discrimination against Women, Dec. 18, 1979, 1249 U.N.T.S. 20378 (language on “family planning” and the “right to reproductive choice” is used in the Introduction and Articles 4, 10(h), and 16(e) of the Convention).

105. WORLD HEALTH ORGANIZATION, SAFE ABORTIONS, *supra* note 101, at 87–103 (referencing legal and policy considerations relating to abortion access and human health, including an analysis of laws and their implementation within the context of human rights).

106. *Id.* at 98.

107. *Id.*

108. 2013 is the most recent year in which a comprehensive survey of this caliber has been conducted. Other organizations have compiled more recent surveys. *See, e.g., Status of the World's 193 Countries and Six Territories/Nonstates, by Six abortion-Legality Categories and Three Additional Legal Grounds Under Which Abortion is Allowed*, GUTTMACHER INST. (2017), https://www.guttmacher.org/sites/default/files/report_downloads/aww_appendix_table_1.pdf [https://perma.cc/B6Y6-93BU] (archived Nov. 2, 2019).

international survey of abortion and reproductive health policies.¹⁰⁹ Out of 196 countries,¹¹⁰ six still enforced a complete ban on abortion, 190 permitted abortion in order to save a woman's life, 102 permitted abortion in cases of rape or incest, 102 permitted abortion if there was a fetal abnormality, seventy permitted abortion for economic or social reasons, and only fifty-nine countries permitted abortion upon request.¹¹¹ Today, six countries in Latin America still outlaw abortion under all circumstances.¹¹²

While abortion laws across the globe have not changed dramatically in the last couple of decades, several countries, such as Ireland, have recently reformed their abortion laws.¹¹³ In May 2018, 66 percent of Irish voters supported a referendum to remove a near-total abortion ban from the Irish Constitution, and in December 2018 the legislature passed a bill which allows a woman to seek an abortion for any reason up to the twelfth week of pregnancy—and later in certain cases—following a three-day waiting period.¹¹⁴ This was a monumental vote because as a nation that was “long a bastion of staunchly conservative Catholicism,” Ireland sent the message that it was frustrated with the Catholic Church and prioritized liberal reform.¹¹⁵ As seen below, countries with high rates of religious affiliation generally show less favorable attitudes towards same-sex relationships and abortion, which often directly affects public policy.¹¹⁶ In the future, other religiously conservative countries—which are

109. See, e.g., U.N. DEPT OF INT'L ECON. & SOC. AFFAIRS, ABORTION POLICIES AND REPRODUCTIVE HEALTH AROUND THE WORLD (1980).

110. *Id.* at 10 (note that “countries” are calculated as “Governments”).

111. *Id.* at 17 (annex 1).

112. *Abortion Fact Sheet*, *supra* note 20.

113. Marge Berer, *Abortion Law and Policy Around the World: In Search of Democratization*, 19 HEALTH & HUM. RTS. J. 13, 17 (2017) (noting that abortion laws across the globe have not changed dramatically in the last 15 years).

114. William Booth & Amanda Ferguson, *Ireland Votes on its Abortion Ban, a ‘Once in a Generation Decision’*, WASH. POST (May 25, 2018), https://www.washingtonpost.com/world/europe/ireland-votes-on-its-abortion-ban-a-once-in-a-generation-decision/2018/05/23/46702c48-591e-11e8-9889-07bcc1327f4b_story.html?utm_term=.485b38443602 [https://perma.cc/7JZ5-92GL] (archived Nov. 2, 2019) (The Eighth Amendment to Ireland's Constitution, passed in 1983, gave the “unborn” and their mothers an “equal right to life,” which in effect outlawed nearly all abortions. In 2013, the legislature added an exception for cases of risk to maternal life, but in all other cases, abortion was punishable by up to 14 years in prison); Ed O'Loughlin, *Irish Lawmakers Vote to Allow Abortion, Part of Landmark Liberal Shift*, N.Y. TIMES (Dec. 6, 2018), <https://www.nytimes.com/2018/12/06/world/europe/ireland-legal-abortion-vote.html> [https://perma.cc/UFD3-XQK3] (archived Nov. 2, 2019).

115. O'Loughlin, *supra* note 114 (In response to anger with the Catholic Church over clerical sexual abuse and institutional neglect of women and children, Irish voters have rebelled against the Church embracing a liberal shift in social policy. For example, in 2015, Irish voters overwhelmingly approved same-sex marriage.)

116. See Germán Lodola & Margarita Corral, *Support for Same-Sex Marriage in Latin America*, in SAME-SEX MARRIAGE IN LATIN AMERICA, *supra* note 8, at 41, 43–44.

abundant throughout Latin America—may also use legal reform, like Ireland did, as a method of challenging the Catholic Church.

II. ANALYSIS

A. *The Power of Public Opinion*

A strong indicator of how a country will tackle social policy is general public opinion within the country on particular issues.¹¹⁷ The variability in public opinion surrounding LGBTQ and abortion rights across Latin America is manifested in the wide range of laws and policies throughout the region.

1. Public Opinion on Same-Sex Marriage

Public opinion on LGBTQ rights—and particularly, the general acceptance of homosexuality—varies greatly across the region.¹¹⁸ Throughout the Americas, 30 percent of people believe homosexuals chose to be that way, and 40 percent of people think that same-sex marriage should be illegal.¹¹⁹ Further, 14 percent believe that being gay, bisexual, transgender, or intersex should be a crime, and 22 percent strongly believe that homosexuals should not be allowed to have private consensual relationships.¹²⁰

Specifically in Latin America, support for same-sex marriage varies considerably among countries.¹²¹ According to one study which scored countries on a 0–100 scale for public support on same-sex marriage, scores throughout Latin America range from 7.2 points (in Guyana) to 57.7 points (in Argentina).¹²² Unsurprisingly, Argentina and Uruguay have the highest scores for public support, 57.7 points

117. See generally CHRISTOPHER WLEZIAN & STUART N. SOROKA, PUBLIC OPINION AND PUBLIC POLICY (Oxford Research Encyc. 2016) (discussing the role of public opinion in public policy in representative democracies).

118. See, e.g., INT'L LESBIAN, GAY, BISEXUAL, TRANS & INTERSEX ASS'N, THE PERSONAL AND THE POLITICAL: ATTITUDES TO LGBTI PEOPLE AROUND THE WORLD (ILGA, October 2016) (providing an overview of attitudes towards homosexuality across Latin America).

119. *Id.* at 28, 39 (The ILGA survey covers sixteen states across the Americas, including parts of the United States, Canada, Central America, South America, and the Caribbean. While not all states in the Americas were covered in the survey, the states chosen are “representative” of the entire region.).

120. *Id.* at 36–37.

121. See *Views on Same-sex Marriage in Latin America*, PEW RESEARCH CTR. (June 23, 2015), http://www.pewresearch.org/fact-tank/2015/06/25/same-sex-marriage-makes-some-legal-gains-in-latin-america/ft_15-06-24_same-sex-marriage-in-lat-am/ [<https://perma.cc/Z4JU-DBE5>] (archived Nov. 2, 2019) (providing a snapshot of the percentage of citizens who favor legal same-sex marriage within each country in Latin America).

122. Lodola & Corral, *supra* note 116, at 43.

and 50.5 points respectively, whereas in El Salvador, public support is averaged at only 10.3 points.¹²³ Although public opinion does not always correlate with a nation's promotion of certain policies, despite some anomalies, the level of public support for same-sex marriage generally correlates to the kinds of formal relationship rights granted to homosexual couples within each country.¹²⁴

There are numerous factors that explain variation in public opinion on same-sex marriage.¹²⁵ Two key factors influencing attitudes towards same-sex marriage are the importance of religion and religious group participation.¹²⁶ There are over 425 million Catholics in Latin America—nearly 40 percent of the world's total Catholic population.¹²⁷ Although fewer Latin American citizens identify as Catholic today compared to the twentieth century,¹²⁸ many Catholics have converted to Protestantism, which effectively intensifies the negative impact of religion on support for same-sex marriage because Protestants are far more likely to oppose same-sex marriage than Catholics.¹²⁹ Accordingly, citizens who are unaffiliated with any organized religion show much higher percentages of support for same-sex marriage.¹³⁰

A noteworthy development in the realm of religion and public policy in Latin America came in March 2013, when the Catholic Church elected its first pope from Latin America, Pope Francis, formerly Cardinal Jorge Mario Bergoglio of Argentina.¹³¹ Throughout the region, a majority of citizens—Catholic or not—generally have a positive or neutral opinion on Pope Francis.¹³² In keeping with his reputation as a more liberal pope than his predecessors, Pope Francis has expressed that the congregation should move towards acceptance of homosexuality in general.¹³³ However, he maintains that only heterosexual marriages are allowed in the Catholic Church, since homosexual unions are not even “remotely analogous to God’s plan for

123. *Id.*

124. *See id.* at 42–43. For example, in 2008, Ecuador enacted a new constitution legalizing civil unions, despite the fact that public support for same-sex marriage in the country is averaged at only 18.4 points out of 100.

125. *See id.* (outlining various socioeconomic and demographic variables correlated to public opinion on same-sex marriage).

126. *Id.*

127. PEW RESEARCH CTR., RELIGION IN LATIN AMERICA: WIDESPREAD CHANGE IN A HISTORICALLY CATHOLIC REGION 4 (Nov. 13, 2014).

128. *Id.* (noting that the number of Latin American citizens identifying as Catholic decreased from 90 percent in the 1960s to 69 percent in 2014).

129. *Id.* at 4–6, 10.

130. *Id.* (77 percent, 75 percent, and 20 percent in Argentina, Uruguay, and El Salvador respectively).

131. *Id.* at 7.

132. *Id.* at 23.

133. Francis X. Rocca, *The Catholic Church's Looming Fight Over Same-sex Blessings*, WALL ST. J. (May 22, 2018), <https://www.wsj.com/articles/the-catholic-churchs-looming-fight-over-same-sex-blessings-1527009408> [<https://perma.cc/V2NB-DA8A>] (archived Nov. 2, 2019).

marriage and family.”¹³⁴ Given the strict catechism of the Catholic Church, it is unlikely that Pope Francis will pave the way to more acceptance of same-sex marriage in Latin America during his tenure.¹³⁵

Other factors influencing public opinion include various demographic and socioeconomic variables, such as political ideology, geography, age, education level, gender, and wealth.¹³⁶ More politically conservative citizens and those residing in small, rural communities generally will show lower support for same-sex marriage.¹³⁷ On the other hand, younger citizens and female citizens generally show more support for marriage equality, as well as citizens with higher levels of wealth and formal education.¹³⁸

2. Public Opinion on Abortion

There are few wide-ranging opinion polls covering attitudes towards abortion across the entire Latin American region, and the majority of available surveys are not nationally representative due to methodological limitations.¹³⁹ Upon a review of the limited studies available, one evaluator commented that respondents in Latin America elicit “conflicting and ambivalent sentiments regarding abortion.”¹⁴⁰ Overall, many respondents show general support for abortions in cases of rape or when a woman’s life is in danger, but oppose abortion for social or economic reasons.¹⁴¹ One 2014 survey shows that 60 percent of respondents in Argentina, 43 percent in Uruguay, and 89 percent in El Salvador opposed abortion.¹⁴² Given that abortion is such a divisive issue, and public support for unrestricted access to abortion in Latin America is weak, making abortion access dependent on public opinion may “perpetuate the effects of abortion restrictions.”¹⁴³ In reality, achieving a national or international consensus on abortion access is

134. *Id.*

135. *See id.* (The catechism of the Catholic Church describes acceptance of homosexuality as “objectively disordered.”).

136. *See* Lodola & Corral, *supra* note 116, at 44–45.

137. *See id.* at 45.

138. *Id.*

139. *See* Kulczycki, *supra* note 39, at 199–200 (noting the limited availability of public opinion studies on abortion covering all of Latin America, since most studies available only cover attitudes towards abortion in Mexico and Brazil, with a few available for Argentina and Colombia); *see also* Eileen A. Yam et al., *Abortion Opinion Research in Latin America and the Caribbean: A Review of the Literature*, 37 *STUD. FAM. PLAN.* 225, 227 (2006) (providing an analysis of twenty-six studies on abortion attitudes across Latin America).

140. Kulczycki, *supra* note 39, at 200.

141. *Id.*

142. PEW RESEARCH CTR, *supra* note 127, at 73.

143. Natalie Sedacca, *Abortion in Latin America in International Perspective: Limitations and Potentials of the Use of Human Rights Law to Challenge Restrictions*, 32 *BERKELEY J. GENDER L. & JUST.* 109, 121 (2017).

virtually impossible.¹⁴⁴ Nonetheless, public support for making abortions more accessible in Latin America has increased in the last couple of years, which may be attributed to numerous factors.¹⁴⁵

A government's response to a public health crisis can greatly influence public opinion. One factor affecting the increase in public support for abortion was the public response to the recent Zika epidemic throughout the region.¹⁴⁶ On average, justification for permitting abortion when the mother's life is in danger increased in 2016 and 2017.¹⁴⁷ In 2012, around 56 percent of respondents in a survey conducted across eighteen countries in Latin America agreed that abortion is justified to save a mother's life, whereas in 2016, 60.9 percent of respondents believed that abortion was justified in this circumstance.¹⁴⁸ This shift in public opinion came at the same time as the outbreak of the Zika virus across the region.¹⁴⁹ Especially in countries with severe outbreaks, justifications for abortion increased considerably more when the government responded by restricting abortion access, rather than facilitating abortion services.¹⁵⁰ The demand for abortions also increased in most countries affected by Zika, largely due to government issued pregnancy warnings.¹⁵¹ Therefore, it is reasonable to infer that the demand for and acceptance of family planning services, specifically abortion, may rise during a public health crisis.¹⁵² Particularly, when no alternatives are offered to women,

144. *See id.* (explaining that “there are also serious obstacles to consensus” on the issue of abortion, and thus, increasing access to abortion through international human rights law “should not be dependent on consensus”).

145. *See generally* Statista Research Department, *Abortion in Latin America – Statistics & Facts*, STATISTA (Aug. 13, 2019), <https://www.statista.com/topics/5317/abortion-in-latin-america/> [<https://perma.cc/387Y-883E>] (archived Oct. 24, 2019) (providing statistics on shifts in public opinion on abortion throughout Latin America and the Caribbean).

