

## Why Hasn't Abortion Been Decriminalized in Latin America?

Abortion is one of the most thorny policy problems faced by modern democracies. Few other issues provoke comparable moral outrage and political polarization. Feminist and liberals see abortion as a question of individual liberty, privacy, and public health; social conservatives maintain that prohibitions on abortion are necessary to protect human life, defend human rights, and uphold moral and family values. Abortion thus involves a “clash of absolutes” (Tribe 1992) between which there is seemingly little ground for compromise. Beneath the rhetoric and the ideology, however, serious public health questions surround the problem of abortion. In countries where abortion is illegal, many women undergo the procedure in clandestine circumstances at great risk to their health. Complications from botched abortions are a leading cause of maternal mortality in many countries and produce a major drain on the public health system. The black market in illegal abortions contributes to corruption and a lack of respect for the rule of law. The problem of abortion demands urgent resolution, yet there is little political will to entertain serious debates about decriminalization.

In Latin America, with the exception of Cuba, the legal status of abortion has changed very little since the promulgation of modern criminal codes in the late nineteenth and early twentieth centuries. These codes criminalized abortion in general, but most did not punish people for performing abortions when the pregnancy threatened the mother's life (“therapeutic” reasons). A large number of countries exempted from punishment “compassionate” abortions (if the pregnancy resulted from rape), and some countries permitted abortions in the event of fetal abnormalities. Only one country, Uruguay, admitted abortion on “social” grounds (though the criminal code of the Mexican state of Yucatan also admits “social” abortions).

The continuing criminalization of abortion in Latin America is puzzling for several reasons. First, the vast majority of Western European and North American countries liberalized strict abortion laws between the late 1960s and the 1980s. In the midst of these global abortion policy changes, laws in

Latin America stayed the same and in some cases grew even more restrictive. Second, at around the same time, Latin American countries introduced legal reforms pertaining to the rights and responsibilities of spouses in marriage, divorce, domestic violence, political participation, and labor law, among others. Abortion was virtually the only gender issue area where major change did not occur. Finally, the restrictive nature of the region's abortion laws in the late twentieth century contrasts to the early twentieth century, when several Latin American countries were vanguards in the field of abortion law. In 1922, Argentina became one of the first countries in the world to declare that abortion would not be punished when performed after rape. Brazil, Mexico, Uruguay, and Cuba then copied the Argentine law during criminal code reforms of the 1930s (Jiménez de Asúa 1942). Most European Catholic countries, including France, Spain, Italy, and Portugal, did not authorize post-rape abortions until the 1970s and 1980s. Latin American countries, in summary, moved from world vanguards of abortion liberalization to world laggards.

Why hasn't abortion been decriminalized in Latin America? This chapter analyzes the experiences of Argentina, Brazil, and Chile in an attempt to answer this question. Even though feminist reproductive rights networks have grown and gained influence under democratic politics, the transition to democracy has coincided with great efforts by antiabortion movements and the Roman Catholic Church to preclude United Nations conferences from endorsing abortion rights and to oppose abortion reform in domestic politics. The strength of antiabortion movements combines with public ambivalence about abortion to increase the political costs associated with abortion advocacy and decrease the benefits. Fearing the wrath of antiabortion movements and the Church, and judging that little will be gained politically by supporting decriminalization, most parties and politicians attempt to steer clear of the abortion issue. Unlike policy changes on other gender issues, such as domestic violence, sex equality in the family, and divorce, there is less consensus about the need to reform restrictive abortion laws, and the coalition supporting change is therefore relatively small.

Beyond the general failure to decriminalize, there are differences in the legal framework of the three countries. Both Brazil and Argentina permit abortions for women who have been raped and when the pregnancy threatens the life of the pregnant woman ("therapeutic" abortions); Chile does not permit abortion under any circumstance. Chile had permitted therapeutic abortions until 1989, when the Pinochet government changed the Health Code to ban all abortions. The political climate and debates about abortion in the three countries also vary, with Brazil the most liberal, Chile the most conservative, and Argentina occupying a middle position. In Brazil, a "legal abortion" movement has set up services in seventeen hospitals to see that victims of rape have access to abortion, and several bills to liberalize abortion have been considered in Congress. Debates about abortion have occurred in

the Brazilian press, and the National Human Rights program has officially declared abortion to be a public health problem. Argentina is the middle case. There is almost no discussion about liberalizing abortion, but conservative attempts to ban abortion under all circumstances have failed. Chile is completely closed to discussions about liberalizing abortion: Since the transition to democracy, only one bill to reinstate therapeutic abortion has been presented in Congress. Most parliamentary debate on abortion centers on conservative proposals to increase the penalties for abortion-related crimes.

A brief note on terminology is in order. To “decriminalize” abortion means to legalize the practice. To “liberalize” abortion means to make laws less restrictive. Liberalization *stretches* existing law by adding more grounds for legal abortion. For example, a country that allows abortion only for risks to the mother’s life or in the event of rape would liberalize by permitting abortion if the child would be born handicapped, if the pregnancy threatened the pregnant woman’s mental health, if the pregnant woman could prove financial hardship, and so on. The puzzle in Latin America concerns not just the uniform failure to decriminalize, but also the inability of every country except for Cuba to stretch the grounds for legal abortion.

The abortion policy stalemate in Argentina, Brazil, and Chile contrasts to the early twentieth century, when Argentina and Brazil pioneered innovations in abortion legislation. This chapter begins with a brief discussion of this early history of abortion politics. The second part of the chapter analyzes the global and regional context of contemporary abortion politics to identify reasons for Latin America’s failure to decriminalize abortion. The next three parts describe abortion politics in the 1990s and early 2000s in Brazil, Argentina, and Chile and explores differences in activities of the feminist reproductive rights movement. The pro- or antiabortion position of the president and the presence or absence of allies in Congress shaped the movement’s strategies. Brazil’s progressive position on reproductive rights in international forums, the unwillingness of Brazilian presidents actively to oppose abortion, and the availability of allies in Congress from the Workers’ Party generated more space for the movement to promote abortion rights than in Argentina and Chile. In these latter two countries, presidents were more explicit opponents of abortion, and virtually no legislators or parties in Congress were willing to raise debates about liberalizing abortion.

### Early History of Abortion Politics

In the context of the early twenty-first century, Latin American abortion laws seem conservative. At the time of their crafting, the laws were bold. As mentioned earlier, Latin American countries were among the first in the world to permit abortions for women who had been raped. Why? In much the same way that international agreements and ideas influenced the experts who drafted civil law reforms during military governments of the 1960s

and 1970s, cosmopolitan theories were brought to bear on the criminal codes promulgated by the Radical Party governments of 1920s Argentina and the dictatorship of Getulio Vargas in Brazil in the 1930s and 1940s. Policy changes were accomplished through reasoned deliberation among elites, primarily upper-class male criminologists, doctors, and politicians who were motivated by new ideas in medical science and criminology and concerns about judicial corruption and public health. The public was hardly involved. What's more, Roman Catholic bishops did not contest early, liberalizing reforms.

Latin American abortion debates were influenced by a growing international movement for "compassionate" abortion provoked by the widespread rapes of women by invading armies during World War I. At the time, various courts in France absolved women of the crime of abortion; some even forgave infanticide. The single most important influence on the development of legislation in Latin America, however, was the work of Spanish criminologist Luis Jiménez de Asúa. Jiménez de Asúa became a full professor of criminal law at the University of Madrid at age twenty-two, wrote scores of books, and held honorary doctorates and professorships from universities in almost every Latin American country. Through his publications and speeches at regional and international meetings, Jiménez de Asúa spread the news of contemporary developments in criminology. After General Francisco Franco assumed power at the conclusion of the Spanish Civil War, Jiménez de Asúa emigrated to Buenos Aires where he remained until his death in 1970. His prolific academic work helped diffuse knowledge about European legal systems throughout Latin America (Cury Urzua 1992: 138). Jiménez de Asúa's proposals about abortion were analyzed by the most respected criminologists in Argentina, Brazil, and Chile, and cited in virtually every criminal code reform in the region (Hungria 1942; Ministerio de Justicia 1929; Soler 1945). Even those who did not agree with his proposals felt the need to respond to them (Ribeiro 1942, 1973).

In Argentina, the new criminal code approved in 1922 permitted abortion for reasons of medical necessity and rape, including the presumed rape of mentally handicapped women. The Senate Commission charged with finalizing the 1922 Criminal Code cited Jiménez de Asúa's work and recognized that the new code's abortion provisions would amount to "a true innovation in criminal legislation." In approving "compassionate" abortion, the commission felt that it would shield women from the anguish of mothering the children of men who had sexually assaulted them. Eugenics was another motivation. Argentine senators wanted to avoid the birth of physically or mentally handicapped children. As the commission noted in its justification for the new legislation:

The issue is seductive and its elaboration in this report may carry us far, leading us into the domain of eugenics, whose study is held to be of transcendental importance for

some members of this Commission and whose problems should be of profound and intense interest to the legislators, educators, sociologists, and jurists of our country. Even criminal science is concerned about the application of [eugenic] principles to more effectively combat the rise in delinquency. . . .

