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## Working Paper

# Governance and the reversal of women's rights: The case of abortion in El Salvador

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WIDER Working Paper 2017/187

## **Governance and the reversal of women's rights**

The case of abortion in El Salvador

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**Abstract:** States' governance of gender is not unidirectional. In addition to 'stagnation' and 'progress', there can be an active reversal of rights already granted to women. Using the case of abortion rights in El Salvador, this paper investigates the following questions: What are the likely causes of *rights reversals*? How might *rights reversals* be more consequential for women's lives than *rights stagnations*? And how might studying *rights reversals* as separate and distinct phenomena improve our scholarly understanding of the relationship between gender and development more broadly? Examining the full range of possible transformations in state governance (reversals, stagnations, and progress), we conclude, results in improved theory and more effective interventions.

**Keywords:** abortion, women, crime, governance, rights, El Salvador

**JEL classification:** I18, K38, N36, N46

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## 1 Introduction: analysing rights reversals

Regardless of whether development is defined as economic growth or as the achievement of individual capabilities, scholars overwhelmingly concur that state governance plays an important role in its promotion (Cohn 2016; see also Viterna and Robertson 2015). Nowhere is this importance more salient than in the analysis of gender and development (Fallon and Viterna 2016). In the past, state governments regularly denied women the right to vote, own property, and be educated. Still today, many states continue to use the categories of ‘men’ and ‘women’ to legislate inequalities in terms of who can marry whom, who can exercise control over their own sexual and reproductive behaviour, who can be drafted into military service, who can inherit family wealth, who can testify in court, who can wear what kinds of clothing, who can legally beat their spouse, who can receive parental leave from work, who can initiate a divorce, who can choose their marriage partner, and who can leave their home at will.

State governments also powerfully regulate gender in more indirect ways (Brush 2003). For example, states’ decisions about social welfare provision define families, affect men’s and women’s relative power within marriages, and contribute to the formation and mobilization of gender identities (Orloff 1993). State tax systems place differential value on paid and unpaid labour. State labour laws shape expectations and opportunities for mothers and fathers. And state health systems assign different values to different bodies when determining access to various kinds of treatment. Because of the power encapsulated in state institutions, development scholars often see states as critical arenas through which to work for improved gender equality.

Interestingly, scholars studying the relationship between states and gender equity typically imagine this relationship as unidirectional. They ask, ‘How can existing institutions of governance [...] be reformed or redesigned to incorporate gender justice and promote gender equality and women’s human rights?’ (Mackay and Waylen 2014: 489), and they suggest that institutional reforms are the best way to achieve these goals. Scholars then typically measure progress by asking first whether or not institutional reforms have been implemented (e.g. Has state X adopted formal gender quotas in legislative elections, or not? Has state Y created a new institution to monitor gender mainstreaming, or not?), and second, whether or not implemented institutional reforms have achieved their desired effects (e.g. Has women’s parliamentary participation increased in state X, or not? Has state Y passed more equitable legislation, or not?).

Yet inherent in these dichotomous classifications is a dichotomous assumption: states are either progressing toward gender equity, or stagnating. Social change is implicitly imagined as unidirectional; states move forward, or they do not.

But what if states’ governance of gender is *not* unidirectional? What if, in addition to stagnation or progress, states also sometimes *reverse* the rights they have already granted to women? What might development scholars and practitioners miss if they study only progress and fail to examine the conditions leading to a reversal of previously granted rights?

El Salvador provides a powerful example of how states can reverse rights already granted to women. Prior to 1997, El Salvador legally allowed abortion in only three circumstances: when the pregnancy endangered the life of the mother; when the foetus had deformities incompatible with life outside the womb; and when the pregnancy was the result of sexual assault. Illegal abortions were readily available and seldom prosecuted. This situation changed dramatically in 1997, when the Legislative Assembly in El Salvador revised its criminal code to ban abortion in every circumstance, even when the life of the mother is threatened. Furthermore, in 1999, the Salvadoran

Legislative Assembly passed a constitutional amendment requiring the government to protect human life from ‘the moment of conception’—an amendment that makes it difficult to re-introduce even limited abortion rights in the future.

El Salvador’s revised legal restrictions on abortion have profoundly and negatively affected poor women’s lives. Most directly, poor women whose bodies are endangered by pregnancy are now unable to acquire the medical treatment they need—an abortion—and instead are left to die in public hospitals (Viterna and Reifenberg 2017: 8). The revised law has also had striking indirect consequences. After the new restrictions on abortion were passed, multiple institutions within the Salvadoran government became increasingly invested in prosecuting abortion ‘crimes’. Today, girls who want an abortion but cannot access it are increasingly likely to commit suicide (MINSAL 2014; Moloney 2014). And remarkably, poor women who suffer miscarriages or stillbirths in El Salvador are now sometimes first charged with abortion, and then convicted of ‘manslaughter’ or ‘aggravated homicide’, and sentenced to up to forty years in prison (Agrupación 2013; Viterna and Guardado Bautista 2014, 2017; Viterna 2017).

The case of abortion in El Salvador thus illustrates clearly that gender rights do not simply stagnate or progress; they also reverse, and sometimes suddenly. Indeed, El Salvador is not the only country to pass new abortion restrictions in recent decades. Poland, for example, went from a country where abortion was broadly legal to a country where abortion was broadly restricted in 1993 (Kulczycki 1995). And like El Salvador, the Dominican Republic, Nicaragua, Malta, Philippines, the Vatican, and a number of sub-state regions in Mexico now ban all abortions—even those necessary to save a woman’s life (United Nations 2011).<sup>1</sup> El Salvador is not even the only country to jail women for failing to bring a pregnancy to term; women in nations as distinct as Mexico, Rwanda, and the United States have been incarcerated for similar crimes.<sup>2</sup> Yet El Salvador, to our knowledge, is the only nation that regularly sentences women to thirty or forty years in prison for ‘murdering’ their stillborn children. As such, it provides an extreme case that is especially well suited to hypothesis generation (Gerring 2007).

