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Jonathan Alvarez
Pace University School of Law, jalvarez@law.pace.edu

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THE CASE OF BEATRIZ: AN OUTCRY TO AMEND EL SALVADOR'S ABORTION BAN

Jonathan Alvarez*

Of course abortion isn't right. But it is even less right to bring unwanted children into lifelong suffering and to strip women of their choice. Making abortion illegal is not the way to prevent it. There is a much larger picture that starts with much deeper roots.

~Anonymous

I. INTRODUCTION

We live in a society in which women's health is inextricably related to politics, and it is usually men—whether husbands, doctors, or politicians—who make the crucial decisions that affect a woman's body. Historically, men have been able to control a woman's health by legislating on issues such as abortion, contraception, and overall healthcare. However, it is the power to choose how and when to procreate that gives women a sense of self worth and social equality. With this in mind, the choice of having an abortion always seems to arouse people's widely differing views on the same topic. Whether Pro-Choice or Pro-Life, everyone can at least agree that it is of vital importance that a woman's health is always protected. Suitably, most people would also agree that abortion should be permissible at least in extreme circumstances, except El Salvador. El Salvador is a place where 9-year-old girls impregnated by rape are forced to bear children, where women have no choice but to continue potentially deadly ectopic pregnancies, where women who have miscarriages are routinely accused of trying to abort their fetuses and imprisoned for murder if found guilty.¹ The

* J.D., 2015, Pace University School of Law; served as Note and Comment Editor of Pace International Law Review; B.A., 2011, Criminology, State

existing abortion legislation in El Salvador is one of the most restrictive in the world. El Salvador is one of seven countries in Latin America where abortion is totally banned by law.² The new Penal Code of 1998 eliminated all exceptional circumstances in which abortion was not punishable – even when a woman is raped, her life is at risk or the fetus is severely deformed. The strict penal code has resulted in an increased number of illegal abortions, disparate incarceration rates of women, and an increased mortality rate due to illegal abortions.³

Despite the clear violation of human rights that the Salvadorian Penal Code has imposed on its women, the government has not taken a single step towards amending its strict abortion laws. Many national and international organizations have urged the government to reform its Penal Code. Even

University of New York College at Cortland. Special thanks to the Pace International Law Review Volume XXVII staff and editors for their help in preparing this Note for publication. This Note is dedicated to my loving parents, Walter Alvarez and Marlene Nieto, whose strength, love, and unwavering support inspire me to succeed every day.

¹ Robin Abcarian, *When they would rather let you die than let you have an abortion*, L.A. TIMES, SEPT. 25, 2014, <http://www.latimes.com/local/abcarian/la-me-ra-amnesty-el-salvador-abortion-report-20140925-column.html>.

² Among the other countries with legislative abortion bans include: Chile, Dominican Republic, Haiti, Honduras, Nicaragua, and Surinam. *El Salvador: Total ban on abortion is killing women and girls and condemning others to decades behind bars*, AMNESTY INTERNATIONAL (September 25, 2014), <http://www.amnesty.org/en/news/el-salvador-total-ban-abortion-killing-women-and-girls-and-condemning-others-decades-behind-bar>.

³ El Salvador has the highest rate of teenage pregnancy in Latin America. Women and girls found guilty of having an abortion are usually charged with aggravated homicide facing prison sentences ranging from two to eight years to a maximum of up to 50 years in prison. Health care providers who assist them face up to 12 years in prison. Because of the ban, clandestine abortions are common. According to the Ministry of Health, there were 19,290 abortions in El Salvador between 2005 and 2008. The actual figure is likely to be much higher. Further, according to the latest World Health Organization figures, 11% of women and girls who underwent a clandestine abortion in El Salvador died as a result. The effects of the unreasonable abortion legislation has also resulted in suicide accounting for 57% of the deaths of pregnant females aged 10 to 19 in El Salvador, though it is likely many more cases have gone unreported. *Id.*

with international organizations pressuring the current government to depenalize abortion, the government has failed to address this ongoing problem.

The case of Beatriz⁴ shined the world's spotlight on El Salvador's terse and stringent abortion law. The case of Beatriz is about a 22-year-old woman, suffering from systemic lupus erythematosus (lupus), and kidney failure, who argued that her pregnancy was killing her and asked the Supreme Court to allow her to have a medically necessary abortion. In addition, Doctors diagnosed the fetus with a severe defect that prevented the brain from developing and determined that the chances for survival were minimal. Even with this in mind, the Supreme Court of El Salvador denied the woman's desperate plea.

Immediately after the harsh rejection by the Country's highest court, local and international organizations petitioned the Inter-American Court of Human Rights (herein after "IACHR") to step in and adopt provisional measures in the case of Beatriz.⁵ In its resolution, the IACHR considered Beatriz's situation is one of extreme seriousness and urgency and that there exists a risk of irreparable harm to her fundamental rights to life and personal integrity.⁶ Further, the resolution urged El Salvador to adopt and guarantee all necessary measures to ensure the protection of Beatriz's rights.⁷ The resolution of the IACHR with respect to the Case of Beatriz has brought a reality check on El Salvador's flawed abortion legislation by urging it to provide an exception in this particular case. Although, Beatriz's struggle ended when she was given a cesarean section, her story carries on as a very significant point for change in El Salvador. The Case of Beatriz and the subse-

⁴ "Beatriz" is a fictional name given to keep the identity of the person confidential.

