

Pregnancy and the 40-Year Prison Sentence: How “Abortion Is Murder” Became Institutionalized in the Salvadoran Judicial System

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Abstract

Using the case of El Salvador, this article demonstrates how the anti-abortion catchphrase “abortion is murder” can become embedded in the legal practice of state judicial systems. In the 1990s, a powerful anti-abortion movement in El Salvador resulted in a new legal context that outlawed abortion in all circumstances, discouraged mobilization for abortion rights, and encouraged the prosecution of reproduction-related “crimes.” Within this context, Salvadoran women initially charged with the crime of abortion were convicted of “aggravated homicide” and sentenced to up to 40 years in prison. Court documents suggest that many of these women had not undergone abortions, but had suffered naturally occurring stillbirths late in their pregnancies. Through analysis of newspaper articles and court cases, this article documents how El Salvador came to prosecute obstetrical emergencies as “murder,” and concludes that activism on behalf of abortion rights is central to protecting poor pregnant women from prosecution for reproduction-related “crimes.”

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Introduction

Most forms of abortion have always been illegal in El Salvador, but historically, Salvadoran women were not prosecuted. However, after a successful anti-abortion mobilization in the 1990s culminated in an absolute abortion ban in 1997, and a constitutional amendment defining life as beginning at the moment of conception in 1999, the Salvadoran state began to prosecute women for abortion for the first time in recent history. Moreover, our data demonstrate that between 1999 and the present, at least 34 women, many of whom were initially charged with the crime of abortion, were eventually convicted for the “aggravated homicide” of their newborns and sentenced to 4–40 years in prison. Many of these women suffered naturally-occurring stillbirths.

How did the Salvadoran judicial system transform from a state that largely ignored the crime of abortion to an aggressive prosecutor of women’s reproductive lives? How did poor women who suffered obstetrical emergencies come to be legally understood as criminals who “murdered” their own children? Analyzing 25 years (1989–2014) of newspaper articles from the largest daily Salvadoran newspaper, *El Diario de Hoy*; six interviews with key informants (activists and legislators); complete court documents from 16 women sentenced to prison for the “aggravated homicide” of a newborn; and sentencing documents from 53 abortion or newborn homicide cases uncovered through a review of judicial records in 12 of El Salvador’s 21 sentencing districts; this article examines how the familiar mobilizing cry of anti-abortion movements—“abortion is murder”—became deeply embedded within the Salvadoran legal and judicial process.

El Salvador is not the only nation to imprison pregnant women for reproduction-related “crimes.”¹ However, its corresponding penalties are among the most extreme in the world. Analyzing this extreme case allows scholars to better understand the conditions under which the idea that abortion is murder can become integrated into the written legal code, and the institutionalized judicial processes, of a nation.

In the following pages, we first review infor-

mation from the court cases of three Salvadoran women wrongfully charged with the “homicide” of their fetus or newborn to illustrate the judicial overreach currently occurring in El Salvador. Second, we present newspaper and interview data to provide an historical account of how anti-abortion discourses pressured the Salvadoran judicial system into adopting such aggressive prosecution tactics. Third, we demonstrate how these aggressive prosecution tactics permeate every level of the judicial process, from the doctors who attend the women during their obstetrical emergencies, to the police who arrest them, to the judges who condemn them for murder. Finally, we conclude that activism on behalf of women’s reproductive health is a key element in preventing states from prosecuting women for reproduction-related “crimes.”

Three examples illustrating how naturally occurring obstetrical emergencies became “murder” in El Salvador

Mirna, charged with attempted aggravated homicide

In May 2002, Mirna was 34 years old, seven months pregnant, and poor. Although she had married at age 19, she and her husband still had no children due to a history of difficulties conceiving, miscarriages, and one premature birth of a child who died at four months old. This pregnancy again appeared problematic; Mirna suffered back pains and significant vaginal bleeding throughout. Feeling the urge to defecate, Mirna went to the pit latrine behind her house, only to accidentally birth her daughter into the latrine. Three neighbors quickly helped retrieve the child. The premature baby—a girl—was taken to the hospital, where she was diagnosed with sepsis and intrauterine growth restriction, but survived.

According to doctors consulted for this paper, the medical factors associated with intrauterine growth restriction are also factors commonly associated with premature or precipitous births. Yet when the police arrived at Mirna’s house to take her and her baby to the hospital, they also captured Mirna for suspected abortion. By the time the case reached the courts, Mirna was charged with

“attempted aggravated homicide.” The judge who found her guilty concluded, “This tribunal has no doubt that the defendant’s behavior was intentional, because who doesn’t know that throwing a newborn baby into a latrine could cause its death.” Mirna was sentenced to, and served, 12 ½ years in prison. Her daughter is now 16 years old.

