LAW AS A SOCIAL DETERMINANT OF UNSAFE ABORTION IN ARGENTINA

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ABSTRACT

Using Burris et al.’s model of law as a social determinant of health, this thesis postulates that the law and its application contribute to abortion-related morbidity and mortality among those women who qualify for a legal and safe abortion according to the justifications stipulated in the Criminal Code. This thesis proposes a circular model in order to show how the application of the law, through courts rulings, contributes to unsafe abortion. On the one hand, Argentine law acts as a pathway along which inequity in socioeconomic status exposes certain women to pathogenic practices, such as self-induced abortions. On the other hand, the law acts as a shaper of socioeconomic status as it perpetuates gender stereotypes, constructing a normative world where sex-role stereotypes are naturalized, and having an impact in women’s lack of access to legal and safe abortions.
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INTRODUCTION

In Argentina, abortion is a criminal offense. Nevertheless, it is justified when the pregnancy entails risk to women’s life or health, and when the pregnancy resulted from rape or sexual abuse committed against an idiotic or insane woman. The complications of unsafe abortive practices have been the main cause of maternal mortality in the last twenty years and represent a third of the total deaths. According to recent estimations requested by the Ministry of Health, nearly 450,000 abortions are performed in Argentina annually. This is equivalent to more than one abortion for every birth (0.64 abortions for every birth). There is no conclusive evidence to determine how many of these unsafe abortions correspond to cases of justified abortions according to the exceptions established in the Criminal Code. Many scholars and reports stress that, in spite of the exceptions, legal and safe abortion is inaccessible for most Argentine women who are legally entitled to the medical procedure.

Silvina Ramos and colleagues argue that the mortality rate due to unsafe abortion is a sign of the State’s failure to meet its duty of service availability for the cases of legal abortion. Since 1984, more than fifty bills have been submitted to Congress aiming to regulate or amend the Criminal Code, in order to decriminalize abortion.

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1 Criminal Code of Argentina, Article 86. The article will be stressed in detail in Chapter 2.
3 Ibid. at 461-62
5 See supra note 2 at 453
7 Supra note 2 at 462
abortion, add exceptions or call a referendum. None of them have been debated up to date.8

This thesis seeks to adapt Scott Burris, Ichiro Kawachi and Austin Sarat’s model of law as a social determinant of ill-health9 to the context of unsafe abortion in Argentina. Using Burris et al.’s model of law as a pathway along which social determinants contribute to ill-health, and as a shaper of those determinants as well, this thesis postulates that the law and its application contribute to abortion-related morbidity and mortality among those women who qualify for a legal and safe abortion according to the justifications stated in the Criminal Code. On the one hand, Argentine law acts as a pathway along which inequity in socioeconomic status exposes certain women to pathogenic practices in self-induced abortions. On the other hand, the law acts as a shaper of socioeconomic status as it perpetuates gender stereotypes, constructing a normative world where sex-role stereotypes are naturalized and having an impact in women’s lack of access to legal and safe abortions.

The theoretical approach chosen to examine the problem is the social epidemiology framework. Chapter 1 will explain this discipline, which considers that health is not only determined by “individual-level factors such as our genetic make-up… but also by social conditions.”10 Scott Burris, Ichiro Kawachi and Austin Sarat’s theory will be addressed in order to demonstrate that the law is one of those social conditions that contribute to unsafe abortion in Argentina.

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8 Supra note 2 at 464
10 Ibid at 510
Chapter 2 will describe and analyze the normative framework within which courts operate. This Chapter is concerned with what the law stipulates. Accordingly, an assessment of the articles that criminalize or justify abortion will be conducted, in order to show the gender stereotypes embodied in the law. This section will also review those articles from the Criminal Code and the Code of Criminal Procedures that state health professionals’ duty of confidentiality, on the one hand, and their duty to report the commission of an offense known during the exercise of the profession, on the other. Furthermore, Argentine system of judicial review will be studied in order to show why the law can be applied heterogeneously by courts.

Chapter 3 and 4 will address the application of the law in courts rulings. The aim is to describe the problem of law as determiner of unsafe abortion in a circular model divided in two parts. Throughout the thesis, the circular model is referred to as “the circle of unsafe abortion.” The circle of unsafe abortion is articulated by two kinds of judicial interventions: ex-post judicial interventions and ex-ante judicial interventions. These are ad hoc denominations created only for the purpose of this thesis.

Chapter 3 will address the first part of the model built upon those judicial interventions that take place once abortion has already been performed –referred as ex-post judicial interventions. Ex-post interventions deal with the legal dilemma of duties that health professionals face between reporting and preserving the confidentiality of those women they have provided with post-abortion treatments. In these instances, judges apply the law heterogeneously; arbitrary interpretations of the law give rise to legal uncertainty and the perpetuation of gender stereotypes. On the one hand, the legal uncertainty contributes to cause health professionals confusion and fear of criminal procedures, which, in turn, has two consequences: it increases the number of reports, i.e. more ex-post judicial interventions, and is conducive to a chilling effect on health
professionals regarding legal abortions. The term “chilling effect” refers to the reluctance of health professionals to perform legal abortions due to a lack of information and a context of legal uncertainty.\textsuperscript{11} Both consequences contribute to women’s lack of access to safe and legal abortions and expose socioeconomically disadvantaged women, who are legally entitled to the procedure, to pathogenic practices, namely, hazardous ways to induce an abortion. In turn, this contributes to unsafe abortion and health inequity. On the other hand, the perpetuation of sex-role stereotypes embodied in the law structures how health professionals feel about abortion and the role of women in society, which has also two consequences: it increases the number of reports, i.e. more ex-post judicial interventions, and it contributes to the refusal of health professionals to perform legal abortions. As in the case of legal uncertainty, the perpetuation of gender stereotypes shapes the normative world where women who need legal abortions cannot access them; exposing socioeconomically disadvantaged women to pathogenic practices.

Chapter 4 addresses the second part of the circle, built upon those judicial interventions that take place before the abortion is performed, in order to grant authorizations for those cases justified by the law –ex-ante judicial interventions. Accordingly, in this instance, judges deal with the scope and interpretation of the legal exceptions that justify some cases of abortion. Ex-ante interventions are a consequence of the chilling effect analyzed in Chapter 3. In other words, the chilling effect prevents health professionals from performing legal abortions, and also triggers ex-ante judicial interventions. These interventions are not required by law but they have become a \textit{de facto} requirement to access legal and safe abortions in many cases. As in the case of ex-

\textsuperscript{11} See \textit{Tysiac v. Poland}, App. N° 5410/03 (2007) (European Court H.R.). In \textit{Tysiac}, the European Court of Human Rights argues at para 56: “the legal prohibition on abortion, taken together with the risk of their incurring criminal responsibility … can well have a chilling effect on doctors when deciding whether the requirements of legal abortion are met in an individual case.”
post judicial interventions, in ex-ante interventions judges also apply the law heterogeneously, creating legal uncertainty. Legal uncertainty also causes health professionals confusion and fear of criminal procedures, in this case regarding the application of the exceptions that justify abortion. In turn, this has two consequences: on the one hand, health professionals often request judicial authorizations to assist a woman that qualifies for a legal abortion, causing more ex-ante judicial interventions, and, on the other hand, health professionals suffer, one more time, the chilling effect and refrain from performing legal abortions. As in the case of ex-post interventions, ex-ante interventions create a new barrier for women to have access to legal and safe abortions, exposing socioeconomically disadvantaged women to pathogenic practices.

Chapters 3 and 4 aim to demonstrate that even though part I and II of the circle of unsafe abortion may be addressed separately, they are also interrelated, creating a vicious circle where unsafe abortion causes ex-post judicial interventions, ex-post judicial interventions cause unsafe abortion and ex-ante judicial interventions; ex-ante judicial interventions, in turn, also contribute to unsafe abortion and start the circle again with ex-post judicial interventions.
CHAPTER 1
Defining the Theoretical Framework: Social epidemiology and Law as a Social Determinant of Health Outcomes

The problem of unsafe abortion has several and sometimes overlapping dimensions; the problem can be addressed from a criminal, human rights, constitutional, public health, cultural or religious perspective, among others. The theoretical framework chosen for this thesis is the social epidemiology perspective. A social epidemiology analysis is based on the idea that social conditions determine health in a structural way. This thesis, nevertheless, goes beyond acknowledging the existence of social determinants of health, and supports Scott Burris, Ichiro Kawachi and Austin Sarat’s proposal that one of those determinants is the law.

Burris et al. argue that the law acts both as a pathway “along which broader social determinants of health have an effect” and as a shaper of those social determinants of health outcomes. Based on their model, this thesis argues that Argentine law is a social determinant of unsafe abortion for certain women that would qualify for a legal abortion according to the justifications of the Criminal Code for the offense. In Argentina, law, in a broad sense,—abortion and abortion-related legislation, Court rulings on the subject and a system of judicial review that is not bound by precedents—acts both as a pathway along which other determinants of unsafe abortion have an effect, and as a shaper, structuring these determinants of unsafe abortion.

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12 See Regional Seminar “Criminal Law and Women in Latin America and the Caribbean” in Women: Watched and Punished (Lima: CALDEM, 1993) at 12; “Abortion is not exclusively a legal topic. However, its criminalization has made it a serious problem in terms of women’s lives and their health.”
13 Supra note 9 at 510
Since this thesis consists in a legal research addressed to legal specialists, Chapter 1 will delve into notions of social epidemiology, social determinants of health and health inequities, as well as Burris et al.’s theory of law as a social determinant of health outcomes.

1.1 Social epidemiology

For the sake of clarity, before analyzing the social epidemiology framework, it is worth to briefly define the concept of epidemiology. According to John M. Last, the science of epidemiology is:

The study of the distribution and determinants of health-related states or events in specified populations, and the application of this study to control of health problems. “Study” includes surveillance, observation, hypothesis testing, analytic research, and experiments. “Distribution” refers to analysis by time, place, and classes of persons affected. “Determinants” are all the physical, biological, social, cultural, and behavioral factors that influence health. “Health-related states and events” include diseases, causes of death, behaviors such as use of tobacco, reactions to preventive regimens, and provision and use of health services. “Specified populations” are those with identifiable characteristics such as precisely defined numbers. “Application to control...” makes explicit the aim of epidemiology –to promote, protect, and restore health.14

Last’s definition of epidemiology has many elements in common with Julie C. Cwikel’s definition of social epidemiology:

Social epidemiology is the systematic and comprehensive study of health, well-being, social conditions or problems, and diseases and their determinants, using epidemiology and social science methods.15

Cwikel underscores that social epidemiology is concerned with both social conditions and social problems, since health outcomes are determined by risk factors such as

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14 J.M. Last, A Dictionary of Epidemiology (Oxford: Oxford University Press, 2001) at 62
individual behaviors and inherited characteristics, but also by “macro trends in the social structure such as distribution of wealth, social resources and exposure to media and market forces.”\textsuperscript{16} Cwikel affirms that “[i]n addition to determining distribution [of disease] and identifying risk factors, a central focus of social epidemiology is implementing what we know about a particular condition in order to maintain and improve health and well-being…this definition emphasizes the use of multidisciplinary approaches to analyze complex social problems.”\textsuperscript{17}

According to Cwikel, social epidemiology focuses on four aspects of public health: the extent or distribution of ill-health or disease in a given population during a certain period of time; the risk factors that produced the health outcome; the social, behavioral and psychological circumstances associated with the disease; and the most accurate policies and interventions to prevent or treat the negative outcome.\textsuperscript{18}

In the words of Burris and his colleagues, social epidemiology “is concerned with the question, ‘Why are some societies healthy, while others are not?’”\textsuperscript{19} Burris et al. consider that the contribution of social epidemiology to traditional epidemiology lies on the fact that “the causes of individual variations in health and illness are conceptually different from the causes of population well-being.”\textsuperscript{20} As pointed out by Cwikel, Burris et al. highlight that social epidemiology focuses on structural/macro trends.

According to Nancy Krieger, the difference between epidemiology and social epidemiology is that social epidemiology proposes an explicit research of “social determinants of population distribution of health, disease and wellbeing, rather than
treating such determinants as mere background to biomedical phenomena.” 21 In other words, social conditions play an active and fundamental role in determining health outcomes. In this regard, Jo Phelan and Bruce Link hold that:

[I]n the process of elucidating the mechanisms connecting social conditions to health and illnesses…we may, over time, lose interest in and come to neglect the importance of the social condition whose effect on health we originally sought to explain. Also, our tendency to focus on the connection of social conditions to single diseases via single mechanisms at single points in time neglects the multifaceted and dynamic processes through which social factors may affect health and, consequently, may result in an incomplete understanding and an underestimation of the influence of social factors on health.22

Based on these ideas, it can be stated that social epidemiology is interested in a more comprehensive conception of determinants of health that focuses on social conditions or social determinants of health. That is to say, there are determinants of health that act in dynamic, non-linear ways on certain health outcomes.23

A social epidemiology approach to ill-health seeks to establish the connection between social conditions and illness.24 Link and Phelan understand ‘“social conditions’ as factors that involve a person’s relationship with other people.”25 In their article, they mention some social conditions such as positions occupied within the social and economic structures of society, race/ethnicity, gender, stressful life events and social support.26 According to Link and Phelan’s theory, there are two aspects that must be explored in the study of social conditions as determinants of ill-health from a social

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23 This fact is also argued by N. Krieger, “Proximal, Distal, and the Politics of Causation: What’s level got to do with it?” (2008) 92 (2) Am J Public Health. 221-230
24 See supra note 22 at 81
25 Supra note 22 at 81
26 See supra note 22 at 81
epidemiology perspective: the context that determines the exposure to risk factors and the identification of the social conditions that may be “fundamental causes” of disease because they involve access to resources.\(^\text{27}\) These two aspects will be addressed in detail in the following section. For the purpose of this section, it is important to emphasize that there is empirical evidence linking certain social conditions with illness. For instance, Link and Phelan mention that low socioeconomic status contributes to lower life expectancy and higher rates of infant and perinatal mortality,\(^\text{28}\) that gender differences were found in mental disorder, renal failure and stroke rates,\(^\text{29}\) and that stressful life events contribute to diabetes, fetal death and depression.\(^\text{30}\) The social conditions by which some people become exposed to certain risk factors and those social conditions that are identified as fundamental social causes of disease are also known as “social determinants of health.”

### 1.2 Social Determinants of Health and Social Determinants of Health Inequities

As was explained in the previous section, Link and Phelan consider that there are two ways by which social conditions work: being part of the context that exposes some people to certain risk factors, and being a fundamental social cause of disease, determining the access of certain people to certain resources relevant to prevent or redress a negative health outcome.

The contextualization of risk factors attempts to explain why certain people are more exposed to individually-based risk factors than others.\(^\text{31}\) According to Cwikel, “risks factors are the behaviors, attributes, inherited characteristics, and exposure that

\(^{27}\) Supra note 22 at 81 (Emphasis added)

\(^{28}\) Supra note 22 at 81

\(^{29}\) Supra note 22 at 82

\(^{30}\) Supra note 22 at 82

\(^{31}\) Supra note 22 at 81
increase the probability of a specific outcome such as a health or social condition, problem, or disease.”

To contextualize risk factors the question “what it is about people’s life circumstances that shape their exposure to such risk factors as unprotected sexual intercourse, poor diet, a sedentary lifestyle, or a stressful homelife” should be addressed. Zita Lazzarini and colleagues explain, for example, how selected enforcement of criminal laws against black populations in the United States exposes black people—rather than white people—to unsafe needle injection practices that are a risk factor for HIV/AIDS transmission. In other words, in order to contextualize risk factors, it is important to analyze “whether there are any social conditions under which the individual-level risk factors would have [little or] no effect at all on disease outcome.” Link and Phelan argue that “without an understanding of the context that leads to risk, the responsibility for reducing the risk is left with the individual, and nothing is done to alter the more fundamental factors that put people at risk of risks.”

The contextualization of risk factors concentrates on the structural/macro social conditions that expose individuals to risk behaviors or factors. For instance, contraception campaigns as an attempt to avoid teenage unwanted pregnancies would prove useless without attending to the fact that many of teenage girls live in overcrowded rooms with male adults who, in many cases, sexually abuse them.

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32 Supra note 15 at 5
33 Supra note 22 at 85
35 Supra note 22 at 85
36 Supra note 22 at 85 (Emphasis added)
37 CEDAW, General Recommendation 24, UN GOAR 1999, UN Doc. A/54/38/ Rev.1, pp. 3-7 at para 12 (b) and 21
To identify those social conditions that are “fundamental causes” of disease, access to resources that can avoid or redress illness should be taken into account. Link and Phelan point to two reasons for access to resources determining health outcomes:

First, resources directly shape individual health behaviors by influencing whether people know about, have access to, can afford, and are supported in their efforts to engage in health-enhancing behaviors. Second, resources shape access to broad contexts such as neighborhoods, occupations, and social networks that vary dramatically in associated profiles of risk and protective factors.38

This argument can be applied to the case of socioeconomically disadvantaged pregnant women, especially those living in rural areas, who have limited access to medical care during their pregnancies, which may reduce their awareness regarding the importance of taking folic acid during the pregnancy, for example, and in turn result in a higher rate of anencephalic pregnancies among this group. Accordingly, “people of higher socioeconomic statues were more favorably situated to know about the risks and to have the resources that allowed them to engage in protective efforts to avoid them.”39 It is not solely a matter of knowing what the risk factors are, but also a matter of having access to and availability of resources to redress ill health.

Even though health is determined by many social conditions, not every relevant social condition is a fundamental social cause of disease. An important characteristic of fundamental causes of disease is the emergence of a link between condition and disease in different health context. A accordingly, “no matter what the current profile of disease and known risks happens to be, those who are best positioned with regard to important

39 Supra note 22 at 86
40 Supra note 22 at 87
social and economic resources will be less afflicted by disease.”41 In addition, a fundamental social cause of disease has an effect on multiple risk factors and multiple disease outcomes.42

Link and Phelan hold that “fundamental causes can defy efforts to eliminate their effects when attempts to do so focus solely on the mechanisms that happen to link them to disease in a particular situation.”43 For instance, a public health policy that considers that the problem of unsafe abortion can be redress with contraceptive methods is only focusing in the mechanism that links the health outcome —unsafe abortion— with a particular situation —consensual unprotected sex. This policy, however, is likely to be ineffective because the problem of unsafe abortion arises in contexts other than consensual unprotected sex, as is the case with rape, or failure of the contraceptive method. The impact of a fundamental social cause of disease cannot only be elucidated by analyzing the connection between a certain risk factor and a certain disease.44 Link and Phelan believe that “if one genuinely wants to alter the effects of a fundamental cause, one must address the fundamental cause itself.”45

Link and Phelan’s theory about the way certain social conditions contribute to disease, specially the notion of “fundamental social causes of disease,” concerns the way “social determinants of health” work. As said before, Link and Phelan’s social conditions are also called “social determinants of health” by other scholars.