Using the extreme case of El Salvador, this paper asks: How might identifying and investigating reversals in gender rights improve our understanding of gender, development, and state governance? Studying such reversals, we argue, is important from both a policy and a humanitarian perspective, as it informs the actions that scholars, activists, and development practitioners can undertake to best support individuals suffering under rapidly regressing laws and institutions. Studying such reversals is also important from a theoretical perspective: we have theories about how states progress toward more equitable governance of gender, but because these theories tend to contrast progression with non-progression, and hence confound stagnations and reversals, we do not have theoretical tools to understand why reversals happen, or how consequential they might be. Nor do we understand whether the factors leading to reversals in one area of governance might challenge progress in other areas, or conversely, actually co-exist with, or even support, progress in other realms of governance. Looking at reversals thus not only opens our analytical lens to the full range of possible transformations in state governance (reversals, stagnations, and progress),

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<sup>1</sup> Chile was included in this list prior to 19 July 2017, when the state legislature voted to permit abortion in very limited circumstances (the courts ruled that the law was constitutional on 21 August 2017). Note, too, that the criminal code in Honduras does not allow abortion under any circumstances, although the Code of Medical Ethics allows abortion when pregnancy endangers a woman’s life. In Haiti, laws do not expressly allow an abortion to save the life of the mother, but the principles of the law have been interpreted to allow therapeutic abortion. See [www.un.org/esa/population/publications/2011abortion/2011wallchart.pdf](http://www.un.org/esa/population/publications/2011abortion/2011wallchart.pdf) for details.

<sup>2</sup> On the USA, see Paltrow 2013, Paltrow and Flavin 2013; on Mexico, see Pain et al. 2014, Gaestel and Shelley 2014; on Chile, see Casas-Becerra 1997; on Nepal, see Ramaseshan 1997; on Rwanda, see Filipovic 2015.

but also requires scholars to better operationalize the multifaceted nature of state governance. In investigating a single case study, this paper does not provide generalizable results, but rather develops an argument for why gender rights reversals should be studied by development scholars, and it generates hypotheses to be tested in future studies.

In the pages that follow, we first investigate the historical socio-political context that gave rise to the abortion rights reversal in El Salvador. We then examine the law's effects in the lives of four women, paying particular attention to how the multifaceted failures of state governance in El Salvador exacerbated the negative consequences of the legislative regression. We conclude by outlining how studying *rights reversals* as distinct phenomena from *rights stagnations* may improve our scholarly understanding of the relationship between gender and development more broadly.

## 2 Data

Studying the historical development of El Salvador's total abortion ban, and its consequences, is complicated by a lack of data. There are no history books that document why this particular legislation was passed at this particular moment in Salvadoran history, or why it has been enforced with such vigour. Nor can we simply look at statistics on maternal mortality to understand the magnitude of the health problem because, according to the Salvadoran doctors interviewed, the state's maternal mortality numbers hide the true nature of the abortion problem by failing to document when a pregnancy exacerbated the illness that was the cause of a woman's death. For example, if a pregnant woman was diagnosed with cancer and doctors withheld chemotherapy from that woman for fear of damaging the foetus in her womb, when the woman died the documented cause of death would be cancer. The fact that her treatment was withheld because of an absolute ban on abortion, which leaves doctors fearful of doing anything that might 'kill' a foetus, has, doctors believe, previously not been captured in statistics.<sup>3</sup> And likewise, although it is relatively easy to document the number of women imprisoned for the 'aggravated homicide' or 'unintentional aggravated homicide' of their newborns, it is much more difficult to access the hundreds of pages of court documents for each case to analyse whether the state's evidence actually supports such a conviction (that is, whether a woman really did murder her newborn), or whether the woman appears to have suffered a naturally occurring miscarriage or stillbirth. It is even more difficult to gain access to the affected women for interviews, as the Salvadoran state severely limits visiting rights to individuals that have been imprisoned.

As a result, our analysis triangulates information from multiple data sources, including an analysis of twenty-five years of newspaper articles from the major daily in El Salvador, *El Diario de Hoy*; a local NGO's count of cases where women were tried and imprisoned for the murder of a 'newborn'; in-depth analysis of court cases from twenty individuals (including consultation with specialists in forensic pathology, obstetrics, and gynaecology and with legal scholars to ensure accurate interpretation of the data); and interviews with thirteen Salvadoran doctors, three officials in the Salvadoran Ministry of Health, activists from four women's organizations, eight deputies in the Legislative assembly, and fourteen women currently or formerly incarcerated for aggravated homicide or attempted aggravated homicide of their newborns.<sup>4</sup>

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<sup>3</sup> Recent changes in how the World Health Organization recommends 'counting' maternal mortality may make statistics more reliable in the near future.

<sup>4</sup> This number includes an interview with one formerly incarcerated woman's parents, since the woman herself died in prison.

### 3 The historical path to rights reversals in El Salvador

What are the likely causes of rights reversals for women? Although we anticipate that there are several possible paths that countries may follow, we believe that El Salvador's reversal stemmed from a moral panic generated by the Salvadoran economic elite and strengthened by transnational events, and from the resulting incentivization of local institutions to prosecute marginalized women.

South African sociologist Stanley Cohen introduced the idea of 'moral panic' to describe a kind of collective hysteria that can erupt, especially when societies undergo a period of upheaval that threatens to transform traditional power relations (Cohen 1972). Moral panics work to re-impose a traditional social order by targeting as 'villains' or 'folk devils' the very marginalized group that appears to be gaining power in the transitional moment.<sup>5</sup> According to Cohen, states often respond to moral panics by proposing highly punitive laws and stricter enforcement.