Carmen, charged with aggravated homicide

In October 2007, 18-year-old Carmen was working as a live-in domestic in El Salvador, making \$80 per month. She was pregnant as the result of a violent sexual assault. Carmen went into labor on a Sunday, and self-delivered a small baby that did not move or cry. The next day, Carmen worked a full day despite continuing to bleed heavily. By the time her employer took her to the hospital, she was regularly losing consciousness from blood loss. The employers claimed to have not known Carmen had been pregnant although Carmen reports that the employers both knew she was pregnant, and also knew that the baby had died. The medical staff who attended Carmen realized she had given birth and reported her for suspected abortion. Like Mirna, the abortion charge was upgraded to aggravated homicide through the course of the trial.

The autopsy of Carmen’s baby found “no external or internal evidence of trauma” on the body, and listed the cause of death as “undetermined,” noting that “with the available studies completed, it is not possible to determine the cause of death.” The autopsy also reported several abnormalities in the body, including incongruent height, weight, and foot measurements; vascular congestion in the heart; and the wrong number of veins in the umbilical cord. Despite clear medical evidence suggesting a stillbirth, and no evidence of a crime, the autopsy nevertheless classified the type of death as “violent.” At no point in the court documents did the forensic analyst provide any justification for this “violent” classification. The judge found Carmen guilty of aggravated homicide and sentenced her to 30 years in jail. In his written statement, the judge admitted frankly that there was no direct evidence of a crime, but said he was able to come to his decision through “the force of reason.”

Maria Teresa, charged with aggravated homicide

In November 2011, 28-year-old Maria Teresa lived with her six-year-old son and his paternal grandparents in a shack of corrugated metal located in a poor, gang-ridden suburb of San Salvador. Her son’s father had abandoned them years earlier, but she continued to live with and care for his elderly parents. She worked in a factory during the day, and supplemented her day job with house cleaning on evenings and weekends. Maria Teresa did not know she was pregnant, as she had been bleeding heavily throughout the pregnancy, and her stomach did not grow. In fact, she reports visiting the doctor twice during the pregnancy, once with pains in her lower abdomen, and another time with sharp pains in her back. The doctors diagnosed her with a bladder infection; even they did not suspect pregnancy.

Maria Teresa woke one night with a strong thirst. While getting a drink of water, she suddenly felt an urge to defecate. She went to the pit latrine outside their home, and was horrified to feel what felt like a “little ball” fall out of her body. She cried out for her mother-in-law before passing out in a pool of blood. Her mother-in-law called an ambulance, and Maria Teresa arrived at the hospital in hypovolemic shock. The doctors, realizing she had given birth, reported Maria Teresa to the police for abortion. The state’s attorney upgraded the charge to aggravated homicide. Although the autopsy data indicated that the fetus likely died in utero and was then expelled, the judge nevertheless found Maria Teresa guilty and sentenced her to 40 years in prison. In his statement, he wrote that Maria Teresa must have known she was pregnant, so she therefore must have “decided to carry out her criminal plan within the area of her household, looking for a moment during which there weren’t any other persons around to carry out this homicide.”

The cases of Mirna, Carmen, and Maria Teresa illustrate a transformation in Salvadoran judicial practice. After 1999, poor Salvadoran women who appear to have suffered naturally occurring obstetrical emergencies began to be prosecuted for the “aggravated homicide” of their newborns. To investigate the events accompanying this judicial

transformation, we analyze 25 years of national-level political developments, as reported through the *Diario de Hoy* newspaper, and as recalled by local activists and politicians.

The birth of the anti-abortion movement in El Salvador

In the early 1990s, El Salvador was in the process of negotiating a peace treaty to end 12 years of civil conflict between the socialist-inspired FMLN (Frente Farabundo Martí para la Liberación Nacional) guerrillas and the Salvadoran state. At this time, Salvadoran law only allowed legal abortions in three circumstances—when the life of the mother was at risk, when the pregnancy was the result of rape, or when the fetus had deformities incompatible with extrauterine life. Nevertheless, illegal abortion clinics operated relatively openly and without fear of prosecution. Although there was much political turmoil and debate at the time, changing abortion laws or increasing the enforcement of those laws, was not on the public agenda. From 1989 to the end of 1992, there was not a single reference to local-level abortion issues or activism in *El Diario de Hoy*. *El Diario* did regularly report on Pope John Paul II's anti-abortion speeches while touring other parts of the world, but the reporters would mention the topic of abortion only in passing, focusing instead on colorful accounts of the city where the Pope was speaking.