Hilary Graham holds that the notion of social determinants of health arose when public health policies identified “factors other than the health care system as driving

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41 Supra note 22 at 87
42 Supra note 22 at 87
43 Supra note 22 at 81
44 Supra note 22 at 88
45 Supra note 22 at 88
population health.” 46 According to her, the concept of social determinants of health “draws attention to those social factors —like people’s social and economic circumstance— that play a major part in the health of individuals and populations.” 47

Norman Daniels, Bruce Kennedy and Ichiro Kawachi explain that “health is produced not merely by having access to medical prevention and treatment, but also, to a measurably greater extent, by the cumulative experience of social conditions over the course of one’s life.” 48

Michael Marmot and Richard Wilkinson define social determinants of health as “the causes of the causes.” 49 While Link and Phelan use a “fundamental cause of disease” approach, Marmot and Wilkinson rely on an “environmental cause of disease” framework. It is possible to argue that both perspectives prefer a “social determinant of health” over an “individual risk factor” perspective. Marmot et al. suggest that focus should be placed on population determinants of health, because “the causes of individual differences in disease may be different from the causes of differences between populations.” 50 Marmot expresses that:

A social determinant of health approach … seeks to redress the imbalance between curative and preventive action and individualized and population-based interventions. And, by acting on structural conditions in society, a social determinants approach offers a better hope for sustainable and equitable outcomes. 51

47 Ibid at 101-102
48 N. Daniels & B. Kennedy & I. Kawachi, Is Inequality Bad for Our Health? (Boston: Beacon Press, 2000) at 4
49 M. Marmot & R. Wilkinson, Social Determinants of Health (New York: Oxford University Press, 1999) at 1
50 Ibid at 4.
Marmot et al. suggest that focusing on the social determinants of ill-health has several advantages, because diseases can be anticipated and prevented in a fairer and long-lasting way. Marmot and Wilkinson are aware that there are social conditions that strongly determine the exposure of individuals to risk factors: they believe that to rely on individuals to remedy or prevent disease perpetuates already existing social inequities, which make less advantaged groups more likely to suffer ill-health.

The notion that certain social determinants of ill-health also contribute to health inequity is further developed by Marmot in two articles, but before explaining the interrelationship between determinants and health inequity, it is worth stating the concept “health inequity” as addressed in this thesis. Marmot defines health inequities saying that “if systematic differences in health for different groups of people are avoidable by reasonable action, their existence is, quite simply, unfair. We call this imbalance health inequity.” Marmot, expressing the views of the Commission on Social Determinants of Health, believes that inequalities in health outcomes within and between certain populations are symptomatic of inequalities of another sort, such as socioeconomic status or gender inequity, and its impact on determining exposure to risk factors and resources. In this sense, the Commission holds that:

The poor health of the poor, the social gradient in health within countries, and the marked health inequities between countries are caused by the unequal distribution of power, income, goods, and services, globally and nationally, the consequent unfairness in the immediate, visible circumstances of people’s lives –their access to health care and education, their conditions of work and leisure, their homes, communities, towns, or cities- and their chances of leading a flourishing life…Together, the structural determinants and conditions of

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52 See supra note 51
54 Ibid at 1661. For more information on the debate around the different definitions of health inequities see P. Braveman, “Health disparities and health equity: concepts and measurement” (2006) 27 Annu Rev Public Health. 167-194
55 Supra note 51 at 1154
daily life constitute the social determinants of health and cause much of the health inequity between and within countries.\textsuperscript{56} Marmot argues that health inequities are due to systemic inequalities that work globally, nationally and locally, shaping society’s hierarchies and social positions. He thinks that “the place people occupy on the social hierarchy affects their level of exposure to health-damaging factors, their vulnerability to ill health, and the consequences of ill health.”\textsuperscript{57}

Marmot and Wilkinson posit that “if social environment is an important cause of ill-health, this is likely to be manifested as social inequalities in health.”\textsuperscript{58} This implies that certain social structures and conditions determine health inequities that ultimately contribute to illness, disease, or, for the purpose of this thesis, a negative health outcome, such as unsafe abortion among women who are legally entitled to the procedure. Thus, the scholars, argue that “the causal direction...is likely to be from social environment to illness.”\textsuperscript{59} In this regard, Link and Phelan agree with Marmot et al. in the fact that “medical sociologists and social epidemiologists have...demonstrated a substantial causal role for social conditions as causes of illness.”\textsuperscript{60}

Marmot et al. maintain that “[b]y understanding how the social environment affects health, its specific features and pathways, it is potentially possible to affect these with consequent impact on health.”\textsuperscript{61} The focus on pathways and mechanisms in which

\textsuperscript{56} Commission on Social Determinants of Health, \textit{CSDH final report: closing the gap in a generation: health equity through action on the social determinants of health} (Geneva: World Health Organization, 2008) at 1
\textsuperscript{57} Supra note 51 at 1156. Besides the findings of the Commission, other scholars have found an empirical relation between social conditions and health inequities. See generally V. Navarro & L. Shi, “The political context of social inequalities and health” (2001) 31 (1) Int J Health Serv. 1-21
\textsuperscript{58} Supra note 49 at 10
\textsuperscript{59} Supra note 49 at 13
\textsuperscript{60} Supra note 22 at 83
\textsuperscript{61} Supra note 49 at 2 (Emphasis added)
social conditions strongly contribute to disease is particularly pertinent to this thesis, because it aims to demonstrate how Argentine law acts both as a pathway along which other social conditions affect health, and as a shaper of those conditions. The model here proposed, suggesting that law is a crucial factor that allows and shapes social environment and conditions that contribute to unsafe abortion in Argentina, will be developed in the following section.

1.3 Law as a social determinant of health

As explained in the previous sections, Bruce Link and Jo Phelan, Michael Marmot and Richard Wilkinson, as well as Hilary Graham endorse the epidemiological position that affirms that factors not typically conceptualized as relevant to health may have an enormous effect on health outcomes.62 In this regard, Burris, Kawachi and Sarat affirm that “integrating legal social science and social epidemiology suggests a dynamic system in which culture, material conditions, the operation of institutions, and the behavior of individuals operate on and influence each other over time.”63 This thesis postulates that, in the context of unsafe abortion in Argentina, one of the factors determining health is the law; in particular, it aims to demonstrate that a reason for women who qualify to have a legal abortion according to the Criminal Code to seek unsafe abortions is the law and its application. To achieve that, this thesis will be based on the conception of “law” as developed by Scott Burris, Ichiro Kawachi and Austin Sarat. The scholars formulate a broad definition of law that entails:

(1) state-linked rules and the system of practices and institutions that support them (‘state law’), and (2) the social meaning that both produce and is produced by the rules (‘legality’).64

62 Supra note 38 at 732
63 Supra note 9 at 511
64 Supra note 9 at 511-12
Concerning the notion of “law” in the first sense, Burris et al. do not expound on what is conceived as “state-linked rules” and a “system of practices and institutions that support them.” Nevertheless, for the purpose of this thesis, “state-linked rules” will be understood following criteria set by WHO. It covers abortion laws or statutes; amendments to abortion laws or statutes; executive, ministerial and other administrative orders or decrees related to abortion; executive, ministerial and other administrative regulations and ordinances related to abortion; quasi or non-governmental regulations on abortion; and, finally, abortion policies. This thesis will look into the criminalization of abortion and its justifications as established in the Criminal Code; health professionals legal obligation of confidentiality towards their patients as established in the Criminal Code; the legal obligation for health professionals to report the commission of an offense prosecutable as prescribed in the Code of Criminal Procedures and the Criminal Code; and, the conflicting rulings of different courts on these legislations.

In addition, for the purpose of this thesis, the notion of “system of practices and institutions that support” state-linked rules will refer to the normative structures in which institutions apply those rules. Accordingly, this thesis will also focus on the system of judicial review that operates in Argentina, and the fact that there is no doctrine, and hence, judges are not bound by precedents from a higher judge or tribunal.

Burris et al. do not expound on what they considered as the second sense of law: the “social meaning” that both produce and is produced by state-linked rules and the

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66 Ibid
system where institutions operate. This thesis will understand that the social meaning of
the law is the impact that the perpetuation of gender stereotypes in the law has on health
professionals’ disposition to report those women that underwent abortions, as well as
health professionals’ lack of willingness to perform legal abortions.

Based on the broad concept of “law” as developed by Burris and colleagues, this
thesis argues that Argentine abortion legislation, conflicting courts rulings regarding the
legal obligation for health professionals to maintain confidentiality and to report
abortion instances, conflicting courts rulings regarding the interpretation of the
exceptions that justify abortion in the Criminal Code, and Argentine system of judicial
review contribute to unsafe abortion among women who are entitled to have a legal and
safe abortion according to the Criminal Code.

There is limited literature on law as social determinant of health. 67 Government
policies among the determinants of population health are mentioned by Daniels,
Kennedy and Kawachi. 68 Other scholars, like Scott Burris, are formulating theories that
posit that law and its enforcement should be considered among the social determinants
of health or disease. Burris has applied this notion in the context of HIV/AIDS. 69 This
thesis seeks to adapt his model to unsafe abortion in Argentina.

Scott Burris, Ichiro Kawachi and Austin Sarat stress the fundamental impact that
law has on social organization and social structure. 70 The scholars state that:

   Law is conventionally considered in its “instrumental” or
   regulatory role. As a regulatory system, law has a variety of

   on Human Rights and HIV Prevention and Care (Canadian HIV/AIDS Legal Network, 2003) at 9
68 See supra note 48 at 9
69 For further information see S. Burris, “Law as a structural factor in the spread of communicable
disease” (1999) 36 Hous L Rev. 1755-1786
70 Supra note 9 at 511
important effects. At least in theory, statutes, court decisions and enforcement practices create tangible incentives for specific behaviors. These incentives operate within institutions and procedures for governance established by law.71

In the Argentine context of unsafe abortion, the regulatory role of the law, which creates tangible incentives to certain behaviors, is observable, for instance, in the resistance of health professionals to perform legal abortions in cases that are justified under the Argentine Criminal Code. Courts interpret the scope of justifications in arbitrary and dissimilar ways, causing legal uncertainty, making health professionals fear criminal proceedings and prefer not to perform legal abortions rather than performing them. This issue will be developed in detail in Chapter 4.

In order to study the impact of law on health outcomes, Burris and colleagues introduce “an heuristic framework for including law as a social factor in epidemiological research, and conversely for understanding how law can have health consequences.”72 The purpose of their model “is to suggest that law is worth considering as an important factor by health researches, and that health is a product of law to which legal researches should be more attentive.”73

Burris and colleagues summarize their thesis holding that:

[S]ocial factors other than law – the sort of “fundamental social causes of disease” described in social epidemiology – broadly structure the level and distribution of health in a population, and focus on the question of how those effects happen, how social structure is converted into health outcomes. We ask, specifically, whether and how the operation of law in society could be one of the means through which structure becomes health.74

71 Supra note 9 at 511
72 Supra note 9 at 510
73 Supra note 9 at 513 (Emphasis added)
74 Supra note 9 at 511
It is possible to see the connection between Burris et al.’s reference to fundamental social causes of disease, and Link and Phelan’s theory analyzed in the previous section. In short, Burris et al.’s proposal of law as a social structure that determine ill health fits in Link and Phelan’s model stressing the effect of fundamental social causes of disease. The specific social conditions addressed by Burris et al. are socio economic position and social cohesion.\textsuperscript{75}

These scholars identify two mechanisms by which law affects health. On the one hand, law is “a pathway along which broader social determinants of health have an effect (i.e., law is one of the social systems through which more fundamental social characteristics work to create health effects);”\textsuperscript{76} on the other hand, “laws and legal practices contribute to the development, and influence the stability, of social conditions that have been associated with population health outcomes (i.e., law contributes to the creation and perpetuation of fundamental social determinants of health)”\textsuperscript{77} The next two subsections will carefully address these two ways in which law operates as a health determinant.

\textbf{1.3.1 Law as a pathway along which broader social determinants have an effect on unsafe abortion in Argentina}

Burris and colleagues consider that “law as a pathway” means wondering “how the normal day-to-day operation of the legal system might be effectuating the sorting of people into better and poorer health that has been broadly shown to be associated with unhealthy social conditions, such as inequality or lack of social cohesion.”\textsuperscript{78} In their

\textsuperscript{75} Supra note 9 at 512  
\textsuperscript{76} Supra note 9 at 510 (Emphasis added)  
\textsuperscript{77} Supra note 9 at 510 (Emphasis added)  
\textsuperscript{78} Supra note 9 at 513
analysis of law as a pathway for social determinants of health, Burris et al. hold that law may act as a pathway in two different ways:

1. negative experiences with law that are unevenly distributed through society may have psychosocial health effects; and
2. law may be a means through which exposure to pathogens or pathogenic practices is unevenly distributed based on socioeconomic position or community social cohesion.

The scholars highlight, in both cases, the inequity element. This means that when law acts as a pathway, it contributes to health inequity because it perpetuates social patterns of inequity, such as socioeconomic status. Chapters 3 and 4 will develop in detail how this occurs in the case of unsafe abortion in the Argentine context.

Concerning the first mechanism by which law acts as a pathway to ill-health, Burris et al. maintain that psychosocial effects of law “are thought to be important mediators of a number of social determinants of health.” The psychosocial health effect of the law refers to the “psychological processes by which daily stressors ‘get under the skin’.” The role of the law as a pathway for stressors will not be addressed in this thesis.

Concerning the second mechanism in which law act as a pathway, Burris et al. maintain that the exposure to pathogens or pathogenic practices takes place because certain social conditions “structure health by influencing things like where people live and their individual and collective capacity to limit or respond to threats.” The idea that law acts as a pathway through which social conditions expose individuals to pathogens or pathogenic practices is extremely similar to Link and Phelan’s notion of “contextualization of the exposure to risk-factors,” explained in section 1.2. Burris et al.

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79 Supra note 9 at 513 (Emphasis added)
80 Supra note 9 at 513
81 Supra note 9 at 513 (Emphasis added)
82 Supra note 9 at 514
affirm that law is “one of the social systems through which this sorting of exposure and rationing of capacity takes concrete form.”

In order to explain how law is a pathway that assists certain social conditions in the determination of exposure to risk factors, Burris et al. provide two examples:

1. People of low socioeconomic position … are disproportionately subject to harmful interactions with law enforcement; and (2) the operation of law gives an advantage to cohesive communities over less cohesive ones in the siting of environmentally hazardous activities.

This thesis is concerned with the first mechanism: the role of law determining the interaction of socio economically disadvantaged women with law enforcement. To explain this notion, the scholars express that, for instance, the racial disparities regarding injection-related HIV/AIDS in the U.S. may be the result of racial disparities in policing. In this case, the enforcement of the law, by means of policing, is a pathway for social inequities to determine black people’s lack of access to disposable syringes, as well as risky behaviors.

In Argentina, the operation of the law acts as a pathway along which other social factors determine unsafe abortion because it exposes socio economically disadvantaged pregnant women, which are legally entitled to have abortions, to pathogenic practices, such as self-induced abortions through the introduction of knitting needles in their cervixes, which ultimately determine abortion-related morbidity and mortality.

This thesis holds that the law and the application of the law concerning abortion—statutes, conflicting courts rulings and system of judicial review—trigger legal uncertainty and perpetuate gender stereotypes that, ultimately, contribute to unsafe abortion. This process will be thoroughly examined in Chapters 3 and 4. For the

83 Supra note 9 at 514
84 Supra note 9 at 514
85 Supra note 9 at 515
86 Supra note 6 at 31
moment, it is important to state that the legal uncertainty and the perpetuation of stereotypes that law triggers have three main impacts: health professionals report their patients when they have had abortions, exposing them to criminal proceedings in breach of the duty of confidentiality; health professionals fear criminal prosecutions and, hence, suffer from chilling effect, refraining from performing abortions authorized by the Criminal Code; and health professionals request judicial authorizations before performing abortions that are legally justified in the Criminal Code. In turn, these consequences contribute to women’s lack of access to safe and legal abortions. Accordingly, women from low socio economic status are more exposed to pathogenic practices regarding abortion, as well as to the whole legal apparatus. The operation of the law influences ill health inequity because it contributes to determine which women are the victims of unsafe abortions as well as criminal prosecutions on the basis of their socioeconomic status.

Figure 1 shows the way in which law operates as a pathway along which other determinants of unsafe abortion have an effect.

Figure 1: Law as a pathway along which health determinants contribute to unsafe abortion in Argentina
The chart may be explained through a simple example: Jane is a 16 years old girl from a low socio economic status who was raped and got pregnant; she is legally entitled to have an abortion but health professionals refuse to perform it; she cannot afford to pay for a safe, though still clandestine, abortion; therefore, she decides to self-induce it through the introduction of needle knits in her cervix; as a result she suffers from obstetric fistula. In this case, the law acts as a pathway along which low socio economic position determines abortion-related morbidity. In other words, low socio economic position is the starting point of the process, and the law is just a means through which the social factor operates. According to Burris et al.’s theory, the law exposes the woman to pathogenic practices. But when we think about the reason why health professionals refused to perform a safe and legal abortion, even though Jane qualified for it, we are driven to wonder about what structured health professionals’ refusal in the first place. In short, the question revolves around what shapes women’s lack of access to legal and safe abortions. Section 1.3.2 will stress this question.

87 Supra note 9 at 512. See the graphic explaining the two relationships between law and health.
1.3.2 Law as a *shaper* of social determinants of unsafe abortion in Argentina

Burris et al. point out that the second role of law in determining health outcomes is the notion that law is not only a pathway for social conditions but a shaper of those social conditions that contribute to health outcomes. The role of law in shaping or developing social conditions implies moving away “from thinking of the fundamental social determinants of health as the *starting point* of the analysis and ask instead how these social structures themselves arise.” \[^{88}\] According to the authors, this means starting from “law and ask[ing] how it might contribute to the *production and reproduction* of the social structures that in turn broadly determine health.”\[^{89}\]

Burris and colleagues address mainly the role of law in shaping a status that, in turn, determines access to resources and exposure to risk factors. They argue that:

> Asking how law contributes to the creation, maintenance, and reproduction of *social status and power* offers a way to identify a role of law in health (and in improving health) at a ‘structural’ level far removed from immediate health outcomes or specific legal mechanisms.\[^{90}\]

Burris et al. develop three ways in which law shapes status. Firstly, they point out how law influences *access to resources* by looking at the way tax laws shape economic inequality, which, in turn, determines health;\[^{91}\] secondly, the scholars stress how law *creates institutions and procedures for governance* by examining the way electoral laws shape political participation, influencing the social cohesion which, in turn, determines health;\[^{92}\] and finally, the authors analyze how law *constructs the normative world* by

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\[^{88}\] Supra note 9 at 511
\[^{89}\] Supra note 9 at 511 (Emphasis added)
\[^{90}\] Supra note 9 at 511 (Emphasis added)
\[^{91}\] Supra note 9 at 515 (Emphasis added)
\[^{92}\] Supra note 9 at 516
reviewing the way discrimination law shapes racism, influencing social position which, in turn, determines health.\textsuperscript{93}

In the case of Argentina, the operation of the law acts also as a shaper of social determinants of unsafe abortion. As said before, this thesis seeks to adapt Burris et al.’s model to the context of unsafe abortion. The legal uncertainty and the perpetuation of gender stereotypes triggered by the law structure \textit{women’s lack of accessibility and availability} to the procedure, determining their socio economic status, and \textit{constructs the normative world} where gender stereotypes are naturalized, affecting the way health professionals feel about abortion and influencing their willingness to perform them. In other words, the perpetuation of gender stereotypes through the operation of the law structures women-who-get-abortions’ social status. In their explanation of the law constructing the normative world, Burris et al. stress that:

\begin{quote}
A set of supportive social norms or ideas that make the application of different treatment to some members of a population sensible, justified or even natural and inevitable … to the people who do the daily sorting in countless encounters and decisions. The rationale is also important in the creation and operation of policies that perpetuate it. Law often provides this rationale.\textsuperscript{94}
\end{quote}

Figure 2 shows how law operates as a shaper of social conditions that determine health.