We argue that a moral panic about 'killer mothers' erupted in El Salvador in the mid-1990s, just as the nation was experiencing a powerful transitional moment. El Salvador has a long history of extreme inequality, with a relatively few individuals historically controlling the vast majority of the nation's land, wealth, and power (Dunkerley 1982). In 1980, a socialist-inspired guerrilla army, the FMLN (Frente Farabundo Martí para la Liberación Nacional), declared war against the elite-controlled, and USA-backed, Salvadoran state to challenge both the extreme economic inequalities in the nation and the violent military actions that the state was using to maintain those inequalities. The FMLN never overthrew the ruling government but, after twelve years of fighting, it won significant concessions through a United Nations-brokered Peace Accord. Specifically, the 1992 Accord conferred to the FMLN formal status as a political party, initiated a land redistribution programme, reduced the size and political power of the military, encouraged a revision of the existing legal code, and scheduled competitive elections for 1994.

Prior to 1992, abortion did not seem to be 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*.<sup>6</sup> Anti-abortion editorials only began to appear in the newspapers in 1992 but, even then, political parties seemed to give the issue limited attention.

However, in 1994, the situation changed dramatically. This was the year of the first post-Peace Accord election in El Salvador, and the first time the traditional political and economic elite of the country had been required to share the Legislative Assembly with the very leftist insurgents they had been battling. This was also the year that the United Nations held its Population Conference in Cairo, a conference that Pope John Paul II claimed was the First World's attempt to force abortion on poor countries in order to control their population. As the anti-abortion groups in El

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<sup>5</sup> Labelling something a 'moral panic' does not mean that the thing has never happened, but rather that the extent and significance of the thing has been wildly exaggerated. For example, one could suggest that some areas of the United States are currently experiencing a moral panic about (white) women being raped by immigrants. To label this a 'panic' does not suggest that no women have ever been raped by an immigrant, but rather that both the perception of and the response to the problem are wildly out of proportion with its actual extent.

<sup>6</sup> Abortion was only mentioned as a sidebar during these years. Specifically, *El Diario* regularly reported on Pope John Paul II's anti-abortion speeches during his tours of other parts of the world, but these reports mentioned abortion only in passing as the topic of the Pope's speech, not as a topic of interest in itself. More typically, these articles focused on providing human interest information about the city where the Pope was speaking.

Salvador increasingly adopted the Pope's rhetoric as their own, and as the local Catholic Church increasingly lent its voice to the anti-abortion agenda, right-wing political groups also began to engage with the topic. Indeed, as the right-wing parties realized how effectively the anti-abortion rhetoric allowed them to demonize the new FMLN party, it became a central campaign issue. The FMLN had not only promoted gender-equitable policies during its twelve years as a guerrilla movement, but it had also encouraged (and even required) women's participation in such gender-bending activities as guerrilla warfare (Viterna 2013). Arguing against abortion rights allowed the Right to frame itself as the defender of traditional social norms—the protectors of unborn babies, women's chastity, and the sanctity of families against anti-free market, anti-family, anti-religion, pro-violence, pro-feminist Communists—without having to seriously engage the Left's proposals for transforming the nation's rampant poverty.

The importance of abortion for El Salvador's national identity was intensified by two UN conferences: the 1994 World Population Conference in Cairo, and the 1995 World Conference on Women in Beijing. While both of these are heralded by scholars and practitioners alike as watershed moments for promoting women's rights around the world, in El Salvador these conferences largely served to solidify the power of the religious Right. Specifically, El Salvador chose as its representative its new first lady, Elizabeth Calderon del Sol. A member of the economic elite, a representative of the right-wing party ARENA, and an outspoken opponent of abortion, Calderon del Sol was celebrated in *El Diario* for vocally 'defending El Salvador's sovereignty' at these conferences, and ensuring that no transnational legislation was passed that would 'force' legal abortion on El Salvador. The newspaper noted with pride that Calderon del Sol was the only Latin American representative assigned to the committee that drafted the final conference declaration in 1994. Pope John Paul II even made statements praising Calderon del Sol's leadership role in countering what he saw as 'pro-abortion' initiatives at the United Nations. The Pope's praise was highlighted with pride by Salvadoran news outlets, likely reinforcing many Salvadorans' understanding of their nation as a recognized and esteemed international leader in the anti-abortion movement.

By 1997, the year of the second post-Peace Accord election, the anti-abortion movement in El Salvador had been largely institutionalized in the Foundation Yes to Life (Fundación Sí a la Vida), an organization that was regularly spotlighted in the media for its anti-abortion activism. It was in this year that the Foundation presented a formal request to the legislative assembly that its revised criminal code not allow any exceptions to abortion—even for the life or health of the pregnant woman. The Foundation then launched a powerful media campaign to educate Salvadoran society on the 'horrors of abortion'. The Catholic Church was a powerful ally; it mobilized thousands of schoolchildren from parochial schools and bussed them to the Legislative Assembly to rally in favour of the total abortion ban (Mejía 1997), while the Archbishop of San Salvador, Fernando Sáenz Lacalle, publicly compared abortion to the 'Nazi death camps' (Garcia 1997). Other high-status individuals also joined the cause: professional organizations like doctors' unions issued statements in favour of the total ban (Galdamez and Joma 1996), and the new (right-wing) minister of health claimed that, regardless of what law was eventually passed, he and his doctors would refuse to practise abortions for any reason in public hospitals in El Salvador (*El Diario de Hoy* 1997).

The FMLN initially presented a united position in favour of maintaining legal abortion in limited circumstances, but it did not have enough party votes to prevent the absolute abortion ban from becoming law. Immediately after the absolute ban was passed, Archbishop Lacalle sent a letter to the legislative assembly saying that it was not enough to reform the criminal code; the country also needed to amend the constitution to define life as beginning at conception (Duarte 1997). The right-wing party ARENA responded by immediately proposing a foetal personhood amendment and using its legislative majority to pass the first of the two votes needed to approve the



amendment. The FMLN again voted en bloc against the amendment, even though it again did not have enough votes to prevent its passage.