In 1992, the Salvadoran state signed peace accords with the FMLN guerrillas, and the FMLN was conferred formal status as a political party. It was also in 1992 that the first anti-abortion editorials and articles began appearing in *El Diario*. Yet it wasn't until 1994 that the abortion agenda won significant attention from Salvadoran politicians. This was the year of the first post-peace accord elections, and the first time the new FMLN party could contend for formal political power. This was also the year that the United Nations planned its Population Conference in Cairo. *El Diario* reported on Pope John Paul II's claims that the Cairo conference was the First World's attempt to force abortion on poor countries in order to control their population. The

anti-abortion movement in El Salvador quickly adopted the Pope's discourse as their own. It was also at this moment that the local Catholic Church in El Salvador became a major player in the pro-life movement, bringing with it the ability to quickly mobilize thousands of individuals in the course of a weekend by making announcements to parishioners during mass. And Salvadoran politicians from two political parties on the right, ARENA (Alianza Republicana Nacionalista) and the PCN (Partido de Conciliación Nacional), began proposing that El Salvador could protect its sovereignty—and the lives of unborn Salvadorans—from UN incursion by passing stronger anti-abortion legislation.

The Truth Commission created by the 1992 Peace Accords recommended a revision of the country's existing criminal code. In 1997, the Foundation Yes to Life presented a formal request to the legislative assembly to ensure that the new criminal code did not allow any exceptions to abortion—even for the life or health of the pregnant woman. It further launched a powerful media campaign, and *El Diario de Hoy* published numerous graphic editorials promoting the “abortion is murder” meme. Articles with titles like “The horrors of abortion” erroneously detailed how “abortionists” cause “babies” torturous pain in their mother's womb by tearing them apart, limb by limb, even in the earliest weeks of pregnancy.² (The current consensus in the medical community is that a fetus cannot feel pain prior to the 24th week of gestation.)³ The Archbishop of San Salvador, Fernando Saénz LaCalle, publicly compared abortion to the “Nazi death camps.”⁴ The Catholic Church mobilized thousands of school children from parochial schools and bussed them to the legislative assembly to rally for the total abortion ban.⁵ Professional organizations like doctors' unions issued statements in favor of the total ban.⁶ The new minister of health claimed that regardless of what law was eventually passed, he and his doctors would not practice abortions.⁷

Resistance and resignation

Despite powerful anti-abortion mobilization, the newly created FMLN political party initially stood

firm in its support for maintaining the legality of abortion when a woman's life was in danger, when a woman was raped, or when the fetus had deformities that would not allow it to survive outside the womb. The party called on the Salvadoran government to prevent abortion, not prohibit it, and they sought to turn the discussion to the economic dimensions underlying unwanted pregnancies. Prominent feminist organizations supported the FMLN position by speaking out against the total abortion ban, and providing scientific and social evidence supporting abortion rights to the legislative assembly.⁸ In 1997, the FMLN voted as a party against the total abortion ban, but they had insufficient votes to prevent its passage.

The new criminal code eliminated all legal options for abortion, and extended the criminal sentence for women who consent to abortion to two to eight years in prison. The new criminal code also introduced a new crime: abortion accomplice. Specifically, the law states that anyone who induces a woman or facilitates with economic or other means the ability to have an abortion in El Salvador can be sanctioned with two to five years in prison. Importantly, although it outlaws both "abortion" and "facilitating abortion," the criminal code provides no legal definition for either term.

Immediately after the total abortion ban was passed, Archbishop Lacalle sent a letter to the legislative assembly stating that it was not sufficient to outlaw abortion in the criminal code; a constitutional amendment defining life as beginning from "the very moment of conception" was also needed.⁹ The right-wing party ARENA responded immediately, using its legislative majority to push the first of two required votes to amend the constitution to recognize fetal personhood. The FMLN again voted as a party against the reform, but again did not have enough votes to block its passage.

Despite their professed concern to protect unborn life, ARENA deputies waited two years before putting the second constitutional amendment vote on the agenda. Their strategy was clear: they waited to introduce the issue until immediately before the next election cycle, so that the FMLN would again be forced to defend abortion publicly during a critical

campaign moment. Public opinion in El Salvador appeared strongly in favor of the amendment. *El Diario* reported that activists collected a remarkable 600,000 signatures and mobilized tens of thousands of protestors to support the amendment.