\textit{Figure 2: Law as a shaper of social determinants of health}

\textsuperscript{93} \textit{Supra} note 9 at 517
\textsuperscript{94} See \textit{Supra} note 9 at 517
This chart can be explained with the same example that was used to explain the operation of the law as a pathway of social determinants of unsafe abortion. The difference is that, when looking at the elements in the law that structure health professionals’ refusal to perform a legal abortion to Jane, it is possible, for instance, to point at the perpetuation of gender stereotypes as a shaper of Jane’s social status. That is to say, the law constructs the normative world where gender stereotypes are acceptable and natural. In addition, by creating legal uncertainty, law also structures Jane’s lack of access to legal and safe abortions. Accordingly, it is possible to understand the law as the starting point of Jane’s socio economic status, at least regarding unsafe abortion and the obstetric fistula outcome.

1.4 Conclusion

Law as a factor that influences health outcomes may work in two directions that are not exclusionary: its enforcement and application, may work as a pathway for social

95 Supra note 9 at 512; see the graphic explaining the two relationships between law and health.
determinants and/or as a shaper of social determinants. This thesis postulates that Argentine law—criminal abortion legislation, conflicting rulings of the courts regarding criminal justifications for abortion and the obligation of health professionals to report abortions in breach of the duty of confidentiality, and the system of judicial review—constitute both a pathway for other social determinants of unsafe abortion, and a shaper in the production and reproduction of social determinants of unsafe abortion. Next Chapter will describe and analyze the Argentine normative framework that acts as a social determinant of health.
CHAPTER 2

The Normative Framework: What Does the Law Say?

In Chapter 1, the social epidemiology approach was introduced in order to frame Argentine law as a social determinant of unsafe abortion among women entitled to have a legal and safe abortion under the justifications offered by the Criminal Code.

Chapter 2 aims to introduce and analyze Argentine law. In Argentina, abortion is legally restricted. The express criminalization of the procedure, however, is only one of the elements in the normative puzzle that determine abortion-related mortality and morbidity. In this Chapter the interrelation will be described between the criminalization of abortion and its exceptions, the legal duty of health professionals to preserve confidentiality and their legal obligation to report the commission of an offense prosecutable ex-officio, which brings about a conflict of duties regarding abortion, the system of judicial review in which courts operate and the constitutional framework that grants constitutional hierarchy to some international human rights treaties.

2.1 The Criminalization of Abortion and its Justifications

The Argentine Criminal Code (CC) criminalizes abortion in articles 85, 86, 87 and 88. The CC states that all criminal offenses are prosecutable ex officio, except those that are initiated by private action. On this regard, in article 72 and 73, the CC

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96 Criminal Code of Argentina, article 71: “All criminal actions shall be prosecutable ex officio, except for: (1) actions depending on a private party; (2) private actions.” (Translation of author)

97 Criminal Code of Argentina, article 72: “1. Crimes listed in Articles 119, 120 and 130 of the Criminal Code, when they do not result in the death of the victim or in any injuries as mentioned in Article 91; 2. Minor injuries, whether intentionally or negligently caused. The crimes provided for in this paragraph, however, shall be prosecuted ex officio when there are public interest or safety concerns involved; 3. Impediment to the contact between minor children and their parents who are no longer living together. For these cases, action shall be brought only by accusation or indictment by the aggrieved party, their
expressly mentions the offenses that are not public order ones, and abortion is not among them.

Art. 85 of the CC punishes abortion:

A person that performs an abortion shall be sentenced:
1. to imprisonment or detention for three to ten years provided it was performed without the woman’s consent. The sentence could be up to fifteen years in the case of the woman’s death.
2. to imprisonment or detention for one to four years provided it was performed with the woman’s consent. The sentence could be up to six years in the case of the woman’s death.99

Article 86 of the CC establishes the cases where abortion is justified:

The physicians, surgeons, midwives and pharmacists who, by abusing their science or art, perform an abortion or cooperate in the procedure, shall be sentenced under art. 85, and will receive, in addition, a limited disqualification for twice the time. An abortion performed by a registered physician, with the pregnant woman’s consent, will not be punishable if:
1. It was performed to avoid a risk to the life or health of the mother provided this risk cannot be avoided by other means;
2. The pregnancy has resulted from rape or sexual abuse committed against an idiotic or insane woman. In this case, abortion requires the consent of her legal representative.100

Diana Maffía analyses each exception in the article 86 of the CC separately. The first exception justifies abortion based on health considerations; doctrine and jurisprudence refer to it as “therapeutic abortion.” The second exception justifies

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98 Criminal Code of Argentina, article 73: “Private actions are those resulting from the following crimes: 1. Adultery; (repealed by Act No. 24453) 2. Libel and slander; 3. Breach of confidentiality, except for cases provided for in Articles 154 and 157; 4. Unfair competition, as provided for in Article 159; 5. Failure to pay alimony, when the victim is the spouse.” (Translation of author)

99 Translation of author
100 Translation of author. Emphasis added
abortion in the case of raped and mental disability; doctrine and jurisprudence refer to it as “eugenic abortion.”

2.1.1 Analysis: article 86 (1) of the Criminal Code

As said in Chapter 1, this thesis holds that one way in which law acts as a pathway and as a shaper of social determinants of unsafe abortion is through the perpetuation of hostile gender stereotypes. It acts as a shaper of social status because it constructs the normative world, influencing women’s lack of access to legal abortions, but it also acts as a pathway along which socio economic status determines unsafe abortion because it exposes women to pathogenic practices. Even though a comprehensive and detailed analysis of the operation of gender stereotypes goes beyond the purpose of this thesis, it is relevant to address the stereotype present in the law.

Michelle O’ Sullivan holds that stereotypes arise due to a need to categorize events and people in the world. She argues that “stereotyping is this tendency to label a particular individual by selecting a given trait, which we perceive her to posses, and then to assume that the consequences we attach to that trait ineluctably attach to the individual.”

Article 86 (1) of the CC justifies abortion when mother’s life or health is at risk. Maffía stresses a preliminary observation regarding the use of the word “mother” in the Article. She points that the term mother entails a relational status towards somebody else; she argues that motherhood is not intrinsic to the feminine role. According to

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102 For more on gender stereotypes and abortion in Argentine history, see M. Bellucci, “Women’s struggle to decide about their own bodies: abortion and sexual Rights in Argentina” (1997) 5 (10) Reprod Health Matters. 99-106
104 Supra note 101 at 150
this scholar, the way in which the law conceives that the mere pregnancy turns a woman automatically into a mother is rooted in a deep prejudice that blurs other characteristics of women and reduces them to a primitive condition.\textsuperscript{105} She further notices that the word \textit{mother} creates social expectation for women to privilege motherhood over any other capacity or life project.\textsuperscript{106} Maffia highlights that reducing women to motherhood is an ideological obstacle that impedes achieving a comprehensive understanding of the conflict of unwanted pregnancy and abortion.\textsuperscript{107}

Maffia’s analysis of the gender stereotype that operates in the law is called “sex-role stereotype.” O’Sullivan holds that “sex-role stereotypes reflect traditional attitudes concerning both the ‘proper roles’ and ‘true nature’ of women.”\textsuperscript{108} Accordingly, O’Sullivan affirms that “sex-role stereotypes suggest that the position of specific women is a result of innate characteristics, not a reflection of the organization of society.”\textsuperscript{109} In this regard, it is pertinent to mention Mary Boyle’s analysis of the nature of abortion legislation. She holds that “the way in which abortion is represented in the debates and legislation, may be dependent on particular constructions of motherhood.”\textsuperscript{110} Furthermore, she suggests that “this is particularly important given the extent to which motherhood dominates cultural representations of women and the extent to which ‘woman’ and ‘mother’ have been conflated.”\textsuperscript{111} The scholar argues that the process of idealizing and naturalizing motherhood takes place in western societies that depict women-as-mothers.\textsuperscript{112}

\begin{thebibliography}{99}
\bibitem{105} Supra note 101 at 150
\bibitem{106} Supra note 101 at 150
\bibitem{107} Supra note 101 at 150
\bibitem{108} Supra note 103 at 188
\bibitem{109} Supra note 103 at 188
\bibitem{110} M. Boyle, \textit{Re-thinking Abortion: Psychology, gender, power and the law} (New York: Routledge, 1997) at 28
\bibitem{111} Ibid at 37
\bibitem{112} Ibid
\end{thebibliography}
It can be affirmed, then, that woman-as-mothers is the sex-role stereotype lying behind the criminalization of abortion.

The content of this stereotype consists in the image of “women who put their own needs second to those of their children; women who willingly retreated from the world and abandoned their own pleasures and interests to devote themselves wholeheartedly and exclusively to the welfare of their children.”113 Accordingly, women who have abortions are selfish and morally inferior to those that do not.114

The origin of this stereotype in Argentina has several roots. Cynthia Steele and Susana Chiarotti write:

Argentina has a long tradition of pronatalist policies, reinforced by conservative forces inside and outside the Catholic Church, evidenced in the establishment of a national day of the unborn child in 1997.115

Chapter 3 and 4 will address how stereotypical notions of womanhood determine unsafe abortion. Nevertheless, it is valuable to notice that, in the case of Article 86 (1) of the CC, the perpetuation of gender stereotypes in the law act as a shaper of the normative world, influencing the social status of women that need abortion, and determining the way health professionals feel about abortion. In turn, this influence women’ access to safe and legal abortion, making the law act as a pathway along socioeconomic status determines unsafe abortion when it exposes poor women to pathogenic practices.

Taking up again the analysis of Article 86 (1) of the CC, “therapeutic abortion” in the Argentine legal context is allowed when there is a risk to the life or health of the

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113 Ibid
114 Ibid at 38
mother. Maffía emphasizes that article 86 of the CC takes both life and health into account, and that health is an integral state of wellbeing.\textsuperscript{116} Furthermore, she underscores one of the most relevant aspects of the law: the article requires the woman’s consent, but not judicial authorization. Maffía points out the natural logic that follows from the article: to decide whether an abortion is therapeutic or not falls under the responsibility and discretion of the health professionals.\textsuperscript{117} The incorporation of extra requisites entails the violation of the division of powers; only be done by the Congress can amend the Code to include the requirement of a judicial authorization.\textsuperscript{118}

\textbf{2.1.2 Analysis: Article 86(2) of the Criminal Code}

In her analysis of Article 86 (2) of the CC, Maffía affirms that, in her opinion, the law must be interpreted as justifying eugenic abortion\textsuperscript{119} under two circumstances: firstly, when the pregnancy results from rape, and secondly, when the pregnancy results from sexual abuse of an idiotic or insane woman.\textsuperscript{120} The truth is that the article is very controversial and admits two different interpretations: the first one is Maffía’s interpretation as explained above, and the second one understands that, for abortion to be legal, the two conditions have to be satisfied: the woman has to be raped and, also, idiotic or insane. Nevertheless, the proper interpretation according to human rights standards is Maffía’s. She argues that, when it comes to an idiotic or insane woman, even if the sexual intercourse did not involve violence, the woman could have never

\begin{itemize}
\item \textsuperscript{116} World Health Organization defines health as a “state of complete physical, mental and social well-being and not merely the absence of disease and infirmity” at Preamble to the Constitution of the World Health Organization as adopted by the International Health Conference, New York, 19-22 June, 1946; signed on 22 July 1946 by the representatives of 61 States and entered into force on 7 April 1948.
\item \textsuperscript{117} \textit{Supra} note 101 at 152
\item \textsuperscript{118} \textit{Supra} note 101 at 152
\item \textsuperscript{119} As a preliminary point, it is worthy to clarify that the term “eugenic abortion” refers to abortion when the woman is idiotic or insane; but when abortion is justified because a healthy woman was raped, the proper term is “sentimental abortion.” Nevertheless, Diana Maffía refers to “eugenic abortion” for both cases.
\item \textsuperscript{120} \textit{Supra} note 101 at 155
\end{itemize}
granted her consent. In fact, in cases where an idiotic or insane woman is raped, the consent of the legal representative is required for an abortion to be performed. Accordingly, from a legal perspective, the case of the idiotic and insane woman constitutes rape, and this case is comparable to the one of a healthy woman who was raped, because the latter did not consent either. The conclusion that follows is that the article justifies abortion both when a healthy woman is raped and when an idiotic or insane woman is abused. Unfortunately, this is not the position adopted by many Argentine judges, who are reluctant to authorize abortions even to abused idiotic or insane women. These cases will be addressed in Chapter 4.

As mentioned in the analysis of article 86(1) of the CC, in article 86 (2) of the CC judicial authorization for the performance of legal abortions is not required either.

In addition to articles 85 and 86 of the CC, article 87 of the CC punishes abortion caused with violence and without intention, and article 88 of the CC states that even though self-abortion is punishable, the attempt to do so is not.

2.2 The legal duty of confidentiality

2.2.1 Analysis: Right and Duty of Confidentiality

The duty of confidentiality is one of the most ancient principles in medicine. The Hippocratic Oath states:

…Into as many houses as I may enter, I will go for the benefit of the ill, while far from all voluntary and destructive injustice,
especially from sexual acts both upon women’s bodies and upon men’s, both of the free and the slaves.

And about whatever I see or hear in treatment, or even without treatment, in the life of human beings –things that should not ever be blurted out outside– I will remain silent, holding such things to be unutterable [sacred, not to be divulged].\textsuperscript{125}

The duty of confidentiality is not only present in the medical sphere; although in this sphere said duty becomes particularly relevant. The World Health Organization (WHO) states that:

Providers have a duty to protect patients’ information against unauthorized disclosures, and to ensure that patients who do authorize release of their confidential information to others do so freely and on the basis of clear information.\textsuperscript{126}

Rebecca Cook and Bernard Dickens identify three aspects that conform the duty of confidentiality:

- The duty of health professionals to protect patient’s information against disclosures without their consent;\textsuperscript{127}
- Patient’s right to know and have access to the information that health professionals have about them;\textsuperscript{128}
- The duty of health professionals to guarantee that those patients who authorize disclosures do it the exercise of their informed and autonomous will.\textsuperscript{129}

Cook and Dickens argue that the duty of confidentiality falls on those health professionals that have received confidential information directly from the patient, but

\textsuperscript{125} S. H. Miles, \textit{The Hippocratic Oath and the Ethics of Medicine} (New York: Oxford University Press, 2004) at xiv
\textsuperscript{128} \textit{Ibid}
\textsuperscript{129} \textit{Ibid}
also on those health professionals who received the information from another health professional that is involved or was involved in the patient’s treatment –even performing an administrative function– as well as on those professionals who received the information without the patient’s express consent.\textsuperscript{130}

Jonathan Herring argues that, at first sight, the confidentiality principle seems to be clear, obvious and undisputable.\textsuperscript{131} Nevertheless, the scholar notices that modern medical practices have turned confidentiality into a complex issue; a patient in a clinic is assisted by several health professionals, each one responsible for different aspects of the treatment. This means that many professionals have or may have access to the patient’s medical records.\textsuperscript{132} Furthermore, the increasing use of digital medical records, while providing a better access to information, make difficult to protect confidentiality.\textsuperscript{133}

This scenario worsens when it comes to abortion issues. Cook and Dickens highlight that the sensitivity concerning reproductive and sexual matters makes abortion a taboo subject in many families, communities and even within the couple.\textsuperscript{134} Accordingly, the duty of confidentiality is especially important in cases of abortion, where the possibility of it being breached is likely to deter women from seeking medical assistance.\textsuperscript{135} In fact, the WHO considers that the breach of confidentiality is a barrier to access safe and legal abortion;\textsuperscript{136} that is to say, non-observance of confidentiality has negative public health consequences.

\begin{thebibliography}{99}
\item \textit{Ibid} at 20
\item J. Herring, \textit{Medical Law and Ethics} (Oxford: Oxford University Press, 2006) at 144
\item \textit{Ibid}
\item \textit{Ibid}
\item Supra note 127 at 20
\item Supra note 127 at 20
\item Supra note 126 at 94
\end{thebibliography}
Jonathan Herring holds that there are three types of arguments for the protection of the duty of confidentiality: consequentialist, deontological and public/private benefits.\(^{137}\)

Consequentialist arguments maintain that the breach of confidentiality may deter the patient from seeking prompt health services. Moreover, if confidentiality is ensured, the patient will feel protected and will provide the information necessary for an accurate diagnosis and treatment. This rationale prioritizes the patient's right to health and efficiency in the provision of the service.\(^{138}\) It is the same rationale behind the General Recommendation 24 of the CEDAW with regard to sexual and reproductive health services:

> While lack of respect for the confidentiality of patients will affect both men and women, it may deter women from seeking advice and treatment and thereby adversely affect their health and well-being. Women will be less willing, for that reason, to seek medical care for diseases of the genital tract, for contraception or for incomplete abortion and in cases where they have suffered sexual or physical violence.\(^{139}\)

There are three deontological arguments: a patient’s personal information is part of that patient’s privacy and it is a foundational part of the patient’s identity; respect for confidentiality entails respect for patients’ autonomy and ability to make decisions about their own life; respect for confidentiality involves a duty of fidelity: health professionals make a promise and the patients expect them to keep it.\(^{140}\)

Public/private benefit arguments are based on the idea that when health professionals breach the duty of confidentiality, they produce an individual damage, but also a social damage, because patients no longer trust health professionals. In turn, the lack of trust has a detrimental impact in public health. In spite of that, Herring admits

\(^{137}\) Supra note 131 at 190-191
\(^{138}\) Supra note 131 at 190-191
\(^{139}\) Supra note 37 at para 12 (d)
\(^{140}\) Supra note 131 at 191
that problems may arise when a particular public interest is considered more relevant than a private interest, and in those cases confidentiality breach is justified.\textsuperscript{141} This is the case in Argentina, where health professionals have a legal duty of confidentiality but also a legal duty to report crimes prosecutable \textit{ex-officio} (public order crimes) when they learn about them during the exercise of their profession. In Argentina, many judges consider that health professionals should report a woman seeking medical attention for an incomplete abortion, because abortion is criminalized and the State has a public interest in protecting public order and prosecuting crimes.\textsuperscript{142} This thesis will demonstrate that the breach of confidentiality, by means of the legal duty of health professionals to report abortion instances, gives rise to public health problems other than the violation of an individual patient’s rights.

In Argentina, the breach of the principle not only affects patients –specifically women with incomplete abortions–, deterring them from seeking proper and timely health services, but also affects health professionals, making them fear criminal prosecutions and discouraging them from offering prompt medical procedures. In short, the legal duty of health professionals to report turns the duty of confidentiality into a right for health professionals. In this regard, it is relevant to notice that the Inter-American Court of Human Rights, in \textit{De La Cruz Flores v. Peru},\textsuperscript{143} has ruled that requiring health professionals a legal duty to report the commission of an offence violates the principle of legality. This case will be addressed in Section 2.4 of this Chapter. Notwithstanding that, the fact that the Court upheld the principle of legality to protect health professionals could be understood as stating that the duty of confidentiality is also a health professionals’ right. The way in which the breach of

\textsuperscript{141} \textit{Supra} note 131 at 191-192
\textsuperscript{142} See e.g. \textit{GN} (2007) National Court of Criminal Appeals, Division VII. This case will be addressed in Chapter 3
\textsuperscript{143} \textit{De La Cruz Flores v. Peru} (2004) Inter American Court of Human Rights
confidentiality in Argentina not only affects women’s rights but also health professionals’ rights, which, in turn, affects women’s rights, will be called the “unsafe abortion circle” and will be developed in detail in Chapters 3 and 4. However, and for the purpose of this section, it is sufficient to say that when the law protects the duty of confidentiality, it is acting as a shaper of positive social conditions that determine good health, because it is structuring women’s accessibility and availability to legal abortions. On the contrary, when the law requires health professionals to report the commission of abortion, in breach of the patient’s confidentiality, it is acting as a pathway along which other social conditions will determine unsafe abortion, and as a shaper of those determinants. In the latter case, law is deterring health professionals from performing legal abortions and hence, determining women’s lack of access to medical services, as well as exposing women to risk factors, such as hazardous abortive practices.