146. MOLLIE COHEN & CLAIRE EVANS, *LATIN AMERICAN VIEWS ON ABORTION IN THE SHADOW OF THE ZIKA EPIDEMIC 1* (Latin Am. Pub. Op. Project 2018).

147. *Id.* at 5–6 (There may be other factors which contributed to this shift in public opinion, but due to the lack of studies available, it is difficult to determine everything that factored into the change in public opinion. The authors note that their findings have limitations, such as their specific measure of abortion justification and the timing of their studies because in some cases, their fieldwork took place well after the peak of the Zika epidemic.).

148. *Id.* at 2.

149. *Id.* at 3.

150. *Id.* at 3–5 (noting that average shifts in justification were also surprisingly large in countries where Zika's prevalence was less severe).

151. Christopher Landry, *Zika is Driving up Demand for Abortion. Here's Why it Shouldn't*, WASH. POST (Nov. 22, 2016), https://www.washingtonpost.com/posteverything/wp/2016/11/22/zika-is-driving-up-demand-for-abortion-heres-why-it-shouldnt/?noredirect=on&utm_term=.eaab6accacbb [<https://perma.cc/4N8L-349X>] (archived Oct. 24, 2019).

152. *See* COHEN & EVANS, *supra* note 146, at 4, 6 (noting, for example, that in El Salvador, where there is an absolute ban on abortion, the government responded solely by advising women to delay pregnancy for two years, without providing an increase in funding for contraception or expanding access to abortion).

these at-risk women and those who are indirectly or directly affected by their decisions, may see a need for policy change.¹⁵³

Surprisingly, many of the factors mentioned above, which influence public opinion on same-sex marriage, correlate differently when applied to public opinion on abortion in Latin America.¹⁵⁴ Religious affiliation is not as predictive, and even those who are unaffiliated with religion tend to oppose abortion.¹⁵⁵ Women are just as likely as men to oppose abortion, and when there is a difference among genders, women are more likely to show opposition.¹⁵⁶ Further, age is not a significant variable, as younger generations are just as likely to oppose abortion in most countries as older generations.¹⁵⁷

B. Theories of Change: Judicialization versus Legislation

Throughout Latin America, LGBTQ and abortion rights have proliferated through judicialization, legislative activity, or a combination of the two.¹⁵⁸ In any social movement, successful advocates will need to understand which avenue is most effective for provoking change. Courts in Latin America are generally weak or nonexistent as actors in the policy arena, partly because most countries in Latin America are civil law jurisdictions.¹⁵⁹ Judicialization, which occurs when courts make decisions that are traditionally left to the legislative and executive branches of government, is relatively strong in Brazil and Colombia.¹⁶⁰ In countries like Argentina, Uruguay, and Mexico, legal reform generally comes from the legislature, political parties, interest groups, and the executive branch; however, more courts are starting to recognize a notion of “relationship equality” that exists outside the code of law.¹⁶¹ As many countries revise their

153. See *id.* at 6; see also Mabel Carabali et al., *The Zika Epidemic and Abortion in Latin America: A Scoping Review*, 3 GLOBAL HEALTH RES. POL'Y 1, 2–5 (2018) (concluding that based on the limited time that has passed since the Zika epidemic and the limited data currently available, it is still unclear whether the epidemic will spur legislative change relating to abortion policies throughout Latin America).

154. See PEW RESEARCH CTR., *supra* note 127, at 74.

155. See *id.*

156. *Id.*

157. *Id.* (noting that in some countries, older generations show greater opposition to abortion).

158. See Alba Ruibal, *Social Movements and Constitutional Politics in Latin America: Reconfiguring Alliances, Framings and Legal Opportunities in the Judicialisation of Abortion Rights in Brazil*, 10 CONTEMP. SOC. SCI. 375, 375–76 (2015) (discussing the role of judicialization in policy making); Jason Pierceson, *Variations in the Judicialization of Same-Sex Marriage Politics in Latin America*, in SAME-SEX MARRIAGE IN LATIN AMERICA, *supra* note 8, at 53.

159. Pierceson, *supra* note 158, at 54–55 (explaining that judges have more power to shape the law and judge-made law often trumps the legislature in common law jurisdictions, whereas, judges are often technocrats who strictly follow codes of law or the constitution in civil law systems).

160. *Id.* at 53; Ruibal, *supra* note 158, at 376.

161. Pierceson, *supra* note 158, at 53–55.

constitutions,¹⁶² more activist judiciaries may be critical in promoting certain rights, especially concerning controversial issues like LGBTQ and abortion rights, given that legislatures are greatly polarized.

C. Comparing LGBTQ and Abortion Rights across Argentina, Uruguay, and El Salvador

1. Argentina

Argentina was one of the first countries in Latin America to make LGBTQ rights and the recognition of same-sex couples a priority, beginning in the early 2000s.¹⁶³ In December 2002, the autonomous city of Buenos Aires enacted civil union legislation, becoming the first jurisdiction in Latin America to not only establish formal relationship rights for homosexual couples but also legitimize “being homosexual.”¹⁶⁴ Other provinces and cities throughout Argentina followed suit, which helped nationalize the issue.¹⁶⁵ As a result of extensive lobbying and use of the judicial system as a platform for change, Argentina became the first country in Latin America to legalize same-sex marriage nationally on July 21, 2010.¹⁶⁶

Argentina is a unique case because activists capitalized on both legislative and judicial methods to bring the issue of relationship equality to the forefront of the Argentinian political agenda.¹⁶⁷ In the 1960s and 1970s, the first grassroots LGBTQ organizations emerged in Argentina;¹⁶⁸ however, these founding organizations largely weakened or disappeared amidst political violence which lasted from 1976 to 1983 (known as Argentina’s “Dirty War”).¹⁶⁹ Following democratic restoration in 1983, Argentina experienced many social and

162. See DETLEF NOLTE & ALMUT SCHILLING-VACAFLOR, *Introduction: The Times they are a Changin’: Constitutional Transformations in Latin America since the 1990s*, in NEW CONSTITUTIONALISM IN LATIN AMERICA: PROMISES AND PRACTICES 3, 5 (2012) (noting that since the period of democratic transitions in the late 1970s, all of the republics in Latin America have reformed their constitutions at least once).

163. Pierceson, *supra* note 158, at 59.

164. Maria Gracia Andía, *Legal Mobilization and the Road to Same-Sex Marriage in Argentina*, in SAME-SEX MARRIAGE IN LATIN AMERICA, *supra* note 8, at 131, 134; Pierceson, *supra* note 158, at 59.

165. See Andía, *supra* note 164, at 136; Pierceson, *supra* note 158, at 59.

166. Andía, *supra* note 164, at 132, 143 (President Cristina Kirchner de Fernandez signed the law on July 21, 2010).

167. See *id.* at 131.

168. See *id.* at 132 (noting that the first two organizations to emerge were the *Grupo Nuestro Mundo* (Our World Group) and the *Frente de Liberación Homosexual* (Homosexual Liberation Front)).

169. Elisabeth Jay Friedman, *Constructing “The Same Rights With the Same Names”: The Impact of Spanish Norm Diffusion on Marriage Equality in Argentina*, 54 LATIN AM. POL. & SOC’Y 29, 42 (2012) (stating that during Argentina’s Dirty War, at least 400 homosexual citizens “disappeared” and many others went into hiding or exile under the rule of a brutal military junta).

structural changes.¹⁷⁰ Most importantly, discourse on rights and social change spread throughout the country, and Argentinian courts established a new role in defending those rights and entering the political realm.¹⁷¹

In 1994, Argentina reformed its constitution, which created some new socioeconomic rights and strengthened a preexisting procedural tool for exercising such rights, the *recurso de amparo* (*amparo*).¹⁷² In Argentina and multiple other nations in Latin America, the *amparo* is a legal process that enables citizens either individually or collectively to bring an “action for the violation of any right protected either explicitly or implicitly by the Constitution or by any applicable international treaties.”¹⁷³ As society gradually became more progressive, many new LGBTQ organizations emerged and advanced the *amparo* as a tool for shaping public policy.¹⁷⁴ Not all LGBTQ organizations in Argentina were working towards the same goal,¹⁷⁵ but the Federation of Gays, Lesbians, Bisexuals and Trans (FALGBT) successfully consolidated several existing organizations, and, between 2007 and 2010, launched a two-track national campaign to influence the courts and the national legislature.¹⁷⁶

On February 14, 2007, LGBTQ rights activist María Rachid and her partner tried to get married at the Buenos Aires Civil Registry.¹⁷⁷ The registrar refused and they brought an *amparo* to the National Civil Tribunal of First Instance on the grounds that restricting marriage to

170. See Andía, *supra* note 164, at 132.

171. *Id.*

172. See Arts. 26–43, CONSTITUCIÓN NACIONAL [CONST. NAC.] (1994) (Arg.) (*New Rights and Guarantees*) (For example, the 1994 Constitution establishes more political rights of citizens (such as the right to introduce bills into the Senate or Chamber of Deputies and the right to access certain funding information from political parties), the right to a “healthy and balanced environment,” and the right to consumer safety. These rights are known as “positive” or “second-generation” rights); Andía, *supra* note 164, at 131.

173. Gloria Orrego Hoyos, *The Amparo Context in Latin American Jurisdiction: An Approach to an Empowering Action*, N.Y.U. L. GLOBAL (Oct. 2017), <http://www.nyulawglobal.org/globalex/Amparo1.html> [https://perma.cc/E3YG-DK22] (archived Oct. 25, 2019) (Other Latin American nations that ensure some form of *amparo* under their constitution include: Mexico, Colombia, Peru, Paraguay, Brazil, Bolivia, Chile, Ecuador, Costa Rica, El Salvador, Nicaragua, Panama, Guatemala, and Honduras. The procedure and judicial force of the *amparo* is different for each country.).

174. See Andía, *supra* note 164, at 132–33 (noting that today the most active organizations are the *Comunidad Homosexual Argentina* (Argentinian Homosexual Community, or CHA), *La Fulana*, and the *Federación Argentina de Lesbianas, Gays, Bisexuales y Trans* (Federation of Gays, Lesbians, Bisexuals, and Trans, or FALGBT)).

175. See *id.* (CHA solely worked towards the adoption of a national civil union bill, while FALGBT and most other organizations worked primarily promoted same-sex marriage legislation).

176. Friedman, *supra* note 169, at 49.

177. Constanta Tabbush et al., *LGBT Rights Yes, Abortion No: Explaining Uneven Trajectories in Argentina under Kirchnerism (2003-15)*, in *SEEKING RIGHTS FROM THE LEFT: GENDER, SEXUALITY, AND THE LATIN AMERICAN PINK TIDE* 82, 101 (Elisabeth Jay Friedman ed., 2018); Friedman, *supra* note 169, at 49.

heterosexuals violated their constitutional rights.¹⁷⁸ The judge ruled against the couple, and the claimants repeatedly lost on appeal.¹⁷⁹ Over the next few years, nearly a hundred homosexual couples similarly sought marriages, hoping to establish their right to marry through the *amparo*.¹⁸⁰ Through some strategic forum shopping in less conservative jurisdictions, a few judges began to rule in favor of the petitioning couples.¹⁸¹ While some of these favorable decisions were repealed, the real strength in these *amparos* was that they evoked great media attention, which effectively put pressure on the legislature.¹⁸²

From this pressure, a same-sex marriage bill was finally put on the congressional agenda in 2009.¹⁸³ After over a year of drafting and civil debates on the floor, the House of Representatives approved the law on May 4, 2010 (126 in favor, 114 against, 4 abstentions).¹⁸⁴ FALGBT then moved to lobby the Senate, which was more conservative than the House.¹⁸⁵ As the Senate vote neared, there were numerous protests and demonstrations from opponents, along with severe admonition from the Catholic Church.¹⁸⁶ The Senate surprised many people by voting in favor of the bill on July 15, 2010 (30 in favor, 27 against, 3 abstentions).¹⁸⁷ The new law replaced the terms “husband” and “wife” with “contracting parties”¹⁸⁸ and granted homosexual couples the same inheritance and adoption rights as heterosexual couples.¹⁸⁹

There were many forces behind the success of the same-sex marriage bill in Argentina. For one, LGBTQ activists in Argentina adopted the Spanish advocacy model directly.¹⁹⁰ LGBTQ activists in Spain aided the passage of same-sex marriage legislation in July 2005, making Spain the fourth country worldwide to legalize same-sex

178. Andía, *supra* note 164, at 138 (stating that civil law requires the consent of a man and a woman for marriage).

179. *Id.*

180. Friedman, *supra* note 169, at 49; *see also* Andía, *supra* note 164, at 138 (highlighting that some of these couples were celebrities and well-known members of LGBTQ organizations).

181. *See* Andía, *supra* note 164, at 138–39.

182. *See id.* at 139.

183. Friedman, *supra* note 169, at 50 (another same-sex marriage bill was first introduced in 2007 by Socialist Deputy Eduardo di Pollina, but it failed to make it on the legislative agenda).

184. Andía, *supra* note 164, at 140–42.

185. *Id.* at 142.

186. *Id.*; Tabbush et al., *supra* note 177, at 86.

187. *See* Andía, *supra* note 164, at 143.

188. Cód. Civ. (2010) (Arg.) (modified by Law No. 26.618, July 21, 2010, Matrimonio Civil).

189. Uki Goñi, *Defying Church, Argentina Legalizes Gay Marriage*, TIME (July 15, 2010), <http://content.time.com/time/world/article/0,8599,2004036,00.html> [https://perma.cc/9EVV-GSBZ] (archived Oct. 25, 2019); Cód. Civ. (2010) (Arg.) (modified by Law No. 26.618, July 21, 2010, Matrimonio Civil).