In the wake of this powerful organizing, the FMLN decided to allow its deputies to vote their conscience, and to no longer promote a party line supporting limited abortion rights. Feminists, who had supported the FMLN position throughout the debate, were disappointed. The personhood amendment passed with the majority of FMLN members casting positive votes, and a minority abstaining. After the vote, several FMLN leaders also made public statements celebrating the constitutional protection of fetal life.

This vote marked a change in FMLN strategy that had profound implications for the abortion rights movement in El Salvador. Not only did the FMLN disengage with the issue of abortion, but some deputies also urged their feminist allies to drop their public support of abortion. With a few important exceptions, feminist organizations concurred. Salvadoran feminists interviewed described the next eight years as a period of "self-censorship." They continued to mobilize around other women's reproductive issues, including access to contraception, sex education, rape prevention, and legal protections from gender-based violence. But with few exceptions, they no longer discussed the issue of abortion publicly. This decision, reported to me by activists from three separate feminist organizations, is also evidenced in the newspaper review. Whereas articles reporting on feminist abortion rights activism were relatively regular up until 1999, they became nearly nonexistent between 1999 and 2007.

Feminists offer two reasons for reducing public support of abortion rights. First, they noted that it was important to maintain the FMLN as allies in the legislative assembly if they were to achieve any of their multifaceted goals for women's rights. Second, feminists feared that speaking out in favor of abortion could have powerful, negative ramifications for their nascent post-war organizations. Anti-abortion activists had proven themselves able to mobilize significant financial and political

resources to counter anyone who spoke in favor of abortion rights. Moreover, because the new criminal code outlawed facilitating abortion, feminists worried that any abortion rights mobilization could result in potential jail time for activists.

Anti-abortion discourse finds a new target

After their legislative victories in 1997 and 1999, anti-abortion discourse in El Salvador appears to have turned its attention toward a new target: mothers who would “murder” their babies. A 2001 article in *El Diario de Hoy*, titled “Crimes without punishment” begins,

*The numbers of newborns being thrown into latrines, trash receptacles, or vacant lots by their own mothers is alarming. Very few children are able to survive this misfortune. The authorities need to capture these women red-handed to process them for aggravated homicide, but to the contrary, these crimes never come to light and are given complete immunity.*¹⁰

Another 2001 article, “Stories of hearts of stone,” states: “They are human beings who only lived the nine months that they were in their mothers’ wombs. Upon birth, they await the sweet hands of a mother, but what they find instead are the talons of soulless women.”¹¹

Although *El Diario de Hoy* had long published articles equating abortion with “murder” more generally, by 2001 the attorney general’s office began to conflate abortion and “homicide” in its statements referencing specific judicial cases. To illustrate: a university student allegedly showed up at the hospital hemorrhaging, saying she had just suffered a miscarriage. The doctors suspected her of provoking an abortion, and reported her to the police. The attorney general’s office told a reporter that although the young woman was initially being charged with abortion, if they could find the deceased baby, they could potentially upgrade the charge to “aggravated homicide” depending on whether the fetus had breathed upon exiting the womb.¹²

El Diario articles also suggest that state agents were feeling increased pressure to prosecute

women for abortions and “homicides.” One 2003 article reports on a press conference in which the nation’s top prosecutor and the director of the national police sought to defend their respective institutions regarding why they had not been more successful in shutting down El Salvador’s clandestine abortion industry. They professed that they were limited legally because the current law only criminalizes actual abortions. If the abortion laws were strengthened to criminalize “intention to abort,” they argued, they would have the legal power they needed to prosecute abortion. The article concludes with a representative of the ombudsman for human rights stating, “In this country, we still don’t have clear and efficient policies that allow us to protect the lives of the unborn.” She also said that the state needed to go further to fight the situations “that we’ve seen, where women throw away their own children as if they were any old thing”¹³

Social mobilization requires an adversary. The Salvadoran anti-abortion movement initially framed itself in opposition to the FMLN and the feminists who would permit (albeit limited) legal abortion in El Salvador. However, when both the FMLN and local feminist organizations reduced their public engagement with the issue of abortion, then it no longer made sense for abortion opponents to target them. Why mobilize in defense of El Salvador’s new anti-abortion laws when there was no threat to those laws in the first place? The newspaper articles reviewed above suggest that, in the face of quiescence from the abortion rights movement, the anti-abortion movement identified a new enemy: the “perverse mother” who was guilty of “murdering” her own innocent child.