2.2.2 Analysis: article 156 of the Criminal Code

The Criminal Code of Argentina states health professionals’ legal duty of confidentiality in article 156:

Any person who, because of his or her status, trade, employment, profession or art, knows a secret whose disclosure may harm others and discloses it without good cause shall be sentenced to a fine of one thousand five hundred to ninety thousand pesos and limited disqualification, if appropriate, for a period of six months to three years.144

Article 156 of the CC refers to professional secrecy in general terms. Its elements are: a secret, a person who knows of it while developing an activity that demands trust, disclosure of the secret, a lack of a good cause to justify the disclosure, and a potential harm. In other words, the article defines both the duty of confidentiality

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144 Emphasis added. Translation of author
and the case in which it could be breached, namely, good cause. Article 156 of the CC is relevant for the purpose of this thesis, because it is understood that it contemplates the duty of confidentiality in the medical field.

Germán Sucar, Jorge L. Rodriguez and Agustín Maria Iglesias make a detailed analysis of the scope and application of article 156 of the CC. The scholars stress that the punishment for the disclosure of a secret is trying to protect the right to privacy as it is part of the individual’s right to freedom. It could be said that Sucar et al. argue for the protection of confidentiality from deontological basis, as explained by Herring. They point out that the aim of the legal provision is to avoid an illegitimate intrusion in the private sphere of the individual. Accordingly, the right to privacy entails the right to avoid the disclosure of private information without consent.

Sucar et al. argue that, as set forth in the article, secrecy covers, on the one hand, those circumstances unknown by the individual (such as an illness the patient is unaware of) but which, if the individual knew, he or she would not want them to be disclosed; and, on the other hand, those circumstances that, even though the individual has learned about, he or she has not expressly manifested them.

Sucar et al. stress that three conditions have to be satisfied in order to consider some information as secret according to the article. The first one is that secrecy has to concern the patient’s private sphere; there is no breach of secrecy when the fact or information is of public knowledge, publicly exposed, or when it is discussed with somebody who is already aware of it. The second condition is patient’s willingness to keep the information confidential; willingness may be express or presumed, and when a

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145 G. Sucar & J.L. Rodríguez & A.M. Iglesias, "Violación de Secretos y Obligación de Denunciar: un dilema ficticio" (1998) 8 (B) Cuadernos de Doctrina y Jurisprudencia Penal. 191-296 at 194-95
146 Ibid at 195
147 Ibid
148 Ibid at 196
149 See R. Nuñez, Derecho Penal Argentino, Parte Especial (Buenos Aires: Bibliografía Argentina, 1967) at 118
150 Supra note 145 at 197
patient has not expressed his or her willingness to keep the secrecy, confidentiality has to be presumed.\(^{151}\) In this regard, Casas and Isla also argue that the duty of confidentiality must be respected even if the patient did not request it expressly.\(^{152}\) The third condition is the *possibility of harm*;\(^{153}\) the kind of harm envisaged by the law does not necessarily have to be an actual harm. The harm can be potential and affect the patient or a third party, such as the patient’s relatives and friends.\(^{154}\)

Regarding the notion of “good cause,” Sucar and colleagues argue that the existence of a “good cause” does not mean that the disclosure of the secret is legal; rather, it means that the disclosure is justified under the criminal law.\(^{155}\) Accordingly, the extent and scope of the “good cause” has to be interpreted complying with express legal principles; otherwise, the requirement for “good cause” constitutes a violation of the principle of legality.\(^{156}\) They believe that there exists “good cause” when there are extenuating circumstances justifying disclosure in order to avoid a greater harm, or when the information was disclosed to protect the legitimate interest of the individual affected by the norm.\(^{157}\) Concerning the avoidance of a greater harm, the scholars maintain that the interest of the State in prosecuting an offense could never be put before the right to freedom, which in the article aims to protect.\(^{158}\) Casas and Isla hold that the duty of confidentiality may be infringed positively, namely, through actions, or negatively, namely, by omission.\(^{159}\)

\(^{151}\) *Supra* note 145 at 197


\(^{153}\) *Supra* note 145 at 198

\(^{154}\) *Supra* note 145 at 198

\(^{155}\) *Supra* note 145 at 201

\(^{156}\) See *supra* note 143. The case will be addressed in Section 2.4 of this Chapter.

\(^{157}\) *Supra* note 145 at 203-204. The scholars give the example of malpractice and fees trials.

\(^{158}\) *Supra* note 145 at 204

\(^{159}\) *Supra* note 152 at 100
In addition to article 156 of the CC, article 244 of the CCP states:

Ministers of recognized religious denominations; lawyers, attorneys, and notaries; physicians, pharmacists, midwives, and other health-care assistants or caregivers; and, regarding State secrets, the military and public officers shall refrain from bearing witness on confidential facts they might know of on account of their own status, trade or profession, at the risk of being disqualified from office. They, however, cannot deny testimony if the interested party absolves them from the duty of confidentiality.160

Sucar et al. believe that the prohibition to become witnesses is rooted in the fundamental role that health professionals, among others, play in society, in which trust is an essential element.161 As was previously observed by the WHO and the CEDAW, the lack of trust in health professionals, especially regarding reproductive and sexual health issues, deters patients from seeking prompt medical attention. Accordingly, even though the protection of professional secrecy may be justified under deontological arguments, when it comes to health professionals’ duty of confidentiality, the justification is also rooted in consequentialist public health considerations.

As mentioned above, the law in Argentina also requires health professionals to report the commission of offences prosecutable *ex-officio* when they find out about them during the exercise of their profession. In the next section, the articles where this duty is required will be analyzed, as well the rationales why, in the cases of women seeking post-abortion treatment, health professionals do not have a duty to report such treatments.

2.3 Legal duty to report

160 Emphasis added
161 *Supra* note 145 at 216
In addition to the legal protection of health professionals’ duty of confidentiality, the Argentine legal system provides for health professionals’ duty to report the commission of any offense they learn about during the exercise of their profession. These two duties seem to be conflicting and they often give rise to a legal dilemma of duties among health professionals. Unfortunately this is a reality common to many Latin American countries, such as Chile and Peru. Even though the situation in other countries exceeds the objectives of this thesis, it is pertinent to highlight the systemic public health problem that the whole region suffers, determined by the law and more specifically, by health professionals’ duty of confidentiality and duty to report the offenses.

In Argentina, article 177 of the Code of Criminal Procedures (CCP) states:

The obligation to report crimes prosecutable ex-officio shall be binding on:
(1) Public officers or civil servants who know of them while exercising their duties;
(2) Physicians, midwives, pharmacists, and other people in the health-care and caregiving sector, with regard to crimes against life and physical integrity known due to the practicing of their profession, except when the facts known are protected by professional secrecy.

Furthermore, article 277 (1) of the Criminal Code (CC) specifies who can be subject to criminal prosecution:

A person shall be sentenced to imprisonment for six months to three years, following the commission of a crime by another person in which he or she has not participated, if he or she:

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162 Articles 231, 246 and 247 of the Criminal Code of Chile protect confidentiality while article 175 of the Code of Criminal Procedures of Chile requires health professionals to report the offenses known during the exercise of their profession.

163 Article 2 (18) of the Political Constitution of Peru, article 165 of the Criminal Code, articles 327 (2) and 165 (2) of the Code of Criminal Procedures, article 141 (1) of the Code of Criminal Procedures and article 15 (a) y (b) of the General Statute on Health protect professional secrecy. On the other hand, Article 30 of the General Statute on Health requires health professionals to report when they assist a woman that present signs of an abortion. Also, Article 407 of the Criminal Code punishes the omission to report.

164 Emphasis added. Translation of author.
(d) Fails to report the commission of a crime or to identify the perpetrator or accessory of a known crime, where he or she is under an obligation to further the criminal prosecution of a crime of that nature.\textsuperscript{165}

In addition to the Articles mentioned above, articles 249\textsuperscript{166} and 274\textsuperscript{167} of the CC are sometimes mentioned among the regulations that require health professionals to report offenses, because article 249 of the CC punishes public officers who delay or fail to perform an act pertaining to their office, and article 274 of the CC punishes public officers who breach their official duty and fail to further the prosecution of a crime, unless they are justified by an insurmountable difficulty.

At first sight, article 156 of the CC and articles 177 of the CCP and 277 (1, d) of the CC seem to constitute a dilemma of duties to health professionals. On the one hand, article 177 of the CCP requires public officers and health professionals to report those offenses that are prosecutable \textit{ex officio}, and article 277 (1; d) of the CC considers that those individuals who refrain from reporting the commission of an offense when there is an obligation to report to be accessories. On the other hand, article 156 of the CC and article 244 of the CCP require health professionals to protect the patients’ confidential information.

Despite that a considerable part of the jurisprudence understands that there is a dilemma of duties,\textsuperscript{168} Sucar and colleagues consider that dilemma fictitious.\textsuperscript{169} They

\textsuperscript{165} Emphasis added
\textsuperscript{166} \textit{Criminal Code of Argentina}, article 249: “Any public officer who illegally delays, or fails or refuses to perform, an act pertaining to their office shall be sentenced to a fine of seven hundred and fifty to one thousand and five hundred pesos and limited disqualification for a period of one month to one year.” (Translation of author)
\textsuperscript{167} \textit{Criminal Code of Argentina}, article 274: “A public officer who, contrary to their official duty, fails to further the prosecution and conviction of criminals will be sentenced to absolute disqualification of six months to two years, unless he/she proves that his/her failure to do so was due to an insurmountable difficulty.” (Translation of author)
\textsuperscript{168} See e.g., \textit{supra} note 142
hold that the natural -and appropriate- legal consequences derived from the normative puzzle are: firstly, that the disclosure of information known under professional secrecy is prohibited, and secondly, that the illegitimate disclosure of the secret can never be used to initiate a criminal procedure against the patient.\footnote{Supra note 145 at 212}

Luis Niño also believes that it is possible to solve the health professionals’ dilemma of duties. For him, the interests and rights at stake are the patient’s constitutional right to health\footnote{Derived from Article 75 (22) of the National Constitution, that states that the International Covenant on Economic, Social and Cultural Rights has constitutional hierarchy.} and patient’s right against self-incrimination.\footnote{National Constitution of Argentina, article 18.} His argument, supported by the many Argentine Courts, states that a report by a health professional violates patients’ right against self-incrimination because a patient does not reveal the offense voluntarily; on the contrary, the patient is compelled to do so by an insurmountable circumstance, in an attempt to protect her life or health. Accordingly, no criminal procedure can be initiated by that kind of report.\footnote{L. Niño “El derecho a la asistencia médica y la autoincriminación” in F.G. Plazas & L.A. Hazan eds., Garantías constitucionales en la investigación penal (Buenos Aires: Editores del Puerto, 2006) 3-16 at 3}

In their analysis of article 177 of the CCP, Sucar and colleagues point out that, since the article reads “except when the facts learned about are protected by professional secrecy,” the duty to report arises only when the information obtained was \textit{not} under the duty of confidentiality.\footnote{Supra note 145 at 214} Accordingly, they consider that the disclosure can only take place when the patient is the victim. If the patient is the author of the offense, reporting it would constitute a violation of article 156 of the CC, because it would expose the patient to a criminal procedure and would cause her an irreparable harm.\footnote{Supra note 145 at 214-15} The idea that a criminal procedure is “potential harm” enough according to article 156 of the CC is partly derived from article 244 of the CCP. In this regard, some
judges consider that if article 244 of the CCP does not allow some professionals, such as lawyers and religious ministers, to become witnesses, it cannot possibly require them to report the offense.\footnote{176} It would be similar to asking a lawyer to denounce his/her client when he/she knows the client is guilty.\footnote{177} In this regard, it is worth noticing the ruling of the Court of Criminal Appeals in the case Zambrana Daza. In this case a woman arrives to the hospital seeking for medical assistance because she had transported drugs in her stomach, which caused serious ulcers. Like in the cases of abortion, in this case the health professional was the one who reported her to the police. Although the case does not have to do with abortion, the right against self incrimination was also at stake. The Court of Criminal Appeals upheld:

\begin{quote}
The right against self-incrimination assumes, precisely, that in spite of accepting he/she could be punished, the person cannot be forced to incriminate him/herself. The fact that the defendant committed the crime does not affect the right, but, on the contrary, gives it its meaning.\footnote{178}
\end{quote}

Unfortunately, the Supreme Court of Argentina, in 1997, overturned the Court of Appeals’ ruling, saying that there was no violation of the right against self-incrimination, and requesting a new ruling.\footnote{179} The Supreme Court upheld that “when it comes to public order offenses, the report is valid to initiate the criminal proceeding; and there are no exceptions that waive the health professionals from their obligation to report.”\footnote{180}

\footnote{176} See Natividad Frías (1966) National Court of Criminal Appeals at 2-3 (LexisNexis Online, N° 30000965)
\footnote{177} See Justice Garcia Ramirez’s concurring opinion in De La Cruz Flores v. Peru. The Case will be addressed in Section 2.4 of this Chapter.
\footnote{178} Zambrana Daza National Court of Criminal Appeals, Division I (Translation of author)
\footnote{179} Zambrana Daza (1997) Supreme Court of Argentina at para 11(ElDial.com AAAF7)
\footnote{180} Ibid at para 17 (Translation of author)
Regarding article 277 of the CC and the statement that failing to report the commission of an offense implies being an accessory to said offense, Sucar et al. believe that it is not possible for a health professional to violate article 277 of the CC because the provision applies to those that have a duty to report, and article 177 of the CCP exempts health professionals from that duty.¹⁸¹

So far, there are solid foundations to uphold the duty of confidentiality over the health professionals’ duty to report. However, it is possible to wonder whether there is any limit to confidentiality. Is there any scenario where the duty health professionals to report offenses is justified? This thesis holds that, at least in the context of unsafe abortion in Argentina, the health professionals’ duty to report is not justified. This point will be studied in the next Section, together with the last element in the Argentine normative framework: the system of judicial review and the international human rights laws in the National Constitution.

### 2.4 The System of Judicial Review and the National Constitution of 1994

#### 2.4.1 The system of judicial review

Argentina is a federal republic. There are two jurisdictional spheres: the local and the national sphere. The local sphere is the provincial jurisdiction. Each province, as well as the City of Buenos Aires, has its own judiciary, Constitution, and procedural codes. On the other hand, the national jurisdiction deals with the cases that were delegated to the national sphere by the provinces. Article 31¹⁸² of the National Constitution (NC) states that the NC constitutes the supreme law of the land.

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¹⁸¹ Supra note 145 at 223
¹⁸² National Constitution of Argentina, article 31: “This Constitution, the laws of the Nation enacted by Congress in pursuance thereof, and treaties with foreign powers, are the supreme law of the Nation; and the authorities of each province are bound thereby, notwithstanding any provision to the contrary included
The Argentine National Constitution was sanctioned in 1853. The document is almost a carbon copy of United States Constitution.\textsuperscript{183} The attributions of the judiciary branch are established in Articles 116\textsuperscript{184} and 117\textsuperscript{185} of the NC. Article 116 of the NC grants the Supreme Court and lower courts with the faculty to exercise constitutional review.

The system of judicial review and, particularly, of constitutional review follows the principles established in the American case law \textit{Marbury v. Madison}.\textsuperscript{186} In Argentina, however, courts operate in a completely different way than American courts; this is mainly because Argentina has a civil law system. In other words, Argentine courts do not follow the rule of the precedent or \textit{stare decisis}. The NC does not grant binding force to any court ruling, not even to Supreme Court rulings. However, because the Supreme Court is the highest national court, some scholars maintain that lower courts have an obligation to follow those precedents except new arguments, which were not addressed by the Court, are at stake.\textsuperscript{187} Nevertheless, Nestor Sagües argues:

\begin{quote}
In fact, a lower tribunal, as a general rule, is not bound to follow the rulings of another court, either hierarchically higher or equal…Accordingly, jurisprudence is, frequently, very diverse and contradictory. Even national statutes and laws … such as the
\end{quote}

\hspace{0.5cm} in the provincial laws or constitutions, except for the province of Buenos Aires, the treaties ratified after the Pact of November 11, 1859.”
\textsuperscript{184} \textit{National Constitution of Argentina}, article 116: “The Supreme Court and the lower courts of the Nation are empowered to hear and decide all cases arising under the Constitution and the laws of the Nation, with the exception made in Section 75, subsection 12, and under the treaties made with foreign nations; all cases concerning ambassadors, public ministers and foreign consuls; cases related to admiralty and maritime jurisdiction; matters in which the Nation shall be a party; actions arising between two or more provinces, between one province and the inhabitants of another province, between the inhabitants of different provinces, and between one province or the inhabitants thereof against a foreign state or citizen.”
\textsuperscript{185} \textit{National Constitution of Argentina}, article 117: “In the aforementioned cases the Supreme Court shall have appellate jurisdiction, with such regulations and exceptions as Congress may prescribe; but in all matters concerning foreign ambassadors, ministers and consuls, and in those in which a province shall be a party, the Court shall have original and exclusive jurisdiction.”
\textsuperscript{186} See \textit{supra} note 183 at 963-964.
\textsuperscript{187} \textit{Supra} note 183 at 980-981
Civil Code, the Commercial Code or the Criminal Code...are interpreted and applied in different ways.188

Juan F. Gonzalez Bertomeu claims that it is hard to implement a stare decisis doctrine in practice if the juridical community does not reach a consensus regarding the importance of doing such a thing. He highlights that a stare decisis doctrine could only be internally incorporated by the judiciary if judges knew that any deviation from the precedent entails some sort of punishment.189 The lack of judicial accountability in Argentina produces conflicting rulings, particularly on such a sensitive issue as abortion. These rulings will be thoroughly analyzed in Chapters 3 and 4.

On the subject of the lack of judicial accountability, Roberto Gargarella stresses that judges, in countries where courts have broad powers –such as the faculty of constitutional review–, lack a shared interpretative theory and operate in a politically unstable context with a civil law tradition, are enormously powerful figures.190 He states that:

[T]he norm is that politically unstable countries develop a very unstable legal history. The main laws and codes, and even the Constitution, are subject to frequent changes.191 Many judges, and particularly Supreme Court judges, are removed after each new government comes to power, whether this government is democratic or not.192 As a consequence, judicial decisions also become very unstable. It is not only that courts at different levels develop different views, but also that the [same] court itself does, even varying from one year to the next.193

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191 The National Constitution of Argentina was amended seven times; the last one in 1994.
192 See, generally, R. Gargarella, La Justicia Frente al Gobierno: Sobre el carácter contramayoritario del poder judicial (Barcelona: Editorial Ariel, 1996)
193 Supra note 190 at 186
For Gargarella, the political and legal context described above, combined with the absence of *stare decisis*, gives the courts an “ample scope to exercise discretion in their decisions.”¹⁹⁴ This is particularly relevant to understand why Argentine courts act as a social determinant of unsafe abortion. Even though this issue will be the focus of Chapters 3 and 4, for the purpose of this section, it is relevant to mention in advance that Argentine system of judicial review act as a pathway to unsafe abortion. The fact that Argentine judges do not have an obligation to follow precedents allows them to rule according to their personal moral and religious views, particularly on abortion issues. Accordingly, the law and its application, namely, the system of judicial review and courts rulings, allow other social determinants, such as gender stereotypes and traditional notions of the role of women in society, to interfere with the rulings, creating legal uncertainty and refraining health professionals from performing legal abortions. In short, the system of judicial review contributes to unsafe abortion.