190. Friedman, *supra* note 169, at 40.

marriage.¹⁹¹ Spain was also successful in making LGBTQ rights an important social issue in general by using the HIV/AIDS epidemic as a platform for human rights advocacy.¹⁹² Argentinian activists borrowed the Spanish slogan (“Same Rights with the Same Names”), the precise language used in the Spanish bill, and many of the advocacy and organization tactics successfully employed in Spain.¹⁹³ Additionally, Spanish activist groups funneled large amounts of financial resources into Argentina.¹⁹⁴

LGBTQ activists’ effective issue framing was another key factor in the success of the Argentinian bill. Activists in Argentina—again borrowing from Spain—framed the issue as a matter of legal “equality,” so the conversation would turn away from “sexuality” and “traditional notions of family.”¹⁹⁵ Supporters of the bill referred to it as the “Egalitarian Marriage Law” which helped create a positive attitude in society regarding the bill, further pressuring legislators.¹⁹⁶ Additionally, the bill would likely not have been passed without the support of then-President Cristina Fernández de Kirchner, a powerful leader of the Peronist (Judicialist) party.¹⁹⁷ Many assume that Kirchner supported the bill because of some built-up tension with the Catholic Church and because she wanted to distract constituents from the scandals surrounding her administration.¹⁹⁸ Kirchner and the Peronists were trying to secularize politics and score some popularity with the left before the next election.¹⁹⁹ Irrespective of motive,

191. Renwick McLean, *Spain Legalizes Gay Marriage; Law Is Among the Most Liberal*, N.Y. TIMES (July 1, 2005), <https://www.nytimes.com/2005/07/01/world/europe/spain-legalizes-gay-marriage-law-is-among-the-most-liberal.html> [<https://perma.cc/7UE5-YA87>] (archived Oct. 25, 2019); see also Friedman, *supra* note 169, at 38 (LGBTQ activists in Spain organized in opposition to dictator Francisco Franco. Following his dictatorship, Spain experienced a great “democratic euphoria” (*la movida*), which gave LGBTQ activists the opportunity to organize and push their agenda with full force.).

192. Friedman, *supra* note 169, at 34.

193. *Id.* at 29–31 (noting that FALGBT in Argentina was modeled directly after the Spanish State Federation of Gays, Lesbians, Trans, and Bisexuals (FELGTB)).

194. *Id.* at 46–47 (The Triangle Foundation (FT) provided generous financial assistance to many LGBTQ organizations in Argentina, including direct funding to produce key lobbying documents. FT raised more than \$1.9 million between 2010 and 2011 solely through Spanish government sources.).

195. *Id.* at 29; Tabbush et al., *supra* note 177, at 94–95.

196. Andía, *supra* note 164, at 142.

197. Friedman, *supra* note 169, at 45.

198. See Encarnación, *Rights Riddle*, *supra* note 7 (discussing Kirchner’s support of same-sex marriage as an example of “pinkwashing,” defined as the “cynical use of momentum on LGBT[Q] rights to either distract from unsavory political behaviors or to disguise lack of progress in other areas, such as women’s reproductive rights”); Goñi, *supra* note 189.

199. Omar G. Encarnación, *Latin America’s Gay Rights Revolution*, 22 J. DEMOCRACY 104, 113 (2011) [hereinafter Encarnación, *Latin America’s*] (noting that the Peronist party became more progressive because it was losing votes, and at the time of the same-sex marriage bill, Kirchner had lost majorities in Congress and her popularity with urban voters was declining sharply); Pierceson, *supra* note 158, at 59 (President

President Kirchner's support certainly helped push the legislature.²⁰⁰ Overall, social mobilization, capitalization on constitutional reform, Spanish influence, executive support, strategic litigation, and media attention were factors that shaped the promulgation of LGBTQ rights in Argentina.²⁰¹

Abortion rights in Argentina have not progressed with the same speed and strength as LGBTQ rights; however, the abortion rights movement has gained momentum in recent years. Argentina has historically been one of the most restrictive countries when it comes to contraceptive and abortion rights.²⁰² Until 1986, the Argentinian government prohibited the sale of contraceptives,²⁰³ and by 2001, Argentina was the only country in the region to not provide any direct support for access to contraception.²⁰⁴ However, amidst a wave of democratization between 1991 and 2002, fifteen provinces enacted laws or developed programs aimed at expanding reproductive rights.²⁰⁵ In 2002, the Argentinian Congress passed a law which created the National Program on Sexual Health and Responsible Procreation and guaranteed access to contraceptives, but did not even address access to abortion.²⁰⁶

The advancement of contraceptive rights in 2002 was partly the result of more female representation in the legislature.²⁰⁷ Activists reclassified "sexual health" as a matter of protecting mothers and the poor, which helped draw support from male legislators.²⁰⁸ However, few elected officials were willing to go beyond contraceptive rights and

Kirchner compared the Catholic Church's opposition to gay marriage to the "times of the Crusades.").

200. See Pierceson, *supra* note 158, at 59; Tabbush et al., *supra* note 177, at 104 (noting how Cristina Kircher's popularity and conflictive relationship with the Catholic Church created a window of opportunity for LGBTQ activists).

201. See Andía, *supra* note 164, at 144–48.

202. See Alexei Barrionuevo, *Argentina Faulted for Reproductive Policies*, N.Y. TIMES (Aug. 10, 2010), <https://www.nytimes.com/2010/08/11/world/americas/11argentina.html> [<https://perma.cc/U2CT-UFX9>] (archived Oct. 25, 2019) (noting that women in Argentina have encountered numerous barriers to making independent decisions about reproduction and securing access to contraceptives).

203. Jennifer Piscopo, *Female Leadership and Sexual Health Policy in Argentina*, 49 LATIN AM. RES. REV. 104, 109–10 (2014) (Argentinian leaders were focused on following the Catholic Church's doctrine, building a "robust population," and prohibiting family planning. In 1974, President Isabel Perón banned family planning because she considered low birth rates to be a threat to the Republic. In 1977, the Argentinian military prohibited contraception for even medical reasons.).

204. *Abortion: Argentina*, HUM. RTS. WATCH, <https://www.hrw.org/legacy/women/abortion/argentina.html> (last visited Dec. 5, 2019) [<https://perma.cc/8F7H-TEZA>] (archived Oct. 26, 2019).

205. Piscopo, *supra* note 203, at 112.

206. Law No. 25.673, Nov. 21, 2002, B.O. (Arg.) (Creación del Programa Nacional de Salud Sexual y Procreación Responsable); see Piscopo, *supra* note 203, at 104 (noting that gender quotas for female representation in Congress helped women gain contraceptive rights).

207. See Piscopo, *supra* note 203, at 104; Tabbush et al., *supra* note 177, at 85.

208. Piscopo, *supra* note 203, at 115.

back access to abortion.²⁰⁹ Even then-President Kircher, who was considered to be a more progressive president and was instrumental in the passage of the same-sex marriage bill, would not support abortion rights.²¹⁰

Since 1984, abortion in Argentina has been criminalized, with only three exceptions: (1) when the woman's life or health is in danger, (2) when the pregnant woman was raped, or (3) when the pregnancy resulted from an assault on a mentally disabled woman.²¹¹ Few of the twenty-three provinces in Argentina even follow the "risk to woman's life or health" exception.²¹² If a woman elects to have a clandestine abortion, she may be criminally charged and sentenced to one to four years in prison.²¹³ A person who causes an abortion may be punished with one to fifteen years in prison, and a doctor performing an abortion will lose their license to practice for double the length of their prison sentence.²¹⁴

Even though abortion is criminalized, it is still commonplace in Argentina. Health minister Adolfo Rubinstein estimated in 2018 that 354,000 clandestine abortions occur every year throughout the country.²¹⁵ Pregnant women who decide to have a clandestine abortion often forego medical care when complications arise out of fear of prosecution, or they have to pay large sums of money to doctors in order to receive help.²¹⁶ This system disproportionately harms poor women, since middle and upper class women generally have access to illegal, but safe, abortion methods.²¹⁷ When complications arise, poor women can only afford treatment in public hospitals, where they run the risk

209. Barrionuevo, *supra* note 202.

210. *Id.*

211. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] arts. 85–88 (Buenos Aires, 1971) (Arg.).

212. Pomeraniec, *supra* note 1.

213. *See* CÓD. PEN. arts. 85–88 (1971) (Arg.).

214. *See id.* (length depends on whether or not the pregnant woman consented to the abortion and whether the woman died from the procedures).

215. Daniel Politi & Ernesto Londoño, *Argentina's Senate Narrowly Rejects Legalizing Abortion*, N.Y. TIMES (Aug. 9, 2018), <https://www.nytimes.com/2018/08/09/world/americas/argentina-abortion-vote.html> [<https://perma.cc/VZ2Q-VYYY>] (archived Oct. 26, 2019) [hereinafter Politi & Londoño, *Argentina's Senate Narrowly Rejects*] (testifying in Congress).

216. *See* Oberman, *supra* note 35; *see also* Katy Watson, *No Going Back: The Two Sides in Argentina's Abortion Debate*, BBC (Aug. 7, 2018), <https://www.bbc.com/news/world-latin-america-45096704> [<https://perma.cc/2DA5-SNDG>] (archived Oct. 26, 2019) (recounting the story of Ana Correa, who suffered from major complications during pregnancy and had to pay a large sum of money to reluctant doctors to treat her).

217. *Argentina Moves Closer to Legalising Abortion*, *supra* note 28 (noting that middle and upper class women can generally buy misoprostol (a relatively safe but illegal drug) for 2,800 pesos (\$112) or can hire a doctor to perform a surgical abortion for roughly \$1,000, whereas poorer women must rely on backstreet abortions or unsafe medication purchased online).

of medical staff reporting them to the police.²¹⁸ In 2014, forty-seven thousand women were hospitalized in Argentina for complications from abortion procedures.²¹⁹ Further, unsafe abortions are the leading cause of maternal mortality in Argentina, with forty to fifty women dying annually from abortion complications in recent years.²²⁰

In the past five years, advocacy surrounding abortion rights and the prevention of gender violence has proliferated across Argentina.²²¹ The country has experienced an increase in the number of cases of “femicide” (gender-based murder), resulting in the formation of a number of women’s advocacy coalitions, which not only fight for an end to domestic violence but also for increased access to abortion services.²²² The 2015 incident where a pregnant fourteen-year-old girl was buried alive by her boyfriend and his mother after being forced to have an abortion was one of the most widely publicized incidents of femicide in Argentina.²²³ The Argentinian public’s outrage in response to this case and countless others helped spark the formation of the movement “*Ni Una Menos*” (Not One Less).²²⁴ *Ni Una Menos* successfully nationalized the issue of the consequences of illegal abortion and gender violence.²²⁵ Through intense lobbying and demonstrations, the *Ni Una Menos* movement encouraged legislators to consider a bill expanding abortion rights in August 2018, which would have fully legalized abortion during the first fourteen weeks of pregnancy.²²⁶

Even though he is personally opposed to abortion, President Mauricio Macri called for Congress to debate the bill and vowed to sign the bill if it was passed.²²⁷ Thousands of advocates and opponents of the bill took to the streets to rally and protest.²²⁸ Supporters of the bill in Argentina and other neighboring countries wore green bandanas,

218. *Id.*

219. *Id.*

220. See *Number of Deaths as a Result of Abortion in Argentina from 2001 to 2017*, STATISTA (Apr. 26, 2019), <https://www.statista.com/statistics/869682/argentina-number-deaths-abortion/> [<https://perma.cc/S6V2-UT2X>] (archived Oct. 26, 2019) (providing a graph of the number of reported deaths by the Ministerio de Salud from abortion procedures between 2001 and 2017); Barrionuevo, *supra* note 202.

221. See Pomeraniec, *supra* note 1.

222. See *id.*

223. Veronica Smink, *Argentine Women Hit Back At Violence*, BBC (June 22, 2015), <https://www.bbc.com/news/world-latin-america-33196281> [<https://perma.cc/5TJM-S8YC>] (archived Oct. 26, 2019); Pomeraniec, *supra* note 1.

224. Pomeraniec, *supra* note 1; Smink, *supra* note 223 (emphasis added).

225. Pomeraniec, *supra* note 1; Smink, *supra* note 223.

226. Daniel Politi & Ernesto Londoño, *They Lost Argentina’s Abortion Vote, but Advocates Started a Movement*, N.Y. TIMES (Aug. 9, 2018), <https://www.nytimes.com/2018/08/09/world/americas/argentina-abortion-laws-south-america.html> [<https://perma.cc/5EXE-UXJK>] (archived Oct. 26, 2019) [hereinafter Politi & Londoño, *They Lost Argentina’s Abortion Vote*].

227. *Id.*

228. *Id.*

which became a symbol of their cause.²²⁹ The Catholic Church, including Pope Francis, opposed the bill vehemently.²³⁰ After a seventeen-hour hearing, the Senate narrowly rejected the bill on August 8, 2018 (38 against, 31 in favor, 2 abstentions).²³¹

While the *Ni Una Menos* movement took a setback, advocates did not leave completely discouraged and remained hopeful that they would succeed in getting a bill passed during the next legislative session.²³² Following the bill's defeat, administrators announced a plan to ease abortion penalties as part of an overhaul of the penal code, but advocates for abortion access are still striving for more.²³³ Most importantly, through their highly publicized demonstrations, advocates changed the conversation, making Argentinian society more sympathetic to women's rights.²³⁴ Even now-Senator Cristina Kirchner—who opposed legalizing abortion while serving as President—voted in favor of the bill.²³⁵ Many legislators like Kirchner were moved by the thousands of young girls that took to the streets to stand up for their rights, and thus the movement is not likely to lose momentum anytime soon.²³⁶

2. Uruguay

In 2007, Uruguay became the first country in Latin America to enact a national civil partnership law (*Unión Concubinaria*).²³⁷ Unlike the case of Argentina, the civil union law was enacted purely through political and legislative means, with little influence from the courts.²³⁸ The real impetus behind this legislation was simply a progressive party holding power within a relatively progressive country.²³⁹ Following a thirteen year military regime, Uruguay returned to democracy in 1985, which created a shift in societal and family structures.²⁴⁰ Due to economic, sociocultural, and demographic changes near the end of the twentieth century, the norms of a “natural

229. Watson, *supra* note 216.

230. Politi & Londoño, *Argentina's Senate Narrowly Rejects*, *supra* note 215 (noting that Pope Francis denounced abortion as the “white glove” equivalent of Nazi eugenics and the Roman Catholic Church held a “mass for life” at the Buenos Aires Metropolitan Cathedral before the vote).