A sharp increase in the number of prosecutions

To estimate the number of convictions for abortion and newborn homicide in El Salvador, we combined information from four separate data collection processes. First, author Guardado Bautista reviewed every legal case from 1997 to 2014 as tried in 12 of the 21 judicial sentencing districts in El Salvador. He recorded all abortion or “homicide

of a newborn” cases sentenced during these years, and when possible, made copies of judges’ sentencing decisions. Second, to see if these prosecutions were indeed new or were a continuation of an earlier practice, we selected the 5 districts among our 12 that had had the highest number of abortion or “homicide of a newborn” cases after 1997, and we returned to these districts, this time to look through all sentencing decisions from 1989-1996. Third, we combined our data with a study completed by a local Salvadoran organization, the *Agrupación por la Depenalización del Aborto*. The *Agrupación* study is broader than ours, as it reviewed all court cases in all of El Salvador from 2000 to the first quarter of 2011.¹⁴ However, its data cover a more limited time period, and only include counts of prosecutions and convictions; its published data does not provide details on the sentences that convicted women receive. Finally, we added to our counts six new cases publicized in the media in 2015 and 2016.

Combined, these data demonstrate that convictions for both “abortion” and the attempted or actual “aggravated homicide of a newborn” began to increase significantly in the year 2000—about the same time that anti-abortion newspaper discourses in El Salvador began targeting the “perverse mother.” Prior to 1998, we found only four cases of prosecution for abortion in the sample of court documents we reviewed. In contrast, between 1998 and 2014, we discovered 74 women who were prosecuted for abortion. Of these, 23 were convicted. Although the *Agrupación* published data do not include sentencing decisions, our more limited analysis suggests that the vast majority of women found guilty of abortion were sentenced to community service, and not prison.

In stark contrast, women whose initial abortion charges were upgraded to homicide were significantly more likely to receive long prison sentences when found guilty. Prior to 1998, we only found two cases of attempted or actual “aggravated homicide” of a newborn in our 5-district sample. However, from 1998 to 2016, we discovered 75 such cases in our combined data. Of these 75 cases, 34 were found guilty. Again, the *Agrupación* data do not include information on women’s sentences, but

our data paint a grim story. Of the 43 cases of homicide we uncovered in our limited sample, 29 were found guilty, nine were found innocent, and five were either missing sentencing information or were still in trial. Of the 29 guilty verdicts, 24 received prison sentences of 25 years or greater, two received sentences of 12-15 years, and three received four-year sentences. The modal 30-year prison sentence for women convicted of the “aggravated homicide” of their newborns is 15 times greater than the minimum prison sentence for abortion (the crime with which these women were often initially charged). It is also two to three times longer than the prison sentences gang members receive for multiple violent murders. This is because gang murders are typically charged only with “homicide,” while these women are charged with “aggravated homicide” due to the relationship between mother and child.¹⁵

Prosecuted for abortion, convicted of murder

The quantitative data above illustrate how, beginning in 1998, El Salvador experienced a dramatic increase in the prosecution of women’s reproductive “crimes.” However, they tell us little about the cases themselves. We therefore secured permission from 16 women convicted of attempted aggravated homicide or aggravated homicide of their newborns to review the entirety of their court documents, including police reports, medical files, autopsy reports, judicial correspondence, and trial documents.¹⁶ The three women whose experiences are detailed above—Mirna, Carmen, and Maria Teresa—were among the 16. We also shared summarized case histories, plus the medical and forensic data from the cases, with Gregory Davis, a medical expert in forensics; and Christine Curry and Jodi Abbott, ob/gyns in the United States, to benefit from their specific expertise in evaluating the cases. We summarize our key findings below.

The women: These 16 Salvadoran women were overwhelmingly poor, poorly educated, and lived in situations that limited their access to medical care (for example, they lived alone in isolated rural areas, lived with physically violent or controlling

partners, lived in areas controlled by gangs where police and ambulances are loath to enter, or were domestic workers living under the surveillance of their *patron*). At least four of the 16 women were pregnant as the result of rape. The women went into labor unexpectedly and while alone. Their babies appear to have died before, during, or shortly after a complicated and unattended birth in what, had they been in the hospital, would likely have been ruled a stillbirth.

The discrimination: We documented extensive and systematic gender bias in each of the 16 cases. By systematic gender discrimination, we mean that at every stage of the judicial process, the state aggressively pursued the woman's prosecution instead of the truth. This began at the moment of arrest and culminated with sentencing. Rather than presenting actual evidence, state personnel justified their prosecution decisions by citing how the accused women violated social expectations of motherhood. For example, they argued that mothers should always know when they are pregnant; mothers should be able to tell the difference between labor pains and the urge to defecate; mothers should know when it is necessary to seek medical care to protect their unborn babies; and mothers should act to protect their unborn or newborn babies even when suffering a severe medical crisis and losing consciousness.