⁵ On the Brink of Death: Violence Against Women and the Abortion Ban in El Salvador, Amnesty International (2014) *available at* http://www.amnestyusa.org/sites/default/files/on_the_brink_of_death.pdf.

⁶ Matter of Beatriz, Provisional Measures, Order of the Court (Inter-Am. Ct. H.R. May 29, 2013), *available at* http://www.corteidh.or.cr/docs/medidas/B_se_01_ing.pdf.

⁷ *Id.*

quent IACHR resolution illustrates the deficiencies of the current Penal Code and the need to amend the strict abortion ban.

This Note examines the evolution of El Salvador's existing penal code, specifically focusing on the abortion legislation. Further, it examines the significance of The Case of Beatriz and it suggests reform for El Salvador's government to include exceptions in their penal code, similar to exceptions available in the United States, to provide women with access to safe abortions in extreme circumstances. Part II will illustrate the struggle that women face in El Salvador. Part III will briefly explore the historical background of the current Penal Code, exclusively the abortion ban. Part IV will also discuss women's rights violated by the abortion ban, at both national and international levels. Part V will focus on The Case of Beatriz, the Inter-American Court of Human Rights resolution, and their particular significance in this controversy. Finally, Part VI will introduce a suggestive method of reform to the existing abortion ban in El Salvador by briefly delving into the United States' idea of a justifiable abortion.

II. SURVIVORS OF ILLEGAL ABORTION

Reading about another person's conflicts and struggles can have the effect of helping us become more sympathetic towards that person. Thus, the following individual stories of two women victims of the strict penal code effectively illustrate the struggle that most women currently face in El Salvador. First, this is one woman's abortion story from the capital, San Salvador:

I came in and was told to lie down. It was not even a bed . . . She came with a piece of cloth and put it underneath my nose, and I felt a little numb. She came back with a long wire, like a TV antenna. It was not like a doctor's instrument. It was just a wire tube with another wire inside it. She put some oil on it and told me to breathe deeply. She put it in. And she was scraping around. I was supposed to be asleep. But I felt pain. I told her it hurt. She said, "Yeah, we're almost done." But she kept scraping around, and I said: "No, no, stop. It's hurting me." Then she said, "It's done." She said I would have a fever and I should not go to the doctor or they would re-

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port me.⁸

Second, the following story is of María Teresa Rivera who is currently serving a 40-year prison sentence for having a miscarriage. María Teresa Rivera was a 28-year-old single parent, working in a garment factory when one day she felt the urgent need to use the toilet. She was later found by her mother-in-law, bleeding on the bathroom floor. She had not known she was pregnant. María Teresa was rushed to hospital where a member of the staff reported her to the police. Police officers arrived and began questioning María Teresa without a lawyer present. She was tried and found guilty of aggravated homicide, despite the fact that much of the evidence used against her was seriously flawed. The judge declared that María Teresa's assertion that she had not known she was pregnant – a key point in the case – was not credible because the court had evidence that in January 2011 she told her employer that she thought she might be pregnant. A pregnancy that began in January 2011 and ended in November 2011 would mean María Teresa had been pregnant for 11 months. María Teresa told Amnesty International: "On the day of the hearing, I only felt pain. When they passed sentence on me I asked God for strength. 'Lord,' I said, 'my son will be 45 years old by the time I get out of this place' . . . I want to be with my son, to sleep beside him."⁹

III. HISTORY: EL SALVADOR'S ABORTION BAN

Before the reforms, the various penal codes and constitutions of El Salvador did not have an explicit exception for abortion, but under accepted criminal law principles, abortion was allowed in certain cases. These exceptional cases allowed abortion on the grounds of necessity where the mother's life was in danger. However, because it was evident that abortion was widespread and that it contributed significantly to maternal

⁸ ANNA HORSBRUGH-PORTER, *CREATED EQUAL: VOICES ON WOMEN'S RIGHTS* 105-06 (2009).

⁹ *Supra*, note 5.

mortality, the Government moved to liberalize abortion laws.

In 1973 the Penal Code was reformed to explicitly offer the possibility to terminate a pregnancy when they were labeled "justified" that is, those who sought: a) performing an abortion to save the life of the mother, b) perform an abortion because the pregnancy had been given as a result of rape or statutory rape, and c) an abortion to avoid a predictably severe deformity.¹⁰

By the 1990's, the Legislative Assembly began receiving proposals to reform the penal code and restrict abortion laws. The media played a significant role in the reform of the penal code. The most influential newspapers gave extensive coverage to articles in favor of reform and opposing abortion in general.¹¹ The media also stigmatized any person who did not agree with a total prohibition of abortion as being in favor of death. In addition, the reform proposal to remove all exceptions to abortion received tremendous support from the Catholic Church and various Catholic groups. These two groups started collecting signatures from supporters and began sending direct messages to government to take action. The media helped boost their message and ideas by publicizing their actions which re-