Despite their professed concern to protect unborn life, ARENA deputies nevertheless waited two years before putting the second constitutional amendment vote on the agenda. Their strategy was clear: they would introduce the issue immediately prior to the 1999 presidential election, so that the FMLN would again be forced to defend abortion rights publicly at a critical campaign moment. This tendency of the Right to launch major pro-life campaigns only in election years lends credence to the argument that, in the face of a social transformation that made it difficult for the Right to use its earlier methods of maintaining power, right-wing politicians and activists were fomenting a moral panic about abortion to gain political power through elections. Legislative elections in El Salvador occur every three years, and presidential elections every five. The abortion issue had erupted in 1994, during the first post-war presidential and legislative elections, and again in 1997, during the second post-war legislative election. As a result, the FMLN had a difficult choice to make in 1999. FMLN deputies were certain that the abortion issue had damaged their outcomes in the previous elections and a show in favour of abortion at this moment would lessen not only their opportunity to win the executive office in 1999, but also their chance to increase their legislative representation in the 2000 election. Consequently, the FMLN decided to drop its party-wide support of limited abortion rights, and allow individual deputies to ‘vote their conscience’. As a result, the personhood amendment was passed in 1999, the large majority of FMLN members voting in its favour.

By the turn of the century, then, we argue that a generation of right-wing state personnel had come to power in part by stoking a moral panic about abortion, and defining themselves as defenders of the unborn. The Chief of Police, the Attorney General, the Minister of Health, the Ombudsman for Human Rights, and many deputies and mayors had now adopted strong, public, anti-abortion stances. However, when the usual target of their anti-abortion attacks—the FMLN—agreed to their legislative demands in 1999, these political leaders did not declare ‘mission accomplished’ and cease their activism. Rather, they appear to have looked for a new target that would allow them to maintain their politically lucrative anti-abortion agenda. The new target they identified, it appears, was the ‘evil’ mothers who would ‘murder’ their own children through abortion and infanticide.

The adoption of this new target is illustrated in the *El Diario* articles. Whereas anti-abortion articles in the 1990s focused on attacking the UN, the FMLN, and feminists, the articles from 2000 onward began to adopt a new villain: the evil mother. To illustrate, one 2001 article, 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. (Garcia 2001a)

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’ (Garcia 2001b). It was also at this time that prominent state officials, including the Attorney General, the Chief of Police, and the Ombudsman for Human Rights, began speaking publicly about their work to prosecute mothers who would ‘murder’ their own babies through abortion or infanticide. Of note, these two terms—abortion and murder—began to be used interchangeably in the statements made by these public officials (Viterna 2017).

The media's new assault on 'evil mothers' paralleled a similar transformation in state institutions. According to our respondents, shortly after the 1999 constitutional amendment, the Attorney General's office began advising public hospitals of their legal obligation to report to the authorities any woman suspected of inducing an abortion. Medical staff we talked to had been uniformly taught that anyone who did not report a woman with signs of a provoked abortion would themselves be in danger of arrest as an 'accomplice' to abortion. One respondent even noted that, in about 1999, all hospitals were instructed to post the phone numbers of the Attorney General's office and the national police by their telephones to incentivize the reporting of suspected abortions, and that they even received a pamphlet that outlined their responsibility to denounce such women.

The increased pressure on medical staff to report abortions dovetailed with another, less intentional, institutional change. Specifically, rates of criminal violence in El Salvador have escalated dramatically since the end of the civil war. Prosecutors working in the homicide division of the Attorney General's office often have around 500 cases on their desks at any given time, and they are often asked to pursue cases against violent gang members, who, it is rumoured, routinely threaten prosecutors or their families with violence if their case is pursued. Prosecutors are also sometimes asked to prosecute defendants with financial resources: individuals who can engage skilled defence attorneys from the private sector, as well as pay for expert witnesses and even forensic examinations, which makes prosecution especially difficult for the poorly resourced state prosecutors. Given the institutional pressure put on these state officers to process cases and to meet monthly quotas, it is perhaps not surprising that women like those described below are processed much more quickly than are others awaiting trial (Viterna and Guardado Bautista 2014). The women themselves are already vilified in the media as baby-killers; they have no economic or criminal power, and so cannot threaten the prosecutor, much less carry out such threats; they are obliged to use state-provided defence attorneys, who do little to prepare for their cases; and the 'evidence' against these women—the body of the dead infant—is typically easy to find as 'proof' of their guilt, in contrast to the many people who are 'disappeared' by gang violence. For these reasons, prosecutors likely find the cases of marginalized women highly attractive from a prosecutorial standpoint. The conditions of the country may therefore intersect powerfully with the political campaign against abortion to incentivize Salvadoran state institutions to prosecute—quickly and harshly—impoverished women.

In the above history, we examined the socio-political processes behind the adoption of the total abortion ban in El Salvador. Specifically, we argued that in a moment of extreme political uncertainty, the political elite in El Salvador utilized narratives about 'abortion as murder' to generate a moral panic and secure their positions as political leaders of the nation. This is demonstrated by the success of this narrative in maintaining the Right's political popularity in the years following the transition, and by the regular timing of the Right's anti-abortion campaigns to coincide with national elections. We have further argued that the Pope's public recognition of El Salvador as an anti-abortion leader at UN conferences may have solidified 'protectors of the unborn' as a key component of Salvadoran national identity. And finally, we have noted that the institutions tasked with enforcing the new abortion law were incentivized to do so both directly (through pressure from political leaders and the media to prosecute 'evil mothers') and indirectly (because impoverished women who have suffered obstetrical emergencies are easier to prosecute than violent gang members or people with resources). Next, we look at the consequences of these legal and institutional transitions in four women's lives.