Sites of discrimination: We found evidence of the aggressive pursuit of prosecution at every stage of the judicial process.

1. To begin, the *police* who investigated the alleged crimes only gathered evidence that would incriminate the women, and consistently failed to gather evidence that would corroborate the women's stories. In the case of Mirna, for example, police took a statement from a neighbor who told them that Mirna purposely threw the baby away because she did not want her husband to know she was pregnant. However, they did not at that time travel to the husband's work place to ask whether he knew Mirna was pregnant. (He later stated vehemently that he did).
2. *Doctors* who treated these women postpartum routinely failed to investigate likely birth complications. In eight of the 16 cases, the most basic medical information, such as the women's blood pressure and estimated blood loss, was not reported on the women's medical charts. Even in cases where these data exist, the medical staff regularly failed to interpret the data for the courts (nor did the attorney general ask for an interpretation). For example, doctors failed to note when a woman's excessive bleeding at the time of birth would have resulted in her acting dazed, confused, and incoherent—a physiological consequence of insufficient oxygen reaching the brain. Such incoherent actions have been used to incriminate most of the 16. In none of the 16 cases did medical staff analyze women's past or present medical conditions, evaluate the placenta, or check for maternal infections, diseases, or chromosomal abnormalities. Of the eight women for whom there are limited data, all were anemic, and some severely so—a pregnancy complication that could be indicative of miscarriage or stillbirth. More concrete actions also demonstrated the doctors' assumptions of guilt. In several cases, doctors testified against the accused women in court, making erroneous claims to support incrimination. For example, Mirna's doctor testified that there was no way that a woman could possibly mistake labor pains for the urge to defecate and the intrauterine growth restriction in her daughter was not caused by a genetic or physiological abnormality, but rather was evidence of the fact that Mirna "did not want the baby." In another case, medical personnel wrote, "patient apparently threw away her baby" on the woman's medical chart.
3. *Forensic analysts* also appear consistently biased toward incrimination. Analysts regularly found that infants were full term, but provided little information to support that conclusion. In Maria Teresa's case, the analyst concluded that the infant was full term, but failed to list the body weight because, he writes, "there was no scale." In another case, the analyst concluded that the

baby was “full term” after listing its length at 51 cm long and its weight at only 700 grams, two measures that are practically impossible to find in the same infant. Forensic analysts also failed to discuss possible breaks in the chain of evidence. In at least nine of the 16 cases, the scene of the alleged crime was contaminated by multiple people prior to the arrival of the police. In one case, the infant’s body was cleaned, dressed, and then prayed over all night before a neighbor suspected malfeasance and called the police the following morning. Yet not a single forensic analyst noted whether and how these breaks in the evidence chain could contaminate forensic findings. Perhaps most centrally, in eight cases medical forensics used a “lung flotation test” to “prove” live birth, and to conclude that the cause of death was likely homicide. This line of reasoning is highly problematic for two reasons. First, establishing that a baby was born alive is a necessary, but not sufficient, condition to prove homicide. An infant could be born alive and breathe for a few minutes before dying a natural death. Yet judges regularly only referenced the fact that a baby had supposedly been born alive to determine that “killing” had occurred. Second, leading forensic experts have rejected the lung flotation test for more than a century because it is known to provide false positives.¹⁷

4. *Judges* were among the most biased actors in the judicial process. Judges frequently admitted only the evidence that supported a guilty verdict, and systematically excluded evidence that supported the women’s testimony. For example, judges admitted testimonies from neighbors who condemned the women (even when the data in their testimonies was highly suspect), but refused to admit testimony from neighbors who supported the women’s telling of the events. In other cases, the autopsies concluded that the cause of infant death was undetermined and may have been due to natural causes, but the judges nevertheless claim that there is sufficient circumstantial evidence to warrant a conviction. To illustrate, Maria, who had already suffered a documented

stillbirth several years earlier, told the courts that her most recent pregnancy also ended in stillbirth. She delivered the baby while home alone, without assistance, and after suffering from three days of high fever. The autopsy was unable to confirm live birth, and specifically stated that the cause of death was “undetermined.” Yet the judge writes his conclusion as if live birth and criminal death had been clearly established: “(The defendant) injured the legal life of a newborn, which by the fact of being born alive, had the right to exist and to be protected from its birth, especially by its mother.” Moreover, the judge seems to argue that the young woman was guilty only because she hid her pregnancy: “No legal motive exists to justify a mother killing her child, much less a defenseless newborn, the evidence in this process demonstrates that the only motive that the defendant had was avoiding public criticism and the rejection by her parents.”