¹⁰ Indeed the text of the 1973 Penal Code established in Article 169, the cases in which abortion was not punishable: (1) El aborto culposo propio que se hubiere ocasionado la mujer o la tentativa de ésta para causar su aborto; (2) El aborto realizado por facultativo con el propósito de salvar la vida de la madre, si para ello no hubiere otro medio, y si se realizare con el consentimiento de la mujer y previo dictamen médico. Si la mujer fuere menor, incapaz o estuviera imposibilitada para dar el consentimiento, será necesario el de su cónyuge, el de su representante legal, o el de un pariente cercano; (3) El realizado por facultativo, cuando se presumiere que el embarazo es consecuencia de un delito de violación o de estupro y se ejecutare con el consentimiento de la mujer; o (4) El practicado por facultativo con el consentimiento de la mujer cuando el propósito sea evitar una deformidad previsible grave en el producto de la concepción. See Código Penal de el Salvador, art. 169 (1973). For a translated version see SOLEDAD VARELA & LUISA CABAL, PERSECUTED: POLITICAL PROCESS AND ABORTION LEGISLATION IN EL SALVADOR: A HUMAN RIGHTS ANALYSIS 28 (Center for Reproductive Law and Policy 2000).

¹¹ *Id.* at 30. Very little space was given to articles that supported the already existing legislation, or articles that were in favor of maintaining the exceptions set out in the 1973 Penal Code.

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sulted in pressure for the Legislative Assembly to take action.¹²

By 1998, the views of El Salvador's legislature on abortion had shifted. The Legislature enacted a new Penal Code that removed all previously included exceptions to abortion and denied women any access to legal abortion. The current code also increased the penalties for abortion than those in the previous code. The woman who induces her own abortion or consents to its performance by another person is punished with two to eight years in prison.¹³ The same penalty applies for the person who performed the abortion with the woman's consent. When the woman does not give her consent, or consent is obtained through violence or deceit, the punishment is four to ten years in prison.¹⁴ In cases where the abortion is carried out by a doctor, pharmacist, or assistant of these professions, the punishment is six to twelve years in prison.¹⁵ Anyone who persuades a woman to undergo an abortion or who facilitates the abortion through economic or any other means is liable for two to five years in prison.¹⁶ If the person who encourages or provides assistance to the woman is the father of the fetus, the punishment is increased by one-third.¹⁷ Unintentional abortion is also penalized by six months to two years imprisonment for the person who caused the abortion.¹⁸

In addition, the Salvadoran government took steps further to solidify its position against abortion. In 1999, the abortion provisions of the Code were moved from the section on of-

¹² *Id.* at 31-33. The media publicized the opinions of high-ranking Archbishops as well as the opinions of organizations such as the Say Yes to Life Foundation. These opinions had the greatest impact on public opinion concerning abortion.

¹³ Varela & Cabal, *supra* note 10 at 28. *See also* Women of the World: Laws and Policies Affecting their Reproductive Lives, Center for Reproductive Law & Policy *available at* http://reproductiverights.org/sites/default/files/documents/wowlac_elsalvador.pdf.

¹⁴ *Id.*

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ Varela & Cabal, *supra* note 10 at 28.

fenses against the human body to a new section of the Code concerning offences relating to human life in formation. The legislative assembly also decided to amend Article 1 of its Constitution to recognize that life begins at the moment of conception, stating: "El Salvador recognizes human beings, from the time of conception, as the be all and end all of activities by the State...It similarly recognizes all human beings as such from the very moment of conception."¹⁹ It was interpreted from that date forward that all abortions were a crime against humans and punishable by stricter sentences.

Since these legal and constitutional reforms, nations around the world, with similar abortion laws, have moved to liberalize abortion at least in extreme circumstances in order to ensure women's rights are protected. However, El Salvador has failed to follow the trend. The strict legislation imposed on abortion has violated fundamental women's rights and subjected them to persecution by the legal system.

IV. SALVADORIAN ABORTION BAN VIOLATES NATIONAL AND INTERNATIONAL RIGHTS

The constitutional and legal reforms of 1997 and 1998 that criminalize abortion have undermined the protection of women's rights by violating provisions guaranteed by the Salvadoran Constitution and International Human Rights Instruments.

a. National Rights: Constitution of El Salvador

The purpose of the legal and constitutional reforms was to deny women the access to a legal abortion; however, these reforms are in contradiction with the Salvadoran Constitution. The Constitution of El Salvador protects every person's right to life, liberty, security of person, and physical integrity.²⁰ It also features provisions to protect the right to health and right to be

¹⁹ *Id.* at 35.

²⁰ EL SAL. CONST., art. 1-3.

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presumed innocent before conviction.²¹ Furthermore it establishes that all persons are equal before the law and there can be no restrictions based on gender.²² El Salvador's anti-abortion legislation violates all of these guaranteed constitutional rights and protections.

1. The right to life

Article 2 of the Constitution of El Salvador states "Every person has the right to life . . . and to be protected in the conservation and defense of the same."²³ The abortion ban violates the fundamental right to life by forcing women to obtain unsafe abortions placing their lives at stake in order to avoid criminal penalties. El Salvador has failed to protect women in the conservation and defense of their right to life by not attempting to reform its restrictive anti-abortion legislation. In addition, the state is discriminatorily violating the rights of its women by giving priority to the fetus and providing it with greater legal protection. By denying women the access to legal abortions, the state has violated women's right to life and has resulted in El Salvador having one of the highest maternal mortality rates in Latin America.²⁴ Instead of fulfilling the obligation of the state to protect women's right to life, the implemented abortion ban has caused women to place their lives at risk when, because of criminalization, they seek unsafe abortion.