But now is not the moment to make, in this report, extensive remarks about eugenics and its relationship to delinquency. It shall be enough to say, to finish with this point, that even if the sterilization of criminals is not accepted by science, by criminal law, and by social consensus . . . *it is indisputable that the law must permit abortion when it is practiced, with medical intervention, with the objective of perfecting the race.* The problem was raised in Europe during the last war due to the rape of numerous Belgian women by drunken, uncontrollable, or criminal soldiers. (Senado de la Nación 1919: 84) (emphasis added)

In the first decades of the twentieth century, ideas about eugenics were pervasive in the southern cone of South America. Eugenicist notions inspired immigration quotas favoring Northern Europeans and helped give rise to national ideologies of racial mixture and whitening, particularly in Brazil (Stepan 1991).

Argentina's abortion law was copied verbatim from a draft bill submitted for consideration in Switzerland by several lawyers in 1916.<sup>1</sup> Though the bill was not enacted in Switzerland, it served as the model for Argentina and other Latin American countries. In fact, the ambiguity of the translation from French and German provoked decades of arguments among Argentine lawyers, some of whom argued that the law permitted abortions only for mentally ill women.<sup>2</sup> At issue was the phrasing of the last part of Article 86, which states that abortion is unpunishable "if the pregnancy results from a rape or an assault on the chastity [*un atentado al pudor*] committed against a mentally handicapped or mentally ill woman [*mujer idiota o demente*]." The question was, does the clause refer to one or two objects? That is, is abortion permitted for a "normal" woman who has been raped, or merely

<sup>1</sup> Between 1912 and 1916, members of a technical commission meeting in Lugano debated various proposals about abortion law, and finally issued a statement recommending that abortion be decriminalized "if the pregnancy results from a rape, from an assault on the chastity of a mentally disturbed, unconscious, or inabilitated woman, or from incest." Due to pressure from the Catholic party, however, the federal government rejected these recommendations, and Switzerland ended up authorizing abortion only in the event of medical necessity (Jiménez de Asúa 1942: 344–7).

<sup>2</sup> Most experts, including Jiménez de Asúa and Argentine thinkers Juan Ramos and Sebastian Soler, believed that the clause authorized abortions in the event of a rape of a "normal" woman *and* the rape of a mentally handicapped woman. Other experts, including prominent criminologist José Peco, held that the article permitted only eugenic abortions performed on mentally handicapped or mentally ill women who had been raped. (Peco was not personally opposed to compassionate abortions; rather, he believed that the article, as phrased, did not authorize them. In fact, the draft criminal code revisions Peco submitted to the Argentine Congress in 1942 proposed that abortions after a rape or act of incest be decriminalized, as long as they were performed during the first three months of pregnancy (Peco 1942: 245).)

for a mentally handicapped or mentally ill woman who has been subject to rape or assault? If the former, why not make one simple reference to rape, which would by extension include cases of mentally handicapped women? If the latter, why does the law repeat itself, since surely a mentally handicapped woman cannot get pregnant from an “assault on chastity” [*atentado al pudor*] that does not involve vaginal penetration?

Apparently, the Argentine Senate worked with the French translation of the German text of a draft bill written by several Swiss criminologists in 1916. The original text followed German law by using the two German words for rape: violent rape (*Notzucht*) and the rape of a mentally handicapped or mentally ill woman (*Schändung*). The French version translated *Schändung* as “*attentat à la pudeur d’une femme idiote, aliénée, inconsciente ou incapable de résistance.*” The Argentine Senate translated the French translation as “*atentado al pudor cometido sobre una mujer idiota o demente.*” If *Schändung* had simply been translated as “rape,” which would have been more accurate, since Spanish has only one word for rape, the second clause of the abortion article would have read as follows: “if the pregnancy results from a rape or rape committed against a mentally handicapped woman.” Read in the revised manner, the law refers to two rapes of two women, not merely mentally handicapped or mentally ill women (Soler 1945: 130–1).

Various attempts were made in Argentina to clarify Article 86. Criminal code bills submitted in 1937 by Eduardo Coll and Euzebio Gomez and in 1942 by José Peco proposed to redraft the abortion articles to make it clear that they included any and all rapes (Peco 1942; Ribeiro 1942: 81). A definitive reform was not enacted, however, until the military government of General Juan Carlos Onganía assumed power in 1966. As discussed in Chapter 3, the Onganía administration spearheaded a massive overhaul of the country’s laws. Justice Minister Conrado Etchebarne organized small commissions of the country’s most prominent jurists to propose reforms, the contents of which were, for the most part, forwarded to and enacted by Onganía without political interference. The commission charged with proposing criminal law reforms consisted of Sebastian Soler, Carlos Fontan Balestra, and Eduardo Aguirre Obaro.

Among the various articles the commission singled out for revision was Article 86, dealing with the conditions of unpunishable abortion. To make the law absolutely clear, the new article read that abortion would not be punished “if the pregnancy results from a rape for which a criminal suit has been initiated. If the victim of the rape is a minor or a mentally handicapped or mentally ill woman [*mujer idiota o demente*] the consent of her legal representative is required” (Ley 17.567 of 1967). In describing the motives behind the revision, the committee declared: “This was one of the provisions of the Code that gave rise to the most disparate interpretations, above all for including the phrase ‘*o de un atentado al pudor cometido sobre una mujer idiota o demente.*’ We leave it perfectly clear that abortion is unpunishable when the

pregnancy results from rape and that it is performed under the conditions specified by the law” (Soler, Fontán Balestra, and Aguirre Obarrio 1967: 2881). In one sense, the Onganía reform made the law stricter by requiring that a criminal suit be initiated for the abortion to be legal. On the other hand, it is indisputable that the reform clarified, in the liberal direction, the circumstances under which abortion would go unpunished.

Over the next two decades, the fate of the abortion article was tied to the various changes of political regime suffered by Argentina. Ironically, while military governments promoted a more “liberal” version of the abortion law, democratic governments restored the law to its historic, more ambiguous version. In 1973, a democratically elected civilian government revoked General Onganía’s liberalizing criminal code reform. After assuming power, the government of Héctor Cámpora (a stand-in for former President Juan Perón, who was making a political comeback) revoked all of the criminal law reforms that had been issued during the previous military administrations. Then, the military government of the Proceso de Reorganización Nacional promulgated a new criminal code reform after seizing power in 1976. The Proceso’s reform sought to reinstate the “scientific and technical advances” introduced by the Onganía administration, including the more liberal version of the abortion article. On the darker side, the same reform reinstated the death penalty in Argentina and prescribed life prison sentences for those convicted of subversive activities (Ley 21.338, sanctioned on June 25, 1976).

After the transition to democracy in 1983, the Radical Party government of Raul Alfonsín promulgated the much-celebrated “Law of the Defense of Democracy” (Law 23.077, sanctioned on August 9, 1984). Alfonsín’s law revoked all criminal laws enacted under prior military governments and established procedural norms for the investigation and trial of human rights violations committed by the Proceso. One consequence of the Alfonsín reform was that Article 86, dealing with unpunishable abortions, was restored to its original, ambiguous form. In the 1990s, the historic debate over the proper interpretation of Article 86 continued. An authoritative doctrinal text by Carlos Fontan Balestra (1991) alleges that the article authorizes abortions performed for all women who have been raped; another text by Carlos Creus (1995) holds that the article permits abortions for mentally handicapped or mentally ill women only.

Nelson Hungria, the criminologist who wrote large parts of the Brazilian Criminal Code of 1940, remarked that the Argentine code of 1922 was one of the first in the world to condone the principle of compassionate abortion, and “our code followed its example” (1942: 279). Criminal codes promulgated in Mexico in 1931, Uruguay in 1933, and Cuba in 1936 also followed the Argentine model (Jiménez de Asúa 1942: 341). In Chile, a 1929 bill proposed decriminalization of compassionate abortion. The proposal, commissioned by a decree issued by President Carlos Ibáñez in 1928, mentioned theories

about “compassionate” abortion elaborated by Luis Jiménez de Asúa at the Third Panamerican Scientific Congress in 1924 (Ministerio de Justicia 1929). Yet the reform was never enacted, and to this day, Chile’s 1875 Criminal Code is still in effect.

It is noteworthy that these reforms were enacted at all, given that any exception to prohibitions on abortion contradicts Church doctrine, and that governments responsible for the reforms had close ties to the Church. The government of Getulio Vargas enacted Brazil’s abortion reforms of 1940, and Vargas’s regime cooperated with the Church on many issues, even declaring marriage indissoluble in 1934, as noted in Chapter 4. The military government of General Juan Carlos Onganía in late 1960s Argentina, which upheld permission for compassionate abortion and clarified the law to eliminate ambiguities in its application, was, like the Vargas regime in Brazil, on good terms with the Church.<sup>3</sup> Perhaps because these governments in power upheld the idea that abortion was morally wrong and should be treated as a crime, Roman Catholic bishops did not speak out when governments stretched abortion laws. To be true to its principles, which oppose abortion under any circumstances, the Church should have contested early changes. Because abortion was framed as a technical issue, however, the Church may have felt that its general position was safe. As we see below, however, Church opposition to abortion grew more intense in reaction to the threat posed by the feminist reproductive rights movement and the liberalization of abortion in North America and Europe.