Despite the civil law tradition, and the heterogeneity of courts rulings, the Argentine system of judicial review offers some mechanisms to unify the jurisprudence in criminal matters.

In 1991, the Code of Criminal Procedures was amended through the sanction of Act No. 24050. The amendment incorporates, among other changes, a National Court of Criminal Cassation (Court of Cassation). The Court has thirteen members in four divisions, and has limited jurisdiction over criminal matters at the national level. According to Fernando de la Rúa and Fernando Díaz Cantón, this entails that the Court

¹⁹⁴ *Supra* note 190 at 193
can only address the application of the substantive criminal law and procedural matters, but it cannot rule on the accuracy of the evidence.\textsuperscript{195}

Articles 10\textsuperscript{196} and 11\textsuperscript{197} of Act No. 24050 establish that the Court of Cassation has the power to convene all its divisions in order to unify the jurisprudence on certain matters of law through what it is called a “plenary decision.” Plenary decisions from the Court of Cassation are binding for the Court, as well as for lower oral courts, courts of appeals and other jurisdictional bodies that report to it.

Unfortunately, on abortion issues, as well as on the duty of confidentiality and the duty to report offenses, the Court of Cassation has not made a plenary decision yet.

\subsection*{2.4.2 International Human Rights Treaties in the National Constitution}

The last amendment of the NC was in 1994. One of the most important reforms was the addition of Article 75 (22):

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

\textsuperscript{195} F. de la Rúa & F. Díaz Cantón, \textit{La Casación Penal: El Recurso de Casación Penal en el Nuevo Código Procesal Penal de la Nación} (Buenos Aires: Ediciones de Palma, 1994) at 4
\textsuperscript{196} Article 10: “The National Court of Criminal Cassation shall meet in a Plenary Court:
(a) To regulate its work or work distribution among its courts.
(b) To unify cases in its courts or avoid contradictory rulings.
(c) To define the interpretation of the law applicable when the Court of Cassation, on the initiative of any of its courts, should deem it advisable. The interpretation of the law as approved in a plenary decision must be applied by the Court of Cassation, the Oral Courts, Courts of Appeals and any other jurisdictional body reporting to the Court of Cassation; however, judges who do not agree with this criterion may express their personal opinion. The established doctrine will only be revised in a new plenary decision.”
(Translation of author)
\textsuperscript{197} Article 11: “The plenary meeting of the Court of Cassation will also be convened when there are decisions contradicting previous decisions by the same Court, when the precedent has been expressly quoted by the appellant prior to the final decision of that Court. The objection resulting in the plenary court meeting shall be filed and grounded within FIVE (5) days, at the intervening court. The Court of Cassation shall establish the applicable doctrine and, should the doctrine in the decision objected fail to be in keeping with the Court’s doctrine, it shall be declared null and void and a new decision shall be made in line with the doctrine established by the Court of Cassation. Until the Court decides whether the objection is legitimate or not, the execution of the decision will be suspended.”
(Translation of author)
International Pact on Civil and Political Rights and its empowering Protocol; the Convention on the Prevention and Punishment of Genocide; the International Convention on the Elimination of all Forms of Racial Discrimination; the Convention on the Elimination of all Forms of Discrimination against Woman; the Convention against Torture and other Cruel, Inhuman or Degrading Treatments or Punishments; the Convention on the Rights of the Child; in the full force of their provisions, they have constitutional hierarchy, do not repeal any section of the First Part of this Constitution and are to be understood as complementing the rights and guarantees recognized herein… 198

An in depth analysis of this article exceeds the purposes of this thesis. Nevertheless, the fact that the mentioned international human rights treaties have, since 1994, constitutional hierarchy is relevant for this thesis, because their provisions are an integral part of the domestic normative framework. This section will focus on some recommendations, observations and jurisprudence from human rights bodies that deal with the health professionals’ duty of confidentiality and their duty to report offenses, and with abortion.

Regarding the duty of confidentiality and its relation with the right to health, CEDAW states:

States parties should … report on measures taken to ensure access to quality health care services, for example, by making them acceptable to women. Acceptable services are those which are delivered in a way that…respects [women’s] dignity [and] guarantees their confidentiality.199

In addition, the Human Rights Committee denounces that “[a]nother area where States may fail to respect women’s privacy relates to their reproductive functions, for example…where States impose a duty upon doctors and other health personnel to report cases of women who have undergone abortion.”200

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198 Emphasis added
199 Supra note 37 at 22
200 HRC, General Comment 28, UN GAOR 2000, UN Doc. A/55/40, Annex VI, p.133 at para 20
Furthermore, the Human Rights Committee has also made a concrete observation to Chile:

The criminalization of all abortions, without exception, raises serious issues, especially in the light of unrefuted reports that many women undergo illegal abortions that pose a threat to their lives. The legal duty imposed upon health personnel to report on cases of women who have undergone abortions may inhibit women from seeking medical treatment, thereby endangering their lives. The State party is under a duty to take measures to ensure the right to life of all persons, including pregnant women whose pregnancies are terminated. In this regard: *the Committee recommends that the law be amended so as to introduce exceptions to the general prohibition of all abortions and to protect the confidentiality of medical information.*

Even though this Concluding Observation was made to Chile, the fact that some Argentine rulings interpret articles 177 of the CCP and 277 of the CC as requiring health professionals to report abortions makes the observation relevant for Argentina.

In addition to the recommendations and observations regarding the breach of confidentiality and its impact on abortion, in 2004, the Inter American Court of Human Rights (IACHR), pronounced a sentence against Peru known as *De La Cruz Flores v. Peru.*

In 1996, María Teresa De La Cruz Flores, a pediatrician, was arrested by Peruvian police forces, prosecuted by a court comprised of “faceless” judges and sentenced to twenty years of imprisonment for the crime of terrorism. The sentence was confirmed by the Supreme Court of Peru in 1998. One of the evidences for the 1996 decision was that De La Cruz Flores has offered health assistance to members of the organization *Sendero Luminoso.* She was accused of participating “…in an operation on

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201 *Concluding Observations of the Human Rights Committee –HRC: Chile. 30/03/99*  
CCPR/C/79/Add.104 at para 15  
202 *Supra* note 143 at para 3
‘Mario’ whose hand had been burned, which corroborates the foregoing; namely, that she took part as assistant surgeon in a skin-grafting operation; and it is evident that the defendant has denied this during the proceeding so as to elude her criminal liability, which has been adequately proved[.]

In the judgment of 2004, the IACHR stated:

Article 18 of the First Geneva Convention of 1949 states that: “[n]one may ever be molested or convicted for having nursed the wounded or sick.” Also, Article 16 of Protocol I and Article 10 of Protocol II, both Protocols to the 1949 Geneva Conventions, establish that “Under no circumstances shall any person be punished for carrying out medical activities compatible with medical ethics, regardless of the person benefiting therefrom.”

The domestic 1996 ruling also stated that “when the physician merely presumes or knows the unlawful origin of the injuries caused to an individual, he is obliged to report the fact or advise the authorities so that they may conduct the respective investigation.” In this regard, the IACHR recognized that confidentiality is privileged over the duty to report, as contemplated in international and domestic laws, such as the International Code of Medical Ethics of the World Medical Association, article 2 (18) of the Constitution of Peru, and article 141 of the Code of Criminal Procedures of Peru. With regard to health professionals’ duty to report, the IACHR believes that:

when delivering the judgment of …1996, the State violated the principle of legality: … for penalizing a medical activity, which is not only an essential lawful act, but which it is also the physician’s obligation to provide; and for imposing on physicians the obligation to report the possible criminal behavior of their patients, based on information obtained in the exercise of their profession...In view of the above, the Court considers that the State violated the principle of legality established in Article 9 of

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203 Supra note 143 at para 93
204 Supra note 143 at para 95
205 Supra note 143 at para 96
206 Supra note 143 at para 97 to 99
the American Convention, to the detriment of Mrs. De La Cruz Flores.207

It is possible to argue that *De La Cruz Flores* has binding force for domestic tribunals. María Angélica Gelli writes that the Argentine National Constitution considers the Supreme Court of Argentina as the highest tribunal in the country. In the domestic sphere, this means that its decisions cannot be appealed. After Argentina admitted the competence of the Inter-American Court of Human Rights (IACHR), nevertheless, the notion that the Supreme Court is the last instance needs to comply with the principles that state that the IACHR’s rulings are definitive and unappealable according the Inter-American Convention of Human Rights, Article 67.208 Gelli explains that a ruling from the IACHR is the final decision in the international sphere and, therefore, the Argentine State and all the powers that constitute it, including the Supreme Court, are bound by the decision.209 Moreover, the Supreme Court in *Espósito*210 stated that the IACHR’s decisions, in cases were the Argentine State is a party, are binding for the whole State, including the Supreme Court.211 Three Justices upheld the automatic and straight application of the rulings while the others did not.212

Nevertheless, there are many arguments to hold that *De La Cruz Flores* is not a binding precedent. One of those arguments is that *De La Cruz Flores* is not a ruling against Argentina. In addition, it is argued that granting binding force to IACHR’s rulings violated the independence of the judiciary that may be derived from constitutional norms. Furthermore, it is affirmed that the fact that the Supreme Court upheld in *Espósito* that IACHR’s rulings have binding force, does not have real

207 Supra note 143 at para 102-103
208 Supra note 183 at 895
209 Supra note 183 at 895
210 *Espósito, Miguel Ángel s/incidente de prescripción de la acción penal promovido por su defensa* (2004) Supreme Court of Argentina
211 Supra note 183 at 896-97
212 Supra note 183 at 898
influence, because, technically, Supreme Courts’ rulings are not binding. Notwithstanding that, judges and scholars seem to agree that IACHR’s rulings have, at least, a strong persuasive force.

Even though there are ethical, legal and health considerations for claiming that the duty of confidentiality should prevail over the State’s interest in prosecuting a crime on the basis of the legal duty to report, it is worth wondering about the limits of the duty of confidentiality. Is there any case where the duty of confidentiality shall yield to more compelling interests? Oscar Cabrera and Martin Hevia discuss this issue. The scholars point out that article 16.2 of the American Convention on Human Rights holds that the exercise of the rights “shall be subject only to such restrictions established by law as may be necessary in a democratic society, in the interest of national security, public safety or public order, or to protect public health or morals or the rights and freedoms of others.”

In accordance with this article, and in order to determine which limitations to the duty of confidentiality are justified under the principles of a democratic society, Cabrera and Hevia appeal to the IACHR’s advisory opinion OC-5/85, where it was argued that:

"The European Court of Human Rights … concluded that "necessary," while not synonymous with "indispensable," implied "the existence of a 'pressing social need'" and that for a restriction to be "necessary" it is not enough to show that it is "useful," "reasonable" or "desirable"… This conclusion, which is equally applicable to the American Convention, suggests that the "necessity" … depend upon a showing that the restrictions are required by a compelling governmental interest. Hence if there are various options to achieve this objective, that which least restricts..."
the right protected must be selected. Given this standard, it is not enough to demonstrate, for example, that a law performs a useful or desirable purpose; to be compatible with the Convention, the restrictions must be justified by reference to governmental objectives which, because of their importance, clearly outweigh the social need for the full enjoyment of the right Article 13 guarantees. Implicit in this standard, furthermore, is the notion that the restriction, even if justified by compelling governmental interests, must be so framed as not to limit the right protected by Article 13 more than is necessary. That is, the restriction must be proportionate and closely tailored to the accomplishment of the legitimate governmental objective necessitating it… 215

The IACHR criteria resembles very much the “proportionality test” used by Canadian courts. It consists in determining, in the first place, if the regulation that limiting rights has a legitimate purpose according to democratic principles; secondly, if the regulation is instrumented through appropriate means; and thirdly, if the regulation has an impact proportional to the objective that is being sought. 216 According to Hevia and Cabrera, in a democratic society, it is reasonable to think that professional secrecy may be limited when there are other interests at stake, such as the protection of third parties or public health. They argue that as long as the limitation to the duty/right to confidentiality is proportionate to the interest that justifies it, States parties are entitled to do it. 217

The proportionality test is a useful tool to see how the law that imposes the health professionals’ duty to report offenses and their duty of confidentiality is acting as a determinant of unsafe abortion. In fact, Center for the Promotion and Protection of

215 Advisory Opinion OC-5/85, Inter-American Court of Human Rights, Compulsory Membership in an Association Prescribed by Law for the Practice of Journalism (Articles 13 and 29 American Convention on Human Rights) at para 46
217 Supra note 214 at 6-7
Reproductive and Sexual Health Rights\textsuperscript{218} (PROMSEX) issued a report applying the proportionality test in the Peruvian context. The result was that the limitation to the duty/right to confidentiality failed in the second and third step of the test, namely, appropriate means and proportional impact.

Regarding the second step, Hevia and Cabrera argue that to require health professionals to report their patients when they had an abortion is not an appropriate mean to protect the life of the fetus, or to solve the problem that unsafe abortions cause to public health.\textsuperscript{219} They maintain that “states can take measures to protect juridical interests in conflict without breaching professional secrecy or affecting women’s right to health, refraining them from seeking medical assistance…”\textsuperscript{220}

Hevia and Cabrera’s assertion is linked to the third step of the test: proportional impact. In this regard, PROMSEX affirms:

\begin{quote}
[If health professionals have a duty to report], the duty/right to professional secrecy and the right to privacy are not the only ones being affected, other rights such as freedom, presumption of innocence, the right against self-incrimination, the right to health and, in some cases, the right to life are too.\textsuperscript{221}
\end{quote}

In other words, law acts as a pathway along which other social conditions, such as socio economic position, determine unsafe abortion and as a shaper of those conditions. This is so because women who can afford safe abortions, do not usually end up bleeding in public hospitals seeking for post abortion treatments and exposed to criminal prosecutions. Socio economically advantaged women who have the means to have an abortion in private clinics do not suffer the health professionals’ refusal to perform

\textsuperscript{218} The original name in Spanish is “Centro de Promoción y Defensa de los Derechos Sexuales y Reproductivos”
\textsuperscript{219} Supra note 214 at 8
\textsuperscript{220} Supra note 214 at 8-9 (Translation of author)
\textsuperscript{221} Centro de Promoción y Defensa de los Derechos Sexuales y Reproductivos, Médicos en Conflicto entre la Cura y la Denuncia: Artículo 30 (Lima: PROMSEX, 2006) at 28 (Translation of author)
abortions due to fear to criminal prosecutions, and therefore, the lack of access to the procedure.

2.5 Conclusion

Chapter 2 analyzed four aspects of the Argentine normative framework where law act as a social determinant of unsafe abortion; sometimes as a pathway along which other social factors determine women’s lack of access to safe abortions or women’s exposure to hazardous abortive practices, other times as a shaper of those factors, when it influences the social positions of certain women, through the construction the normative world.

As Argentina is a civil law country, this Chapter addressed what the law actually establishes regarding the criminalization of abortion and its justifications, health professionals’ “conflicting” legal duties of confidentiality and to report offenses, and the constitutional framework that defines the system of judicial review and the hierarchy of international human rights treaties. The following Chapters will examine the application of the law in courts rulings; in Burris and colleagues’ words, “whether and how the operation of the law in society could be one of the means through which structure becomes health”\textsuperscript{222}

\textsuperscript{222} Supra note 9 at 511
CHAPTER 3

Application of the Normative Framework: The circle of Unsafe Abortion (Part I)

Chapter 3 and Chapter 4 aim at demonstrating that the application of Argentine law, through courts rulings, acts as a social determinant of unsafe abortion among women entitled to have a legal abortion under the exceptions stipulated in the Criminal Code. Accordingly, these Chapters explain the dynamic between the law, the courts and the health outcome by means of a circular model. The model is built upon two kinds of judicial interventions that apply to abortion issues: ex post and ex ante judicial interventions. The aim is to show that ex post judicial interventions contribute to ex ante judicial interventions that, in turn, cause ex post judicial interventions. Women are caught in this factual/legal circle, where the most affected are women of low socioeconomic status. In this thesis, the interrelation is referred to as the “circle of unsafe abortion.” For the sake of clarity, the process is divided in two parts: part I is analyzed in Chapter 3 and part II, in Chapter 4.

Chapter 3 will focus on ex post judicial interventions, the kind of interventions that take place once abortion has already been performed. For the aim of this thesis, the kinds of ex post interventions that will be analyzed are those that are initiated by the report of a health professional who assisted a woman in a post-abortion treatment. Accordingly, ex post interventions deal with the “dilemma,” developed in Chapter 2, between health professionals’ legal duty of confidentiality and their legal duty to report offenses. Even though in Argentina abortion is a public order offense prosecutable ex officio, i.e., anybody can report its commission, the truth is that almost all ex post judicial interventions are initiated by the report of a health professional or by the authorities of the hospital where the health professional works. The cases where
abortions are reported by individuals that are not bound by the duty of confidentiality will not be addressed in this thesis.

The purpose of this Chapter is to show that courts rulings, in ex post interventions, apply the law arbitrarily and perpetuate sex-role gender stereotypes of women as motherhood that are embodied in the law.

The heterogeneous application of the law produces legal uncertainty regarding the interpretation of health professionals’ legal duty of confidentiality and legal duty to report offenses in abortion cases. The uncertainty concerns not only whether health professionals must report the woman that has had an abortion, but also whether courts consider that report valid to initiate a criminal procedure against the woman or the providers of the abortion. As explained in Chapter 2, reports on abortion are due to the apparent collision of article 277 of the CC and article 177 of the CCP, on the one hand, with article 156 of the CC, on the other. Sucar and colleagues’ article, Luis Niño’s article and the ruling of IACHR on De La Cruz Flores shed light on the issue, demonstrating that a proper interpretation of the legal provisions leads to exempting health professionals from the duty to report, as they are protected by professional secrecy and because the legal obligation to report violates the principle of legality, the right against self-incrimination and the right to health. Nevertheless, Argentine courts rulings are not unified in their interpretation of the law. Chapter 3 will examine three rulings from the National Court of Criminal Appeals (NCCA) that posit three different interpretations on this matter even though the phenomenon of the conflicting interpretations occurs at a national level. The jurisprudence of the different divisions of the NCCA is a concise and comprehensive sample of the diverse criteria that courts apply at all levels of the judiciary.
Legal uncertainty has two consequences: firstly, it triggers more ex post interventions because health professionals report an offense even when they are not supposed to do so, and secondly, it causes a “chilling effect” on health professionals, which discourages them from performing legal abortion procedures. Both consequences contribute to unsafe abortion.

Ex post judicial interventions also cause the perpetuation of sex-role stereotypes, which in turn has two consequences: health professionals report the women they assist, which causes more ex post judicial interventions; and health professionals refrain from performing legal and safe abortions to women entitled to the procedure. Both consequences are conducive to unsafe abortion.

The application of the law acts as a pathway along which socioeconomic status has an impact on unsafe abortion when it intimidates and confuses health professionals, deterring them from performing legal abortions and exposing poor women to pathogenic practices. The application of the law also act as a shaper, structuring those social conditions that determine unsafe abortion, when the law determines women’s lack of access to legal and safe abortions and constructs a normative world that naturalizes and perpetuates gender stereotypes.

3.1 Ex Post Judicial Interventions

The NCCA is divided into five Divisions with three Justices each. Even though they integrate the same Court, the five Divisions have not yet reached a consensus with respect to the interpretation of health professionals’ legal duty of confidentiality and their duty to report offenses. Three jurisprudential criteria coexist in the NCCA.

The first jurisprudential criterion was upheld for the first time in 1966, in a precedent called Natividad Frías and it was followed somewhat peacefully by the
majority of the national courts. The ruling states that the report filed in breach of the
duty of confidentiality violates the patient’s right against self-incrimination and, hence,
it does not implicate the woman but it does implicate the provider of the abortion.