2. The right to liberty, security of person, and physical integrity

The Constitution also affords women and all citizens the right to liberty, to security of person and to physical integrity.²⁵

²¹ *Id.* at art. 12; *see also* art. 65.

²² *Id.* at art. 3.

²³ *Id.* at art. 2.

²⁴ The maternal mortality rate is 300 deaths per 100,000 women. Only Bolivia and Haiti have higher rates in Latin America. World Bank, World Development Indicators 98-100 (1999). This report was done following the 1998 and 1999 legal and constitutional reforms of El Salvador.

²⁵ El Sal Const., art. 2.

The right to liberty gives women protection to exercise individual autonomy and preserve freedom. The strict abortion ban violates this right by depriving women of their freedom to decide how to handle their lives. Specifically, the abortion ban takes control away from women to make decisions concerning their reproductive health.

The rights of security of person and physical integrity infer that the State is prevented from interfering with any decisions people make regarding his or her physical integrity. The anti-abortion legislation is a threat to these protected rights because it allows for El Salvador to invade women's bodily integrity. The abortion ban forces women to carry out unwanted pregnancies, even when special circumstances exist such as the mother's life being at risk. In addition, the abortion ban forces many women to obtain unsafe abortions for fear of being penalized. Furthermore, the abortion ban creates an obstacle for women to obtain proper pre and postnatal medical treatment necessary to preserve their physical integrity.

The anti-abortion legislation is in conflict with these fundamental rights because it deprives women of the freedom to make choices regarding their reproductive health. It also interferes with women's physical integrity by restricting the opportunities for women to obtain proper medical treatment.

3. The right to equality before the law

Another right guaranteed by the Salvadoran Constitution is equality before the law and nondiscrimination.²⁶ Abortion is a procedure only for women and by criminalizing anyone who aborts; the law is specifically targeting women. The legislation is preventing women from obtaining proper medical treatment. In particular, women of low or middle class are discriminated against because they are forced to have illegal, unsafe abor-

²⁶ Article 3 of the Salvadoran Constitution states that: "All persons are equal before the law. For the enjoyment of civil rights, no restrictions shall be established that are based on differences of nationality, race, sex or religion. Hereditary offices and privileges are not recognized." *Id.*, art. 3.

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tions while women of higher classes have the option of going abroad or paying for expensive safe procedures. The application of the abortion ban is in violation of this right because it criminalizes a procedure only afforded to women. It also prevents access for poor women to obtain necessary treatment, in many cases, to save their life and health. The disparity between women of different socioeconomic levels proves that this legislation is discriminatory in contrary to the guaranteed non-discriminatory provision. All these forms of discrimination establish that the anti-abortion law is in clear conflict with the fundamental right of equality before the highest law of the land, the Constitution.

4. The right to be presumed innocent

The Constitution also guarantees “[e]very person accused of an offense shall be presumed innocent while his guilt is not proven in conformity with the law”.²⁷ This right is violated in abortion cases because many women who are charged under this legislation are subjected to preventive custody.²⁸ Preventive custody should only be applied in special circumstances where the accused is likely to flee. In the case of women who undergo an abortion procedure, it is less likely that they will flee to avoid apprehension. Even with that in mind, prosecutors in El Salvador detain women immediately upon charging them under the anti-abortion legislation.²⁹ In most cases, these detentions are given to women in hospital who are recovering from a badly performed abortion.³⁰ It is simply egregious behavior by the state of El Salvador to place women in preventive custody for a crime that does not need such enforcement. It is also tremendously humiliating and threatening to health to have women detained immediately after having an abortion performed. A woman penalized under the current anti-

²⁷ *Id.*, art. 12.

²⁸ VALERA & CABAL, *supra* note 10, at 58-59.

²⁹ *Id.*

³⁰ *Id.*

abortion legislation is denied the fundamental right to be presumed innocent because they are detained and put in preventive custody way before any trial or proceeding can begin.

5. The right to health

Finally, the Constitution of El Salvador guarantees its people the right to health and obliges the state to ensure that every citizen's right to health is protected.³¹ The abortion ban violates this fundamental right by forcing women to endure pregnancies specifically when the fetus is the product of a rape or when the pregnancy would cause complications to the mother's health. A woman forced to endure these unwanted pregnancies is going to suffer mentally and physically, this is a clear example of the state of El Salvador's failure to protect its women's right to health. In addition, the state is denying women the access to health services because fear of criminalization is preventing women from seeking proper medical treatment associated with abortions.³² Also, this criminalization socially stigmatizes women who have abortions and as a result affects their mental health and well being inconsistent with the protections that the Constitution guarantees for all Salvadoran citizens.

b. International Rights: Universal Declaration of Human Rights and American Convention on Human Rights

El Salvador has signed various international treaties recognizing that some human rights are so valuable that they require protection both at the national and international level. In El Salvador, the sources of law are hierarchically ordered in the following way: the Constitution, international treaties, laws, and regulations.³³ El Salvador considers international

³¹ EL SAL. CONST., art. 1; *see also* art. 65.