### Why Hasn’t Abortion Been Decriminalized?

The 1990s and early 2000s would seem to have been a propitious time to change old laws restricting abortion, as the 1980s and 1990s saw the growth of feminist reproductive rights movements at the global, regional, and national levels and the consolidation of international norms on reproductive rights. The reproductive rights movement, which links think tanks, activist groups, private foundations, and, increasingly, international population agencies, seeks to expand women’s decision-making autonomy over issues of reproductive and sexual health, including abortion. The movement worked with national delegations and U.N. officials to see that reproductive rights were recognized in the agreements reached at the International Conference on Population and Development in Cairo in 1994 and the Fourth World Conference on Women, held in Beijing in 1995.<sup>4</sup> Both the Cairo and

<sup>3</sup> In fact, when revising the civil code provisions on marital separation, the Onganía government incorporated suggestions made by Church officials.

<sup>4</sup> Reproductive rights movements were also active in regional politics, particularly at the string of Latin American Feminist Encuentros, held biannually beginning in 1981, and the regional preparatory meetings organized for the United Nations’ Cairo and Beijing conferences (Sternbach et al. 1992). At the fifth Latin American feminist Encuentro held in Argentina in

Beijing documents committed governments to address the public health consequences of unsafe abortion, to help prevent unwanted pregnancies, to see that abortion is safe in countries where it is legal, and to provide safe medical assistance to women with abortion-related complications. The Beijing document also included a phrase calling on governments to “consider reviewing laws containing punitive measures against women who have undergone illegal abortions” (paragraph 106k, Platform for Action).

U.N. plans of action are statements of principle that, though they represent political commitments, are not binding on signatory countries. Yet the programs are of tremendous normative importance. The Cairo and Beijing documents, for example, helped legitimize feminist arguments in domestic politics and served as instruments of consciousness raising and political mobilization. As one activist put it:

[t]he Cairo Conference legitimized reproductive rights as a human rights concept. . . . If someone asks: what are reproductive rights? you can tell them. And this is not just your opinion, but a definition that has been debated and agreed to by a wide variety of countries and cultures.<sup>5</sup>

Feminist achievements in the international sphere were not uncontested, however. Tremendous controversy surrounded discussions on reproductive and sexual health at Cairo and Beijing when a coalition of conservative forces (including the Vatican, some Muslim countries, and Argentina) attacked the use of the word “gender” and attempted to eradicate clauses about reproductive rights from the final documents (Franco 1998).<sup>6</sup> At the follow-up conferences – Cairo Plus Five and Beijing Plus Five – held in 1999 and 2000, respectively, feminists tried to incorporate more progressive statements on abortion into the final documents, while antiabortion groups sought to backtrack on the agreements reached in 1994 and 1995. To block inclusion of abortion-related clauses, conservative groups attempted to preclude the adoption of *any* final document (Corrêa 2000: 1).<sup>7</sup>

1990, participants organized the Latin American and Caribbean Health and Reproductive Rights Network and resolved to establish September 28 as the “Day for the Legalization of Abortion in Latin America and the Caribbean.” Every year the day provides an opportunity for the movement to organize demonstrations and seminars to promote abortion rights.

<sup>5</sup> Interview with Sonia Corrêa, Rio de Janeiro, July 31, 1997.

<sup>6</sup> The Vatican, as a permanent nonmember state observer at the United Nations, cannot vote in the United Nations General Assembly but can vote on policy recommendations issued at U.N. Conferences (CRLP 1999).

<sup>7</sup> Brazil and some other Latin American countries played important roles in these debates. In the preparatory meetings for Beijing Plus Five, Latin American countries (with the exception of Honduras and Nicaragua) formed a negotiating block called SLAC (for “Similarly Minded Latin American Countries” or “Some Latin American Countries”). SLAC helped broker an agreement so that both documents recommended, in addition to calling on countries to reconsider punitive laws for abortion, that health practitioners be trained to perform those abortions permitted by law.

Antiabortion activism in U.N. conferences was the product of two important trends in global abortion politics, trends that also help explain Latin America's failure to decriminalize. The first had to do with reform within the Roman Catholic Church. Beginning with his election in 1978, Pope John Paul II promoted changes to enhance the Church's institutional control and coherence, making it a more committed and effective opponent of abortion. The pope placed a high priority on Latin America, where he sought to counter the influence of liberation theology and replace its popular and participatory approach with a "Polish model" emphasizing unity, hierarchy, and discipline (Levine 1990: 35–6). The pope centralized power in the Church, reorganized the Papal Commission for Latin America, appointed theologically conservative bishops to Latin American posts, and took measures to discredit outspoken proponents of liberation theology such as Gustavo Gutiérrez (Peru) and Leonardo Boff (Brazil) (Blofeld 2001; Ghio 1991). These institutional changes increased the Vatican's ability to ensure that increasingly strict official views were reflected at all levels of Church activity. Pope John Paul II took a hard line on divorce, abortion, and birth control at a time when some sectors of the Church were calling for greater openness. Some observers have speculated that John Paul II's rigorous defense of traditional sexual morality stems from his background in the Polish Church. For Polish bishops operating during Communist rule, when the state controlled virtually all of civil society, defense of the family amounted to a defense of one of the last realms of human freedom (Whale et al. 1980: 40–1). Sexual morality, moreover, was one of the main points of conflict between the Church and the communist state that counted on abortion as its main method of birth control. Thus, though never an easy matter, liberalizing abortion laws became considerably more contentious after Karol Wojtyła became Pope.

The second trend was the growth of antiabortion movements. When, in the 1960s and 1970s, tens of Western European and North American countries modified their laws on abortion, antiabortion groups were largely dormant. The 1973 United States Supreme Court decision in *Roe v. Wade*, however, prompted a massive conservative outcry and sowed the seeds of the global antiabortion movement. Few policy changes have incited a comparable degree of outrage. For conservatives, *Roe v. Wade* was a "bolt from the blue," for it took a belief they assumed to be a basic fact of life – that the embryo is a person – and "threw it into the realm of opinion" (Luker 1984: 140). Conservatives saw the legalization of elective abortion as an assault on motherhood, sex roles, and the origins of human life, and maintained that the denial of these values in one society would represent a defeat for all societies. Antiabortion activists organized to fight and defend their views in multiple arenas – in the courts, the legislature, outside clinics, and at U.N. conferences, and over Medicare funding, foreign aid, and federal research money. U.S. foes of abortion also helped organize similar movements in

Latin America. The antiabortion network Human Life International (HLI) has a regional office in Miami and affiliates in virtually every Latin American country.

Latin American antiabortion activists have attempted to manipulate principles of human rights to their advantage. Arguing that democratic states seeking to protect human rights must defend innocent fetal life and forbid abortion, opponents of abortion maintain that the right to life at conception is the logical fulfillment of international norms on human rights. Former Argentine Justice Minister Rodolfo Barra, for example, argues that constitutional protections for fetal life are necessary to implement the general principles established in the Declaration of Human Rights endorsed by the United Nations in 1948 (Barra 1997). In this way, antiabortion claims resonate with the human rights discourse deployed by new democratic governments to distinguish themselves from authoritarian predecessors. Antiabortion claims couched within a human rights discourse may have a stronger purchase in societies with bitter memories of authoritarian and totalitarian rule. To prevent a return to the past, when state power was used arbitrarily against human life, postauthoritarian societies have placed particular emphasis on laws to protect the weak and the innocent. In Germany in 1976, for example, the Constitutional Court struck down a liberal abortion law, explaining that constitutional protection of all forms of life was an explicit response to the experience of the Holocaust (Glendon 1987: 6).

The antiabortion movement has successfully resisted domestic proposals to liberalize abortion and helped create a climate in which few people are willing to advocate abortion rights. In Brazil in 1993, for example, Senator Eva Blay of São Paulo introduced a bill to Congress that would decriminalize abortions performed during the first trimester of pregnancy and guarantee women access to abortions in the public health system. Blay organized a seminar in Congress and invited prolife and prochoice speakers from all over Brazil to participate. To protest the seminar and the bill, an antiabortion group amassed in the corridors of the Senate, waved banners, and insulted the senator, who called congressional security to escort her out of the building. Some senators told Blay that her abortion bill was important for Brazil and that they were personally in favor of it, but would not endorse it for fear of losing votes.<sup>8</sup> After the return to democracy in Argentina, several bills to liberalize abortion were presented in Congress, but none were discussed in commission or within political parties. As Alberto Maglietti, Radical Party senator and author of one of the bills to decriminalize abortion, recalled: “No one has demonstrated interest in considering this bill. It is an impolitic issue for the political environment of our country. To speak publicly in favor of abortion is impolitic.”<sup>9</sup>

<sup>8</sup> Interview with Eva Blay, Sao Paulo, September 5, 1997.

<sup>9</sup> Interview, Buenos Aires, July 21, 1998.

Nonetheless, Latin American countries have succeeded in enacting legislation on other “impolitic” and controversial gender issues. Divorce is a good example. As Chapter 4 showed, divorce was illegal in Brazil and Argentina until the 1970s and 1980s, largely due to Church opposition and legislators’ fear of the Church. During military rule in Brazil and shortly after the democratic transition in Argentina, big coalitions of reformers organized in civil society and Congress to demand divorce. In response, the Church threatened politicians and created a climate of intimidation reminiscent of its behavior on abortion. Bishops and priests lobbied legislators, spoke against prodivorce politicians from the pulpit, and organized public demonstrations. In spite of this pressure, divorce was made legal in Brazil in 1977 and in Argentina in 1983. The eruption of conflict between the government and Church over human rights, economic policy, and/or education opened a window of opportunity for reformers to legalize divorce.