The second jurisprudential criterion of the NCCA was recently upheld by Division VII in a precedent called GN, and states that health professionals have a duty to report the commission of an abortion even if they are in breach of the duty of confidentiality, and that the report implicates both the woman and the providers.

The third jurisprudential criterion of the NCCA was upheld by Division VI in ruling known as Luque, and it states that if a health professional reports an abortion known during the exercise of his/her profession, no criminal procedure can be initiated against the woman who caused her own abortion or allowed someone else to cause it, or against the providers of the abortion.

3.1.1 Natividad Frías

In 1966, the National Court of Criminal Appeals (NCCA) ruled a plenary decision called Natividad Frías (NF). At that time, it was possible for the NCCA to issue plenary decisions on criminal matters because the National Court of Criminal Cassation (Court of Cassation) had not yet been created. NF is the ruling followed by the majority of the judges; mainly because it is a plenary decision. Nevertheless, NF is also applied because it seems to protect women and to punish the providers of illegal abortions. Section 3.3 will explain the reasons why NF does not actually protect women.

In *NF*, a woman who was admitted to a public hospital due to complications derived from an unsafe abortion was reported by the health professional that assisted her. The trial judge found her guilty of abortion. Her lawyer appealed the sentence to the NCCA, which ruled:

A report filed by a health professional who learnt of the abortion while exercising his or her official or unofficial duties *is not valid to initiate a criminal procedure against the woman* who has caused her own abortion or allowed someone else to cause it. *The report, however, is valid to initiate a criminal procedure against the perpetrator of the abortion*, as well as the co-perpetrators, instigators and accessories.\(^\text{225}\)

In other words, the NCCA states that the report filed in breach of the duty of confidentiality does not incriminate the woman but it does incriminate the provider of the abortion.

The NCCA argument is based on the constitutional guarantee against self-incrimination, stated in article 18 of the National Constitution:

> No inhabitant of the Nation … may be compelled to *testify against himself*, nor be arrested except by virtue of a written warrant issued by a competent authority. The defense by trial of persons and rights may not be violated…\(^\text{226}\)

The NCCA argues that public interest can never justify, let alone, demand that a woman be exposed to the inhuman decision between death and prison.\(^\text{227}\) This last point gives rise to the NCCA’s assessment of the right against self-incrimination. The ruling states that taking advantage of a woman’s desperation to force her to confess the offense, and then initiate a criminal procedure against her violates article 18 of the National Constitution in a cruel and ignoble way.\(^\text{228}\)

In its analysis of the legal provisions at stake, the NCCA argues that, even though article 156 of the CC punishes the disclosure of a secret without “good cause,”

\(^{225}\) *Supra* note 176 at 20 (Translation of author, emphasis added)

\(^{226}\) Emphasis added

\(^{227}\) *Supra* note 176 at 4

\(^{228}\) *Supra* note 176 at 3
“good cause” must be understood as “legal cause.” In other words, only a legal provision can exempt health professionals from their duty of confidentiality.\textsuperscript{229} The mere public interest in the prosecution of an offense does not constitute good cause because, otherwise, the institution of secrecy loses its meaning.\textsuperscript{230} In this regard, Justice Lejarza uses priests and lawyers as an example, as confidentiality of confession are protected notwithstanding the public interest in the prosecution of a public offense.

The NCCA highlights that if the report is considered valid, then the law is violated twice: firstly, by the health professional who breaches his duty of confidentiality, secondly, by the judges who do not stand up for the right against self-incrimination.\textsuperscript{231} On the subject, Luis Niño believes that “it is not the health professional’s behavior that is reprehensible, but rather the initiation of the criminal procedure derived from that report.”\textsuperscript{232}

Regarding articles 249 and 274 of the CC, which punish public officers who delay or fail to perform an act pertaining to their office or fail to further the prosecution of a crime, the NCCA resorts to an argument of social equity. It underscores that the duty of confidentiality does not depend on whether the health professional is a public officer or not. Every health professional is bound by it.\textsuperscript{233} The NCCA refuses to make a distinction between health professionals that work in private institutions and those who work in public institutions, because stating that public health professionals are public officers would entail discrimination between women who have the economic means to seek post-abortion treatment in a private clinic, and women that are in a disadvantaged economic situation.\textsuperscript{234}

\textsuperscript{229} Supra note 176 at 2
\textsuperscript{230} Supra note 176 at 2-3
\textsuperscript{231} Supra note 176 at 4
\textsuperscript{232} Supra note 173 at 6 (Translation of author)
\textsuperscript{233} Supra note 176 at 4
\textsuperscript{234} Supra note 176 at 8-9
Regarding the nature secrecy, the NCCA claims that confidentiality does not need to be expressly requested; on the contrary, confidentiality is implicit in all cases.\textsuperscript{235}

The NCCA further stresses that if health professionals must refrain from bearing witness on confidential facts they knew of because of their own status, trade or profession, then it is reasonable to think that they cannot report the crime either.\textsuperscript{236}

It is relevant to notice that, according to the NCCA, the violation of the right against self-incrimination does not invalidate the whole criminal proceeding; rather, it only invalidates the proceeding against the woman.\textsuperscript{237}

3.1.2 \textit{G.N.}

\textit{GN} was tried by the NCCA, Division VII, in 2007. In this case, a woman was admitted to a public hospital presenting with an incomplete abortion, fever and abdominal pain. She was assisted by a health professional who, after performing a dilation and curettage procedure, reported her to the police authorities.\textsuperscript{238} The trial judge applied \textit{NF} arguing that the report was not valid to initiate a criminal procedure against the defendant. The case was appealed to the NCCA, Division VII, who ruled:

\begin{quote}
\text{[A]bortion is a public order offense prosecutable \textit{ex officio} – particularly a crime against life--; hence, the criminal procedure must be initiated by a report [filed by the health professional]…Otherwise, the criterion established in [Natividad] Frías gives an absolute value to professional secrecy, bases the problem in a constitutional guarantee –right against self-incrimination- that is not applicable to the case, and deprives [the fetus] of legal protection leaving it totally vulnerable. This infringes what is proclaimed by the National Constitution and Human Rights instruments.}\textsuperscript{239}
\end{quote}

\textsuperscript{235} \textit{Supra} note 176 at 8
\textsuperscript{236} \textit{Supra} note 176 at 9
\textsuperscript{237} \textit{Supra} note 176 at 9
\textsuperscript{238} \textit{Supra} note 142 at 1
\textsuperscript{239} \textit{Supra} note 142 at 35 (Translation of author)
In short, Division VII considers that a report filed by a health professional who learns about the offense while exercising his/her duties is valid to initiate a criminal procedure against the woman and the providers of the abortion.240

The NCCA observes that while it is true that the criterion established in NF is constantly applied by Argentine courts, it is also true that NF is no longer a binding precedent because since Act No. 24050 (article 10), the National Court of Criminal Cassation is the only tribunal with the capacity to unify jurisprudence in a plenary decision.

The main argument of Division VII is based on the right to life of the fetus. The Justices make reference to several international and domestic legal provisions that, either tacitly or expressly, protect the right to life.241 They maintain what they are protecting by punishing abortion is the right to life of the fetus, and that article 177 of the CCP stipulates the obligation for health professionals to report crimes prosecutable ex officio with reference to crimes against life and physical integrity. Division VII claims that the conflict is not between State’s duty to prosecute the offense, on the one hand, and the breach of confidentiality on the other: they argue that it is the child’s right to life that is at stake.242 Although the aim of this section is to describe the ruling, it is important to highlight that whenever the Division VII makes reference to the fetus, it uses the word “child.” As was explained by Maffia in Chapter 2, it is possible to see how courts seek to perpetuate the notion that a pregnant woman is a mother, and the fetus, her child.

241 The Court mentions, for instance, the Universal Declaration of Human Rights, Article 3 and the American Convention of Human Rights, Article 4.1
242 Supra note 142 at 17
Regarding women’s right to health, the Division remarks that the medical attention is still being provided, regardless the legal consequences of the report.\textsuperscript{243}

On the violation of the right against self-incrimination, the Court stresses that the fact that a woman arrives at a hospital confessing that she committed an abortion does not constitute forced self-incrimination in order to save her life. On the contrary, they believe it is the natural outcome of an illicit action that was committed knowing the risks it entailed.\textsuperscript{244} In addition, the Division explains that, when the woman arrived at a health center, the criminal procedure had not started yet; thus, her confession does not constitute self-incrimination. They hold that the right against self-incrimination cannot be violated before the procedure begins.\textsuperscript{245} The Justices argue that the mere fact that the woman has consulted the health professional showing organic signs of the crime does not constitute self-incrimination because she is not “testifying”\textsuperscript{246} against herself.\textsuperscript{247} Furthermore, the ruling observes that the woman arrived to the health center at her own will; she was not forced by any person or authority, but rather moved by the consequences of something that she had voluntarily caused.\textsuperscript{248} In this regard, the tribunal cites a 1997 Supreme Court precedent known as \textit{Zambrana Daza}.\textsuperscript{249} The ruling was on drug transportation; the Supreme Court stated that the individual who commits a crime and after that seeks medical care in a health center runs the risk that the police may learn of the crime and its evidences.\textsuperscript{250} In short, the NCCA, Division VII, considers

\begin{itemize}
\item \textsuperscript{243} \textit{Supra} note 142 at 10
\item \textsuperscript{244} \textit{Supra} note 142 at 10
\item \textsuperscript{245} \textit{Supra} note 142 at 11
\item \textsuperscript{246} The literal translation of the right against self-incrimination in the National Constitution is “the right not to declare against oneself.” The Court uses the literal meaning of the word “declaration” to uphold that if the health professional learns of the offence through organic evidence, like traits of an abortion, there is no self-incrimination because there is no verbal “declaration.”
\item \textsuperscript{247} \textit{Supra} note 142 at 11
\item \textsuperscript{248} \textit{Supra} note 142 at 11
\item \textsuperscript{249} \textit{Supra} note 179
\item \textsuperscript{250} \textit{Supra} note 142 at 12
\end{itemize}
that the right against self-incrimination does not include cases where there is material evidence, as a result of the defendant’s exercise of free will.\textsuperscript{251}

Regarding article 156 of the CC, the Court analyzes the notions of “good cause” and “harm” concerning the disclosure of secrets. On the subject of “harm,” the judges argue in strikingly unreasonable ways, positing, for instance, that the report of an abortion does not aim at causing harm, and that the criminal prosecution of a woman that has had an abortion cannot be considered harm either.\textsuperscript{252} On the topic of “good cause,” the judges maintain that good cause is applies in the case of an offence prosecutable \textit{ex-officio}. The judges argue that the law, according to the principles of conservation of the social order, stipulates that all \textit{ex-officio} offenses must be prosecuted in order to protect society.\textsuperscript{253} In other words, the Court states that the protection of the right to life –considered as the ontological assumption of all other rights– is good cause enough, and that there is no harm.\textsuperscript{254}

As regards the validity of the report, the Court points out that article 177 (2) of the CCP does not prohibit or invalidates the report filed in breach of the duty of confidentiality; it only observes that, if health professionals are protected by professional secrecy, they are under no obligation to report an offense. In other words, the Division interprets that the article exempts health professionals from reporting if they are protected by confidentiality, but if they do file a report, said report is valid to initiate the proceeding.\textsuperscript{255}

\textsuperscript{251} \textit{Supra} note 142 at 12
\textsuperscript{252} \textit{Supra} note 142 at 15
\textsuperscript{253} \textit{Supra} note 142 at 20
\textsuperscript{254} \textit{Supra} note 142 at 19
\textsuperscript{255} \textit{Supra} note 142 at 21
In conclusion, the ruling establishes that the right against self-incrimination is not violated, and therefore, the legal provisions that protect life from conception are the framework to which all other legal provisions must abide by.256

3.1.3 Luque

In 2008, the NCCA, Division VI, tried Luque,257 which is the third jurisprudential criterion on the issue of abortion.258 Division VI and other courts have applied the criterion that was upheld in Luque before,259 although those rulings represent a small part of the jurisprudence.

Ms. Luque was a woman who arrived at a public hospital seeking health care for abortion complications. The health professional who treated her reported the offense to the police. The trial judge considered that the report was valid in order to initiate the procedure against Ms. Luque, but her lawyer appealed the ruling to the NCCA.

The ruling states that the criminal procedure was initiated due to an irregularity— the violation of the right against self-incrimination—and that there are no other independent legal channels to investigate the offense. Following NF, the tribunal declares the invalidity of the whole procedure.260 In other words, by invalidating the whole process, the NCCA, Division VI, states that the report filed in breach of the duty of confidentiality entails a violation of the right against self-incrimination, and thus, it cannot implicate the woman or the provider. It is worth noticing that the Court does not expressly state that the providers cannot be implicated by the report, but the annulment

256 Supra note 142 at 28
257 Luque (2008) National Court of Criminal Appeals, Division VI
258 In September 2008, the NCCA, Division I, reaffirmed the criterion stated in Luque, in a precedent called A.G.. Nevertheless, Luque is analyzed in this thesis because the argumentation is richer. See A.G. (2008) National Court of Criminal Appeals, Division I.
260 Supra note 257 at 4
of the entire procedure entails that consequence. In addition, in 2007, the NCCA, Division VI, ruled on *Silva*, expressly stating that the invalidity of the procedure affects only the woman involved.\(^{261}\) In turn, in *Luque*, this clarification was not provided, so it may be assumed that Division VI changed *Silva* standard and it does not prosecute providers now.

Section 3.3 will examine how these three disparate rulings contribute to legal uncertainty and perpetuate gender stereotypes affecting health professionals’ willingness to report women who had abortions, and inhibiting them from performing legal abortions to those women legally entitled to the procedure.

### 3.2 What Elements Contribute to a Heterogeneous Application of the Law?

Siri Gloppen, Roberto Gargarella and Elin Skaar stress the important role of courts in modern democracies. The scholars highlight their influence in maintaining and fostering the rule of law and guaranteeing the protection of human rights. Nevertheless, they wonder whether the courts do in fact accomplish these goals.\(^{262}\) They argue:

> Take the premise that in a democratic society system, well-functioning and independent courts are central to making political power-holders accountable –that is, ensuring transparency; obliging public officials to justify that their exercise of power is in accordance with their mandate and relevant rules (*answerability*); and imposing checks if government officials overstep the boundaries for their power as defined in the constitution, violate basic rights or compromise the democratic process (*controllability*). Do courts in new democracies play such role?\(^{263}\)

In Argentina, *NF*, *GN* and *Luque* are three examples of how, in the context of abortion, courts do not ensure transparency, answerability and controllability, but they rather contribute to legal uncertainty, the perpetuation of gender stereotypes and violation of

\(^{261}\) *Silva* (2007) National Court of Criminal Appeals, Division VI at 2

\(^{262}\) Supra note 190 at 1

\(^{263}\) Supra note 190 at 1
constitutional rights such as women’s right to health, right against self-incrimination, 
and equality. It is striking that such a heterogeneous jurisprudence exists even within 
the same tribunal.

As explained in Chapter 2, that heterogeneity is produced by the Argentine 
system of judicial review, and by the fact the National Court of Criminal Cassation 
(Court of Cassation) has not yet ruled a plenary decision on these matters.

The fact that cases of health professionals in a conflict of duties, and their 
relation with abortion have not yet been addressed by the Court of Cassation or the 
Supreme Court may seem fortuitous. Nevertheless, it is not a mere unfortunate 
coincidence. On the one hand, most of the courts apply NF, and because NF waives 
the punishment to the woman, lawyers do not appeal the rulings. Although it is true that 
NF prosecutes providers and their lawyers could appeal the rulings, in many cases it is 
the woman who caused her own abortion, and in other cases there is not enough 
evidence to prosecute providers. Furthermore, it is also about a lack of political will. 
Motta and Rodriguez analyze the political side of this “fortuitous situation.” The 
scholars point out that when the Supreme Court of Argentina ruled on a case concerning 
health professionals’ duty of confidentiality and their duty to report offenses, the Court 
refrained from deciding on the substantive issue of abortion, and ruled instead that it did 
not have jurisdiction. The very fact that few higher courts actually pronounced on 
this matter shows the perpetuation of a status quo that has been overlooking the public 
health problem and the juridical problem that the legal uncertainty causes.

264 See supra note 6 at 67
265 There is no official data regarding the amount of providers that are, in fact, sentenced through the 
application of NF and GN; as far as this research went, there are very few cases were providers were 
sentenced.
266 See Maria Esther Delgado (1996) Supreme Court of Argentina
267 C. Motta & M. Rodriguez, Mujer y Justicia: el caso argentino (Buenos Aires: Banco Mundial, 2001) 
at 68-69
3.3 How Does the Application of the Law Contribute to Unsafe Abortion?

As previously said, this thesis holds that the application of the law by the courts regarding health professionals’ obligation to report abortions when they are also under the duty of confidentiality, is arbitrary and heterogeneous. This fact, in turn, causes legal uncertainty among health professionals and perpetuates gender stereotypes, affecting health professionals’ intention to report women who underwent an abortion, deterring them from performing legal abortions, and discouraging women from seeking post-abortion treatment. In short, ex post judicial interventions contribute to cause abortion-related mortality and morbidity among women legally entitled to that medical procedure.

3.3.1 Ex Post Judicial Interventions, Legal Uncertainty, More Ex Post Judicial Interventions and the Chilling Effect on Health Professionals Regarding Legal Abortion

As previously said, one of the effects of the arbitrary application of the law through courts rulings is the legal uncertainty, which, in turn, contributes to cause fear and confusion on health professionals; the fear drives them to report the women that they assist in post abortion treatments and also prevents them from performing legal abortions to those women entitled to those procedures. That is to say, ex post judicial interventions cause legal uncertainty, which in turn has two consequences: it encourages more ex post judicial interventions and it contributes to the chilling effect on health professionals regarding legal abortion cases.

On the subject of legal uncertainty encouraging more ex post judicial interventions, Silvina Ramos and colleagues state that:
Frequently, health professionals are suspicious of the legality of the interpretation [that prioritizes the duty of confidentiality] and, fearing they might misunderstand the scope of the law, prefer to report the woman to the authorities.268

Because courts rulings are sometimes contradictory, health professionals do not have the legal guarantee of not being prosecuted under article 277 of the CC if they fail to report the woman they assisted. Therefore, they decide to report the offense. In turn, those reports trigger more ex post judicial interventions, which produce more conflicting rulings. And the circle begins all over again.

On the subject of legal uncertainty causing a “chilling effect” on health professionals, there are many scholars269 and reports270 which document that, in Argentina, the criminalization of abortion, together with the legal uncertainty caused by conflicting rulings on health professionals’ duty of confidentiality and their duty to report offenses, contributes to produce a “chilling effect” on health professionals with reference to the provision of legal abortion services. This situation takes place because the application of NF and GN establishes that the reports made in breach of the duty of confidentiality are valid to initiate a criminal proceeding against the provider of the abortion. This means that, if in view of a case of legal, health professionals will be reluctant to provide the service in the knowledge that if complications arise, or if the woman, for instance, does not receive a post-abortion treatment and her health deteriorates, she may seek medical care, be reported, and the health professional might be criminally prosecuted. The reader may be wondering why, if the health professional has performed a legal abortion according to the justifications contemplated in the Criminal Code, this kind of things happen. The answer to this question is addressed in

268 Supra note 2 at 482 (Translation of author)
269 See, generally, supra note 6
270 See, generally, S. Ramos et al., Los médicos frente a la anticoncepción y el aborto: ¿una transición ideológica? (Buenos Aires: CEDES, 2001)
Chapter 4: judges have not reached a consensus regarding the scope and interpretation of the exceptions for legal abortion.