³² SOLEDAD VARELA & LUISA CABAL, PERSECUTED: POLITICAL PROCESS AND ABORTION LEGISLATION IN EL SALVADOR: A HUMAN RIGHTS ANALYSIS 57 (Center for Reproductive Law and Policy 2000).

³³ *See* Women of the World: Laws and Policies Affecting their Reproduc-

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treaties equal to domestic laws and when in conflict, treaties prevail.³⁴ However, the legislation criminalizing abortion in El Salvador fails to comply with international obligations that have the status of law. The Salvadoran abortion ban completely ignores two of the most important international human right treaties: The Universal Declaration of Human Rights and the American Convention on Human Rights.

1. Right to Life, to Liberty, and to Security of Person.

The Universal Declaration of Human Rights [Universal Declaration] provides that all individuals have the right to life, liberty and to security of person.³⁵ The American Convention on Human Rights [American Convention] also provides that every person has the right to have his life respected, the right to personal liberty and the right to security.³⁶ These two treaties obligate all member nations to guarantee the protection of these rights to their respective citizens. El Salvador has failed to protect the right of life, liberty or security of person for its own women by establishing strict punitive legislation against abortion. Here, the abortion ban poses a tremendous obstacle for the women of El Salvador by denying them the choice of how to manage their bodies. In addition, the liberty of women has been restricted, even completely deprived, by the Salvadoran government because women are not free to choose courses of action as they wish in regard to their own bodies. These international treatises that have the status of law have no effect in El Salvador because the nation is completely ignoring the right to life, liberty and security of person that they are guaranteed. Instead of preventing and avoiding situations where women's

tive Lives, Center for Reproductive Law & Policy at http://reproductiverights.org/sites/default/files/documents/wowlac_elsalvador.pdf.

³⁴ El Sal. Const., art. 144. Since the provisions of international treaties have the status of law, only the Constitution is above them.

³⁵ Universal Declaration of Human Rights, G.A. Res. 217A(III), art. 3, U.N. Doc. A/810, (Dec. 10, 1948).

³⁶ American Convention on Human Rights art. 7.1, Nov. 22, 1969, O.A.S.T.S. No. 36

lives are at risk, the abortion ban exposes them further to death by leaving them with no other choice but to resort to clandestine abortions. The provisions of these two instruments specifically addressing the right to security of person urges member nations to provide their citizens, including women, with policies and measures that guarantee no unwarranted invasions by governmental authorities into the most private aspects of every citizen, their own bodies. The abortion legislation currently deprives women of proper health care to carry out unwanted pregnancies and by forcing them to carry out these pregnancies the ban is in itself a clear invasion of women's bodies. It is very clear that the punitive abortion legislation in El Salvador is a violation of the right to life, liberty, and security of person guaranteed by the two most important human right instruments in the world.

2. The Right to Reproductive Freedom and Autonomy

The American Convention in article 4 and article 7 enshrines the concept of individuals having the right to reproductive freedom and autonomy.³⁷ The Universal Declaration in article 25 recognizes that "motherhood and childhood require special care and assistance" and along with article 3's recognition of the right to life, liberty, and security of person, they provide further support to the concept that individuals are entitled the right to reproductive freedom and autonomy.³⁸ The exercise of this right is violated when women are denied all possibility of deciding the number of their children by interrupting an unwanted pregnancy.³⁹ To guarantee citizens the full enjoyment of the right to reproductive freedom and autonomy, the state must create the necessary conditions for women to control their reproductive capacity.⁴⁰ El Salvador has failed to provide its women with the full enjoyment of this right by

³⁷ *Id.* at art. 3 & 7.

³⁸ *Supra* note 35, art. 3 & art. 25.

³⁹ VARELA, *supra*, note 32.

⁴⁰ *Id.*

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imposing such punitive legislation. The abortion ban clearly violates this right guaranteed by international agreements because it serves as a roadblock for women who seek abortions, even in extreme circumstances such as rape or illness. Instead of creating the necessary conditions for women to fully exercise autonomy over their reproductive lives, the state has decided to intrude into the most private aspect of an individual's life: reproduction. El Salvador is a poverty-stricken Latin American country with 34% of its people at the national poverty line and therefore has limited access to sexual education and family planning information, leaving its women with abortion as the only way to control their fertility.⁴¹ The abortion ban serves only as an obstacle for Salvadoran women to fully exercise their right to reproductive autonomy and freedom and this is a clear violation of international agreements that El Salvador is bound by.

3. The Right to Health and Family Planning.

The Universal Declaration recognizes that the right to health and family planning is essential in order to attain well-being.⁴² This instrument obligates member states to provide adequate policies and measures to ensure that its citizens, especially women and children, have proper access to health care.⁴³ Women are deprived of this right to health when they

⁴¹ World Bank, *World Development Indicators*, <http://data.worldbank.org/country/el-salvador> (last visited Feb. 18, 2014).

⁴² *Supra* note 35, art. 25. The article states, "Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control." Health and well-being are juxtaposed to show that they are essentially important to each other. The article goes on further to say that "Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection." This part of the article further emphasizes that women and children are in need of heightened protection to ensure their adequate well-being.