Why hasn’t this occurred in the case of abortion? Put another way, why could reformers defeat the Church on divorce but not on abortion? The abortion issue generates a unique degree of political polarization and moral outrage. Opponents of abortion see their role as an absolutist defense of human life, a position that leaves little room for political compromise. Though opponents of divorce felt strongly about the need to defend the institution of indissoluble marriage, this view was not as firmly held nor as widely shared as the idea that abortion involves the taking of innocent life. Moreover, the movement backing legal divorce was bigger than the abortion rights movement. Divorce reformers included politicians from across the political spectrum, lawyers, judges, professional associations, feminists, and members of the media. Public opinion polls showed overwhelming public support for divorce. The coalition for abortion rights, by contrast, has rarely involved more than a few isolated politicians, some health practitioners, and the feminist reproductive rights movement, and public opinion is more ambivalent.

Several features of the sociology of abortion in Latin America make it difficult to mobilize a big coalition for abortion reform. Though abortion rates are high, antiabortion laws are rarely enforced and public opinion largely condemns abortion. Because abortion is illegal, it is difficult to gather data on the practice. Data in Table 6.1 are estimates based on hospital admittances for abortion complications, interviews with medical practitioners, and surveys of women about family planning.

Argentina was not included in the multicountry study. Still, estimates suggest that women undergo between 350,000 and 400,000 illegal abortions per year (Durand and Gutiérrez 1998: 33). Latin American abortion rates are higher than in other industrialized countries. Based on data from around 1995, the Alan Guttmacher Institute estimated the abortion rate in Latin America to be 37 per 1,000 women aged fifteen to forty-four. In the United States, the rate was 23 per 1,000 women; in Canada, 16; in Germany, 8; in England, 16; and in the Netherlands, 7 (Alan Guttmacher Institute 1999).

TABLE 6.1. *Incidence of Abortion in Latin America*

| Country            | Annual number of abortions | Rate per 1,000 women | Average number of abortions per woman | Percentage of pregnancies that end in abortion |
|--------------------|----------------------------|----------------------|---------------------------------------|--|
| Brazil             | 1,433,350                  | 36.5                 | 1.3                                   | 31   |
| Chile              | 159,650                    | 45.4                 | 1.6                                   | 35   |
| Colombia           | 288,400                    | 33.7                 | 1.2                                   | 26   |
| Dominican Republic | 82,500                     | 43.7                 | 1.5                                   | 28   |
| Mexico             | 533,100                    | 23.2                 | 0.8                                   | 17   |
| Peru               | 271,150                    | 51.8                 | 1.8                                   | 30   |
| Total              | 2,768,150                  | 33.9                 | 1.2                                   |  |

Source: Alan Guttmacher Institute (1994).

Punitive laws on abortion are hardly ever enforced. In Brazil, for example, women are rarely prosecuted for having an abortion, and even when the police are called upon to investigate an illegal abortion, most cases are rejected by the courts and archived. Some 53 percent of a sample of 765 abortion cases heard in a Sao Paulo court between 1970 to 1989 were archived. Only 4 percent of the cases led to a conviction (Ardaillon 1997: 111). Based on her laborious analysis of court records of abortion trials, Ardaillon concludes that society is not interested in punishing abortion: "It is as if there is an enormous social investment in [abortion's] prohibition and little interest in its de facto criminalization" (1997: 105). Even when cases are brought to trial, juries and judges are seldom willing to convict. In Chile, on the other hand, there is greater willingness on the part of doctors, nurses, prosecutors, and judges to enforce laws on abortion. Between 1980 and 1989, some 1,939 people were prosecuted for abortion in Santiago's courts (Casas 1996).

Lax enforcement means that the middle classes have access to safe abortions in private clinics. Consequently, many Latin American observers do not see a real "need" for the liberalization of abortion laws.<sup>10</sup> (By contrast, prohibitions on divorce cut directly at middle-class interests.) Latin America's poor, who endure abortions in clandestine and dangerous circumstances, are the primary victims of abortion's illegality. Poor women in urban and rural areas tend to depend on untrained providers or traditional methods known to induce abortions, and are susceptible to infection, hemorrhage,

<sup>10</sup> This statement is my personal observation based on extensive field research in several Latin American countries (Argentina, Brazil, Chile, Mexico, Peru), interviews with hundreds of people in the field and at international conferences, and shorter trips to other countries (Costa Rica, Nicaragua, Venezuela).

TABLE 6.2. *Percent of Respondents Who Approve of Abortion Under the Circumstances Specified, by Country, Early 1990s*

| Country          | Risk to mother's health | Child born handicapped | Mother unmarried | Couple do not want more children |
|------------------|-------------------------|------------------------|------------------|----------------------------------|
| Argentina        | 77                      | 59                     | 18               | 25                               |
| Brazil           | 84                      | 51                     | 13               | 15                               |
| Chile            | 75                      | 41                     | 7                | 14                               |
| France           | 92                      | 83                     | 24               | 40                               |
| Spain            | 82                      | 72                     | 29               | 31                               |
| United States    | 85                      | 53                     | 28               | 25                               |
| 43-country total | 82                      | 68                     | 31               | 36                               |

Source: World Values Survey.

damage to uterus or cervix, and adverse reactions to drugs (Alan Guttmacher Institute 1994). Whereas just 13 percent of higher income urban women suffer from postabortion complications, 44 percent of poor urban women and 54 percent of poor rural women suffer from complications (*ibid.*). Only around half of these women are hospitalized for treatment of these problems. Thus, it is not surprising that the most vocal proponents of abortion reform are feminist activists with left-leaning tendencies and a concern for social justice.

Though abortion is widespread, surveys show that people tend to disapprove of abortion unless the mother's health is at risk or, more infrequently, in the event of fetal anomaly. Table 6.2 describes results from the World Values survey, a study taken in forty-three countries between 1991 and 1994. (Responses from France, Spain, and the United States are presented for the purposes of comparison.)

National polls conducted in Argentina, Brazil, and Chile lend additional support to these results, for they demonstrate public support for laws that permit abortion on narrow grounds but less support for elective abortion. (Due to the sensitive nature of the abortion issue, there are relatively few surveys on this question.) One survey of 500 Buenos Aires residents revealed that 54 percent favored permission for abortion on narrow grounds, while only 27 percent supported elective abortion (Dubkin 1994: 115). In Brazil, a Datafolha poll conducted in 1997 of São Paulo residents revealed that 56 percent felt abortion laws should stay the same (compared with 37 percent in 1994), while only 21 percent believed that the law should be more permissive (fully 43 percent of those surveyed in 1994 thought the law should be liberalized). Nineteen percent thought abortion should be decriminalized. (In 1994, 18 percent favored decriminalization) (*Folha de São Paulo*, August 28, 1997). In Chile, a poll conducted by a newspaper in 2000 revealed that 78 percent of respondents agreed that abortion should

be permitted if the mother's life is in danger, 55 percent agreed in the case of rape, and 54 percent agreed if the fetus is deformed (Blofeld 2001: 19), suggesting that most people believe that Chile's outright prohibition on abortion should be relaxed.

With the exception of Chile, these public opinion surveys imply little public support for a substantial revision of abortion laws. Moreover, since the illegality of abortion poses little health risk to middle-class women, and abortion-related punishments are rarely enforced, most politicians see little to be gained by jumping onto an abortion rights bandwagon.<sup>11</sup> And there are many costs involved in advocating abortion rights in light of opposition from the Vatican, antiabortion movements, and national bishops' councils. In spite of the efforts of feminist reproductive rights movements and a growing international consensus that punitive abortion laws should be reconsidered, few parties or politicians in Latin America are willing to engage the issue. These common factors help explain the general failure to decriminalize abortion in Latin America. Yet as the following sections of this chapter show, there are important differences in the political climate surrounding abortion in Brazil, Argentina, and Chile. Reproductive rights movements have responded in distinct ways to the abortion stalemate and to the opportunity structures provided by the government in power and the presence of allies in Congress.

### **Brazil: The Emergence of a "Legal Abortion" Movement**

Beginning in the mid-1980s, Brazilian reproductive rights activists organized a nationwide effort to encourage public hospitals to perform those abortions permitted by law (so-called legal abortions). Though the Brazilian Criminal Code of 1940 permits abortions on "compassionate" grounds (that is, for women who have been raped), no administrative procedures existed to allow women who relied on the public health system to have access to abortions under these circumstances. Fearing criminal prosecution, doctors were reluctant to perform abortions on women who had been raped. Without a judge's authorization, how could they be certain that the woman's claims about rape were true and that the abortion was therefore legal? Though the framers of Brazil's criminal code acknowledged the problem of doctors' legal liability when introducing permission for "compassionate" abortion, they neglected to stipulate professional standards for doctors confronted by

<sup>11</sup> Many Latin Americans practice a "double discourse" when it comes to abortion. According to Shepard, "This phrase is widely understood to signify the art of espousing traditional and repressive socio-cultural norms publicly, while ignoring – and often participating in – the widespread flouting of these norms in private. Thanks to the ubiquity of the double discourse, in most Latin American countries the reproductive and sexual choices open to citizens are much wider than the official policies would lead one to believe" (2000: 114).

women whose pregnancies resulted from rape.<sup>12</sup> As a result, most of the burden of verifying the rape fell on doctors, few of whom had the time or the resources for potentially lengthy investigations, and women were left unattended.