## 4 Four women's stories

### 4.1 Estela (2017)<sup>7</sup>

Estela, a Salvadoran mother of three, was pregnant with her fourth child when she began having chest pains and extreme shortness of breath. Her local doctors diagnosed a chronic cardiovascular problem, and referred her to the National Women's Hospital in El Salvador—the facility best equipped to treat pregnancy complications. When women become pregnant, the volume of blood in their bodies increases by 50 per cent, requiring their hearts to work harder. As a result, it is not unusual for pregnant women to become aware of chronic heart problems that had not been evident before. Indeed, Estela had delivered three children vaginally, without complications, prior to this pregnancy. Nevertheless, by the time Estela arrived at the national hospital with her fourth pregnancy, her 'maternal cardiovascular risk' was what the World Health Organization's guidelines classify as level IV, which indicates an 'extremely high risk of maternal mortality or severe morbidity'. The recommended treatment is pregnancy termination (European Society of Gynecology 2011: 3158). Estela was twenty weeks pregnant. The doctors at the National Hospital for Women explained the situation to Estela, and she and her family all expressed a clear desire to interrupt the pregnancy, even though the foetus could not survive such a premature birth. Nevertheless, the hospital leadership decided that the recommended procedure would put the doctors in danger of incarceration for performing an illegal abortion. They thus decided to transfer Estela to a different hospital better equipped to monitor her cardiac condition. At twenty-six weeks, Estela went into labour, and was returned to the Women's Hospital. She delivered a 700 g baby via caesarean. Both Estela and the baby died shortly after delivery, leaving Estela's three children without their mother.

### 4.2 Manuela (2008)<sup>8</sup>

Manuela, a single mother of two living in extreme poverty, had been abandoned by her *compañero* seven years earlier. In 2008, Manuela walked the 3 km distance to her local health clinic three times to discuss how ill she was feeling. In addition to experiencing extreme tiredness and nausea, she was concerned about several masses growing on the side of her neck. The local health clinic did not have a qualified doctor on its staff at the time, and the medical practitioners who saw Manuela not only failed to diagnose the serious disease behind her symptoms—lymphoma—but also failed to realize that she was pregnant. Instead, during the first two visits, they told Manuela that she was suffering from gastritis, and both times they prescribed the same wholly inadequate treatment: 500 mg of amoxicillin every eight hours, and 500 mg of acetaminophen every six hours. It is unclear whether Manuela herself knew she was pregnant. Later, when Manuela was approximately seven months pregnant, she began to experience powerful abdominal cramps. Perhaps thinking she was having another attack of 'gastritis', she went to the pit toilet located down a steep hill behind her home. There, she experienced a precipitate and premature birth of what forensic evidence indicates was a stillborn baby. Manuela passed out from the loss of blood. When she regained consciousness, she pulled herself back up the steep terrain to her humble, dirt-floor home. Her mother found her there a short while later, lying in a pool of blood and fading in and out of consciousness. Her mother convinced a neighbour with a truck to take Manuela to the same clinic that had missed her

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<sup>7</sup> Estela is a pseudonym. This case was reported to the first author by two separate doctors, in two separate, anonymized, interviews conducted in June 2017.

<sup>8</sup> Manuela is a pseudonym. The data for this case are a 2017 report by the Inter-American Commission on Human Rights (IACHR), copies of Manuela's court documents, communication with a doctor who researched the case for IACHR, and an interview by the first author with Manuela's parents in June 2017.

pregnancy and misdiagnosed her lymphoma on earlier occasions. Upon realizing that she had given birth, the clinic called the police. The police originally arrested Manuela for abortion, but by the time her case went to trial, the charge had become aggravated homicide. She was sentenced to thirty years in prison.

Manuela's legal rights were systematically violated through the course of her treatment and trial. The practitioner who treated Manuela at the clinic at the time of her medical emergency wrote on her medical chart that the pregnancy was from an 'infidelity', given that Manuela's *compañero* had abandoned her seven years earlier. The police interrogated Manuela in the hospital without first reading Manuela her rights, and without allowing her legal representation. Manuela's illiterate parents were also interrogated. The police threatened Manuela's mother that she, too, could go to jail as an accomplice if Manuela did not admit to the crime. Her father was asked to sign a paper that he was told would help his daughter, but which was actually a statement condemning her. He signed with a thumbprint, because he had never learned to write his name. The doctor who had performed the autopsy claimed that the infant had been born alive and had been suffocated in the latrine, but used a discredited examination to claim that there had been a live birth and offered no evidence of suffocation. Indeed, the doctor's own report notes that the oesophagus and the lungs of the dead foetus were free of debris, casting significant doubt on his own conclusions. The Office of Legal Medicine insisted that the grandparents take on additional debt by travelling to the local municipality and paying to register both the birth and the death of the foetus—actions not required for stillborn babies. Manuela refused to sign any of the documents the police gave her—not her supposed confession, nor her acceptance of the state-assigned lawyer—yet she was imprisoned anyway, as the court documents argued that she was caught '*en flagrancia*' of aggravated homicide. It was not until a year after her arrest that Manuela was finally diagnosed with lymphoma, which may have been a complicating factor in her obstetrical emergency. She was given a treatment schedule by her doctor, but the prison regularly missed taking her to hospital for treatment. In January 2010, when she was gravely ill, she was finally admitted to hospital, where she died in April 2010. She had not seen her children since she had been arrested, more than two years before.