⁴³ *Id.*

are forced to continue pregnancies that put their lives at risk in turn affecting their mental and physical health. The legislation punishing abortion not only punishes women who undergo abortions, but also seeks to criminalize any other participants who help in the process, specifically doctors, pharmacists, or assistants in these professions.⁴⁴ The unnecessary reach of this abortion legislation has made health care professionals report any suspicious activity of abortion in order to not fall victim to the punitive legislation. Women in El Salvador are denied the right to health care because there is a great fear that any abortion complications taken to a hospital or health care facility will result in them being reported to the authorities. Health, specially reproductive health, is fundamental to a women's well-being, but when women cannot rely on safe health care, as in El Salvador, they are exposed to the danger of clandestine abortions performed under dangerous conditions.⁴⁵ The abortion ban is the equivalent of denying women the right to health care because women are hesitant to seek treatment for fear of being reported, which leaves them with only clandestine abortion procedures, and therefore they are forced to carry out their unwanted pregnancies.

The American Convention also recognizes that there are certain "Rights of the Family" and enshrines the concept of the right to family planning.⁴⁶ The American Convention states in article 17 that "the family is the natural and fundamental group unit of society and is entitled to protection by society and the state."⁴⁷ There is a special emphasis on the right of the family in this article because the Convention considers the family to be essential in every society. The abortion ban violates all existing rights to family and family planning because it deprives women of the right to choose and plan their own families. It denies them the right to terminate unwanted pregnancies even in the most extreme cases: such as a woman being

⁴⁴ PENAL CODE, art. 134.

⁴⁵ Varela, *supra* note 32, at 68.

⁴⁶ *Supra* note 36, art. 17. Rights of the Family.

⁴⁷ *Id.*

raped or the pregnancy is putting her life at risk due to an illness. In addition, the abortion legislation also contains a crime punishing the “advertisement of means to obtain an abortion.”⁴⁸ Therefore, health care facilities in El Salvador cannot legally give women who are seeking advice on family planning any information regarding the methods to controlling reproduction, such as abortions. In El Salvador, it is the voice of the government through its strict punitive legislation that controls all aspects of family planning. The abortion ban violates international rights guaranteeing the citizens of member nations the right to family and its planning.

4. The Right to Privacy

Article 12 of The Universal Declaration has recognized the right to privacy stating, “no one shall be subjected to arbitrary interference with his privacy.”⁴⁹ The American convention has also agreed with the concept of the right to privacy stipulating that all persons have the right to have their honor respected and their dignity recognized.⁵⁰ It also stipulates the right of all persons to have their private and family life, their home and their correspondence protected from interference or arbitrary attacks that compromise their honor and reputation, as well as their right to legal protection from such attacks.⁵¹ As you can see, both of these international human rights instruments are in unison when it comes to the right to privacy. Their identical language makes their reasoning similar and shows the emphasis that these two international agreements have placed on this particular right. In the context of absolute criminalization of abortion, this right is violated insofar as women are denied the right to make decisions about their own

⁴⁸ *Supra* note 36, art. 374. *See also* note 25.

⁴⁹ *Supra* note 35, art. 12 (stating “no one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honor and reputation. Everyone has the right to the protection of the law against such interference or attacks.”).

⁵⁰ *Supra* note 36, art. 11. Right to Privacy.

⁵¹ *Id.*

bodies and reproductive capacity without interference of third parties.⁵² Here, the Salvadoran government is intruding into the privacy of women's lives by denying them the choice of how to handle their very own bodies. The government acting as a third party through its punitive legislation is arbitrarily controlling the decisions that women make and thus denying them the very same right to privacy absolutely guaranteed by two of the most important international human rights instruments in the world.

5. The Right to Equality before the Law

The Universal Declaration and the American Convention both recognize that equality before the law is a fundamental right that should be guaranteed by every member nation for its respective citizens.⁵³ El Salvador in signing these two agreements bound itself to take the necessary policies and measures to put equality into practice and to eliminate all possible discriminatory obstacles. As we all know, abortion is a problem that only targets women and in El Salvador, the abortion legislation is specifically targeted at women. The abortion laws in El Salvador are clearly discriminatory in nature because they deny women several fundamental rights, and thus women are not placed at the same equal footing as men. Laws that penalize certain medical interventions that exclusively affect women constitute a barrier to receiving necessary medical care, thus compromising women's right to gender equality and violating the international obligation of governments to respect interna-

⁵² VARELA, *supra* note 28.

⁵³ See *supra* note 35, art. 7 (stating "all are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of the Declaration and against any incitement to such discrimination."); *supra* note 36, art. 1 (stating "the States Parties to this Convention undertake to respect the rights and freedoms recognized herein and to ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination for reasons of race, color, sex, language, religion, political or other opinion, national or social origin, economic status, birth, or any other social condition.").

tionally recognized rights.⁵⁴ In this respect, it is clear that El Salvador and its strict abortion legislation deny women the rights essential to their equality in society. The abortion laws also ignore the obligations that El Salvador as a member state of these international treaties has bound itself to respect and abide by.