The legal abortion movement sought to institutionalize procedures for hospitals to establish the legality of an abortion. Linking feminist reproductive rights activists and NGOs, doctors, gynecologists, and other health practitioners,<sup>13</sup> members of the media, workers in the Ministry of Health, and some congressmen, the movement has been successful in building public awareness about legal abortion and securing some changes. In 1985, the Rio de Janeiro state legislature passed a law requiring public hospitals to attend to legal abortions. At the request of Rio's Archbishop, Dom Eugenio Salles, the state governor vetoed the law, though a Rio de Janeiro municipal ordinance was adopted later in the year with the same purpose (Linhares Barsted 1993). In 1989, the São Paulo city government under Workers' Party mayor Luiza Erundina created a service for legal abortions at the Jabaquara Hospital. (The service was later established in other hospitals around the city.) At Jabaquara, a commission of doctors and social workers was appointed to receive petitions from women seeking abortions and, on the basis of supporting documentation (a police report and medical exam verifying a rape, for example) and the period of gestation, to authorize or decline the abortion. Explicit police authorization was not required (Araújo 1993; Dacah 1993). Between 1989 and 1996, some 311 women requested abortions at the Jabaquara Hospital, and 109 abortions were performed. The primary rationale for denying the abortion was that the pregnancy had advanced beyond twelve weeks (*Fêmea*, August 1997). By the end of 1999, sixteen public hospitals in Brazil had introduced legal abortion services, several municipalities had approved laws authorizing such services, and approximately 400 legal abortions had been performed (Neto 1999; *Fêmea*, August 1999).

<sup>12</sup> The issue of doctor liability was amply considered by criminologists in the early twentieth century. Nelson Hungria, author of Brazil's criminal code, wrote that "to avoid abuses, a doctor should act only with conclusive proof of the alleged rape unless the event was widely known or the rapist had already been convicted" (1942: 274). He continued: "For his or her own safety, the doctor should obtain the consent of the woman or her legal representative in writing or in front of credible witnesses. If there is a suit against the rapist, it would be advisable to consult the judge and public prosecutor . . ." (ibid.). Spanish criminologist Jiménez de Asúa acknowledged that without administrative procedures, the best and most reputable physicians would be the most reluctant to risk their careers by performing abortions, unfairly leaving women to abort on their own (1942: 393-4).

<sup>13</sup> The Brazilian Federation of Gynecological and Obstetrical Societies created, in 1996, a National Commission on the Legal Interruption of Pregnancy (Comissão Nacional de Interrupção da Gestação Prevista por Lei) and organized an Interprofessional Forum on the Realization of Legal Abortion (Fórum Interprofissional sobre Atendimento ao Aborto Previsto por Lei) to orient medical professionals (Neto 1999: 1).

To generalize these experiences for Brazil as a whole, two legislators from the Workers' Party introduced a bill (called the "legal abortion" bill) to the national Congress in 1991. The bill would require *all* of the country's public hospitals to perform abortions on women who had been raped or whose lives were at risk. Following the example of the municipal regulations established in São Paulo, the bill establishes that women can petition for an abortion by presenting either a police report or a report of an official medical exam (attesting to the occurrence of a rape) to a local health board. Provided that the board grants its approval, the local public health service would have to perform the abortion within seven days of the presentation of the petition.<sup>14</sup> The bill received support from feminist groups, labor unions, medical associations, members of the judiciary, the National Health Council, National Council on Population and Development, and even some Protestant priests. Feminist groups also organized a nationwide campaign in support of the bill, part of which involved gathering signatures (in places as exotic as Ipanema Beach in the city of Rio de Janeiro) on thousands of postcards to send to Congress.

Not surprisingly, the legal abortion bill has provoked vehement opposition from the Roman Catholic Church and antiabortion groups, with the latter lobbying fiercely for its defeat, even sending members to hold prayer services in the halls of Congress. The Brazilian Bishops' Council (CNBB) made a passionate appeal to legislators to vote against the bill, declaring that abortion "is always a grave and unacceptable assault on the fundamental right to life." Citing Pope John Paul II's encyclical *Evangelium vitae*, the bishops declared that whatever reasons, "as grave and dramatic as they seem, can never justify the deliberate suppression of an innocent being" (CNBB 1997). Supporters framed the bill as a question of social justice, arguing that the bill sought merely to implement the fifty-seven-year-old criminal code to allow poor women access to legal abortions. The antiabortion movement, by contrast, attempted to turn debate on the bill into a referendum on the morality of abortion after rape. The CNBB stated: "In the case of rape, the human being conceived is totally innocent and defenseless. How can it be punished with death?"

In spite of this pressure, the bill was approved by the Chamber of Deputies' Committee on Social Security and the Family in 1995, and in 1997 was approved by one vote in the Chamber of Deputies' Constitutional Committee. Interestingly, even some those committee members affiliated with the Catholic Caucus (Grupo Parlamentar Católico, or GPC) voted in favor of legal abortion (Aldana Santin 2000: 2). As is the usual practice on controversial social issues, no major political party took an official position, leaving legislators to "vote their conscience." Nor did President Cardoso make any public statement about the bill. Nonetheless, abortion opponents have

<sup>14</sup> Projecto de Lei (bill) 20/91.

succeeded in preventing the bill from being considered by the entire chamber and then passed to the Senate. By 2002, the vote of the whole chamber had been delayed several times.

According to a survey conducted by the feminist lobby CFEMEA in 1999, the vast majority of Brazilian legislators support the idea of legal abortion. Fully 87 percent of those who responded to the survey (a total of 273 deputies and senators)<sup>15</sup> endorsed the idea that the public health system should perform those abortions permitted by law. Thirty-six percent of legislators were favorable to expanding the conditions of legal abortion, while 42 percent believed the law should stay as it is (that is, permitting abortions in the event of rape or a risk to the mother's life). Nine percent expressed support for a law that would permit abortion under any circumstance, and only 7 percent believed abortion should be banned absolutely (Rodrigues 2000: 2–3). Legislators' views resemble those of the general public: 73 percent of those surveyed in a 1997 poll of São Paulo residents approved of the legal abortion bill (*Folha de São Paulo*, August 28, 1997). As Rodrigues notes, the problem faced by advocates of abortion rights is not so much conquering legislative opinion but generating enough political will to put the abortion issue on the congressional agenda. Abortion is not among the priority of most legislators, even those who express sympathy for the goals of the reproductive rights movement (*ibid.*).

In late 1998, the legal abortion movement scored a major victory when the Ministry of Health issued a rule to standardize the treatment of victims of sexual violence in public hospitals. Elaborated by officials in the Women's Health Unit, the rule (*norma técnica*) directs public hospitals to perform abortions at the request of women who have been raped; to conduct complete physical exams, give psychological consultations, and perform laboratory tests for sexually transmitted diseases and HIV/AIDS; and to gather forensic evidence for the prosecution of the aggressor. The rule guarantees that legal abortions be attended in Brazil regardless of the situation in Congress, and reflects a willingness on the part of senior officials in the Cardoso administration to engage the abortion issue, though not to endorse its legalization. (The Health Minister at the time, José Serra, was the governing party's candidate for president in the 2002 elections.) Feminist reproductive rights advocates, however, believe that a national law is still necessary since the Health Ministry's rule can be revoked by the Executive at any time (*Fêmea*, August 1999).<sup>16</sup>

<sup>15</sup> A total of 313 deputies and senators (53 percent of Congress) responded to the survey.

<sup>16</sup> Already in 1998, antiabortion deputy Severino Cavalcanti introduced a bill to Congress to suspend the Health Ministry's decree. In 1999 and 2000, respectively, the Committee on Social Security and the Family and the Constitutional Committee of the Chamber of Deputies voted to reject Cavalcanti's proposal. Cavalcanti and other abortion opponents argued that the Health Ministry's rule represented the first step toward the legalization of abortion (*Fêmea*, August 1999).

Meanwhile, a routine process of criminal code reform created the possibility of stretching Brazil's abortion law. In 1998 and 1999, a commission of legal experts deliberated over reforms to the 1940 Criminal Code.<sup>17</sup> In 1999, this committee presented its proposal, which upheld the general criminalization of abortion, to the Minister of Justice. According to the commission's only female member, there was no discussion about decriminalization, since they felt that any mention of this possibility would generate so much controversy in Congress as to preclude approval of a new Code (Wiecko de Castilho 1999: 2). Nonetheless, the proposal contained several changes to abortion law. First, it enabled judges to waive criminal penalties against women who had committed the crime of abortion. Second, it expanded the categories of legally permissible abortion to include three cases: (1) to prevent a grave and irreversible damage to the health of the pregnant woman; (2) when the pregnancy results from a crime against sexual freedom, and (3) in the event of defects that render the fetus inviable (*Jornal da Rede Saúde*, no. 18, September 1999). If approved by Congress, the commission's proposals will represent a small, though significant, liberalization of abortion law in the country, particularly the article permitting abortion for a risk to the pregnant woman's *health*, not just her life. Yet the process of criminal code reform has been stalled by high turnover in the Ministry of Justice and the different ideas of each new minister. (Six different individuals held the post of minister of justice during the second term of President Fernando Henrique Cardoso alone, which ran from 1998 to 2002.) Reportedly, however, the president intervened in at least one instance to make sure that the proposed changes with respect to abortion would be preserved in spite of personnel changes (*ibid.*). By 2002, the new code had still not been sent to Congress.