231. Politi & Londoño, *They Lost Argentina's Abortion Vote*, *supra* note 226.

232. Politi & Londoño, *Argentina's Senate Narrowly Rejects*, *supra* note 215.

233. Politi & Londoño, *They Lost Argentina's Abortion Vote*, *supra* note 226.

234. Politi & Londoño, *Argentina's Senate Narrowly Rejects*, *supra* note 215.

235. Politi & Londoño, *They Lost Argentina's Abortion Vote*, *supra* note 226.

236. See Politi & Londoño, *Argentina's Senate Narrowly Rejects*, *supra* note 215; Politi & Londoño, *They Lost Argentina's Abortion Vote*, *supra* note 226.

237. Diego Sempol, *The Creation of Civil Partnerships in Uruguay*, in SAME-SEX MARRIAGE IN LATIN AMERICA, *supra* note 8, at 89, 89.

238. Pierceson, *supra* note 158, at 62.

239. *Id.*

240. Charles G. Gillespie, *Uruguay's Return to Democracy*, 4 BULL. LATIN AM. RES. 99, 99 (1985); Sempol, *supra* note 237, at 90–91.

family” and the “single breadwinner model” of defined heteropatriarchal roles gradually weakened.²⁴¹ By 1996, only 37 percent of households classified as traditional nuclear families.²⁴² Uruguayan society also experienced a general decline in the number of marriages and an increase in *de facto* unions (known as “*concubinatos*”).²⁴³

As society became more secular and progressive, advocates for LGBTQ rights finally found a safe space for open discourse, with the first LGBTQ organization emerging in 1984.²⁴⁴ The legislature eventually responded to this new discourse. In 2003, the legislature revised the criminal code to include a provision proscribing up to two years of jail for “incitement of hatred” based on sexual orientation or gender identity,²⁴⁵ and, a year later, the legislature passed a separate law explicitly prohibiting discrimination based on sexual orientation.²⁴⁶

Legislation promoting LGBTQ relationship rights first entered the political arena with force in the early 2000s,²⁴⁷ although it did not really gain traction until the *Frente Amplio*’s (FA) electoral victory in 2004.²⁴⁸ By platforming as a social democratic “mass party,” starkly opposed to the traditional parties²⁴⁹ and attempts at neoliberal reform, the FA became a catch-all party for disenfranchised voters.²⁵⁰ The FA instituted a wave of “*progresismo*,”²⁵¹ effectively positioning Uruguay

241. Sempol, *supra* note 237, at 90–91 (noting that societal transformations in Uruguay throughout the twentieth century included an increase in the number of nuclear families with no children, more female-headed households and women in the workforce, and the reformation and secularization of divorce rights).

242. *Id.* at 91.

243. *Id.* at 91 (emphasis added) (these *de facto* unions were given very little legal recourse upon dissolution and dissolution rights were only afforded through a judge’s discretion, which often disadvantaged homosexual couples).

244. *See id.* at 92.

245. Law No. 17.677, Incitación al Odio, Desprecio o Violencia o Comisión de estos Actos contra Determinadas Personas, Aug. 6, 2003, DIARIO OFICIAL [D.O.] (Uru.) (modifying Article 149 of Uruguay’s Penal Code).

246. Law No. 17.817, Lucha Contra El Racismo, La Xenofobia y La Discriminación, Sept. 14, 2004, DIARIO OFICIAL [D.O.] (Uru.).

247. Sempol, *supra* note 237, at 93 (there were a few civil union bills introduced between 2000 and 2002, but they did not gain much traction in the legislature).

248. *Id.* at 92; Juan Pablo Luna, *Frente Amplio and the Crafting of a Social Democratic Alternative in Uruguay*, 49 LATIN AM. POL. & SOC’Y 1, 1, 23 (2007) (The *Frente Amplio* (“Broad Front” party) won the presidential election and gained an absolute congressional majority (50.7 percent of votes) in the Oct. 2004 general election, and assumed office in Mar. 2005. This was the first time since 1966 that a party had gained control of the presidency and both chambers of Congress.).

249. Luna, *supra* note 248, at 1 (designating the dominant traditional parties in Uruguay as the *Colorado* and *Blanco* parties (the Red and White Parties)).

250. *Id.* at 1–2, 4, 17 (the FA garnered votes from the working class as well as more progressive sectors of the middle class and the intelligentsia).

251. Niki Johnson et al., *Explaining Advances and Drawbacks in Women’s and LGBTIQ Rights in Uruguay*, in SEEKING RIGHTS FROM THE LEFT: GENDER, SEXUALITY,

“at the vanguard of gay rights in Latin America.”²⁵² During this progressive shift, several new organizations dedicated to sexual identity and sexual orientation, such as the *Ovejas Negras* (Black Sheep), emerged and predominately focused on public education and advocacy framing.²⁵³ On March 16, 2005, FA Senator Margarita Percovich introduced a bill that regulated couples with five years of uninterrupted cohabitation, regardless of sex or sexual orientation.²⁵⁴

Legislators who supported the bill sought to rudimentarily recognize same-sex couples, guaranteeing them some basic rights such as enabling them to form a partnership of assets.²⁵⁵ When defending the bill, advocates turned away from traditional conversations about politics and religion, and instead focused on academic research and evidence of social change.²⁵⁶ Advocates pointed to the similarities between homosexual and heterosexual couples and the need to modernize the law to catch up to inevitable societal changes.²⁵⁷ Additionally, it was critical that the bill be presented as a “conservative” measure by making a clear distinction between civil partnerships and marriage.²⁵⁸ The bill also included various restrictive conditions, such as the requirement of five years uninterrupted cohabitation and the exclusion of any adoption rights for civil union couples.²⁵⁹

Most opposition came from the Catholic Church and legislators from the *Partido Nacional* (National Party) but the Catholic Church has less political influence in Uruguay since it is a relatively secular

AND THE LATIN AMERICAN PINK TIDE, *supra* note 177, at 48, 51; Sempol, *supra* note 237, at 92 (emphasis added) (discussing Uruguay’s progressive social and political reforms).

252. Encarnación, *Latin America’s*, *supra* note 199.

253. Sempol, *supra* note 237, at 92–95, 108 (other sexual diversity organizations included the *Grupo Diversidad* (Diversity Group), *Encuentro Ecuménico para la Liberación de las Minorías Sexuales* (Ecumenical Forum for the Liberation of Sexual Minorities), CIEISU, and *Hermanas de la Perpetua Indulgencia* (Sisters of Perpetual Indulgence); Johnson et al., *supra* note 251, at 56 (noting that the *Ovejas Negras* and other key organizations found success in situating their demands within the broader context of social struggles, acknowledging that Uruguayan exhibited a “phobia of diversity,” and framing their agenda under the overarching goal of creating a “more just and equal social system”).

254. Sempol, *supra* note 237, at 93–95 (the bill was introduced into the Senate’s Constitution and Legislation Commission).

255. *Id.* at 96.

256. *See id.* at 95; *see also* Johnson et al., *supra* note 251, at 71–72.

257. Sempol, *supra* note 237, at 98, 102; *see also* Johnson et al., *supra* note 251, at 71–72 (noting that the bill was framed in the media as a matter of “equity” for couples and different kinds of families).

258. Sempol, *supra* note 237, at 96.

259. *Id.* at 94–96 (noting that some supporters of the bill believed that it was a weak legislative proposal because it excluded the possibility of adoption, but Percovich defended this exclusion by stating that “society was not prepared” to accept adoption rights for same-sex couples).

country.²⁶⁰ After a couple of years of debate and revisions, Percovich's bill was passed by the Chamber of Deputies on November 28, 2007, followed by the Senate on December 18, 2007, and was then signed into law on December 27, 2007.²⁶¹ The new law granted homosexual couples rights similar to those of heterosexual couples on inheritance, pensions, social security, child custody, and dissolution.²⁶² In September 2009, Uruguay's Parliament extended the law, making Uruguay the first country in Latin America to afford homosexual couples adoption rights.²⁶³

A few years later, under the direction of the FA, Uruguay became the second country in Latin America (behind Argentina) to pass a national same-sex marriage law.²⁶⁴ The Marriage Equality Law (*Matrimonio Igualitario*) was passed by the Senate on April 2, 2013 (23 in favor, 8 against), the Chamber of Deputies on April 10, 2013 (71 in favor, 21 against), and was signed into law by then-President José Mujica on May 3, 2013.²⁶⁵ Similar to the strategy used in passing the civil union law, advocates pointed to the need to update the law to keep up with societal changes and establish legal equality.²⁶⁶ The law

260. See *id.* at 95; Amy Edmonds, *Moral Authority and Authoritarianism: The Catholic Church and the Military Regime in Uruguay*, 56 J. CHURCH & ST. 644, 662 (2014) (noting that the *Partido Nacional* is commonly known as the *Blanco* (White) party and explaining that religious questions never achieved great importance within Uruguayan politics).

261. Sempol, *supra* note 237, at 95.

262. Law No. 18.246, Unión Concubinaria, Dec. 27, 2007, D.O. (Uru).

263. Law No. 18.596, Código de la Niñez y la Adolescencias, Sept. 19, 2009, DIARIO OFICIAL [D.O.] (Uru.); Reuters, *Lawmakers in Uruguay Vote to Allow Gay Couples to Adopt*, N.Y. TIMES (Sept. 9, 2009), <https://www.nytimes.com/2009/09/10/world/americas/10uruguay.html> [<https://perma.cc/36AJ-2F42>] (archived Oct. 27, 2019).

264. Vladimir Hernandez, *Uruguay Congress Approves Gay Marriage Bill*, BBC (Apr. 11, 2013), <https://www.bbc.com/news/world-latin-america-22102740> [<https://perma.cc/FT29-C3E9>] (archived Oct. 27, 2019).

265. Law No. 19.075, *Matrimonio Igualitario*, May 3, 2013, D.O. (Uru.); Catherine E. Shoichet, *Same-Sex Marriage Bill Awaits President's Signature in Uruguay*, CNN (Apr. 11, 2013), <https://web.archive.org/web/20170410212857/http://edition.cnn.com/2013/04/10/world/americas/uruguay-same-sex-marriage/> [<https://perma.cc/AW5Q-58P3>] (archived Oct. 27, 2019). For more information on José Mujica, see Giles Tremlett, *José Mujica: Is This the World's Most Radical President?*, GUARDIAN (Sept. 18, 2014), <https://www.theguardian.com/world/2014/sep/18/sp-is-this-worlds-most-radical-president-uruguay-jose-mujica> [<https://perma.cc/FM8X-SGUF>] (archived Oct. 27, 2019) (Mujica was known as a "left-wing guerilla," and is still considered to be one of the most radical presidents in the world for his hippie lifestyle and progressive stances on marijuana, homosexuality, and abortion. On supporting gay marriage, Mujica stated that he is simply "recognising something as old as humanity.").

266. See *Uruguay Congress Voting on Gay Marriage*, POLITICO (Dec. 11, 2012), <https://www.politico.com/story/2012/12/uruguay-congress-voting-on-gay-marriage-084913> [<https://perma.cc/X46E-Y429>] (archived Oct. 27, 2019) (One of the law's co-sponsors, FA deputy Anibal Pereyra, argued, "Uruguay's civil code needs to be updated so that all the rights and responsibilities apply to anyone who wants to marry, straight or gay.").

created uniform rules for all people seeking marriage, regardless of sexual orientation, and replaced the words “*marido y mujer*” (“husband and wife”) with “*cónyuges*” (“contracting parties”).²⁶⁷ Overall, Uruguay’s status as a “vanguard” of homosexual rights was the result of a progressive party holding power during a time when society was breaking from a historically traditional structure.²⁶⁸ Uruguay’s secular population is far more accepting of homosexuality than most Latin American countries, which provided a favorable political landscape for the FA to carry out its agenda.²⁶⁹

Uruguay is also a vanguard with respect to abortion rights, bolstering some of the most progressive abortion laws both regionally and internationally.²⁷⁰ Since October 2012, abortion has been decriminalized, allowing women to undergo an elective abortion during the first twelve weeks of pregnancy if certain prerequisites are met.²⁷¹ Elective abortion is allowed during the first fourteen weeks of pregnancy in cases of rape, and there is no gestational limit when the woman’s health is at risk or if there is a severe fetal anomaly.²⁷² Uruguay’s relatively progressive law resulted from decades of activism by feminist groups and the medical community, evolving public opinion on abortion, and legislative compromise.²⁷³

Abortion in Uruguay was criminalized up until 2012, apart from a short period where it was decriminalized between 1934 and 1938.²⁷⁴ The 1938 law reinstated abortion as a crime, but included certain exceptions which would mitigate punishment in cases of rape, “family honour,”²⁷⁵ undue economic burden, or danger to the woman’s life.²⁷⁶ While these exceptions existed on paper, women who fell under an

267. Law No. 19.075, *Matrimonio Igualitario*, May 3, 2013, D.O. (Uru.); *Uruguay Votes to Legalise Gay Marriage*, AL JAZEERA (Apr. 10, 2012), <https://www.aljazeera.com/news/americas/2013/04/201341105239642840.html> [<https://perma.cc/NEG3-J8PL>] (archived Oct. 27, 2019) (emphasis added).

268. Pierceson, *supra* note 158, at 62.

269. See Lodola & Corral, *supra* note 116, at 43; *Views on Same-sex Marriage in Latin America*, *supra* note 121.

270. See Simon Romero, *Uruguay Senate Approves First-Trimester Abortions*, N.Y. TIMES (Oct. 17, 2012), <https://www.nytimes.com/2012/10/18/world/americas/uruguay-senate-approves-first-trimester-abortions.html> [<https://perma.cc/M7TY-W7TR>] (archived Oct. 27, 2019) (Cuba and Guyana were the only Latin American countries to permit abortions prior to 2012).

271. Law No. 18.987, *Interrupción Voluntaria del Embarazo*, Oct. 30, 2012, D.O. (Uru.).

272. *Id.* arts. 2, 6.

273. Susan Wood et al., *Reform of Abortion Laws in Uruguay: Context, Process and Lessons Learned*, 24 REPROD. HEALTH MATTERS 102, 102 (2016).

274. *Id.* at 103 (noting that abortion was decriminalized between 1934 and 1938 due to public outrage over a woman’s death from an unsafe abortion).

275. Law No. 9.763 art. 1, *Aborto Se Modifica un Capítulo del Código Penal, Declarandolo Delito*, Jan. 24, 1938, DIARIO OFICIAL [D.O.] (Uru.); Wood et al., *supra* note 273, at 103 (The “family honour” exception applied “when the woman was an unmarried ‘virgin,’ regardless of whether the pregnancy resulted from rape.”).