In still other cases, the judges seem to acknowledge that the infant death was due to natural causes, but they nevertheless condemn women of aggravated homicide because, as mothers, they should have done more. In one case, a judge wrote: “Such is the case that (the defendant) has two other children, and therefore knows what it means to give birth, and knows the care that she should take with a newborn.” In another case: “The conduct and attitude shown by the defendant is characterized by an omission which manifested at the moment of the birth; this same lack of timely assistance, and not wanting to cooperate by going to a health care center, were the causes leading to the death of the child.”

Importantly, social expectations of motherhood are a central theme in many of the judges’ rulings. One ruling reads: “(the Court) could not reach any other conclusion than that, if the child was dead and his death had been produced violently, then the author of this action couldn’t be any other person but the mother.” Another reads:

since the first person called to protect the life of a newborn is the mother, because she is the person in whom nature has deposited the procreation of

life, and the care to conserve this life, ultimately assuring that this life flourishes; the complete opposite occurred in this case, given that it was the mother herself who, despite being the first obliged to protect this life, was the one who destroyed it with her actions.

Explaining new forms of prosecution in El Salvador

“Abortion is murder” is a common rallying cry for anti-abortion activists around the globe. But in El Salvador, it has done far more than rally adherents—it has transformed how the state’s judicial system prosecutes pregnant women. Why? Although complex questions like this defy simple causal explanations, the brief historical review above offers important insight.

First, the anti-abortion movement in El Salvador took root in a period of what Swidler calls “unsettled times.”¹⁸ Such moments provide a unique opportunity for powerful groups to promote cultural change based on their preferred ideologies.¹⁹ In 1992 El Salvador, warring factions had just signed a peace treaty. The conservative ARENA party had spent the better part of the 20th century defending with violence a traditional political and economic system that maintained power in the hands of the landed aristocracy. Now they were required to share the legislative assembly with the very “communist insurgents” they had tried to eliminate. ARENA had long argued that FMLN “communists” were anti-free market, anti-family, and anti-religion. Attacking the FMLN for its defense of (limited) abortion rights was (a) remarkably consistent with ARENA’s historical ideology, (b) well-suited to gaining political power in the new arena of political contestation, and (c) supported by Pope John Paul II’s recognition of ARENA leaders in protecting the unborn at the Cairo convention.

Second, the language of El Salvador’s new anti-abortion legislation is particularly likely to result in increased prosecutions. As noted above, Salvadoran law has institutionalized legal uncertainty about in utero “deaths.” If life begins at conception, and abortion is undefined, then why aren’t miscarriages or stillbirths legally equivalent

to manslaughter, or even aggravated homicide? Moreover, the Salvadoran law is unique in that it penalizes not just abortion, but also “facilitating” abortion, an additional threat that may have encouraged doctors to report suspected abortion, and discouraged the mobilization of abortion rights advocates.

Third, the abortion rights movement made a collective decision to exit the formal political debate for eight years (1999-2007). During this time, the powerful anti-abortion movement no longer had a political opponent with which to engage. Anti-abortion advocates responded to this vacuum by creating a folk devil to attack—the “perverse mother,” or “soulless woman,” who would callously “throw away” her own child. It was shortly after the abortion rights voices disappeared that references to perverse women began appearing, and that women who suffered obstetrical emergencies began going to jail with increased frequency.

Fourth, the high rates of criminal violence in El Salvador put extraordinary pressure on the judicial system, and this may encourage the prosecution of women for obstetrical emergencies. A source inside the El Salvador attorney general’s office reports that it is not uncommon for prosecuting attorneys in the homicide division to have 500 cases on their desk at any one moment. These attorneys also face quotas dictating how many cases they must move forward each month. Because prosecuting alleged gang murderers may open prosecutors to threats of violence from gang affiliates hoping to influence the outcome of the trial, it is not surprising that prosecutors choose to try cases like Mirna, Carmen, and Maria Teresa—poor women who have no money for defense attorneys, no plans to execute violence against their prosecutors, and who are easily detained while in the hospital recovering from their obstetrical emergencies.