### 4.3 Carmen (2007)<sup>9</sup>

Originally from a rural zone, eighteen-year-old Carmen was working as a domestic employee in an urban area of El Salvador in October 2007. The oldest of nine children, she had been working full time since she was twelve years old to help her mother cover household expenses, given that her father had abandoned them. She had never had a boyfriend, and she had never before been pregnant. She earned \$80 per month.<sup>10</sup>

Nine months earlier, Carmen had been raped by a neighbour of her employer. She had left that job to avoid continuing to see her rapist, and soon afterwards, while working in her new job, realized she was pregnant. When she began to have labour pains, she asked her new employer, a woman who was currently separated from the father of her child, for the salary she was due so that she could travel to her family and get help with the birth. Her employer said no, presumably because she did not have the money to pay Carmen. That night, in the bed in her small room, Carmen self-birthed her son. She reports that he whimpered a few times and died in her arms. Carmen passed out, bleeding profusely. According to Carmen, when her employer opened the door the next morning and saw her lying in blood, with a dead infant at her side, she simply closed

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<sup>9</sup> The data for this case are Carmen's court documents, and an interview between Carmen and the first author in June 2017.

<sup>10</sup> For comparison, in 2015, the minimum wage in an El Salvador textile factory was \$250 per month.

the door and walked away in horror. She nevertheless asked her own child to care for Carmen while she was at work. At about 1 o'clock in the afternoon, the employer returned and, according to Carmen, said she was going to take Carmen to the hospital to avoid having 'two deaths' in the household. By the time they arrived at the hospital, the employer's own testimony notes that Carmen was fading in and out of consciousness. The employer told the doctors that she did not know what was wrong with Carmen, and that Carmen had only told her she was experiencing a 'heavy menstruation'. When the doctors told the employer that Carmen had just given birth, the employer denied knowing that Carmen was even pregnant. The hospital reported Carmen to the authorities.

What happened next is difficult to determine because the court documents are filled with contradictions. Although Carmen states that the infant's cadaver was left lying on her bed in plain sight, and that she herself told the doctor at the hospital where to find it (a story corroborated by one version of the court documents), and although all the court documents concur that Carmen's room was no larger than a small closet, the police nevertheless report requiring much time, and several searches, to find the cadaver. Some documents say that it was the employer herself who found the body; other documents say that it was the employer's ex-partner, and father of her child; still others say that the police accompanied the ex-partner to the house, where they found the body together. Indeed, the court documents could not even agree on whether the plastic bag in which the baby was supposedly found, 'hidden' under the bed, came from the 'Despensa de Don Juan' store or the 'Super Selectos' store. Nor is there any explanation of why so many searches by so many people were required to find a cadaver that in the end was reportedly found directly under the bed in the tiny room where the birth occurred. Only upon interviewing Carmen years later, and learning that the employer's ex-partner was also a police officer, do we begin to make sense of the conflicting reports. It appears that the police provided contradictory information because they were not telling the truth, but rather inventing stories to try to corroborate the employer's false story. By making it appear that Carmen was trying to hide the dead infant, they would help to exonerate their fellow officer's ex-partner, and mother of his child, from responsibility for the baby's death.

Despite the extensive contamination of the scene from multiple people 'looking' for the baby, the autopsy reported 'no external or internal evidence of trauma' on the foetus. The forensic doctor listed the cause of foetal death as 'undetermined', and concluded: 'with the available studies completed, it is not possible to determine the cause of death.'

The autopsy also included several inconsistencies that the forensic doctor never attempted to explain. First, the baby's measurements were given as 52 cm tall, 2,500 g in weight, with a plantar foot length of 5 cm. Generally speaking, these measures correspond to the height of a nine-month-old baby, the weight of a seven- or eight-month-old baby, and the foot length of a five-month-old baby, and suggest that the foetus was not getting the nutrients it needed to develop properly. Second, the foetal autopsy lists in the Histopathology Report indicate that the infant's heart suffered from 'vascular congestion'. Third, the autopsy notes that the umbilical cord did not have the correct number of arteries connecting the mother to the baby, a condition associated with stillbirths. And finally, despite the fact that the autopsy clearly states that the cause of death was 'undetermined' and that there were 'no signs of trauma to the baby's body', either externally or internally, the autopsy nevertheless classified the 'type of death' as 'violent'. Legal Medicine never provided any reasoning for this classification at any point in the trial.

In the end, the sentencing judge provided only one rationale for Carmen's guilty verdict: he argued that Carmen must have been guilty of homicide because she hid the pregnancy and lied about the birth to her employer. In other words, the judge clearly accepted the employer's testimony as truth, despite the employer's clear incentive to misrepresent the situation. In an earlier statement, a

different judge had also attributed guilt to Carmen because she did not seek medical help during the child's birth. Taken together, these judges justified their guilty verdicts solely on their contention that Carmen did not act appropriately at the moment of the birth.

Remarkably, at the moment in the statement where the judge is expected to discuss the 'action' for which Carmen is condemned, he simply writes the word 'action', making it clear that the judge himself has no idea what Carmen supposedly did to warrant a homicide verdict:

ACTION: In accordance with the evidence obtained in the present case it is determined that the defendant, CARMEN, performed *an action* that affected a legally protected life, given that the defendant actively produced the death of a NEWBORN, who was her son, thereby causing irreparable harm [our emphasis]

Carmen was sentenced to thirty years in prison for allegedly committing an unspecified, unknown, and unmotivated action that somehow resulted in the 'violent' death of her newborn child, all without leaving any marks on its tiny body. During the course of the trial, any evidence that would have supported Carmen's version of the events—the unexplained abnormalities in the foetal body, the likely effects of severe haemorrhaging on her mental state, the fact that she was prevented from getting help by her employer, the intimate relationship between her employer and the police officer who examined the scene of the crime—were simply never presented.