Silvina Ramos and colleagues write:

[T]he illegality…of abortion keenly determines the kind of medical assistance that women receive in public hospitals due to abortion complications. Under this framework, the quality of the service is deficient and the women who undergo this situation are victims of institutional violence.271

Following to Burris et al.’s theory, this quotation refers to the role of the law as a shaper of the determinants of health, such as quality and access to medical attention. As explained in Chapter 1, on the basis of Link and Phelan’s model of the contribution of fundamental social factors to disease, Burris et al. believe that one way in which law act as a shaper of social factors that determine illness is by “influencing access to resources.” Silvina Ramos et al. describe how the criminalization of abortion structures the lack of access, availability and quality suffered by women seeking a legal abortion. In addition, it could be said that women’s lack of access exposes them to pathogenic practices, turning the law into a pathway along which social factors, such as socio economic status, play a role in determining health inequity as well. At the same time, the medical and legal consequences of unsafe abortions, such as morbidity, mortality and criminal procedures, consolidate and structure lower socio economic status, making the law act, again, as a shaper. For instance, a woman suffering from obstetric fistula is likely to end up as a sex-worker; a woman that has faced a criminal procedure may find difficulties in applying for a job or social assistance benefits.

The impact on women of ex post judicial interventions is not only determined by the behaviors of health professionals towards the application of the law. Ex post judicial

271 *Ibid* at 48-49 (Translation of author, emphasis added)
interventions have a direct effect on women, for they know that if they seek post-abortion treatments, they run the risk of being reported to the police. Therefore, they do not seek prompt medical assistance, risking their lives and health. In this case, according to the framework set by Burris et al.’s, law acts as a pathway along which other social factors determine health inequity by exposing socio economically disadvantaged women to pathogenic practices, such as their failure to seek prompt post-abortion treatment.

3.3.2 Ex post Judicial Interventions, Perpetuation of Gender Stereotypes, More Ex post Judicial Interventions and the Refusal of Health Professionals’ to Perform Legal Abortions

Even though there is some literature which documents the fear health professionals experience with reference to criminal prosecutions, there is also literature that provides evidence to the fact that, in Argentina, abortion is one of the offenses dealt with in the most ineffective way. The application of NF by the majority of the courts proves the inefficacy of the criminalization of abortion laws. Silvina Ramos and colleagues documented this reality, arguing that:

According to data on women discharged from hospitals in 2005, 68,869 received assistance for incomplete abortions. This figure, together with the estimations concerning the amount of clandestine abortions [that take place in Argentina] suggests that the effectiveness of the criminalization of abortion as a deterrent is very low or nonexistent. It only serves to increase the risks entailed by the procedure, which causes the death of many women, specially the poor ones. Even though there is no official data on this issue, the conclusion is derived from the significant difference in the numbers of clandestine abortions and the number of women that are imprisoned for committing abortions. Therefore, the reluctance to decriminalize abortion despite the

272 See supra note 2 at 461-462
proved inefficacy of its criminalization is another evidence of the
double standard that controls women’s bodies…

It is worth wondering, then, if the only element that drives health professionals
to report abortions and deters them from performing legal abortions is the legal
uncertainty caused by the arbitrary application of the law in ex post judicial
interventions. The research carried out for this thesis showed that the behavior of health
professionals is not only determined by legal uncertainty, but also by their beliefs on the
matter. In this regard, Lidia Casas explains:

Although [the criminalization of abortion] is one of the most
inefficient in practice, it has an enormous symbolic power, because
it gives an impression of moral order, regardless the high number
of clandestine abortions that take place in the [Latin American]
continent.

This thesis goes beyond accepting the fact that health professionals have their own
moral or religious positions, and analyzes how, in Argentina, the law contributes to the
stereotypical notion of “womanhood as motherhood” that has a detrimental impact on
women’s health, leading to unsafe abortion. This question deals with whether the
criminalization of abortion and the way courts interpret the scope of health
professionals’ duty to report and their duty of confidentiality perpetuate gender
stereotypes embodied in the law and in society, which in turn, determines the attitude of
health professionals towards abortion, their willingness to report it and their inclination
to perform it. Even though this research did not find conclusive evidence to assert that
the perpetuation of gender stereotypes by the law can shape the perception of health
professionals on womanhood, motherhood and abortion, many Argentine scholars see a
correlation between cultural ideas of abortion and the resistance of society to the

273 Supra note 2 at 481 (Translation of author)
jurisprudencia latinoamericana (Tomo I) (Bogotá: Siglo del Hombre Editores, 2008) at 401 (Translation of author)
liberalization of abortion laws. In this regard, Juan José Llovet and colleagues argue that:

Given the controversial nature of the issue, a more detailed study of the social acceptability of abortion is also needed. This would help to understand the ideological climate in which politicians and/or activists behave, and to evaluate the social legitimacy of eventual liberal reforms. What arguments do politicians and activists use to define themselves in relation to the abortion issue? What does it mean to them to be in favor of or against the legalization of abortion? To what extent is abortion perceived as a woman’s right? What reasons are used for the moral and social sanction of abortion?275

Like the legal uncertainty caused by ex post judicial interventions, the perpetuation of gender stereotypes in ex post this kind of interventions has three consequences: more ex post judicial interventions, the reluctance of health professionals to perform legal abortions, and women’s hesitation to seek post-abortion treatments.

Regarding ex post judicial interventions that perpetuate gender stereotypes, and trigger more ex post judicial interventions, Silvina Ramos et al. mention a research conducted by some of them in 2001, which found that 60% of the health professionals surveyed were in favor of the duty to report.276 This data explains why health professionals report even when GN, the most restrictive ruling, states that they do not have the legal obligation to report, but if they do so, the report is valid to prosecute the woman and the provider.

As said before, the perpetuation of gender stereotypes also prevents health professionals from performing legal abortions. Women who get abortions are gone astray which, in turn, has an impact on health professionals’ willingness to perform abortions. On this subject, Silvina Ramos and colleagues write:

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276 Supra note 2 at 482
Often, health professionals show a lack of knowledge regarding the application of the law, and have a … stereotyping attitude towards women that request abortions, even in the cases where abortion is legal.277

When the perpetuation of stereotypes by means of ex post judicial interventions contributes both to more ex post interventions and to the reluctance of health professionals to provide legal abortions, the law acts as a pathway and a shaper of social factors that determine abortion. On the one hand, as in the case of legal uncertainty, when health professionals refuse to provide the service, they expose women to pathogenic practices, making the application of the law a pathway along which the lower socioeconomic status have an inequitable impact on certain women. On the other hand, the application of the law acts as a shaper when it “constructs a normative world” where gender stereotypes and their health consequences are acceptable, preventing health professionals from performing legal abortions and from providing accurate post-abortion treatments. Even though Burris et al. explain this role of the law with an example of racism and how law labels “certain behaviors as ‘normal’ rather than discriminatory,”278 the model is useful to show how, in Argentina, the law and the courts have an effect on the perception of health professionals and society of women who have abortions and of the public health problem of unsafe abortion as a whole. In this regard, Cynthia Steele and Susana Chiarotti write:

The public health system in Argentina is based on hierarchical and patriarchal underpinnings which exacerbate existing power inequalities between health care providers and users. Women, particularly those who are poor and disenfranchised, who are the primary users of public health care, often ‘experience a broad range of discrimination, especially on the grounds of gender, class, age and ethnicity’.279

277 Supra note 2 at 478-79 (Translation of author, emphasis added)
278 See supra note 9 at 517
279 Supra note 115 at 40
Human Rights Watch interviewed several women that had suffered differential treatment because they underwent abortions:

Angelica Grimau, thirty-one, told Human Rights Watch that she had personally witnessed doctors at her local public hospital denying medical services to a woman who told her she was hospitalized for post-abortion care: “She was left until the end. … The woman had blood all over, but they just put her in a bed. … They did not treat her.” Julia Reina had a similar experience when she was hospitalized due to an incomplete selfinduced abortion. Reina witnessed a nurse saying to another woman: “You liked killing your child, here you will see how you will suffer.”

Naturally, health professionals’ attitudes deter women from seeking post abortion treatment. This same consequence is a result of legal uncertainty, as was explained in the previous section. Human Rights Watch also reported on this matter:

When women hemorrhaging or suffering from life-threatening infections or injuries caused by botched abortions show up at public hospitals, health care personnel sometimes scorn them and deny them treatment. Doctors performing post-abortion curettage—the highly painful scraping of a woman’s uterus with a sharp instrument—sometimes do so without anesthesia. Women who fear criminal proceedings are discouraged from seeking necessary post-abortion care, often to the serious detriment of their health.

As in the case of the legal uncertainty, in this case ex post judicial interventions are a pathway for socioeconomic status to determine health inequity.

3.4 The Circle of Unsafe Abortion: Part I

The aim of this section is to use a figure to illustrate the previous sections. As observed above, law and its application contribute to unsafe abortion in two ways. Firstly, the legal uncertainty produced by conflicting rulings causes more ex post
judicial interventions and a chilling effect on health professionals, who fear criminal prosecutions and, therefore, do not perform legal abortions; in this case, law acts as a shaper of social determinants of unsafe abortion and as a pathway along which social factors determine unsafe abortion and health inequity. Second, law perpetuates, fosters and structures hostile stereotypes of “womanhood as motherhood” acting also as a pathway and a shaper of social factors that contribute to unsafe abortion, when it influences the view health professionals on abortion, determining their willingness to report and their reluctance to perform legal abortions.

The situation described above is illustrated in figure 3:

The legal and factual situation can be briefly bulleted as follows:

- A woman undergoes an unsafe abortion;
- the procedure gets complicated and she is compelled by the situation to seek post abortion treatment in a health center;
the health professional that assisting her faces a “dilemma” of duties, and decides to report her to the police;

- ex post judicial interventions take place. The rulings apply the law arbitrarily and heterogeneously (Natividad Frías, GN, Luque) and perpetuate gender stereotypes;
- ex post judicial interventions on the one hand, cause, legal uncertainty, and on the other, perpetuate gender stereotypes;
- legal uncertainty created by courts aggravates the health professional’s dilemma of duties, which leads to more ex post judicial interventions: health professionals, erring on the side of caution, prefer to report women to the police;
- legal uncertainty caused by the courts produces a “chilling effect” on health professionals regarding legal abortion cases, which, in turn, expose women to unsafe abortive practices.

- The perpetuation of gender stereotypes creates health professionals’ perspective of womanhood and motherhood, which contributes to more ex post judicial interventions and the refusal of health professionals’ to perform legal abortions; in turn, this determines unsafe abortion.

3.5 Conclusion/Bridge to Chapter 4

The “chilling effect” caused by the legal uncertainty produced by courts rulings not only encourages unsafe abortion: as explained in the introduction of this Chapter, it also promotes the request of health professionals for judicial authorizations before performing abortions to women legally entitled to have the procedure under the justifications stipulated in the Criminal Code. The second consequence of the chilling
effect gives rise to the second part of the circle of unsafe abortion, which is driven by what this thesis calls *ex ante judicial interventions*. The effect of this kind of judicial interventions will be examined in Chapter 4.
Chapter 3 examined the first part of the circle of unsafe abortion, where ex-post judicial interventions, on the one hand, give rise to legal uncertainty that contributes to more ex-post judicial interventions and to the chilling effect on health professionals; and, on the other hand, perpetuate gender stereotypes that increase the number of ex-post judicial interventions and prevent health professionals from performing legal abortions. In both cases, the final health outcome is that women entitled to have a legal abortion under the exceptions established in the Criminal Code resort to unsafe abortive practices. In addition to it, the legal uncertainty and the perpetuation of gender stereotypes discourage women from seeking prompt post-abortion treatment, risking their life and health, and contributing to health inequity.

Chapter 4 aims to explaining how the circle of unsafe abortion worsens and broadens when the chilling effect caused by the legal uncertainty produced by ex-post interventions not only determines unsafe abortion directly, but also leads to ex-ante judicial interventions, which ultimately contribute to unsafe abortion as well. Ex-ante interventions consist in the health professionals’ requirement for a judicial authorization before performing abortions to women who qualify to have legal abortions under the exceptions of the Criminal Code. Chapter 4 analyzes the way courts interpret the exceptions under which abortion is legally justified. As mentioned in Chapter 2, the Argentine Criminal Code stipulates that abortion is legally justified when it is performed to avoid a risk to the mother’s life or health, if that risk cannot be avoided by other means; and when the pregnancy has resulted from rape or sexual abuse committed
against the honor of an idiotic or insane woman. 282 Even though ex-ante judicial interventions for authorizations are not required by law, they are, in fact, made very often. At this stage, again, courts apply the law arbitrarily and heterogeneously. In some cases, courts consider that they cannot act before an abortion is performed because the law does not require that intervention. 283 In other cases, courts have ruled that ex-ante judicial interventions are necessary to redress the legal uncertainty previously created by the law. 284 In addition, some judges consider that the risk to health may be physical or mental but has to be imminent and severe, 285 while others are less strict in their interpretation of what constitutes a mental health risk. 286 Furthermore, in the case of pregnancies resulting from rape, some judges maintain that the law justifies abortion when the woman raped is idiotic or insane, 287 while others argue that the law justifies abortion when the woman was raped, regardless of their mental condition. 288

Chapter 4 seeks to demonstrate that the arbitrary and heterogeneous way in which courts interpret the exceptions for legal abortion, before an abortion is performed, leads, again, to legal uncertainty, in this case, regarding the situations where abortion is justified. As in the first part of the circle of unsafe abortion, in part II ex-ante judicial interventions have two consequences: they provoke more ex-ante judicial interventions every time a legal abortion case arises and they cause a chilling effect on health professionals, preventing them from performing legal abortions. These two consequences ultimately contribute to abortion-related mortality and morbidity.

282 Criminal Code of Argentina, article 86
283 See C.P. de P.A.K s/autorización (2005) Supreme Court of Buenos Aires; Defensora del Pueblo y Menores N°2 (en representación de la persona por nacer) s/medida cautelar de protección de persona (2007) Supreme Court of Entre Ríos (lexisnexis.com)
284 See O.,M.V. s/victima de abuso sexual (2007) Court of Civil and Commercial Appeals of Mar del Plata, Division II
285 See Y.,R.H. (2005) Trial Court of Bahía Blanca, N°1
286 See supra note 284
287 See supra note 285
288 See supra note 284
Accordingly, the second part of the circle completes the whole picture of unsafe abortion: ex-post interventions create a need for ex-ante interventions, ex-ante interventions lead to unsafe abortion, which ultimately starts the circle again when ex-post interventions take place. In this sense, the legal provisions regarding abortion, the health professionals’ duty of confidentiality and their duty to report, combined with a judicial system of review that allows courts to apply the law arbitrarily and perpetuating gender stereotypes, are social determinant of unsafe abortion among women entitled to have legal abortions.

4.1 Ex-ante Judicial Interventions

Unlike the examples selected to illustrate ex-post judicial interventions, the cases chosen to expose ex-ante judicial interventions were not settled in the same court. For this Chapter, it was decided to address more diverse rulings from different courts rather than similar rulings from the same tribunal. This decision was not necessary for the analysis of ex-post judicial interventions, because within the same court there were dissenting opinions enough to exemplify legal uncertainty.

4.1.1 C.P. de P.A.K.

In 2005, the Supreme Court of Buenos Aires (SCBA) ruled on C.P. de P.A.K. (CP). CP is a case of legal abortion justified under article 86 (1) of the CC: a health risk justification. A woman required judicial authorization to have an abortion because she was suffering from heart failure, chronic arrhythmia, obesity and nicotine poisoning, and her pregnancy was life-endangering. The Court of Appeals authorized the procedure but the Guardian ad litem appealed the ruling to the SCBA. The SCBA upholds that a
judicial authorization is not required to perform abortions justified under the exceptions of the Criminal Code.\textsuperscript{289}

The main argument of the SCBA is that judges lack jurisdictional power to grant or deny an authorization in cases where abortion is already authorized in the Code.\textsuperscript{290} Justice Lássari states:

\begin{quote}
[T]he factual and legal situation at stake is a circumstance that deemed licit by the law. In accordance, health professionals should have assumed their responsibilities and solved the problem without judicial intervention. However, they have refused to do so, asking for a judicial authorization and causing a difficult situation where the mother and the fetus would have lacked a response if there had been no judicial decision.\textsuperscript{291}
\end{quote}

In other words, the argument of the SCBA is more formal than substantial. Justices dismiss the appeal because the there was no legal issue under discussion. Accordingly, the woman was able to have the abortion because the ruling of the Court of Appeals was restored.

In 2006, the SCBA heard a similar case, called \textit{R., L.M.}, and decided to follow \textit{CP}'s rationale.\textsuperscript{292}

In addition, in 2007, the Supreme Court of Entre Ríos ruled on \textit{Defensora del Pueblo y Menores N°2} following the rationale of \textit{CP}. The difference was that the pregnant woman was a minor, had been raped and suffered from mental disorders.\textsuperscript{293}

\subsection*{4.1.2 \textit{O., M.V.}}

\textsuperscript{289} \textit{Supra} note 283 at 24-25 (Justice Roncoroni)
\textsuperscript{290} \textit{Supra} note 283 at 49 (Justice Lássari)
\textsuperscript{291} \textit{Supra} note 283 at 49 (Justice Lássari) (Translation of author)
\textsuperscript{292} \textit{R., L.M. NN Persona por nacer. Denuncia} (2006) Supreme Court of Buenos Aires
\textsuperscript{293} \textit{Defensora del Pueblo y Menores N°2 (en representación de la persona por nacer) s/medida cautelar de protección de persona} (2007) Supreme Court of Entre Ríos
In 2007, the Court of Civil and Commercial Appeals of Mar del Plata (CCCAMP), Division II, ruled on *O., M.V. (OMV)*. The case involved a 14-year-old girl raped by her stepfather. Her mother asked for a judicial authorization to perform a legal abortion. The trial judge granted the authorization, but the ruling was appealed by the Guardian ad litem. The CCCAMP ruled, firstly, that the judiciary must intervene to grant or deny authorization for legal abortions, in order to provide legal certainty to health professionals; and secondly, that the case meets both the exceptions stipulated in article 86 of the CC. In other words, the CCCAMP considers that the case qualifies for a therapeutic abortion, to protect her mental health, and for a eugenic abortion, because she was raped and under aged.

Unlike the SCBA in *CP*, the CCCAMP in *OMV* considers that, although the law does not require judicial authorization for the performance of legal abortions, judges are entitled to intervene because that gives health professionals a legal guarantee that they will not be criminally prosecuted after performing abortions. The CCCAMP states that:

> Health professionals, reasonably afraid of committing a crime, require a judicial authorization before performing [abortive] procedures, and the administrators of justice (judges, public officers, legislators, lawyers) respond that an authorization is not necessary or that it is not possible to request it. We tell health professionals that they must perform abortions and not until then are we going to be able to determine if the procedure was legal or illegal, and, therefore, if they are acquitted or sentenced. This entails requiring health professionals to behave in a heroic way, without safeguards, exposing them to several criminal and professional punishments if the judge considers that the abortion was not legally justified.

It is striking that the CCCAMP concluded that the best way to guarantee legal certainty was by means of judicial intervention. On the contrary, this thesis maintains that, unlike

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294 *Supra* note 284 at 3 (Justice Loustaunau)
295 *Supra* note 284 at 3 and 26 (Justice Loustaunau and Justice Nélida I. Zampini)
296 *Supra* note 284 at 3 (Justice Loustaunau) (Translation of author)
the CCCAMP’s criterion, ex-ante judicial interventions cause even more legal uncertainty and increases the number of judicial authorizations in a case by case basis, endangering women’s life and health, and violating their constitutional and human right to health. As explained in Chapters 2 and 3, because of the Argentine system of judicial review, ex-ante judicial authorizations are another instance of courts applying the law arbitrarily and heterogeneously, rather than an opportunity to provide legal certainty. This is so because courts are not bound by the stare decisis principle.