Why has Brazil been able to entertain a debate about legal abortion, and even to contemplate, in the criminal code reform, the expansion of conditions for legal abortion? In the first place, no Brazilian president since the return to democracy has adopted a firm position against abortion nor allied with the antiabortion movement. The Brazilian government has not tried to cultivate the favor of the Vatican by repressing the reproductive rights movement or attempting to ban abortion outright. By contrast, the position of the Brazilian government in international conferences, evidenced by its leadership in the SLAC coalition at Beijing Plus Five, has been relatively progressive (see note 7). Moreover, some sectors of the government endorse the goals of the legal abortion movement. For example, the National Human Rights Program, released in May 2002 by the Ministry of Justice, proposes that "abortion be considered a public health issue, with guaranteed access

<sup>17</sup> Traditionally, criminal codes are divided into two parts: the general part, which deals with overall principles, and the special part, which defines crimes. The general part of the code was reformed in the early 1980s, but a committee to consider changes to the special part of the code was created only in 1997.

to legal abortions in the public health services” (Ministerio da Justiça 2002). Though no Brazilian president has actually advocated liberalizing abortion, their failure vehemently to oppose abortion generates political space for the legal abortion movement to operate. Most Brazilian political parties, while they will not support abortion, will also not defend restricting it. When, in 1995, a constitutional amendment proposal to include a clause protecting life at the moment of conception came up for a vote, the whips of all major political parties, in a departure from the normal practice, instructed their deputies to vote against the proposal; only one party left the vote open (*Fêmea*, April 1996). As noted earlier, party leaders rarely close the vote on controversial social issues.

The reproductive rights movement has allies in the leftist Workers’ Party (PT). Though the party had only around 10 percent of the seats in Congress in the 1990s, PT deputies have been the most prominent sponsors of bills to liberalize abortion. Of course, not all of the PT supports abortion rights. Historically, the party has wavered on the issue of abortion because of close ties between some sectors of the PT and the Church. For example, in the 1994 elections, the PT party platform initially endorsed the decriminalization of abortion. Under pressure from the Church, however, the party later removed mention of abortion from its program (Haas 2001: 263). Nonetheless, the presence of the PT in Congress and the willingness of several PT deputies to serve as advocates of abortion reform keeps abortion on the congressional agenda. In Argentina and Chile, by contrast, most presidents have actively opposed abortion, and feminist reproductive rights movements have found few allies in Congress willing to raise the abortion issue (though in Argentina, feminists found allies willing to oppose conservative efforts to ban abortion altogether). As a result, the movements there have focused more on expanding the state’s commitment to family planning and women’s reproductive health and less on the legality of abortion.

### Argentina: Policy Stalemate

In dramatic contrast to the situation in Brazil, the Argentine government, at least under President Carlos Menem in the 1990s, has actively opposed abortion. In 1994, Menem proposed that the presidents gathered for the Fourth Ibero-American Summit in Cartagena, Colombia, sign a declaration that explicitly condemned abortion. Although Menem was unable to convince the other presidents, he received a letter from Pope John Paul II thanking him for “his initiatives aimed at promoting family values and defending life.”<sup>18</sup> Then, the Argentine government spearheaded opposition to abortion at the Cairo and Beijing conferences, developing, together with the Vatican and Iran, reservations to the consensus documents declaring that the concept of

<sup>18</sup> *Clarín*, July 1, 1994.

reproductive health not be interpreted to endorse abortion (Dinardi, Gogna, and Ramos: 11–12). In 1998, Menem issued a presidential decree declaring March 25 the “Day of the Unborn Child.” (The date was selected to coincide with the Roman Catholic Feast of the Annunciation.) With copious references to international agreements such as the Universal Declaration of Human Rights, the Convention on Children’s Rights, and even the Cairo and Beijing conferences, the decree declared that “the international community has identified the child as a dignified subject of special consideration [*un sujeto digno de especial consideración*]” (Decreto 1406/98). Though the text insisted that “the protection of life is not an ideological or religious question, but rather something that emanates from human nature,” most Argentine observers believed that the decree was part of a governmental effort to charm the Vatican.

Menem attempted to use the process of constitutional reform to advance his antiabortion position. During the constitutional convention held in 1994, Menem and his justice minister, Rodolfo Barra, attempted to add a phrase to the Constitution granting the right to life “at conception in the maternal womb until natural death,” in order to produce legal closure on the issues of abortion and euthanasia. At a dinner in the presidential palace hosted for delegates from the ruling Peronist party, Menem asked the delegates to work as hard as possible to guarantee inclusion of the phrase in the Constitution.<sup>19</sup> Church officials joined with antiabortion movements and with the conservative “Tradition, Family and Property” group to lobby delegates, organize demonstrations, and circulate petitions. Cardinal Antonio Quarracino, Archbishop of Buenos Aires, declared on television that “delegates who vote for abortion will pass into history as criminals, because abortion is, was, and will be simply and terribly a crime: the killing of an innocent being.”<sup>20</sup> Two other proposals to ban abortion, one by veteran Peronist politician Antonio Cafiero and another by the leader of right-wing party MODIN, were also presented to the convention.

Opposition political parties, feminists, and the medical and legal communities mobilized to defeat these antiabortion proposals. As in Brazil, Argentine parties were unwilling to advocate for abortion rights but also unwilling to support outright bans on abortion. (Nonetheless, there was no Argentine equivalent to the Brazilian Workers’ Party that gave the reproductive rights movement a toehold in Congress through the actions of sympathetic legislators.) Legislators from the opposition Radical and Frepaso parties claimed that delegates lacked a mandate to legislate on the abortion issue, since no political party had mentioned the issue in its electoral campaign for delegates to the convention. Moreover, the framework agreement signed by Alfonsín and Menem (called the “Pacto de Olivos”) precluded

<sup>19</sup> *Clarín*, July 9, 1994.

<sup>20</sup> *Página 12*, July 12, 1994

the constitutional convention from introducing any modification to the first part of the Constitution elaborating “declarations, rights and guarantees.”<sup>21</sup> These procedural issues allowed people to oppose the antiabortion proposal without having to express support for abortion.

Meanwhile, over a hundred women’s groups formed an alliance (called MADEL) to defeat the “life at conception” proposal. MADEL lobbied delegates, organized street demonstrations, and disseminated their arguments through the news media. In the process, “the women’s movement underwent a hitherto unheard-of political and organizational experience that marked a turning point in its history” (Dinardi et al.: 13). Several major newspapers and magazines at the time provided extensive coverage of the abortion debates and results of investigative reports into women’s varying experiences with and attitudes toward abortion (ibid.). Feminist legislators and activists from the governing Peronist party confronted the president’s position. The National Women’s Council, in spite of being organizationally dependent on the presidency, made public their opposition to the “life at conception” clause at press conferences and open letters.<sup>22</sup> The position of Peronist women angered party leaders close to the president. After the convention, the president of the Women’s Council, Virginia Franganillo, was asked to resign from her position. Following the 1995 elections, the council was completely reorganized and staffed with women known not to be feminists.<sup>23</sup> In the end, the convention delegates implicitly rejected the “life at conception” proposal by failing to consider it in the plenary.

The antiabortion movement and the support it has received from the Menem presidency limited the political space for the feminist reproductive rights movement and its medical and legal allies to advocate the liberalization of abortion laws. Instead, the movement focused on expanding the state’s commitment to women’s reproductive health through the provision of family planning services and sex education. The ties forged between feminist groups in the constitutional reform fight of 1994 created an organizational base for this activism. Feminist groups and women legislators introduced a family planning bill to Congress, which was approved by the Chamber of Deputies in 1995. In the Senate, however, various senators proposed to prohibit distribution of IUDs, which they considered abortifacients, and to require that minors receive parental authorization before receiving contraceptives. The acrimonious debate delayed voting on the bill for so long that it had to be thrown out. Then, in April 2001, the Chamber of Deputies

<sup>21</sup> *La Nación*, July 11, 1994.

<sup>22</sup> In contrast to the alliance of women’s groups, composed largely of those sympathetic to the political opposition, the Peronist women distinguished between their opposition to Menem’s abortion proposal and their overall support for him (see *Página 12*, July 17, 1994). The issue of opposition to, or alignment with, the government precluded the formation of an alliance between women from the Peronist party and women from the opposition.

<sup>23</sup> Interview with Virginia Franganillo, Buenos Aires, July 17, 1998.

approved a similar bill, called the “Law on Sexual Health and Responsible Procreation,” which proposed to create a national family planning program that would provide contraceptives in public hospitals, work on breast and cervical cancer prevention, and offer information about sexual health and the prevention of STDs (*Clarín*, April 19, 2001).<sup>24</sup> Meanwhile, ten Argentine provinces, the city of Buenos Aires, and several municipalities introduced legislation on reproductive health (Ramos 2001; Schlueter 2000).

After Menem left office in 1999, the political climate changed. The next president, Radical Party leader Fernando de la Rúa, still opposed abortion, though not as vigorously. Argentina ceased to ally automatically with the Vatican in international forums, publicly recognized that women’s reproductive and sexual rights constitute part of human rights, and acknowledged the connection between high abortion rates and women’s lack of access to health services.<sup>25</sup> In his speech before the United Nations in June 2000, Argentine foreign minister Enrique Candioti departed from previous policy by declaring that sexual and reproductive rights are a part of women’s human rights (Candioti 2000: 4). The government drafted a federal plan on maternal mortality that called for improvement of family planning services, sex education, the prevention of sexual violence, and the reduction of unwanted pregnancies (Consejo Nacional de la Mujer 2000).