276. Law No. 9.763 art. 1, D.O. (Uru.); Wood et al., *supra* note 273, at 103.

exception could rarely receive an abortion in a medical facility.²⁷⁷ This greatly impacted low-income women who felt that they had no safe place to receive information and make an informed decision, consequently forcing them to resort to unsafe methods.²⁷⁸ Women who resorted to these unsafe methods and suffered complications often delayed seeking medical treatment out of fear of being reported.²⁷⁹ From 1995–1999, unsafe abortions were the leading cause of maternal mortality in Uruguay.²⁸⁰

The prevalence of unsafe abortions developed into a public health crisis, which in turn prompted activists to nationalize the issues of female reproductive rights and abortion risk reduction.²⁸¹ In the decade following the restoration of democracy in 1985, a few bills decriminalizing abortion were introduced, but they either failed to reach Parliament or were defeated in the Senate.²⁸² While these bills failed to gain traction, they did give the issue of abortion rights some visibility, which was advantageous when the FA assumed power in 2005.²⁸³

Meanwhile, activists in the medical community decided to address the issue on their own—within the bounds of the 1938 law—through the development of a pilot risk-reduction program with the purpose of preventing and mitigating the effects of unsafe abortions.²⁸⁴ In 2001, a small group of physicians developed the program “*Iniciativas Sanitarias*” (Health Initiatives against Abortion in Risky Conditions), with the objectives of providing pregnant women with public-domain information to help them make informed decisions and facilitating “lower-risk abortions”²⁸⁵ for those women who decided to go ahead with

277. See Ana Labendera et al., *Implementation of the Risk and Harm Reduction Strategy Against Unsafe Abortion in Uruguay: From a University Hospital to the Entire Country*, 134 INT’L J. GYNECOLOGY & OBSTETRICS S7, S7 (2016).

278. *Id.* (such unsafe methods include consuming toxic substances and inserting plant stalks in the cervix).

279. *See id.*

280. Patrick Adams, *From Uruguay, a Model for Making Abortion Safer*, N.Y. TIMES (June 28, 2016), <https://www.nytimes.com/2016/06/28/opinion/from-uruguay-a-model-for-making-abortion-safer.html> [<https://perma.cc/8LXT-GT9W>] (archived Oct. 27, 2019) (noting that by the late 1990s, unsafe abortions accounted for nearly 30 percent of maternal deaths); Labendera et al., *supra* note 277, at S7.

281. *See* Labendera et al., *supra* note 277, at S7; *see also* Wood et al., *supra* note 273, at 105 (explaining that this public health crisis was exacerbated by Uruguay’s socioeconomic crisis which carried into the early 2000s).

282. *See* Wood et al., *supra* note 273, at 103 (Uruguay’s Parliament (*Parlamento*) is composed of two chambers, the Chamber of Representatives and the Chamber of Senators).

283. *See id.*; *see also* Johnson et al., *supra* note 251, at 66 (noting that by the time the FA came to power, the “legalization of abortion had been transformed from an exclusively feminist issue into a broader citizen claim”).

284. *See* Labendera et al., *supra* note 277, at S8.

285. A “lower-risk abortion” is defined as a case in which the woman: (1) has a counseling visit before reaching a gestational age of twelve weeks and decides to terminate the pregnancy, understanding the information provided to her; (2) has access

the abortion.²⁸⁶ The program was structured as a series of three counseling sessions with an interdisciplinary team.²⁸⁷ In the first session, the team would assess whether the participating woman met one of the legal abortion exceptions and apprise her of all available options.²⁸⁸ If the woman elected to undergo an abortion, the team would discuss certain risks to avoid when terminating the pregnancy during the second session.²⁸⁹ If necessary, the team would meet with the woman a third time for a postabortion evaluation, in which the team would address any complications and provide appropriate post-event contraceptive protection “with absolute confidentiality.”²⁹⁰

By 2004, the *Iniciativas Sanitarias* program had achieved a considerable reduction in emergency visits for abortion-related complications and a decline in maternal deaths.²⁹¹ As a result, the Ministry of Health gave the program official status through Ministerial Decree, Regulation 369, formally recognizing that unsafe abortions are a public health issue and that women should at least be advised of the risks they face in the event of an unwanted pregnancy.²⁹² In 2006, the Ministry of Health decided to slowly disseminate this program formally throughout select health centers across Uruguay.²⁹³ Within a few years, the program achieved national success²⁹⁴ and was incorporated

to misoprostol and uses it following international medical standards; (3) has an uncomplicated or incomplete abortion; (4) has no immediate complications; and (5) uses a safe, effective contraceptive method that is suitable for her situation which she has selected herself. *See id.* (emphasis added).

286. *See id.*

287. *See id.* (explaining that the interdisciplinary team consisted of physicians, midwives, psychologists, and nurses).

288. *See id.*; *see also* Adams, *supra* note 280 (explaining that to operate within the law, the physician would explain how to safely use misoprostol, but provide no information on how or where to obtain the drug).

289. *See* Labendera et al., *supra* note 277, at S8 (explaining that the interdisciplinary team would provide information on how the procedure is executed in countries where abortion is legal).

290. Adams, *supra* note 280; *see also* Labendera et al., *supra* note 277, at S8.

291. *See* Labendera et al., *supra* note 277, at S8. The authors explain that the program was piloted in the Pereira Rossell Hospital (CHPR), Uruguay’s main public maternity hospital. *See id.* at S7. The CHPR generally treats socially and economically vulnerable patients, but with limited resources, poorer women often resort to higher-risk methods for terminating pregnancy. *See id.* Consequently, unsafe abortion was the cause of 47 percent of maternal deaths at the CHPR, compared to the national average of 30 percent). *See id.*; *see also* Adams, *supra* note 280.

292. *See* Ordenanza 369/04, Medidas de Protección Materna Frente el Aborto Provocado en Condiciones de Riesgo, Montevideo: MSP (Uru.); Labendera et al., *supra* note 277, at S8.

293. *See* Labendera et al., *supra* note 277, at S8. The authors explain that this nation-wide dissemination project was called “Health Initiatives-Protect Uruguayan Woman’s Lives and Health by Reducing Unsafe Abortion,” which was sponsored by the International Federation of Gynecology and Obstetrics (FIGO), through the Uruguayan Society of Gynecology.

294. *See id.* at S9–S10 (explaining that the national program resulted in reduced maternal deaths and overall improved reproductive services, and almost all participants reported that they felt respected and believed that their confidentiality would be

into law in 2008 under a comprehensive sexual and reproductive health bill.²⁹⁵

This 2008 sexual and reproductive health bill—as passed by Parliament—further decriminalized abortion up to twelve weeks without restriction and without a gestational limit in cases of rape, fetal abnormality, or severe health risk to the mother.²⁹⁶ However, FA President Tabaré Vázquez went against his own party’s position and vetoed all portions of the bill addressing abortion.²⁹⁷ Although the decriminalization of abortion failed in 2008, activists continued to mobilize and rallied behind the election of José Mujica in 2009.²⁹⁸ In September 2012, the Senate passed an abortion bill which included essentially the same provisions that were vetoed by Vázquez in 2008.²⁹⁹ Even though the FA enjoyed an absolute majority in the Chamber of Deputies, it could not garner enough votes to pass the bill due to opposition from just one member.³⁰⁰ However, one legislator from the small Christian Democratic Independent Party offered his vote in exchange for some modifications to the bill—the revised bill eliminated certain language which referenced a pregnant woman’s rights and imposed various restrictions and requirements on women seeking abortion services.³⁰¹ Following these concessions, the Chamber of Deputies passed the Voluntary Interruption of Pregnancy Law (*Interrupción Voluntaria del Embarazo*) on September 25, 2012 (50 in favor, 49 against), which was subsequently passed by the Senate on October 17, 2012 (17 in favor, 14 against).³⁰² President Mujica signed the bill on October 22, 2012.³⁰³

The 2012 law decriminalized abortion under certain conditions, in effect permitting elective abortions during the first twelve weeks of pregnancy.³⁰⁴ The gestational limit is raised to fourteen weeks in cases

protected); see also Leonel Briozzo et al., *Overall and Abortion-Related Maternal Mortality Rates in Uruguay Over the Past 25 Years and Their Association With Policies and Actions Aimed at Protecting Women’s Rights*, 134 INT’L J. GYNECOLOGY & OBSTETRICS S20, S20 (2016) (providing more information on the program’s impact on maternal mortality rates).

295. See Law No. 18.426, *Defensa del Derecho a la Salud Sexual y Reproductiva*, Dec. 1, 2008, DIARIO OFICIAL [D.O.] (Uru.); Wood et al., *supra* note 273, at 103.

296. See Law No. 18.426 (Uru.).

297. See Wood et al., *supra* note 273, at 103–04; see also Johnson et al., *supra* note 251, at 67 (noting that Vázquez vetoed the abortion articles in the bill based on his personal convictions, but only three government ministers signed Vázquez’s veto in 2008; due to such conflicts with his party, Vazquez split from the Socialist party within the FA).

298. See Wood et al., *supra* note 273, at 103.

299. See *id.*

300. See *id.*

301. See *id.*

302. See *id.*; Romero, *supra* note 270.

303. See Law No. 18.987, *Interrupción Voluntaria del Embarazo*, Oct. 22, 2012, D.O. (Uru.).

304. See *id.* art. 2 (Uru.).

of rape, and there is no gestational limit in cases where there is a risk to the woman's life or severe fetal anomaly.³⁰⁵ While this law is relatively liberal compared to the rest of Latin America, many activists feel that the law is still too restrictive due to the modifications made in the Chamber of Deputies negotiations.³⁰⁶ For example, individual practitioners and health institutions as a whole can claim "conscientious objection" and refuse to provide abortion services.³⁰⁷ Further, the requirements to access abortion services are burdensome—any woman seeking an abortion must meet with a three-person interdisciplinary team³⁰⁸ to discuss alternatives and risks of the procedure, and, following such counseling, undergo a five-day reflection period.³⁰⁹

The law does not actually legalize abortion—it simply decriminalizes abortion for women who fit within the law's requirements, meaning that women who have an abortion outside of Uruguay's health system or outside the law's parameters still could face legal and health consequences.³¹⁰ Since 2012, the law has confronted numerous challenges from antiabortion activists,³¹¹ and the judiciary has not definitively interpreted the rights granted to women under the law.³¹² For instance, in 2017, a Uruguayan family judge

305. See *id.* art. 6 (Uru.) (additionally requiring women who are victims of rape to file a judicial complaint in order to fall under the fourteen-week gestational limit).

306. See Wood et al., *supra* note 273, at 105; see also Elizabeth Sulis Kim, *I Was Given Photos of the Foetus: Abortion Stigma Lingers in Pioneering Uruguay*, *GUARDIAN* (Oct. 10, 2018, 2 PM), <https://www.theguardian.com/global-development/2018/oct/10/uruguay-pioneering-abortion-laws-changed-lives-yet-stigma-lingers> [https://perma.cc/C6EL-5QC8] (archived Oct. 25, 2019)

(discussing the stigma women face when electing to undergo an abortion and the obstacles they must overcome to access abortion services).

307. Wood, *supra* note 273, at 105. The authors explain that nearly 30 percent of gynecologists have objected to providing services (with even higher rates of objection in some provinces). See *id.* at 107. Further, there is no fee for medical abortion services which creates a disincentive for practitioners to take the time and provide high quality medical abortions. See *id.* Only gynecologists can perform the procedure, which also limits a woman's options when seeking care. See *id.*; see also Law 18.987, art. 9 (Uru.).

308. See Wood, *supra* note 273, at 105 (explaining that the interdisciplinary team consists of a gynecologist, social worker, and mental health professional).

309. See Law 18.987, *supra* note 303, at art. 3.

310. See Wood et al., *supra* note 273, at 105; see also *Maldonado: Dos Mujeres a Prision por Aborto Ilegal*, *EL PAIS* (Mar. 17, 2015), <https://www.elpais.com.uy/informacion/maldonado-mujeres-prision-aborto-ilegal.html> [https://perma.cc/JPV6-GYTX] (archived Oct. 25, 2019) (noting that in 2015, three women were prosecuted and two women received prison sentences for undergoing abortions outside of the law's parameters).

311. See Wood et al., *supra* note 273, at 106. The authors explain that in June 2013, antiabortion activists attempted to call a national referendum to overturn the law and re-criminalize abortion. See *id.* The proposal failed at the pre-referendum stage since only 8.8 percent of registered voters participated and a referendum can only be called if 25 percent of voters vote in favor of the pre-referendum. See *id.*

312. See Wood et al., *supra* note 273, at 107 (noting Uruguay's lack of commitment in establishing a woman's rights).

ruled that a young woman could not terminate her pregnancy in her tenth week of gestation due to objections from her ex-boyfriend.³¹³ The ex-partner's legal challenge prevented the woman from being able to obtain an abortion within the legal twelve-week period.³¹⁴ This case signifies that the absolute rights of a pregnant woman in Uruguay have not been established, and it is unclear whether the rights of a father or fetus can trump a mother's autonomy. While Uruguay's abortion law serves as a model for numerous other nations,³¹⁵ it is unclear what strength the law actually has in practice. Nonetheless, Uruguay was able to pioneer abortion reform through great influence from the medical community, legislative persistence and compromise, and effectively framing the issue as a public health crisis.

3. El Salvador

Whereas Argentina and Uruguay are considered to be two of the most liberal countries in Latin America, El Salvador is considered to be one of the most conservative.³¹⁶ El Salvador has some of the most restrictive laws when it comes to LGBTQ and abortion rights.³¹⁷ When considering El Salvador's reluctance towards more progressive social policies, it is important to note that El Salvador is one of the least economically developed and least secularized countries in Latin America.³¹⁸ These factors often contribute to low public support for progressive social policies.³¹⁹

313. See Magdalena Martinez, *Uruguay Court Rules Man Can Stop Ex-Partner From Having Abortion*, EL PAIS (Feb. 27, 2017, 3:27 PM), https://elpais.com/elpais/2017/02/28/inenglish/1488283686_293552.html [https://perma.cc/9GLD-6FWS] (archived Oct. 25, 2019); Lauren Rankin, *Controversial Ruling Threatens Abortion Access in Uruguay and Beyond*, REWIRE NEWS (Mar. 14, 2017, 6:13 PM), <https://rewire.news/article/2017/03/14/controversial-ruling-threatens-abortion-access-uruguay-beyond/> [https://perma.cc/9M52-XVGV] (archived Oct. 25, 2019).