V. THE CASE OF BEATRIZ, THE INTER-AMERICAN COURT OF HUMAN RIGHTS RESOLUTION AND THEIR SIGNIFICANT EFFECT ON ABORTION REFORM.

Beatriz, a 22-year-old poor woman from the rural part of El Salvador, suffering from a history of aggravated lupus and resulting kidney disease, became pregnant for a second time in her life.⁵⁵ Around early 2013, she was experiencing complications during her fourth month of pregnancy and underwent ultrasounds.⁵⁶ According to the ultrasounds that were performed, the fetus was diagnosed with an anencephalic (lacking a large part of the brain and skull) abnormality incompatible with life outside the womb.⁵⁷ On March 2013, the doctors treating Beatriz at San Salvador's Specialized Maternity Hospital requested an opinion from the hospital's advisory committee and the Coordinating Board for the Protection of Children, where they indicated that it was of vital importance to do a medical procedure because there is a strong probability of death to mother as she had a thirteen-week fetus with anencephaly incompatible with extra uterine life. In this regard, the opinion of the competent authority or institution to initiate the recommended medical procedure was requested.⁵⁸ On April 2013, the Medical Committee considered the matter and agreed that it was medically necessary to end the pregnancy.⁵⁹ On April 11th, Beatriz' attorneys filed for *amparo* (protection) to the Constitutional

⁵⁴ *Supra* note 32, at 66.

⁵⁵ *Supra* note 5, at 24.

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

Chamber of the Salvadoran Supreme Court of Justice (hereinafter “the Constitutional Chamber”) requesting its authorization to provide her the treatment needed without delay. On April 17th, the Constitutional Chamber issued its decision admitting the application for *amparo* filed in order to preserve the right to life and health of Beatriz.⁶⁰ Despite the medical urgency, it took six days for the Court to simply agree to hear the case, and no decision on her entitlement to receive urgent medical treatment to safeguard her life was forthcoming.⁶¹ In said decision, the Constitutional Chamber “decided to adopt preventive measures so that the defendant authorities would guarantee the right to life and health, both physical and mental, of Beatriz, providing the necessary and appropriate medical treatment for the preservation of these rights, while this *amparo* is being processed.”⁶²

On April 24th, the IACHR received communications informing it of the facts that had occurred with regard to Beatriz in the State of El Salvador.⁶³ It sent a request for information to the State, requiring it to forward, within 72 hours, any information it considered pertinent on the situation of Beatriz, and the medical treatment with which she was being provided.⁶⁴ Two days later, four UN experts also called on the Salvadoran government to urgently provide this woman with the necessary medical treatment in order to safeguard her life and health. On April 29th, the IACHR granted Beatriz “protective measures” urging El Salvador to provide her with the medical treatment recommended by her doctors, in accordance with her wishes.

Through its “protective measures” the IACHR asked the State of El Salvador to adopt preventive measures to protect the life, personal integrity, and health of Beatriz based on: (i) the recommendations of the Medical Committee of the National

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

Maternity Hospital; (ii) the fact that the fetus is anencephalic; (iii) the absence of a prompt ruling by the Supreme Court of Justice on the application for “amparo” filed in early April; and (iv) the effects that the passage of time would have on the rights of Beatriz.⁶⁵ Thus, the IACHR specifically requested that the State of El Salvador: (1) adopt the necessary measures to implement the treatment recommended, in order to safeguard the life, personal integrity, and health of Beatriz, and (2) reach an agreement with the beneficiary and her representatives on any measure to be adopted.⁶⁶ Yet, Beatriz was still not afforded the necessary treatment. Further, Beatriz’s case was covered in a surplus of newspapers almost daily in El Salvador and was attracting worldwide attention.⁶⁷ Even then, the Salvadorian government maintained its silence.

On May 15th, over a month after the filing of her appeal, the Supreme Court’s Constitutional Chamber finally held a hearing to examine Beatriz’ case.⁶⁸ In the middle of the hearing, after 30 minutes of questioning and attempting to convince the judges to allow her access to the treatment needed to save her life, Beatriz suffered an attack of hypertension and was rushed to hospital resulting in the conclusion of the hearing on May 16th.⁶⁹ Despite the increasing risk to Beatriz’ life with each passing day, the judges of the Chamber said they would give a definitive ruling within 15 working days.

Around May 24th, the legal representatives of Beatriz submitted a request for provisional measures, rather than simply protective measures, in favor of Beatriz to the IACHR.⁷⁰ They indicated that the beneficiary was, at that time, commencing the twenty-fourth week of her high-risk pregnancy, and thus slightly more than five weeks had passed since the Medical Committee of the hospital recommended ending the