The government’s relatively more liberal position created space for a Supreme Court ruling in January 2001 that authorized the abortion of a fetus suffering from anencephaly in the seventh month of pregnancy. Two lower courts had denied permission for the abortion, and the Supreme Court, for the first time in fourteen years, called the justices in from a summer recess to discuss the issue and submit its decision. In their public statements, the justices were careful to differentiate their decision from a more general permission for abortion, though they made clear that the juridical good they aimed to protect was the mother’s mental health (*Clarín*, January 12, 2001).

### Chile: Abortion Illegal Under any Circumstance

The Chilean Criminal Code, which dates from 1875, does not admit any exceptions to the criminalization of abortion. Since 1875, there have been

<sup>24</sup> The law is ambiguous on several points. Though the bill requires that public hospitals distribute contraceptives for free, and that these contraceptives be “nonabortive, impermanent, and reversible,” it does not include a list of contraceptives. Rather than directly address the question of contraceptive provision to minors, the bill merely states that the law would not contradict the principle of parental power, nor the rights of children. Finally, the bill establishes that health professionals who find the use of contraceptives morally unacceptable can exercise a “right to free conscience” and opt out of applying the law (*Clarín*, April 19, 2001).

<sup>25</sup> Interview with National Women’s Council president Carmen Storani, Buenos Aires, August 2000.

four attempts to redraft the criminal code, at least one of which proposed to decriminalize “compassionate” abortion.<sup>26</sup> Yet the reform was never enacted, and abortion continued to be criminalized under all circumstances. Then, in 1931, President Carlos Ibáñez promulgated a series of reforms to the Health Code, which included the legalization of therapeutic abortion and sterilization. The new article read:

Only with therapeutic objectives may one interrupt a pregnancy or perform an intervention to sterilize a woman. The documented opinion of three doctors is required. When it is not possible to proceed in the above said manner, due to the urgency of the situation or the lack of doctors in the area, the doctor and witnesses should document what has been done, with the doctor remaining in charge of the depositions. (Article 226 of decree law 226, published in the *Diario Oficial*, May 29, 1931)

The law thus authorized doctors to perform abortions and sterilizations with “therapeutic objectives.” Though no precise definition was offered of “therapeutic,” it is commonly understood to refer to medical procedures necessary to avert a serious risk to the life or health of the pregnant woman or the child.

Chilean abortion law stayed the same until 1989, when the military government, on the eve of its departure from power, removed the Health Code’s article authorizing doctors to perform therapeutic abortions. The new code stated: “It is prohibited to carry out any action whose objective is to provoke an abortion” (Law 18,826, enacted on September 15, 1989). The reform originated in a motion by a navy admiral, head of the government’s legislative commission, and followed consultations among the governing junta and several doctors, academics, and one member of the Pope’s international commission on theology (two of these experts, both from the University of Chile, expressed support for therapeutic abortion) (Valenzuela Carrazola: 3–4). The admiral later explained that the reform reflected the military government’s commitment to protect human life and human rights (Casas 1993: 38–9). The change was not made public. One researcher who studied the issue in the early 1990s noted that only a few of the employees she interviewed in hospitals were aware that permission for therapeutic abortion had been repealed (Valenzuela Carrazola: 4). The modification of the Health Code

<sup>26</sup> The reform was ordered in a decree issued by President Carlos Ibáñez in 1928. The authors of the proposal, appeals court judges Eduardo Erazo and Rafael Fontecilla, followed many other Latin American countries in importing the theories about “compassionate” abortion elaborated by Spanish criminologist Luis Jiménez de Asúa at the Third Panamerican Scientific Congress. The proposed Article 92 read: “The woman who becomes pregnant as the result of rape may obtain permission from a judge to interrupt her pregnancy when, in consideration of her dignity, the circumstances under which conception occurred led to turmoil or deep moral suffering” (Ministerio de Justicia 1929: 33). Erazo and Fontecilla believed that it was unnecessary explicitly to decriminalize therapeutic abortion since this was already justified by the concept of “state of necessity” (Ministerio de Justicia 1929: xviii).

effectively placed Chile, along with El Salvador, Andorra, and Malta, into the small group of countries where abortion is forbidden under all circumstances.

As of 2002, Chilean law continued to forbid abortion under any circumstance. Since the return to civilian rule in 1990, virtually no politician or government official has been willing to entertain debates about liberalizing abortion, and only one bill has been presented in Congress to reinstate therapeutic abortion. This bill was sponsored by a group of deputies from the Socialist and Democratic (PPD) parties and led by Adriana Muñoz, a feminist (Camara de Diputados, Session 41, September 17, 199, Boletín 499-07). The bill received support from various medical practitioners (e.g., Gayán 1993), but generated consternation among the women who had united in the Concertación de Mujeres por la Democracia (the multiparty women's alliance that helped usher in the democratic transition), since they had earlier agreed to avoid controversy by suppressing issues such as divorce and abortion during Chile's first democratic government (1990-4).<sup>27</sup> The bill was archived before reaching the floor of the Chamber, and Muñoz was vilified by abortion opponents, leading to her defeat in the parliamentary elections of 1993. Since then, few legislators have been willing to express any support for changes to abortion law, ceding much of the initiative on the abortion issue to parties of the right. Only the Socialist Party and the Communist Party have officially endorsed the reinstatement of therapeutic abortion.<sup>28</sup>

Chilean abortion opponents argue that permission for therapeutic abortion is medically and legally unnecessary, since advances in medical science have greatly reduced the number of circumstances in which the life of the mother and the fetus come into conflict. In these rare events, however, the law does not punish actions taken by doctors to defend the mother's life. Chile's conservative think tank Libertad y Desarrollo (Liberty and Development) argues that Chile's Health Code "does not punish those actions that, being necessary to protect the life of the mother and executed with that intention, endanger the life of the child" (Libertad y Desarrollo 1991). In other words, the law permits therapeutic abortion, as long as it is an indirect consequence of a medical procedure and not its principal aim:

If, for example, the life of a pregnant woman is threatened by an infection that requires major surgery, from which the death of the fetus could result, the performance of such an operation is permitted according to current legislation ... because the operation in the example is conducted with the intention of saving the mother's life and not with the intention of causing an abortion. ... (Ibid.)

<sup>27</sup> Muñoz argued that she did not break the pact since her bill proposed not to legalize abortion, but rather to reinstate an old law permitting therapeutic abortion. Interview, Santiago, April 24, 1998.

<sup>28</sup> See, e.g., the statement of Socialist Party president Camilo Escalona to *La Tercera*, February 16, 1995.

These arguments resemble St. Thomas Aquinas's dictum that the moral status of an action lies in its intention and recall early Roman Catholic doctrine, which did not oppose therapeutic abortion.<sup>29</sup>

Most legislative activity on abortion in Chile has surrounded proposals from politicians on the right seeking to extend prison terms for those convicted of abortion crimes. One of the bills, sponsored by Unión Demócrata Independiente (UDI) Senator Hernan Larraín, introduces the concept of "effective repentance" to create incentives for women to help the police apprehend abortion practitioners by granting them a reduction in sentence. The bill also proposes to redefine abortion from a "crime against public morality" to "homicide" (Blofeld 2001: 20; Larraín 1994). The bill was approved by the Constitutional Commission and the Health Commission in 1998, but in 1999 was defeated by a narrow margin on the Senate floor, with thirteen senators voting in favor and fifteen against. (In line with Chilean political practice, eight senators who had "paired" their votes abstained from the final vote.)<sup>30</sup> Larraín reported in an interview that he won even though the bill lost because he managed to divert the terms of the Chilean abortion debate away from the issue of liberalization and toward the question of punitive strategies and whether abortion should be considered the legal equivalent of homicide (Blofeld 2001: 53).

This political climate precludes much activism on abortion, but Chilean feminist activists have still attempted to expand the state's commitment to reproductive health. Historically, the Chilean state has taken a relatively active role in family planning. Beginning in the 1960s, when the Christian Democratic government of the period sought to combat extremely high rates of maternal and infant mortality stemming from abortion complications, the government has provided family planning services through the public health system. Conservatives made some efforts to shut down family planning during the Pinochet dictatorship, but these were ultimately unsuccessful. In theory, contraceptives are available to all women of child-bearing age. In practice, there is considerable resistance to providing minors with contraceptives without parental authorization. Feminists and health officials also complain that sterilization is difficult to obtain. Regulations dating from 1975 permit the public health system to sterilize only women meeting all of the following criteria: over thirty years old, more than four children, a history of at least three caesarian sections, medical reasons justifying the operation, and the documented consent of their spouse.<sup>31</sup> In the 1990s, among the goals

<sup>29</sup> As Chapter 2 mentioned, many theologians have felt that if abortion is the indirect consequence of a medical procedure designed to save the mother, it may be morally valid, since the primary intention is to protect life, not to abort the fetus. As a result, some Church thinkers voiced support for therapeutic abortion until 1930, when the encyclical *Casti connubii* harshly condemned abortion, including therapeutic abortion (Noonan 1970).