314. See Rankin, *supra* note 313 (explaining that the woman later suffered a miscarriage, and now faces even further criminal allegations from the ex-partner).

315. See Raul de Mora, *Eliminating Maternal Deaths from Unsafe Abortions in Uruguay*, UNFPA (Aug. 18, 2011), <https://www.unfpa.org/news/eliminating-maternal-deaths-unsafe-abortion-uruguay> [https://perma.cc/PV4T-HSXG] (archived Oct. 25, 2019) (discussing how Uruguay's model for addressing unsafe abortions can be disseminated across the globe).

316. See CORRALES, *supra* note 38, at 8, 18, 21 (noting that the conservativeness of a country is important in evaluating LGBTQ rights).

317. See *id.* at 29–32; see also Elisabeth Malkin, *They Were Jailed for Miscarriages. Now Campaign Aims to End Abortion Ban*, N.Y. TIMES (Apr. 9, 2018), <https://www.nytimes.com/2018/04/09/world/americas/el-salvador-abortion.html> [https://perma.cc/Q3NQ-CPSS] (archived Oct. 25, 2019) (noting that only six small countries in Latin America have maintained an outright ban on abortions, and “no other country enforces such a ban with the zeal of El Salvador”) [hereinafter Malkin, *Campaign Aims*].

318. See CORRALES, *supra* note 38, at 10, 23.

319. See *id.* (noting that in many cases low GDP is correlated to lower scores on the LGBTQ rights index, although there are exceptions).

El Salvador experienced a bloody civil war between 1980 and 1992.³²⁰ Although the war ended over two decades ago and democratic institutions are now in place, the country is still plagued with violence and high murder rates.³²¹ El Salvador's LGBTQ population is especially vulnerable to such violence.³²² In the last decade, El Salvador has taken some steps towards preventing and punishing discrimination and violence based on sexual orientation or gender identity, but enforcement of these protective measures is virtually nonexistent.³²³ Hate crimes against LGBTQ individuals are still commonplace and often go unpunished,³²⁴ forcing many LGBTQ citizens to flee the country.³²⁵ Further, El Salvador has made little progress with respect to same-sex relationship rights: neither same-sex marriages nor civil unions are legal in El Salvador, although not constitutionally prohibited.³²⁶

El Salvador's Constitution refers to the state's role in protecting the "family unit," stating that the "legal foundation of family is marriage and rests on the juridical equality of the spouses."³²⁷ Article 33 of El Salvador's Constitution provides that the law regulates the "personal and patrimonial relations among spouses themselves" and establishes spousal rights and reciprocal duties.³²⁸ Further, Article 33 states that the law "shall regulate the family relations resulting from

320. See INT'L HUMAN RIGHTS CLINIC, SEXUAL DIVERSITY IN EL SALVADOR: A REPORT ON THE HUMAN RIGHTS SITUATION OF THE LGBT COMMUNITY I, 6 (2012) [hereinafter SEXUAL DIVERSITY IN EL SALVADOR] (estimating that 75,000 Salvadorans died during the civil war).

321. See *id.* at 1, 13 (noting that another 74,000 Salvadorans were murdered between 1992 and 2011).

322. See *id.* at 13.

323. See HARVARD LGBT SHADOW REPORT, *supra* note 47 (reporting on continued acts of violence and discrimination against LGBTQ individuals in El Salvador).

324. See Nina Lakhani, *LGBT in El Salvador: Beatings, Intolerance, Death*, AL JAZEERA (Aug. 12, 2015), <https://www.aljazeera.com/indepth/features/2015/08/lgbt-el-salvador-beatings-intolerance-death-150805075132892.html> [<https://perma.cc/5WSJ-H947>] (archived Oct. 25, 2019) (discussing how police forces contribute to the violence through police brutality and the arbitrary detention of LGBTQ individuals); SEXUAL DIVERSITY IN EL SALVADOR, *supra* note 320, at 13 (explaining that it is rare for perpetrators to be arrested or convicted in the majority of homicide cases due to El Salvador's norm of impunity).

325. See Anastasia Moloney, *'Terrorized at Home', Central America's LGBT People for Their Lives: Report*, REUTERS (Nov. 27, 2017, 11:52 AM), <https://www.reuters.com/article/us-latam-lgbt-rights/terrorized-at-home-central-americas-lgbt-people-to-flee-for-their-lives-report-idUSKBN1DR280> [<https://perma.cc/SVX7-PWRZ>] (archived Oct. 25, 2019); Lakhani, *supra* note 324 (explaining that El Salvador has experienced "epidemic levels of violence" forcing 136 LGBTQ people to flee the country between 2012 and 2017; one organization reported over 500 cases of murder and assault against LGBTQ individuals between 1993 and 2015, but there are many cases that go unreported).

326. See Anna C. Forgie, Note, *El Derecho A Amar (The Right to Love): Same-Sex Relationships in Spain and El Salvador*, 9 N.W. J. INT'L HUM. RTS. 185, 199 (2011).

327. CONST. POL. REPÚB. EL SAL. Dec. 20, 1983, tit. I, cap II, art. 32.

328. *Id.* at art. 33.

the stable union of a *man* and a *woman*.”³²⁹ Thus, while gay marriage is not explicitly prohibited in El Salvador’s Constitution, the law naturally excludes homosexual couples.

In April 2009, the *Asamblea Legislativa* (Legislative Assembly) of El Salvador considered proposed amendments to Articles 32 through 34, which would effectively institute a constitutional ban on same-sex marriage.³³⁰ The proposed amendments would change the language of Article 32 so that only “men and women who were born so” are competent to enter into marriage.³³¹ Further, the proposed amendments provided that any marriage or alternative union between same-sex couples that was celebrated or recognized under the laws of another country, or otherwise incompatible with Salvadoran law, would “be null and void in El Salvador.”³³² Adoption by same-sex couples would also be explicitly prohibited.³³³ These proposed amendments made it through the legislature but failed at the ratification stage.³³⁴

The election of President Mauricio Funes in March 2009 ultimately defeated the amendments, due to his party’s withdrawal of support for the changes.³³⁵ Forty-six legislators voted in favor of the amendments, just ten votes short of the two-thirds majority needed to amend El Salvador’s Constitution.³³⁶ Although the proposed constitutional ban on gay marriage failed in 2009, the amendments received overwhelming support from many factions of society,³³⁷ which signified that El Salvador was not likely to establish any form of same-

329. *Id.* (emphasis added).

330. See Edgardo Ayala, *Anti-Gay Reform Fails in Congress*, IPS NEWS (Sept. 6, 2009), <http://www.ipsnews.net/2009/09/rights-el-salvador-anti-gay-reform-fails-in-congress/> [https://perma.cc/4236-2M4H] (archived Oct. 25, 2019); see also Forgie, *supra* note 326, at 199.

331. Ayala, *supra* note 330; see also Forgie, *supra* note 326, at 199.

332. Ayala, *supra* note 330; see also Forgie, *supra* note 326, at 200.

333. See Ayala, *supra* note 330 (modifying Article 34 of El Salvador’s Constitution).

334. See *id.*; see also HARVARD LGBT SHADOW REPORT, *supra* note 47, at 5 (explaining that the bill containing the proposed amendments was initially passed in 2006).

335. See Ayala, *supra* note 330; see also Forgie, *supra* note 326, at 200. The authors explain that Funes’s election marked a dramatic shift in power. See *id.* At the time of the initial vote, the Farabundo Martí National Liberation Front (FMLN) supported the measure, likely to garner centrist votes. See *id.* However, during the campaign for the 2009 elections, the FMLN (Funes’ party) changed its position and denounced the amendments as a violation of civil rights. See *id.*

336. See Ayala, *supra* note 330.

337. See *id.*; see also Forgie, *supra* note 326, at 200–01 (providing that hundreds of Catholics and Evangelicals protested in support of the proposed amendments; the *Alianza Republicana Nacionalista* (Nationalist Republican Alliance, or ARENA), which was the party in power prior to the FMLN, and the *Fundación Salvadoreña para el Desarrollo Económico y Social* (Salvadoran Foundation for Economic and Social Development, or FUSADES) strongly supported the amendments as a means of defending public morality and the foundation of family).

sex relationship rights in the near future.³³⁸ A similar bill banning same-sex marriage was passed by the legislature in 2015.³³⁹ This constitutional amendment was blocked by El Salvador's Supreme Court in 2018, but only on procedural grounds, leaving the possibility open for future legislative assemblies to revisit the measure.³⁴⁰

After he assumed office, President Funes did implement a few measures to protect the LGBTQ population.³⁴¹ In 2010, President Funes issued Decree 56, which prohibited discrimination based on sexual orientation by public employees and established the National Directorate for Sexual Diversity.³⁴² However, many advocates for LGBTQ rights claim that these measures have done little to protect LGBTQ individuals due to lack of enforcement.³⁴³

Many LGBTQ individuals who are victims of violence or discrimination either do not know their rights, are too afraid to come forward for fear of retaliation, or feel disincentivized to file a complaint or police report because there is rarely any formal follow-up or resolution for victims.³⁴⁴ The legislature has done little to help the situation—homicide and aggravated assault based on sexual orientation were not even included as specific crimes in the Penal Code until 2015.³⁴⁵ Further, LGBTQ individuals are vulnerable to discrimination when accessing health care services.³⁴⁶ El Salvador has the highest HIV seroprevalence rates among men sleeping with men in all of Central America, due in part to LGBTQ citizens' limited access to preventative resources and treatment.³⁴⁷

338. See Lodola & Corral, *supra* note 116, at 43 (recalling that support for same-sex marriage in El Salvador scored at merely 10.3 points out of 100).

339. See *El Salvador: Constitutional Ban*, *supra* note 48; Rodriguez-Jimenez, *supra* note 48.

340. See *El Salvador: Constitutional Ban*, *supra* note 48 (noting that the Supreme Court held that there were procedural missteps since the vote was fast-tracked with only a few days left in the legislative session, affording no time for the public to be informed and provide input).

341. See HARVARD LGBT SHADOW REPORT, *supra* note 47, at 6–7 (providing a summary of presidential action).

342. See Decree No. 56, May 12, 2012, DIARIO OFICIAL [D.O.] (El Salv.); see also SEXUAL DIVERSITY IN EL SALVADOR, *supra* note 320, at 19 (explaining that the National Directorate for Sexual Diversity, established under the office of the Secretary of Social Inclusion, was designed with the intent to eradicate discrimination, promote inclusivity, and educate Salvadoran society about issues facing the LGBTQ community).

343. See SEXUAL DIVERSITY IN EL SALVADOR, *supra* note 320, at 19.

344. See *id.* at 18–20.

345. See CÓD. PEN. arts. 129(11) and 155(5) (El. Sal.).

346. See SEXUAL DIVERSITY IN EL SALVADOR, *supra* note 320, at 25–26 (explaining that in 2009, the Ministry of Health passed Agreement No. 202 to eradicate all forms of discrimination based on sexual orientation in public health services, but it is nonbinding and is poorly enforced).

347. See Ramón J. Soto et al., *Sentinel Surveillance of Sexually Transmitted Infections/HIV and Risk Behaviors in Vulnerable Populations in 5 Central American Countries*, 46 J. ACQUIRED IMMUNE DEFICIENCY SYNDROME 101, 105–06 (providing that the seroprevalence rate of HIV for MSMs in El Salvador is 15.3 percent.).

Thus, El Salvador has a long way to go toward the protection of even the most basic human rights of LGBTQ individuals. Given El Salvador's economic vulnerability, strong religious affiliations, and the general intolerance of homosexuality that permeates Salvadoran society, LGBTQ advocates in El Salvador face deeply ingrained institutionalized resistance.³⁴⁸ It will take a dramatic shift in both public attitudes and legislative priorities to achieve material and enduring LGBTQ rights in El Salvador.

Likewise, El Salvador has made little progress—and arguably has actually regressed—when it comes to abortion rights. Abortion was never legal in El Salvador, but until 1997, there were exceptions which permitted abortion in cases of rape, fetal abnormality, or if the mother's life was at risk.³⁴⁹ Even though abortion was only permitted in limited circumstances, Salvadoran women historically were not prosecuted for undergoing an abortion.³⁵⁰ However, antiabortion advocates began to successfully mobilize throughout the 1990s, following the end of the Salvadoran Civil War in 1992.³⁵¹

El Salvador's two major right-wing parties and the Catholic Church became more vocal antiabortion advocates, believing that the country could protect its sovereignty and unborn Salvadoran children through more stringent abortion legislation.³⁵² While El Salvador's Penal Code was under revision, the "Foundation Yes to Life" submitted a formal request to the *Asamblea Legislativa* to prevent the new code from including any exceptions permitting abortion.³⁵³ In 1997, every member of the *Farbundo Martí National Liberation Front* (FMLN) voted against the ban, but the party did not have enough votes to block its passage.³⁵⁴ The revised Penal Code eliminated all exceptions permitting abortion, increased penalties for women, and

348. See CORRALES, *supra* note 38, at 10, 32; see also Forgie, *supra* note 326, at 202 (noting that religion "permeates daily life" which influences the media; Salvadoran news outlets often express their objections to LGBTQ rights in support of the church).

349. See Jocelyn Viterna & Jose Santos Guardado Bautista, *Pregnancy and the 40-Year Prison Sentence: How "Abortion Is Murder" Became Institutionalized in the Salvadoran Judicial System*, 19 HEALTH HUM. RTS. J. 81, 85 (2017) (defining fetal abnormality as a "deformity incompatible with extrauterine life").

350. See *id.* at 82.

351. See *id.* at 84.

352. See *id.* (explaining that the two major right-wing parties fighting abortion are ARENA and the *Partido de Conciliación Nacional* (National Coalition Party, or PCN)); see also Jocelyn Viterna et al., *Governance and the Reversal of Women's Rights: The Case of Abortion in El Salvador* 5 (U.N. World Inst. for Dev. Econ. Research Working Paper No. 2017/187, 2017) (noting that ARENA representative, Elizabeth Calderon del Sol was praised by Pope John Paul II and celebrated by the Salvadoran newspaper, *El Diario*, for "vocally defending El Salvador's sovereignty" at international conferences, and "ensuring that no transnational legislation was passed that would 'force' legal abortion on El Salvador").