The CCCAMP upholds the need for judicial authorizations because:

Otherwise, we would consolidate the vicious circle where health professionals do not perform abortions fearing criminal sanctions and judges consider there are no grounds for judicial authorizations, but do not guarantee the absence of sanctions. Accordingly, health professionals will maintain their refusal to perform abortions.297

The CCCAMP acknowledges the existence of a circle of unsafe abortion somewhat similar to the one proposed in this thesis;298 but the solution it produces is the exact opposite of the one suggested in this research. The CCCAMP argues that breaking the circle requires ex-ante judicial interventions.

On the scope of article 86 of the CC and its exceptions regarding therapeutic and eugenic justifications, the court states:

…[A] pregnancy resulting from rape is a particular case of the general exception of art. 86 (1) regarding health risks to the mother; the case is also framed under art 86 (2) because the pregnancy is the result of rape.299

297 Supra note 284 at 4 (Justice Loustaunau) (Translation of author)
298 The vicious circle described in the ruling is also stressed by C. Motta & M. Rodriguez, supra note 267 at 31: “the situation in the country is such that, even when abortion justified by the criminal law, women cannot always access the procedure. Doctors require judicial authorizations and judges consider that they cannot intervene before the abortion has already been performed. This has led to a situation where women are trapped in circle of inaction, that causes, in fact, an absolute prohibition of abortion” (Translation of author)
299 Supra note 284 at 8 (Justice Loustaunau) (Translation of author)
In other words, the court interprets article 86 of the CC under a relatively progressive light, considering that health risks also include mental health risks. Justice Loustaunau claims:

continuing with a pregnancy resulting from rape deteriorates the already fragile health of the minor, exposing her to serious health risks. While the termination of the pregnancy will not erase the trauma caused by rape, but it will avoid the consequences of the unwanted situation.300

Accordingly, article 86 (2) of the CC applies to abused healthy women as well as insane or idiotic women.

4.2 Legal Uncertainty Regarding the Scope and Application of the Exceptions for Legal Abortion and the Jurisdiction of the Courts in Ex ante Interventions

The problem with ex ante judicial interventions is documented by several scholars and reports. Human Rights Watch maintains that “an additional and arbitrary level of approval is added to a woman’s access even to abortions that are not punishable under Argentine law.”301 The organization further adds:

[W]hile the penal code does not require judicial authorization for an abortion, judicial authorization had become a de facto requirement because most doctors would not carry out the procedure without it.302

As it has been already mentioned, these interventions produce legal uncertainty and, therefore, more ex ante judicial interventions and a chilling effect on health professionals. The following sections will examine each element separately.

300 Supra note 284 at 8-9 (Justice Loustaunau) (Translation of author)
301 Supra note 6 at 52
302 Supra note 6 at 51-52
4.2.1 Legal Uncertainty

On the subject of the legal uncertainty triggered by ex-ante judicial interventions, Silvina Ramos and colleagues underscore that the main barrier to access legal abortion in Argentina is the disagreement among judges regarding the extent and scope of the exceptions contemplated in the law.303 With reference to the exception that justifies abortion under health considerations, the scholars describe the burdensome judicial procedures that some women must undergo in order to get an abortion to which they are legally entitled.304 The authors also denounce that the concept of health risk is arbitrarily restricted, by many judges, to physical health risk and that this criterion contradicts the World Health Organization’s definition of health.305 In relation to the exception that justifies abortion when the woman has been raped and suffers from mental disability, the scholars describe how mentally disabled women who have been raped face difficulties to access a legal abortion within the judicial and health systems.306

Paola Bergallo studies the legal problems that arise from restrictive laws. She argues that as a consequence of the criminalization of abortion, the absence of additional regulations for the cases where abortion is justified is common.307 In turn, the lack of regulations causes legal uncertainty, obstructing the performance of legal abortions.308 Bergallo describes four consequences of the criminalization of abortion. Firstly, she argues that it is usual to find disagreements regarding the interpretation of

303 Supra note 2 at 467-68
304 Supra note 2 at 467-68
305 Supra note 2 at 467-68. The restrictive interpretation of health risk is also addressed by Diana Maffia, supra note 101 at 152
306 Supra note 2 at 467-68
307 See supra note 6 at 50: “In practice, such “non punishable” abortions are rare because there are no clear policies regulating access.”
308 P. Bergallo, “El derecho al aborto en los sistemas jurídicos del mundo” in Hoja Informativa Nº05 (Buenos Aires: CEDES, 2007) at 6
the legal requirements for legal abortion, for instance, the vagueness of the terms *risk* and *danger*.309 Secondly, she points out that the ambiguity of the law, together with a lack of regulations to define which institution will be responsible for evaluating the concurrence of the requirements, leads to several and imprecise administrative and juridical procedures in order to obtain authorizations.310 Thirdly, she observes that these obstacles are fostered by the legal uncertainty caused by heterogeneous judicial interpretations and the lack of financial resources to have the necessary legal assistance to initiate a judicial procedure.311 Fourthly, she explains that, once the authorization was obtained, access to the service may still be limited, because legal uncertainty discourages health professionals from performing abortions.312

The *legal uncertainty* created by ex-ante judicial interventions has two consequences: an increase in ex-ante interventions and a chilling effect on health professionals.

4.2.2 Increasing Ex ante Judicial Interventions

The first consequence concerns ex-ante interventions with unacceptable delays and cumbersome procedures that constitute a risk for women’s lives and health. Decisions like *OMV*, although granting the authorization, foster illegitimate interventions of the courts before legal abortions are performed. Diana Maffía argues that when abortion is consented and legal, the public health services must assist the woman and refrain from impeding access to legal abortion through the requirement of judicial authorization. She holds that judicial authorizations represent a barrier that
arbitrarily prevents access to health care and constitutes a violation of women’s constitutional right to health.313

Maffia argues that both the health professionals that require judicial authorization and the judges that intervene are in violation of women’s right to health.314 She denounces that the delays caused by judicial interventions increase the risks of medical procedures, and sometimes the judicial decisions are made when it is already too late to perform the abortion.315 It is relevant to underscore that ex-ante judicial interventions violate the division of powers and the principles of democracy, because judges confer on themselves legal powers that were not granted to them by Congress. In this sense, the application of the law, in ex-ante judicial interventions, acts both as a shaper of and a pathway to unsafe abortion because it imposes an extra requirement to access legal and safe abortions, structuring the context of risk factors and exposing socioeconomically disadvantaged women to pathogenic practices.

4.2.3 Chilling Effect

The second consequence triggered by diverse jurisprudential criteria is the chilling effect on health professionals. This subject is addressed by Nina Zamberlin, who states:

Even though [the Criminal Code stipulates the exceptions for a] legal abortion, women in that situation rarely have access to legal and safe abortion services. Often, health professionals demand judicial authorizations in order to terminate the pregnancy because they fear criminal prosecutions; in other instances they simply refuse to perform the procedure.316

313 Supra note 101 at 152
314 Supra note 101 at 152
315 Supra note 101 at 152
316 N. Zamberlin, “El aborto en la Argentina” in Hoja informativa N°03 (Buenos Aires: CEDES, 2007) at 2 (Translation of author)
In addition, in *OMV* the Court expresses clearly the legal uncertainty and fear that affects health professionals whenever a case of legal abortion arises.

Although it is well documented that health professionals fear criminal procedures, this circumstance does not seem the only cause deterring them from performing legal abortions. Like the health professionals refusal to perform legal abortions triggered by ex-post judicial interventions, the chilling effect created by ex-ante judicial interventions is also determined by the health professionals’ beliefs on the matter. Once again, it is worth wondering to what extent these beliefs are structured by the symbolic role of the law when it perpetuates gender stereotypes with reference to abortion.

In this regard, it is interesting to mention Diana Maffía’s analysis of how health professionals perpetuate stereotypes that undermine women’s ability to decide what is good for their health. Maffía declares that:

> The conception of integral health is not only comprised of health (physical and social), but also of a state of “wellbeing.” Wellbeing is a subjective concept. No one but the woman can define her own wellbeing. In this particular case, “wellbeing” entails to take women’s opinion seriously.317

Susana Chiarotti argues that the issue under discussion goes beyond abortion. In fact, the issues at stake are women’s sexuality, their control over their bodies and autonomy, their claim to be considered full members of society, and the way they exercise their citizenship.318

Maffía and Chiarotti provide interesting insights to argue that, when it comes to the circle of unsafe abortion, part II, the law and its application act as a *shaper* of social

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317 *Supra* note 101 at 152 (Translation of author)
conditions that contribute to unsafe abortion both when they originate ex-ante judicial interventions and have an impact on access to legal abortions, and when, like in the circle of unsafe abortion, part I, they “construct the normative world”, perpetuating and fostering gender stereotypes.

In addition, when illegitimate ex-ante judicial interventions and gender stereotypes trigger legal uncertainty and delays in the provision of the service, the law acts as a *pathway* along which other social determinants of unsafe abortion affect the health outcome. In this regard, Juan José Llovet and Silvina Ramos maintain:

> Comparative analysis of legal norms in Latin American societies has disclosed how the law and politics of abortion affect the *availability* and *quality* of abortion services. In fact, restrictive legal norms leave most women, especially poor women, without access to safe abortion. Even when there are specific grounds for legal abortion (such as in the case of rape, risk to the woman’s life or health, and congenital anomalies of the fetus), judicial authorization is not easy to obtain. The illegality of abortion also affects the quality of medical care, and leads to many cases of complications from botched abortions.\(^{319}\)

As in Chapter 3, we can conclude in Chapter 4 that the consequences derived from judicial interventions expose women to pathogenic practices, construct the normative world that accepts gender stereotypes and their ill-health outcomes and contribute to health inequity.

### 4.3 The Whole Circle of Unsafe Abortion: Part I and II

So far, Chapter 4 has dealt with the relation between courts heterogeneous rulings and unsafe abortion. Through the analysis of cases, Chapter 4 demonstrated how heterogeneous and conflicting rulings on the subject of legal abortion can create legal uncertainty that causes increasing ex-ante judicial interventions and a chilling effect on

\(^{319}\) *Supra* note 275 at 61 (Emphasis added)
health professionals, leading women to seek unsafe abortions when they are entitled to have legal abortions. Figure 4 illustrates the second part of the circle of unsafe abortion:

FIGURE 4

This chain of events, determined by ex ante judicial interventions, needs to be added to the circle of unsafe abortion determined by ex post judicial interventions that was described in Chapter 3.

Figure 5 illustrates the complete circle of unsafe abortion form when Part I and Part II are put together. Figure 5 explains the interrelation between the two kinds of judicial intervention that determine unsafe abortion.

FIGURE 5
Accordingly, the whole unsafe abortion circle can be explained as follows:

- A woman undergoes an unsafe abortion;
- she suffers from complications and is compelled by the situation to seek post abortion treatment in a health center;
- the health professional that assists her faces an “dilemma” of duties, and decides to report her to the police;
• ex-post judicial interventions take place; the rulings apply the law arbitrarily and heterogeneously (Natividad Frías, GN, Luque), perpetuating gender stereotypes;

• ex post judicial interventions create, on the one hand, legal uncertainty, and on the other, gender stereotypes;

• legal uncertainty created by courts aggravates the health professionals dilemma of duties, which leads to more ex-post judicial interventions: health professionals err on the side of caution and report women to the police;

• legal uncertainty created by the courts causes a chilling effect on health professionals regarding legal abortion cases, which, in turn, exposes women to unsafe abortive practices;

• the perpetuation of gender stereotypes has an impact on health professionals’ view on womanhood, motherhood and abortion, which contributes to more ex-post judicial interventions and the refusal of health professionals to perform legal abortions; in turn, this determines unsafe abortion;

• the chilling effect triggered by ex post judicial interventions also drives health professionals to request ex ante judicial interventions in order to obtain an authorization to perform legal abortions;

• ex ante judicial interventions take place and the rulings apply the exceptions for legal abortion in an arbitrary and heterogeneous way (C.P. de P.A.K., O., M.V.);

• ex ante judicial interventions create legal uncertainty and health professionals’ fear to be criminally prosecuted if they perform an abortion that is considered legal without judicial authorization;

• the legal uncertainty created by courts encourage ex ante judicial interventions that cause delays and endanger women’s health and lives;
the legal uncertainty produced by the courts also causes a chilling effect on health professionals regarding legal abortion cases, deterring them from carrying out the medical procedure;

- the chilling effect contributes to unsafe abortion practices and the circle starts again when a woman arrives to a health institution seeking post-abortion treatment.

4.4 Conclusion

Chapter 3 addressed the first part of the circle of unsafe abortion, determined by ex post judicial interventions where courts apply the law arbitrarily. The conflicting rulings have two consequences: legal uncertainty and perpetuation of gender stereotypes. Chapter 3 examined two effects derived from the legal uncertainty: more ex post judicial interventions and the chilling effect on health professionals in relation to legal abortion. In both cases, the legal uncertainty led directly to unsafe abortion practices. Chapter 4 highlighted the chilling effect of the legal uncertainty triggered by ex post judicial interventions: ex ante judicial interventions. This represents the second part of the circle of unsafe abortion, where conflicting rulings regarding the interpretation of the exceptions for legal abortion cause, once again, legal uncertainty, increasing ex ante judicial interventions and the chilling effect on health professionals respecting legal abortion cases. In turn, these elements create a context where women entitled to have legal and safe abortions as envisaged in the Criminal Code end up seeking unsafe abortions.

In both parts of the circle, the law and its application act as a pathway along which the socioeconomic status determines an exposure to pathogenic practices that amount to unsafe abortion, and as a shaper of social status, structuring the access to safe
and legal abortion and constructing the normative world where gender stereotypes are naturalized and accepted.
CONCLUSION

Argentine laws regarding the criminalization of abortion and its justifications, and the legal duty of health professionals to preserve confidentiality and their legal duty to report offenses prosecutable *ex-officio*, together with a system of judicial review that allows conflicting courts rulings on these issues contribute to cause abortion-related morbidity and mortality among women who qualify for a legal and safe abortion according to the Criminal Code.

On the one hand, conflicting rulings in ex post judicial interventions, on the matters of 'the obligation of health professionals to report abortions if they assist women for post-abortion treatment, prompt legal uncertainty and perpetuate gender stereotypes embodied in the law. In turn, both consequences foster more ex post judicial interventions and prevent health professionals from performing legal abortion to those women that are entitled to them.

On the other hand, conflicting ex post interventions drive health professionals to apply for judicial authorizations, or ex ante judicial interventions, in order to perform legal abortions even in cases where the law does not require them. The application of the law in ex ante judicial interventions is also heterogeneous and arbitrary, triggering more ex ante judicial interventions and preventing health professionals from performing legal abortions.

Scott Burris, Ichiro Kawachi and Austin Sarat’s social epidemiology model was used to argue that in both ex post and ex ante judicial interventions, abortion and abortion-related legislation causes health consequences that make the law act as a pathway along which a lower socioeconomic status exposes women to pathogenic practices in order to induce an abortion, as well as a shaper of women’s lack of access to
safe and legal abortions and of the normative world that establishes women’s social status.

The ideal way of breaking the circle of unsafe abortion according to Luque would be to require courts to rule in ex post judicial interventions and according to CP in ex ante judicial interventions. Regarding the causal chain in Part I, if all courts ruled that the report by health professionals is not valid to implicate the woman or the people who carry out the abortion, it is possible that, in that context, women would not dread to seek post-abortion care, and health professionals would not fear to perform legal abortions. In other words, a homogeneous jurisprudence following Luque would seem to solve the legal uncertainty that causes constant ex post judicial interventions, and chilling effect on health professionals, which determine unsafe abortion and ex-ante judicial interventions. Luque criterion, however, does not solve the problem; while it is true that ex ante judicial interventions are determined, to some extent, by NF’s and GN’s prosecution to providers, these interventions are also determined by the perpetuation of sex-role stereotypes embodied in the law. In addition, as briefly mentioned, since abortion is an offense prosecutable ex-officio, in many cases, health professionals require ex-ante judicial authorizations because they fear criminal procedures initiated by someone who is not bound by the duty of confidentiality, such as a pro-life group.320

Ex post judicial interventions ruling following Luque would not completely deter ex ante judicial interventions and the chilling effect on legal abortion cases. Accordingly, the solution seems to be that courts should apply Luque in ex-post interventions in order to take out the juridical uncertainty of the causal chain in Part I, and apply CP in ex-ante interventions in order to avoid the circle of abortion, Part II.

320 See supra note 2 at 470-71
The application of *CP* would prevent courts from illegitimate interventions, causing delays and juridical uncertainty. Nevertheless, *CP* is not a satisfactory solution to avoid the chilling effect on legal abortion cases; the CCCAMP in *O., M.V.* was correct to point out the vicious circle of inaction where health professionals do not perform abortions for fear of a criminal prosecution –due to reports made by individuals that were not bound by the duty of confidentiality–, and judges consider that there are no grounds for a judicial intervention. Unfortunately, there is no official data on how many health professionals are prosecuted after performing an abortion that they considered legal due to reports made by actors not bound by the duty of confidentiality. The literature on the inefficacy of abortion laws suggests that those kinds of prosecutions are very few. Nevertheless, the fear among health professionals and the perpetuation of stereotypes in the law is strong enough to deter them from performing legal abortions if they lack a judicial authorization.

For *CP* to break the circle of inaction described by the judge in *OMV*, and for *Luque* to solve the problems derived from the circle of unsafe abortion described in part I, two conditions should be met: firstly, all courts should apply these rulings uniformly; secondly, in cases where the abortion has already been performed, and the report is made by someone not bound by the duty of confidentiality, jurisprudential consensus is needed with respect to the scope and application of the exceptions for legal abortion. Instead of ex ante judicial authorizations, the safeguard for health professionals in cases of legal abortions should be uniform jurisprudential criteria stating the proper interpretation of the exceptions in article 86 of the CC.

Even though a uniform application of these two rulings, together with clear guidelines explaining the scope of the exceptions for legal abortion, would prevent the

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321 *Supra* note 284 at 4 (Justice Loustauau)
law from acting as a pathway and as a shaper of social determinants of abortion-related mortality and morbidity, this scenario is not likely to happen. As explained in Chapter 2, the fact that Argentina is a civil law country with a system of judicial review that does not follow the stare decisis doctrine makes almost impossible to unify the jurisprudence, especially if the National Court of Criminal Cassation or the Supreme Court make no comment on the matter. In addition, the sex-role stereotypes embodied in the law still construct a normative world in which a woman needing an abortion is gone astray and, hence, is rejected.

It is possible to maintain, then, that in Argentina law acting as a social determinant of abortion-related morbidity and mortality is a structural problem of enormous dimensions. The law and its application, together with the legal system, cause legal uncertainty and perpetuate gender stereotypes. In turn, these two effects influence women’s access to legal abortion, expose women to pathogenic practices and shape the normative world that naturalizes gender stereotypes and their effect on health. As mentioned in Chapter 1, Link and Phelan believe that “if one genuinely wants to alter the effects of a fundamental cause, one must address the fundamental cause itself.”\(^{322}\) It is worth wondering, then, whether the circle of unsafe abortion will ever be redressed insofar as abortion is still a criminal offense.

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\(^{322}\) *Supra* note 22 at 88
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