Rebirth of the abortion rights movement in El Salvador

In 2006, the *New York Times Magazine* published an in-depth analysis by author Jack Hitt on the total abortion ban in El Salvador.²⁰ Hitt examined

the case of a young woman named Karina who, he reported, was serving a 30-year prison sentence for “abortion.” When the article was published, anti-abortion activists in El Salvador and elsewhere criticized Hitt. Karina was serving 30 years for aggravated homicide, they argued, not for abortion, and Hitt’s error reflected his abortion rights motives in writing the article. What we recognize today as a clear prosecutorial pattern illuminates the reason behind Hitt’s mistake—the young woman was initially charged with abortion, and only later was the charge upgraded to aggravated homicide. After serving seven years in prison, Karina was released when a new trial found no evidence of homicide.²¹

Hitt’s controversial article had a powerful, if largely unintended outcome. He had solicited help from local feminist activists while investigating, and it was only through working with Hitt that these activists realized that Salvadoran women were being imprisoned for the “aggravated homicide” of stillborns. The activists began meeting quietly with other feminist groups to talk about how to mount a legal defense for the young woman highlighted in the *Times* piece. And as the feminist activists uncovered additional cases, they began to re-assess their silence on abortion.

In 2009, the FMLN won control of the executive office, and fear of prosecution for “facilitating” abortion lessened. The feminist activists who had already been quietly defending women imprisoned for stillbirths decided to organize formally, creating the *Agrupación Ciudadana por la Despenalización del Aborto*. Through their activism and provision of free legal representation, this small group of determined feminists has secured the release of five women imprisoned for the aggravated homicide of their newborns. Carmen was pardoned, and Karina and Maria Teresa were both awarded new trials where they were found “not guilty.”²²

The *Agrupación*’s defense of women imprisoned for “homicide” brought new international attention and resources to the abortion rights cause in El Salvador, and has proven to others that mobilizing on behalf of abortion rights does not carry the extreme political costs once imagined. Most centrally, the FMLN has responded to the renewed

abortion rights activism by introducing a new bill that would re-insert the original “exceptions” to the abortion law.

Conclusion

For the past 50 years, advocates argued for legal abortion primarily on grounds of public health and women’s right to self-determination.²³ Recently, however, advocates are raising a new concern: legal restrictions on pregnant women are increasingly landing women in prison for reproduction-related “crimes.”²⁴ In Mexico, more than 600 women were arrested for abortion between 2009 and 2011, and at least some of them appear to have suffered spontaneous miscarriages.²⁵ In the United States, increasing numbers of mothers considered morally suspect—typically welfare moms and drug users—are being sent to jail under “fetal harm” laws.²⁶

Within this context, El Salvador is a critical case for three key reasons. First, El Salvador is to our knowledge the only place in the world where women receive decades-long sentences for suffering an obstetrical emergency. Investigation into these cases allows continued, informed pressure on the Salvadoran state that may eventually lead to the release of these wrongfully imprisoned women.

Second, the case of El Salvador provides powerful evidence for the critical role of abortion rights activism in protecting marginalized women. Even though the pre-1999 abortion rights voice was unable to change public opinion, failed to stop the passage of the total abortion ban, and failed to defeat the constitutional amendment defining life as beginning at the moment of conception, it still served a critical role. Specifically, by making itself the target of the anti-abortion movement, the abortion rights movement provided a buffer to the marginalized women most at risk for prosecution under the new law. When the abortion rights voice disappeared, poor Salvadoran women were scapegoated as “perverse mothers” and jailed for “aggravated homicide.”

A final lesson from El Salvador is that the rallying cry “abortion is murder,” typically studied for its importance in mobilizing activists, must

also be studied for its ability to reshape judicial systems. Judicial systems are comprised of individuals—doctors, police officers, attorneys, judges, legislators, and bureaucrats—whose behavior is motivated not only by legislation and regulation, but also by the cultural lens with which they see the world. As demonstrated above, after the explosion of anti-abortion mobilization in the 1990s, the words “abortion” and “homicide” were regularly used interchangeably in El Salvador, not only by the anti-abortion activists themselves, but also by mainstream news reporters, and high-ranking legal officials. It is thus not surprising that this same blurring of abortion and homicide in cultural discourse became institutionalized in the policies and practices of the Salvadoran judicial system. When “life begins at conception” and “abortion is murder,” then logically, any loss of life within the uterus—provoked or naturally occurring—warrants investigation. And because provoked abortions are often medically indistinguishable from naturally occurring miscarriages, judges will be asked to determine a woman’s responsibility for a “failed” pregnancy, likely by evaluating whether the woman upholds the appropriate cultural standards of mothers. As the case of El Salvador makes clear, women who are poor, poorly educated, and victimized by violence will be the most vulnerable to prosecution.

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