353. Viterna & Bautista, *supra* note 349, at 84.

354. See *id.* at 85 (explaining that the *Frente Farabundo Martí para la Liberación Nacional* (Farbundo Martí National Liberation Front, or FMLN) had only been conferred formal party status in 1992).

added the crime of being an “abortion accomplice.”³⁵⁵ The code outlaws “abortion” and “facilitating abortion” but provides no legal definition for either term.³⁵⁶

Shortly after the complete ban was passed, the antiabortion coalition decided it needed to go even further.³⁵⁷ The Nationalist Republican Alliance (ARENA) quickly moved forward a proposed constitutional amendment defining life as beginning from “the very moment of conception,” which effectively recognizes fetal personhood.³⁵⁸ The proposed constitutional amendment passed the first required vote despite opposition from the FMLN.³⁵⁹ The second vote was strategically scheduled by ARENA to take place right before the 1999 election cycle, which forced the FMLN to publicly defend its position in a political climate where a majority of Salvadorans favored the amendment.³⁶⁰ In an effort to prevent electoral damage, FMLN leaders advised individual deputies to “vote their conscience.”³⁶¹ Consequently, the amendment passed in 1999, with a large majority of FMLN member’s votes.³⁶² By establishing the fetal right to “personhood,” the amendment allows—and actually encourages—judges to upgrade an abortion charge to a conviction of aggravated homicide, if the court determines that the fetus breathed upon exiting

355. CÓD. PEN. arts. 133–35 (El Sal.) (providing that women who are charged with the crime of abortion can face two to five years in prison. Doctors or other medical professionals who assist in an abortion can face six to twelve years in prison, and anyone who assists the woman financially or in another way “facilitates” the abortion can receive a prison sentence of two to five years; the revised code was passed in April 1997, and entered into force on April 20, 1998).

356. Viterna & Bautista, *supra* note 349, at 85.

357. *See id.*

358. *Id.*; *see also* Viterna et al., *supra* note 352, at 5.

359. *See* Viterna & Bautista, *supra* note 349, at 85; Viterna et al., *supra* note 352, at 5.

360. *See, e.g.*, Viterna & Bautista, *supra* note 349, at 85 (there was a strong public opinion in favor of the amendment—activists collected roughly 600,000 signatures and organized protests with tens of thousands of supporters); Viterna et al., *supra* note 352, at 6 (“Right-wing politicians and activists were fomenting a moral panic about abortion to gain political power through elections.”).

361. Viterna & Bautista, *supra* note 349, at 85; *see also* Viterna et al., *supra* note 352, at 6 (noting that FMLN deputies were convinced that the abortion issue had damaged their outcomes in the previous elections, and were acting on the defensive for the 1999 presidential election and the 2000 legislative election).

362. *See* CONST. POL. REPÚBL. EL SALVADOR [C.P.] art. 1, ¶ 2 (providing that the amendment adds paragraph 2 to Article 1, stating that El Salvador “recognizes as a human person every human being since the moment of conception”); *see also* Viterna & Bautista, *supra* note 349, at 85 (noting that some FMLN leaders even publicly praised the new amendment).

the womb.³⁶³ Aggravated homicide carries a prison sentence of thirty to fifty years.³⁶⁴

The amendment's passage not only caused the FMLN to disengage in the fight for abortion rights, it further forced the party's feminist allies to stop publicly supporting the issue.³⁶⁵ As a result, antiabortion activists identified the "perverse mother" as their coalition's new target, and began aggressively seeking prosecutions against women for "murdering" their children.³⁶⁶ Between 1998 and 2003, a reported 283 criminal investigations were initiated against women charged with unlawful abortion, and between 2000 and 2011 at least 129 women were prosecuted for abortion or aggravated homicide.³⁶⁷ Most of these women were reported while seeking treatment for severe obstetric emergencies by medical personnel, despite their legal and ethical obligations to ensure patient confidentiality and privacy.³⁶⁸ Consequently, pregnant women are incentivized to delay seeking care for serious complications, further increasing the risk of maternal morbidity.³⁶⁹

Following the nationally institutionalized belief that "abortion is murder," everyone involved in the investigation process usually works against the accused mother under the presumption of guilt.³⁷⁰ Often, police forces only gather evidence that will incriminate the mother, and doctors neglect to report basic medical history and treatment information, which would likely indicate a pregnancy complication or naturally occurring abortion.³⁷¹ Forensic analysts often neglect to report evidence or fabricate their conclusions to show that the fetus was aborted late term or was born alive in order to bump the charge to aggravated homicide, and judges solely admit evidence and testimony

363. Viterna & Bautista, *supra* note 349, at 86, 90 (explaining that due to pressure on the judicial system, judges have been encouraged to prosecute women for obstetrical emergencies, especially since prosecuting gang murderers leaves judges more susceptible to violence).

364. See Cód. PEN. art. 129 (El Sal.); *see also* Viterna & Bautista, *supra* note 349, at 87 (noting that this sentence is two to three times longer than the prison sentences for gang members who commit numerous violent murders—who would just be charged with homicide—due to the special relationship between mother and child).

365. See Viterna & Bautista, *supra* note 349, at 85–86.

366. *Id.* at 86.

367. See Heathe Luz McNaughton et al., *Patient Privacy and Conflicting Legal and Ethical Obligations in El Salvador: Reporting of Unlawful Abortions*, 96 AM. J. PUB. HEALTH 1927, 1929 (2006); *see also* Zureick et al., *supra* note 50, at 121 (disclaiming that data from more recent years is not available).

368. See Zureick et al., *supra* note 50, at 121–22 (providing that in a 2006 study, 56 percent of obstetricians reported that they had notified law enforcement about a suspected abortion); *see also* McNaughton et al., *supra* note 367, at 1927–28 (providing an explanation of the legal and ethical obligations for health care providers in El Salvador).

369. See McNaughton et al., *supra* note 367, at 1927.

370. Viterna & Bautista, *supra* note 349, at 92; *see also* Zureick et al., *supra* note 50, at 123.

371. See Viterna & Bautista, *supra* note 349, at 88.

that would support a guilty verdict.³⁷² Moreover, the complete abortion ban disproportionately affects marginalized women, since most women prosecuted are young, impoverished, uneducated, and more vulnerable to violence.³⁷³

This pattern of aggressive prosecution continued with little backlash or media attention until the mid-2000s.³⁷⁴ However, feminist activists started to reengage when the New York Times published an in-depth analysis on the total abortion ban in El Salvador, exposing cases of innocent women who were serving long prison sentences for aggravated homicide, despite a lack of evidence supporting their charges.³⁷⁵ In 2009, activists established the *Agrupación Ciudadana por la Despenalización del Aborto* (Citizen's Associations for the Depenalization of Abortion), and since its formation the group has secured the release of five women who were falsely imprisoned for aggravated homicide.³⁷⁶ There are more than two dozen women still serving sentences of up to thirty years for attempted and aggravated homicide.³⁷⁷

Increased national activism has drawn international attention to abortion rights in El Salvador, which forced legislators to reassess the complete ban.³⁷⁸ In April 2018, two bills were introduced that would reintroduce some exceptions to the ban, but supporters had a limited window of time to push the bills forward, since a new conservative majority assumed office in May.³⁷⁹ The legislature adjourned without voting on these proposals.³⁸⁰ It is now unclear whether the momentum and support built for these proposals will materialize into future legislative action. Nonetheless, activists are now aware that it will take

372. See *id.* at 88–89.

373. See *id.* at 87; see also Zureick et al., *supra* note 50, at 124 (concluding that many women are “blamed for adverse pregnancy outcomes that are the result of poverty, violence or environmental factors” that the state should address).

374. See Viterna & Bautista, *supra* note 349, at 85, 90.

375. See Jack Hitt, *Pro-Life Nation*, N.Y. TIMES (Apr. 9, 2009), <https://www.nytimes.com/2006/04/09/magazine/prolife-nation.html> [<https://perma.cc/2B7K-V2PQ>] (archived Oct. 25, 2019); Viterna & Bautista, *supra* note 349, at 90–91.

376. Viterna & Bautista, *supra* note 349, at 91.

377. See Elisabeth Malkin, *Supporters of El Salvador's Abortion Ban Foil Efforts to Soften It*, N.Y. TIMES (Apr. 26, 2018), <https://www.nytimes.com/2018/04/26/world/americas/abortion-ban-salvador.html> [hereinafter Malkin, *El Salvador's Abortion Ban*] [<https://perma.cc/776V-LJEP>] (archived Oct. 25, 2019).

378. See Malkin, *Campaign Aims*, *supra* note 317; see also Zureick et al., *supra* note 50, at 123 (noting that El Salvador's abortion law and practices have been criticized by the UN High Commissioner and the Inter-American Court).

379. See Malkin, *Campaign Aims*, *supra* note 317 (explaining that one bill would permit abortion when the mother's health is at risk or for a minor who has been raped; another bill would expand the exceptions to permit abortion in all rape cases and in cases where the mother is carrying an unviable fetus).

380. See *id.* (explaining that there were extensive lobbying efforts from both sides, as many doctors and the Ministry of Health supported relaxing the ban; however, many legislators were concerned with the political cost of voting in support of the bill).

aggressive and persistent lobbying and international pressure to weaken the “abortion is murder” mindset that is indoctrinated in Salvadoran society.

III. SOLUTION

The variation in laws and policies among these three countries can be explained through a multitude of socioeconomic, political, and historical factors unique to each country. When evaluating “what worked” in the LGBTQ and abortion rights movements in Argentina, Uruguay, and El Salvador, it is helpful to keep this variability in mind. However, many of the successful policy-making tools employed in these countries can be consolidated into a “transnational toolkit” for shaping law and policy that is transferrable across the Latin American region.

A. *Building a Transnational Toolkit: What Works*

1. Combined Judicial and Legislative Advocacy

In Argentina, same-sex marriage advocates launched a two-track national campaign to influence the courts and the legislature.³⁸¹ By using the tool of the *amparo* and using constitutional reform to their advantage, activists engaged the courts in their plight.³⁸² Although the petitioners lost most cases, the *amparos* were successful in garnering attention from the media, which put pressure on the legislature.³⁸³ Further, the *amparo* is a powerful tool in the context of judicialization which is important because in a growing number of jurisdictions, judges are making policy outside of the legislature.³⁸⁴ National judiciaries are in a unique position because they have the opportunity to not only interpret and transform domestic law but also reinforce and bolster international law. As international treaties and covenants gain force and more pressure is exerted from international courts, judges may be compelled to cite international law in their decisions,³⁸⁵ such as the Inter-American Court’s recent opinion recognizing patrimonial

381. See Friedman, *supra* note 169, at 49.

382. See *id.*; see also Andía, *supra* note 164, at 138–39.

383. See Andía, *supra* note 164, at 138–39.

384. See generally Alexandra Huneeus et al., *Cultures of Legality: Judicialization and Political Activism in Contemporary Latin America*, in CULTURES OF LEGALITY: JUDICIALIZATION AND POLITICAL ACTIVISM IN LATIN AMERICA 3 (Javier Couso et al. eds., Cambridge Univ. Press 2010) (discussing how Latin American courts are acting as the “defenders of rights” and more frequently intervening in political controversies).

385. See generally David Sloss & Michael Van Alstine, *International Law in Domestic Courts*, in RESEARCH HANDBOOK ON THE POLITICS OF INTERNATIONAL LAW 79 (Wayne Sandholtz and Christopher A. Whytock eds., 2017) (discussing the trend in domestic courts citing international treaties and conventions, referred to as the “judicialization of international law”).

rights of same-sex couples.³⁸⁶ Judge-made law is particularly powerful in countries with unstable democratic institutions, such as hybrid regimes with a mix of democratic and authoritarian features.³⁸⁷ In these unstable political climates, judges can circumvent the legislature and political gridlock to uphold nationally and internationally recognized human rights principles.

2. Building Off a Public Health Crisis

Fighting for policy change in response to a public health crisis can also be a powerful tool. In many countries, such as Argentina and Spain, LGBTQ rights became a real public concern and hence were placed on the political agenda because of the HIV/AIDS epidemic.³⁸⁸ Once society became concerned with LGBTQ individuals as a vulnerable class, it was easier to advocate for their collective rights. Further, Uruguay's abortion law resulted from the medical community's response to an (arguably legislatively created) public health crisis.³⁸⁹ A coalition of medical professionals led the charge in creating a risk-reduction program to prevent unsafe pregnancies and reduce maternal mortality rates, which was eventually adopted executively and legislatively.³⁹⁰ By shifting the focus to scientific and empirical evidence, advocates were able to turn the conversation away from pure moral debate.³⁹¹ Similarly, the *Ni Una Menos* movement in Argentina developed in response to increased maternal mortality rates and an increase in cases of "femicide."³⁹² Additionally, public health crises have the power to change public opinion, as seen with the increase in justifications for abortion following the Zika epidemic.³⁹³ Over the next decade, governments may implement new health laws to safeguard against crises like the Zika epidemic.³⁹⁴ Activists should

386. See Advisory Opinion OC-24/17, *supra* note 16, ¶¶ 160, 199, 223–35.

387. See Hoyos, *supra* note 173 (noting the power of the *amparo*); see also Møller & Skaaning, *supra* note 60, at 97, 101 (describing hybrid regimes in Latin America); ECONOMIST *supra* note 63.

388. See Friedman, *supra* note 169, at 34.

389. See Adams, *supra* note 280 (noting that Uruguay's 1938 abortion law led to an increase in maternal morbidity and an increase in women suffering complications from unsafe abortions).

390. See generally Law No. 18.426 (Uru.) (discussing the legislative adoption of the risk-reduction program); Ordenanza 369/04 (Uru.) (discussing the executive adoption of the risk-reduction program through the Ministry of Health); Labendera et al., *supra* note 277 (discussing the medical community's role in shaping law and policy).

391. See Briozzo et al., *supra* note 294, at S21; see also Labendera et al., *supra* note 277, at 59–60 (noting that advocates relied on statistics showing a decrease in maternal mortality rates resulting from the risk-reduction program).