#### 4.4 Maria Teresa (2011)<sup>11</sup>

In November 2011, twenty-eight-year-old Maria Teresa lived with her six-year-old son and his paternal grandparents in a corrugated metal shack located in a poor, urban barrio. Her son's father had abandoned them years before, but she continued to live with and care for his elderly parents. Maria Teresa worked in a factory during the day, ironing labels onto clothes with a heavy press. On evenings and weekends, she supplemented her factory income by picking up small jobs cleaning houses and washing clothes. Maria Teresa did not realize she was pregnant from a brief relationship that had ended months earlier; she was still experiencing regular vaginal bleeding, which she had interpreted as her monthly period, and her stomach never grew. Nor was she the only one who missed the pregnancy. Neither her neighbours nor her family members had noticed a growing belly. Extraordinarily, Maria Teresa had also visited the doctor multiple times in the previous months because she was experiencing sharp pains in her back, and not even the doctors recognized that she was pregnant. At one point, the doctors diagnosed Maria Teresa with a bladder infection, a condition known to cause pregnancy complications. Later, when the back pains became so severe that Maria Teresa could barely walk or stand and had to miss several days of work at the factory, the doctors prescribed injections three times a day with what Maria Teresa believes was Diclofenac, a drug that is not recommended for pregnant women. Maria Teresa asked a neighbour to inject her while she was at home, and a nurse at the factory clinic injected her at midday when she returned to her strenuous job there.

After more than a month of three-times-daily injections, Maria Teresa woke one night with a strong thirst. She left her small shack to get a drink from their only source of water—an outdoor spigot—but was interrupted by a strong urge to defecate. She quickly entered the pit latrine outside their home where, to her horror, she felt a 'little ball' fall out of her body. She cried out for help, and then passed out in a pool of blood. Maria Teresa's mother-in-law heard the fall and called an

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<sup>11</sup> Maria Teresa's story is compiled from her court documents, from observing one trial proceedings, and from interviews with two of Maria Teresa's neighbours, her mother-in-law, and Maria Teresa herself. Her story was also reported by the authors in the *Health and Human Rights Journal* (see Viterna and Guardado Bautista 2017).

ambulance. When Maria Teresa arrived at the hospital, she was in hypovolemic shock. Realizing she had given birth, the doctors reported Maria Teresa to the police for suspected abortion. The state's attorney upgraded the charge to aggravated homicide. Although the autopsy data indicated that the foetus likely died in utero and was then expelled, the judge nevertheless found Maria Teresa guilty and sentenced her to forty years in prison. In his statement, the judge reasoned that Maria Teresa had been pregnant before, so she must have known she was pregnant this time. She therefore must have been hiding her pregnancy, waiting 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'.

#### 4.5 Putting the cases in context

The four cases outlined above are not isolated events. Given the paucity of statistics, it is unclear how many women, like Estela, have died from their inability to access a therapeutic abortion, although the doctors we interviewed stated that they are never allowed to interrupt a pregnancy when the foetus still has a heartbeat—not even when women are in grave danger of death. Data on women's incarceration is somewhat easier to discover. Specifically, a local women's organization has found and documented thirty-five cases to date where women who appear to have suffered an obstetrical emergency of some sort have been convicted of attempted aggravated homicide or aggravated homicide of their newborns. Many, like Maria Teresa, Carmen, and Manuela, were initially charged with abortion, and only had the charges upgraded to 'homicide' during the course of the trial. At the time of this writing, such convictions continue at an average rate of one or two per year; the most recent was in July 2017, when nineteen-year-old Evelyn was sentenced to thirty years for birthing what appears to have been a stillborn baby into the pit toilet behind her house (Viterna 2017). We have reviewed court documentation from twenty of these thirty-five cases, and we have spoken directly with twelve of the women who received convictions, plus the family of Manuela. Although we do not have space to review the cases here, we note that in every case, the total abortion ban's effects were exacerbated by failures of the state in other areas of women's lives:

- **Protection from abject poverty:** In all but one of the cases we reviewed, the prosecuted women were living in poverty, a poverty often exacerbated because either their fathers or their partners had abandoned them, leaving them or their mothers with many children to feed, and no state support for child care or education, which would facilitate employment. Poverty is highly correlated with premature delivery, foetal birth defects, and poor foetal growth, likely because women without economic resources are more likely to suffer from malnutrition, more likely to be exposed to environmental toxins through their workplace or neighbourhoods, and less likely to be enrolled in pre-natal care or to have the resources they require to access health care when needed.
- **Protection from child labour:** Many women, like Carmen, were sent to work outside the home from as young as twelve years old. These youngsters were often sent to work in isolating situations, such as living and working inside an employer's home, or picking coffee in remote areas of plantations, which left them vulnerable to abuse.
- **Protection from abusive labour conditions:** Many incarcerated women, like Carmen, worked as domestic labourers, where they were paid paltry amounts, worked constantly from the moment they woke up until the moment they went to sleep, failed to receive pay, and often were extremely limited in their ability to physically leave the household without their employer's permission.
- **Protection from violence:** At least eight of the twenty women whose cases we reviewed became pregnant because of a rape; at least two suffered from routine and brutal violence by their male partners.

- **Guarantee of education:** Most of the women incarcerated for abortion-related ‘crimes’ had little or no educational attainment. This lack of education in some cases restricted the women’s ability to recognize that they had become pregnant. It also lessened their capacity to defend themselves in court, as they often were unable to read their own trial documents; nor had they been educated as to their right to due process.
- **Guarantee of health care:** Many of the women were held responsible for not realizing they were pregnant, when the very state-provided medical staff from whom they sought help also did not realize they were pregnant and may even have prescribed treatments that exacerbated the conditions leading to stillbirths. At the moment of medical emergency, the staff that treated the women failed to note even the most basic of information that would help the courts determine whether a medical emergency had occurred (information like blood pressure, body temperature, and the condition of the placenta), and sometimes even inscribed a woman’s guilt onto her medical chart. As noted above, Manuela’s doctor wrote in her file that she was pregnant ‘from an infidelity’; in another case, someone wrote in a chart that a woman ‘apparently threw away her baby’. In none of these cases was doctor–patient confidentiality respected.
- **Guarantee of due process:** As noted above, these women were convicted despite a lack of evidence that any crime had been committed. The pressure that the anti-abortion movement had put on public institutions to prosecute women who ‘murdered’ their own babies through abortion, the prosecuting attorneys’ quotas that incentivized pursuing the most marginalized of cases, and the willingness of police and investigating attorneys to believe the statements of relatively wealthy employers rather than those of their impoverished domestic employees, all exacerbated a system that already lacked the expertise and resources to provide due process to individuals charged with a crime.