<sup>30</sup> Communication between Mireya Zuleta Reyes and Bonnie Shepard, November 2, 1999.

<sup>31</sup> Interview with Rene Castro, director of the Maternal and Infant Health Program, Ministry of Health, Santiago, April, 1998.

of the Ministry of Health's Maternal and Infant Health Programs was the reduction of unwanted pregnancies and the risks associated with abortion (Ministerio de Salud 1993: 5).

In the mid- to late 1990s, Chilean feminist politicians drafted a reproductive rights bill similar to that approved by the Chamber of Deputies in Argentina. In 2000, Socialist deputy Fanny Pollarolo and nine others introduced to Congress a bill that would guarantee citizens the right to sex education and contraception. One deputy who cosponsored the reproductive rights bill affirmed to the press the existence of an agreement not to discuss the issue of abortion.<sup>32</sup> The Open Forum on Health and Reproductive Rights (an NGO) has held meetings and demonstrations every year to commemorate the Latin American Day for the Decriminalization of Abortion, but when they circulated a draft bill to introduce permission for abortion on several grounds (risk to the mother, rape, and fetal anomaly), no politician was willing to touch it.<sup>33</sup>

## Conclusion

The common failure of Latin American countries to liberalize abortion, in spite of their openness to gender-related policy changes in other areas, confirms that gender policy issues need to be disaggregated. We need to reconsider the impression left by the experiences of the United States and Western Europe, where policies on women's parental and property rights, liberal divorce, and elective abortion changed sequentially between the 1960s and 1980s. The simultaneity of these reforms suggested that they were part of a single package, that change on one issue would lead to change on the next. Latin American experiences show otherwise and imply that abortion is a unique policy issue. Few other policies generate a similar amount of moral controversy and political polarization. Abortion invokes deep questions: As Kristin Luker puts it, abortion is merely "the tip of the iceberg" beneath which are complex world views about motherhood and morality (1984). The fact that abortion-related penalties are rarely enforced, that middle-class women have access to safe abortions, and that the majority of respondents in public opinion surveys see little need to change the law makes politicians and parties more reluctant to endorse change on abortion than on other gender issues.

Latin American experiences with abortion also suggest that abortion policy may be getting harder to change over time. In the 1980s, the Vatican became a more committed and effective opponent of abortion, and began to use international conferences in the 1990s to advance its position. Meanwhile, the antiabortion movement mobilized on a global scale in reaction

<sup>32</sup> *El Mercurio*, April 17, 2001.

<sup>33</sup> Interview with Lidia Casas, Santiago, April 14, 1998.

to liberalizing changes in North America and Western Europe. By the time the abortion debate arrived in Latin America, reproductive rights advocates had to confront these highly organized foes, as well as a global climate in which antiabortion activists were scoring major victories. In the late 1980s and early 1990s, several Eastern European countries, including Poland, the Slovak Republic, and Hungary, restricted liberal communist-era abortion laws after democratic transitions (Githens 1996; Zielinska 2000).<sup>34</sup>

Two scenarios might change the outlook for abortion politics in the region: The growing participation of women in political decision making and the increase in religious competition. Women's presence in political leadership has grown steadily. From an average of 9 percent in 1990, by 2002, women's representation in the lower houses of Congress had increased to 15 percent. Women's share of the Senate grew from an average of 5 percent in 1990 to 12 percent in 2002. And whereas women occupied 9 percent of ministerial posts in 1990, by 2002 this had increased to an average of 13 percent and as high as 40 percent in some countries (Htun 2002; Inter-American Dialogue 2001). Will these women produce change on abortion? There is some reason to be skeptical. In the past, women seen as defenders of abortion rights have been politically handicapped. For example, Graciela Fernandez Meijide lost the election for governor of Buenos Aires province in Argentina in 1999 after she failed effectively to respond to charges from her opponent that she supported abortion.<sup>35</sup> After presenting a bill to Congress to reintroduce therapeutic abortion, Chilean deputy Adriana Muñoz was defeated at the polls after being pilloried by the right opposition and labeled an "abortionist." Biases against women in politics are made worse by suspicions that women seek radical changes to gender relations. Many women in power fail to advocate on behalf of women's rights. Data gathered in Argentina between 1993 and 1995, for example, showed that 58 percent of women legislators presented no bills related to women's rights issues (Htun and Jones 2002).

On the other hand, there are examples of women leaders spearheading significant changes to abortion policy. In 2000, Rosario Robles, then mayor of Mexico City for the left PRD party, introduced legislation to modify the

<sup>34</sup> In Poland in 1993, a 1956 law that permitted elective abortion during the first trimester of pregnancy was replaced by a law that criminalized abortion except for medical grounds or when the pregnancy resulted from rape. Bishops of the Roman Catholic Church, who gained credibility and stature with the democratic transition, were instrumental in securing the abortion restrictions. Popular support for changing the abortion law was enhanced by the fact that the old liberal law was associated with the communist past (Githens 1996; Zielinska 2000). This was not the general pattern in all of Eastern Europe, however. In countries such as the Czech Republic and Bulgaria, permissive abortion laws were hardly affected by the democratic transition. In Romania, antiabortion laws were abolished after the fall of Ceausescu (Githens 1996).

<sup>35</sup> *Clarín*, October 19, 1999.

city's criminal code on abortion matters. The proposal, approved through support by the PRD and PRI parties, added two additional grounds for legal abortion: if the mother's health (not just her life) is at risk and if the fetus has birth defects. Robles agreed with the feminist movement that abortion is a public health problem posing grave risks for women, but she also sought to exploit the abortion issue for political advantage. Earlier in the year, the PAN-dominated legislature of the northern state of Guanajuato had voted to rescind permission for abortion for women who had been raped, triggering nationwide protest and indignation. Robles sought to distinguish her party from the conservative tendencies of the PAN and to exploit public fears that the PAN (whose leader, Vicente Fox, had recently been elected to the presidency) would impose a strict moral order in the country.

Growing religious diversity in Latin America is another factor that might affect abortion politics. The growth of Protestant evangelical churches,<sup>36</sup> particularly in Brazil and Chile, has reduced Roman Catholic hegemony in the region. We might think that the weakening of the Church would undermine some of the organized opposition to abortion. Brazil's giant *Igreja Universal do Reino de Deus*, for example, supports women's right to abortion in the event of rape.<sup>37</sup> Yet there are some reasons to doubt that Protestant growth will contribute to abortion law liberalization. Many Protestant churches, particularly Pentecostal churches, are equally or even more conservative than the Roman Catholic Church when it comes to gender issues. Most endorse a strict sexual division of labor based on male authority and female submissiveness in family life (Steigenga and Smilde 1999: 173).<sup>38</sup> Moreover, the Roman Catholic Church has responded to the Protestant threat with renewed attempts at evangelization and institutional reform. Between the late 1970s and late 1990s, the Church increased the number of bishops and parishes and successfully recruited seminarians at higher rates than before (Gill 1999: 33–4). Religious competition has reinvigorated, rather than marginalized, the presence of the Roman Catholic Church in political life.

When and if Latin American countries relax restrictions on abortion, their eventual policies may be more likely to resemble some European laws than

<sup>36</sup> In Latin America, it is common to refer to all Protestant churches as “evangelicals.” The term includes both mainstream churches (Baptists, Presbyterians, Lutherans, etc.) and Pentecostals. The latter are the most active evangelicals in Latin America. More than the mainstream churches, Pentecostals emphasize “born again” conversions, fighting against “worldly” things in order to be in communion with Christ, charismatic acts such as speaking in tongues and divine healing, and millennialism (Steigenga and Smilde 1999: 176).

<sup>37</sup> Interview with Federal Deputy Aldir Cabral, pastor of the *Universal*, Rio de Janeiro, June 2002.

<sup>38</sup> Nonetheless, some studies have shown that in practice, participation in Pentecostal sects has enabled women to transcend their traditional gender roles and given women greater confidence (Steigenga and Smilde 1999: 173–5).

the permissive policies of the United States.<sup>39</sup> European laws, particularly the French law, are notable for their attempt to steer a middle course between the different values invested in the abortion debate. The first article of the French law, for example, declares that the “law guarantees the respect of every human being from the commencement of life” (quoted in Glendon 1987: 16). Yet in fact, the French permit abortion under a fairly wide range of circumstances, for the law allows abortion through the tenth week of pregnancy for women who claim to be in “distress.”<sup>40</sup> The significant point here is that the law simultaneously permits abortion while purporting to answer one of the major concerns of antiabortion activists – the negation of fetal life – by admitting rather bluntly that questions of human life are at stake. At least in part because of the compromise forged by the wording of the abortion law, France has escaped the public conflict and polarization plaguing abortion in the United States (Glendon 1987; Outshoorn 1996). If Latin America is to liberalize abortion, reformers may need to seek compromise rather than outright victory.

<sup>39</sup> My characterization of U.S. law as permissive refers to the letter of the law only, since one must distinguish between abortion’s legal status and its availability. By the latter criteria, U.S. policy is restrictive for, in contrast to many European countries, the public health system (Medicare) does not fund abortions.

<sup>40</sup> The law requires that women undergo counseling prior to abortion and imposes a one-week waiting period. There are no sanctions against women who *pretend* to be in distress, and the state pays 70 percent of the cost of nontherapeutic abortions (and 100 percent of medically necessary abortions).