392. Pomeraniec, *supra* note 1; see also Smink, *supra* note 223.

393. See Cohen & Evans, *supra* note 146, at 1–6.

394. See Carabali et al., *supra* note 153 (noting that it is still uncertain what legislative changes will be made in the wake of the Zika epidemic).

capitalize on these crises and pressure the legislature to enact preventative measures, rather than just facilitating damage control.

3. Consolidating Advocacy Coalitions

Social movements are strongest when the participating advocacy coalitions are unified and persistent. In building an advocacy coalition, activists need to build alliances with other interest groups and with members of the legislature. In Argentina, the divide between advocacy groups may be one reason why same-sex marriage legislation took so long to pass.³⁹⁵ Ultimately, FALGBT proved to be a stronger advocacy group, but the LGBTQ rights movement might have progressed more rapidly if FALGBT and other key groups simultaneously fought for the same goal.

4. Forging Alliances

Advocacy coalitions find power in numbers. They are given a stronger voice through allies, whether in the public or private sphere. In Uruguay, abortion rights activists found allies in the medical community and with the Ministry of Health.³⁹⁶ These allies helped nationalize their interests and gave them a platform to fight for legislative change.³⁹⁷ Professional organizations with expertise on a given issue can often serve as powerful allies.

Nonetheless, advocacy coalitions usually need some support from lawmakers and other elected officials to remain active, because fighting in a hostile political climate can seem futile. In times of political instability and civil war, activist groups may go silent or disappear altogether, as seen with the majority of LGBTQ organizations in Argentina during the country's Dirty War.³⁹⁸ Once democracy was restored in Argentina, activists rebuilt their coalition and devised new strategies, taking advantage of a new political climate, which encouraged discourse on human rights and social

395. See Andía, *supra* note 164, at 132–33 (noting that other LGBTQ groups, such as CHA solely pursued civil union legislation, while FALGBT strived for same-sex marriage legislation).

396. See Labendera et al., *supra* note 277, at S8 (explaining that the medical community launched a risk-reduction program to prevent and mitigate the effects of unsafe abortions, which was given formal status by the Ministry of Health through Ordenaza 369/04).

397. See *id.*; see also Wood et al., *supra* note 273, at 103 (providing that the legislature decided to incorporate the risk-reduction program into law after seeing its national success, particularly through evidence of a reduction in maternal mortality and an improvement in reproductive health services).

398. See Andía, *supra* note 164, at 132; see also Friedman, *supra* note 169, at 42 (noting that the LGBTQ community was targeted by the brutally violent military junta during Argentina's Dirty War from 1976 to 1983, which impacted the strength and visibility of LGBTQ coalitions).

change.³⁹⁹ Similarly, many feminist activists in El Salvador disengaged from the fight for abortion rights when the FMLN withdrew its public opposition to the 1997 total abortion ban in order to maintain alliances with FMLN legislators and avoid potential financial and legal ramifications for publicly supporting abortion rights.⁴⁰⁰

Therefore, it is critical for advocacy coalitions to find allies in the executive branch and the legislature. For example, President Cristina Fernández de Kirchner was instrumental in the passage of same-sex marriage legislation in Argentina.⁴⁰¹ In Uruguay, President José Mujica was an important ally to both the LGBTQ and abortion rights movements.⁴⁰² Further, President Mauricio Funes helped prevent the enactment of a constitutional ban on same-sex marriage in El Salvador.⁴⁰³ In the legislature, LGBTQ advocates found allies in the Peronist Party (Argentina),⁴⁰⁴ the FA (Uruguay),⁴⁰⁵ and the FMLN (El Salvador).⁴⁰⁶ The FA was also influential in the passage of Uruguay's 2012 abortion law.⁴⁰⁷ However, neither the Peronists nor the FMLN provided consistent support for abortion rights.⁴⁰⁸

5. Embracing Setbacks

For grassroots advocacy to succeed, coalitions must not only consolidate and form powerful alliances, but also embrace setbacks and learn from legislative defeat. A big part of managing setbacks is an amenability to compromise. For example, in Uruguay the FA was able to garner enough votes for the 2012 abortion bill only by affording some concessions, such as limiting language referring to women's rights and including strict requirements for accessing abortion services.⁴⁰⁹ Likewise, Uruguay's civil union law appeased conservatives because it

399. See Andía, *supra* note 164, at 132.

400. See Viterna & Bautista, *supra* note 349, at 85–86 (noting that feminist groups were worried that they would lose funding or face criminal penalties for publicly supporting abortion rights).

401. See Friedman, *supra* note 169, at 45.

402. See Schoichet, *supra* note 265; see also Tremlett, *supra* note 265 (discussing Mujica's support for LGBTQ relationship rights); Wood, *supra* note 273, at 103–04 (noting that President Mujica was willing to sign an abortion law, whereas his predecessor Tabaré Vázquez was not).

403. See, e.g., Forgie, *supra* note 326, at 200; Ayala, *supra* note 330.

404. See Encarnación, *supra* note 199 (noting that the Peronist party was becoming more progressive on LGBTQ rights because it was losing votes and needed to secure popularity with urban voters).

405. See Sempol, *supra* note 237, at 93; see generally Luna, *supra* note 248.

406. See Forgie, *supra* note 326, at 200; Ayala, *supra* note 330.

407. See Wood et al., *supra* note 273, at 103–04.

408. See Tabbush et al., *supra* note 177 at 82 (noting Kirchner's and the Peronist's lack of support for abortion rights); Viterna & Bautista, *supra* note 349, at 85–86 (discussing the FMLN's withdrawal of support for abortion rights in 1999).

409. See Wood et al., *supra* note 273, at 103.

made a clear distinction between civil partnerships and marriage, excluded adoption rights, and imposed various restrictive conditions.⁴¹⁰ Although abortion rights activists in El Salvador and Argentina both recently suffered discouraging legislative defeats, these setbacks should be viewed as learning opportunities.⁴¹¹ If these coalitions can embrace their setbacks, maintain momentum, and learn how to make appropriate compromises, they may actually gain strength through defeat.

6. Right Place, Right Time Phenomenon

Sometimes powerful grassroots organization alone is not enough for real legislative change to materialize; in most cases, it takes targeted advocacy in the right place, and at the right time. For example, Uruguay is a relatively secular country, which provided a more welcoming environment for LGBTQ and abortion rights advocates.⁴¹² As soon as the FA, a progressive party, assumed power, advocacy coalitions seized on the opportunity to launch their legislative agendas given the new favorable political and social climate.⁴¹³ When President Vázquez went against the FA's position and vetoed the abortion provisions of the 2008 sexual and reproductive health bill, abortion rights advocates rallied behind a presidential candidate who was more amenable to their goals (President Mujica).⁴¹⁴ More progressive leadership within an already progressive country allowed Uruguay to achieve its position at the “vanguard” of LGBTQ and abortion rights.⁴¹⁵ It is worth noting that in both Argentina and Uruguay, progressive political parties flourished after periods of military dictatorships.⁴¹⁶ Following periods of oppression, advocacy groups can capitalize on new political and social dynamics to strengthen their platforms and gain visibility.

410. See Sempol, *supra* note 237, at 94–96 (providing, for example, that the civil union law imposed five years of uninterrupted cohabitation as an eligibility requirement).

411. See Malkin, *Campaign Aims*, *supra* note 317; Politi & Londoño, *Argentina's Senate Narrowly Rejects*, *supra* note 215.

412. See Sempol, *supra* note 237, at 95.

413. See Encarnación, *supra* note 199; Johnson et al., *supra* note 251, at 51.

414. See Wood et al., *supra* note 273, at 103.

415. See Encarnación, *supra* note 199; see also Romero, *supra* note 270 (characterizing Uruguay as a leader in LGBTQ and abortion rights within Latin America and globally).

416. See Christine Armario, *AP Explains: The Rocky Rise of LGBT Rights in Latin America*, AP NEWS (June 13, 2019), <https://www.apnews.com/31de1cb8536a4aea9cc0b09b64f5dc5e> [<https://perma.cc/G56B-5JCX>] (archived Oct. 25, 2019) (discussing how authoritarian governments throughout Latin America “considered homosexuality a scourge to the silenced” and that gay rights activists suffered disproportionately during these periods of oppression). See generally LEWIS, *supra* note 56.

On the other end, El Salvador is a far more conservative country.⁴¹⁷ Abortion advocates trying to eliminate the total ban in 2018 were conscious of this unfavorable political climate.⁴¹⁸ Now that a more conservative assembly is in office, abortion rights advocates will likely halt legislative mobilization efforts until the next election cycle.⁴¹⁹

Therefore, it is imperative for activists to know who is on their side, gauge legislative interest, and use recent national and international events to determine when their strategies will be most effective. The “right time” may be different for each movement. For example, in Argentina, President Kirchner was a powerful advocate for same-sex marriage, but she adamantly opposed abortion rights during her presidency.⁴²⁰ Future advocates may lack the benefit of hindsight employed in this Note, but nonetheless, timing is a critical tool that should not be ignored.

7. Framing the Fight

Advocates must be strategic in how their demands are constructed because effective framing will not only engage supporters but also weaken opposition. For instance, same-sex marriage advocates in Argentina borrowed the Spanish model, framing the issue as a matter of “legal equality” to turn the conversation away from “sexuality” and the protection of “traditional notions of family.”⁴²¹ Similarly, advocates for civil union legislation in Uruguay found success in characterizing the bill as a method to catch up to inevitable societal changes, such as the rise in *de facto* unions and nontraditional families.⁴²² The Inter-American Court has likewise framed the issue as one of “equality,” holding that heterosexual and homosexual couples should enjoy one uniform legal system.⁴²³

Additionally, abortion rights activists in Argentina and Uruguay effectively framed abortion rights as a public health issue.⁴²⁴ In El Salvador, abortion rights advocates often frame the issue as a matter of justice, fighting against the unjustified imprisonment of women charged with abortion and aggravated homicide.⁴²⁵ Abortion rights

417. See CORRALES, *supra* note 38, at 8, 12, 21.

418. See Malkin, *Campaign Aims*, *supra* note 317.

419. See *id.*

420. See Tabbush et al., *supra* note 177, at 83 (noting Kirchner’s divergent position on the two issues).

421. Friedman, *supra* note 169, at 29; see also Tabbush et al., *supra* note 177, at 94–95.

422. See Johnson et al., *supra* note 251, at 71; Sempol, *supra* note 237, at 93–95.

423. See Advisory Opinion OC-24/17, *supra* note 16, ¶¶ 223–25; Rep. Inter-Am. Ct. H.R. 2017, 117–18.

424. See Labendera et al., *supra* note 277, at S8; Pomeraniec, *supra* note 1; see also Smink, *supra* note 223 (discussing Argentina and Uruguay’s treatment of maternal morbidity and unsafe abortions as public health crises).

425. See Viterna & Bautista, *supra* note 349, at 91.

advocates and legislators in all three countries could benefit from more discourse on the internationally recognized rights to privacy and confidentiality, in order to give their positions international legitimacy.⁴²⁶ Successful framing creates a middle ground between advocates and opponents. Therefore, a powerful message that appeals to both sides should be at the foundation of any social movement.

8. International Outcry as a Platform

As mentioned above, there are numerous international treaties and conventions addressing LGBTQ and abortion rights, but these internationally constructed rights often lack visible domestic force. The Inter-American Court, the UN, and other international intergovernmental organizations may need to take a more active role in defending these rights. Domestic courts and legislatures should also do more to enforce the treaties and conventions to which their countries are signatories. The Inter-American Court is in a unique position as an enforcer of human rights within Latin America. Countries following the compulsory jurisdiction of the Inter-American Court should take advisory opinions more seriously and implement measures to prevent future liability in contentious cases.⁴²⁷ Further, countries who want to serve as transnational defenders of human rights should bring more cases to the Inter-American Court to strengthen the Inter-American Convention and build a more cohesive OAS.

In addition, national movements can be strengthened by indirect or direct support from other countries. This support can come in many forms, such as modeling successful advocacy (e.g., Ireland's monumental abortion vote) or domestic protests (e.g., neighboring countries protesting in support of Argentina's proposed abortion law).⁴²⁸ When human rights movements transcend domestic borders, the international community can put powerful pressure on national legislatures. This tool of putting international pressure on national legislatures has the potential to shape domestic laws in a piecemeal fashion, but over time, this tool could also dramatically redefine global norms.

426. See Convention on Human Rights, Nov. 22, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (recognizing some of these fundamental rights).

427. See Alvarado, *supra* note 17 (explaining that Costa Rica's Attorney General mandated that Costa Rican judges must comply with the Inter-American Court's advisory opinion).

428. See Booth & Ferguson, *supra* note 114 (discussing Ireland's monumental vote eliminating the constitutional abortion ban); O'Loughlin, *supra* note 114; Watson, *supra* note 216 (noting that in the weeks leading up to Argentina's abortion vote, there was a wave of protests in neighboring countries).

B. *The Toolkit in Practice*

This toolkit provides some explanation for why the LGBTQ and abortion rights movements have progressed at different speeds and strengths among Latin American countries. These tools are not universal and may not work for every country, but establishing strategies for change that are broad in scope can help Latin America progress as a region. As seen by the divergence in policies among neighboring countries, there are multiple opportunities for Latin American countries to learn from one another's successes and failures. This toolkit captures only some of these lessons—but this toolkit provides at least some trajectory for the region at large.

IV. CONCLUSION

Undoubtedly, the LGBTQ and abortion rights movements have come a long way in Latin America, and on a global scale, but the fight is far from over. Throughout Latin America, many LGBTQ citizens still face discrimination and violence, and in most jurisdictions homosexual couples are not afforded the same legal relationship rights as heterosexual couples. Similarly, many pregnant women in Latin America are not afforded even the basic rights of autonomy, privacy, and confidentiality, and further, often face harsh criminal sentences for suffering natural obstetric complications. Throughout the region, same-sex relationship rights have progressed with more fervor than abortion rights, but both of these movements provide valuable lessons going forward. This “transnational toolkit” for social and political change can be used for each movement and adapted to fit the unique conditions of each country. If activists can learn how to better develop and apply new strategies, and use defeat to fuel momentum, there is great potential for both the LGBTQ and abortion rights movements to flourish in Latin America.

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