It is important to note that, according to our interviews, women with financial means can still access abortions, therapeutic or otherwise, by attending private clinics. It is only women who are already marginalized by the state in these other ways who must also risk their lives by going to a public hospital when they suffer complicated pregnancies or births.

## 5 Discussion

We began this paper by asking whether the reversal of women’s rights is a different social and political phenomenon from the stagnation of women’s rights. We investigated this question first by documenting the historical process by which abortion rights were reversed El Salvador, and then by examining the consequences of that reversal for women’s lives. We are now in a position to address this question.

First, rights reversals are indeed different from rights stagnations and, as such, merit analysis by scholars of gender and development. Newly restrictive laws differ from restrictive laws that have been on the books for decades, because new reversals are often put in place through a powerful mobilization of political will and public opinion. This mobilization likely ensures that new laws are in the public eye and emphatically enforced in a way that long-existing laws are not. Moreover, once political parties and their leaders have gained power by tying their political careers to the pursuit of a rights reversal, then those same political players will have a vested interest in maintaining the reversal, and thus their political careers, in the future. These processes suggest that rights reversals are harder to change than rights stagnations.

Second, scholars have already pointed to the ‘gap’ that exists between laws on the books and laws in practice (Gould and Barclay 2012). Even when progressive laws are written, these scholars argue,



whether and how they are actually enforced depends largely on decisions made by ‘street-level bureaucrats’ who incorporate their personal ideas and beliefs into their work activities (Lipsky 2010). For example, new laws against gender-based violence may not make an actual difference in women’s lives because the specific police officers tasked with enforcing the laws may choose to ignore women’s claims of spousal abuse, or because judges who believe that all men have the right to punish their wives may choose not to prosecute such crimes. Intriguingly, the case of abortion in El Salvador demonstrates that this same gap between laws and enforcement can affect regressive, not just progressive, legislation. However, when regressive laws are passed, street-level bureaucrats exercise their discretion toward *harsher* prosecution than what is legislated, rather than the reverse. As the cases above demonstrate, when women are thought to be ‘baby-killers’, Salvadoran state officials are willing to ‘manufacture’ guilt even when no evidence of guilt exists, and to extend initial charges of abortion to the more highly penalized charge of homicide. Importantly, it is only a certain kind of woman who is targeted by the hyper-application of the abortion ban: poor, poorly educated, exposed to violence, reliant on public health care, and isolated from networks of social support. Critically, the fact that the hyper-prosecution of these laws in El Salvador continued even after the FMLN came to power suggests that the norms and practices of hyper-prosecution are now firmly institutionalized in the practices of state personnel. Such institutionalization is evident in the medical schools in El Salvador, which no longer train doctors to perform abortions, even though in certain cases this is the indicated treatment to save a woman’s life; in the hospitals, where doctors are advised from their intern year onward of the requirement to report suspected abortions; in police forces, which now have protocols for examining the ‘crime scene’ of a woman’s uterus; in the Office of Forensic Medicine, where specialists have been trained to use faulty tests to ‘prove’ the live birth of an infant, and to suggest that proving live birth is somehow sufficient to also prove homicide; and among judges, who have now established numerous precedents for finding women guilty of murder only because they supposedly did not do enough to ensure that their foetus was born healthy. The institutionalization of such over-enforcement practices demonstrates for us the most worrisome consequence of rights reversals. It is quite likely that, at some point in the future, limited abortion rights will be re-legalized in El Salvador. However, even when the law is changed, it is difficult to imagine that the accompanying institutional practices—practices that have been consistently employed by state employees over the last twenty years and that closely align with the moral panic about homicidal mothers in El Salvador—will be transformed.

Third, state failures in other areas of women’s lives compound the potential negative consequences of rights reversals. The great majority of women prosecuted for the ‘murder’ of their newborns were already in precarious positions due to their lack of economic wellbeing, lack of formal education, lack of power in the workplace, lack of protection from violence, and lack of quality medical care. If the Salvadoran government had provided better protection for women in any one of these other areas of state provision, the likelihood of suffering hyper-prosecution from this particular rights reversal would have been lower. We therefore suggest that the greater a state’s failure in other areas of women’s lives, the greater the likelihood that regressive laws will harm those women. It is probably because of these multiple and overlapping state failures that progressive institutional change is considered to be a very slow process, but regressive institutional change appears to occur rapidly.

Fourth, scholars of gender and development must investigate not only when and how reversals occur, but also how they coexist with, and perhaps even stem from, gender progressions. The idea of a moral panic stems from situations where a formerly marginalized group is gaining power at moments of social transition. Moral panics serve to put these individuals ‘back into place’ by demonizing them, typically by suggesting that they are harming innocent victims (Cohen 1972). The case of El Salvador suggests that transnational pressures to promote gender equity may in

some contexts contribute to a backlash against women's rights. It is particularly interesting that the UN Population Conference of 1994 and the UN Women's Conference of 1995 are both held up as watershed moments for women's equality among scholars and practitioners of gender and development, but that these same two conventions actually contributed to a rights reversal in El Salvador. We suggest that, at times of social upheaval, political actors often seek to reinforce traditional gender norms as an effective means of countering the perceived radical nature of the times (see also Viterna 2012). Consequently, by including 'rights reversals' in their analyses, scholars of gender and development can begin to investigate whether gender progress in some areas of governance can coexist with, or even contribute to, rights reversals in others.

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