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

pregnancy, a situation that places the life, integrity and health of Beatriz at serious risk.⁷¹ On May 29th, in response to the seriousness of the situation and the Salvadoran authorities' failure to provide Beatriz with the "protective measures" she had been granted before, the IACHR intervened and ordered the State to take all necessary steps, in an urgent manner, to enable Beatriz' doctors to treat her without interference.⁷² However, the Supreme Court of El Salvador reasoned that the life of the mother could not take precedent over the life of the baby to perform an abortion. Instead, on June 3rd, the Court ordered Beatriz's medical team to perform a C-section to remove the baby and try and save both of them.⁷³ The Court's delay had forced Beatriz to wait until she had passed the 20th week of pregnancy resulting in the need for the C-section. By gambling with Beatriz' life, the authorities attempted to claim that no new legal precedent had been set and that the total prohibition on abortion had been respected.⁷⁴ As expected, the newborn died approximately five hours after birth; large parts of its head and brain were missing. Beatriz survived. It is still not clear what the long-term effects of the delay in treatment will be on her physical and mental health.⁷⁵

a. A Big Step Forward: The Effect on Abortion Reform

The Case of Beatriz and the Provisional Measures of the Inter-American Court of Human Rights present a big step forward in the direction of abortion reform in El Salvador. The intervention of the IACHR in the final judgment of El Salvador's Supreme Court decision has resulted in much needed emphasis on the issue of abortion in El Salvador.⁷⁶ Beatriz has shown that El Salvador's ironclad restriction does not have to unreasonably deny relief for women whose lives are at risk due

⁷¹ *Id.*

⁷² *Supra* note 6.

⁷³ *Supra* note 5.

⁷⁴ *Id.*

⁷⁵ *Id.*

⁷⁶ *Supra* note 4, at 25.

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to unwanted pregnancies. Although Beatriz was ultimately allowed to have a C-Section as a solution, the fight for abortion reform continues to progress at a pace stronger than before.

The punitive abortion legislation in El Salvador, from the time before its inception until immediately before the case of Beatriz, has shown a trend of strict criminality and signs of no budging. Beatriz and the actions of El Salvador to afford her the chance to remove her baby, although not by an abortion, prove that there is hope for a less restrictive approach to the subject of abortion.

Amnesty International and the United Nations Committee of Human Rights are few among many other world organizations that have placed El Salvador on their sights.⁷⁷ These organizations are aiming to encourage the State to revise their current abortion bans and strict penal codes to facilitate the protection of the fundamental rights currently being denied to women by the abortion ban.

In addition, the Salvadoran prisons are filled with middle and lower class women who do not have education and resources to avoid being criminalized. The current legislation is extremely discriminatory towards its own women. Under the Constitution of El Salvador and the international instruments that the State is part of, El Salvador is obligated to provide its people with a legal system that adequately safeguards their rights and ensures fairness and equality for all. El Salvador has failed to ensure that the rights of its women are secured and the case of Beatriz has highlighted for the world the tragic consequences that a strict abortion ban can have on its women.

VI. THE RECIPE FOR REFORM: MODEL PENAL CODE'S
JUSTIFIABLE ABORTION IDEOLOGY

Currently, the practice of abortion is legal in the United States. In the 1950s and 1960s, recognition that illegal abortion was widespread and often dangerous led to calls for abortion law reform. The response was a massive penal code reform pro-

⁷⁷ *Id.* at 43.

ject started by the American Law Institute ("ALI") in 1952. The purpose of this massive reform project was to homogenize an American legal system that varied from state to state. The ALI, comprised of judges, attorneys, and law professors, modernized state criminal codes by presenting model statutes that the states could then adapt and adopt.⁷⁸ In 1959, the ALI outlined a model that, in effect, would amend criminal laws to expand conditions for legal abortions. The ALI's Model Penal Code § 230.3 proposed that abortion should be a felony, with the level of punishment to depend on whether the abortion took place up to or after the twenty-sixth week of pregnancy.⁷⁹ It added, however, that

[a] licensed physician is justified in terminating a pregnancy if he believes there is a substantial risk (1) that continuation of the pregnancy would gravely impair the physical and mental health of the mother or (2) that the child would be born with grave physical or mental defect, or (3) that the pregnancy resulted from rape, incest, or other felonious intercourse.⁸⁰

So although most abortions were still illegal, there were some situations where a woman could obtain a legal abortion in many states. These three exceptions that made abortion justifiable were used as a model for abortion law reform legislation enacted in 14 states from 1967 to 1972.⁸¹ In the past several years, a trend toward liberalization of abortion statutes has resulted in adoption, by one third of the States, of less stringent laws, most of them patterned after Section 230.3.⁸² Similarly, these three exceptions can each serve as an example of reform for El Salvador's strict penal code.

⁷⁸ DAVID P. CLINE, *CREATING CHOICE: A COMMUNITY RESPONDS TO THE NEED FOR ABORTION AND BIRTH CONTROL, 1961-1973* 23 (2006).

⁷⁹ MODEL PENAL CODE § 230.3 (Proposed Official Draft 1962).

⁸⁰ Justifiable Abortions in MODEL PENAL CODE § 230.3(2) (Proposed Official Draft 1962).

⁸¹ RAYMOND TATALOVICH, *THE POLITICS OF ABORTION IN THE UNITED STATES AND CANADA: A COMPARATIVE STUDY* 29 (1997); *see also supra*, note 86, at 24.

⁸² IAN SHAPIRO, *ABORTION: THE SUPREME COURT DECISION 1965-2007* 32 (3d ed. 2007).

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The three exceptions in Section 230.3 of ALI's Model Penal Code would help shape abortion reforms to alleviate the legal and health struggles that all Salvadoran women face. The case of Beatriz serves as the perfect example of how abortion reform, modeled after Section 230.3, could prevent this same situation from happening to many other Salvadoran women in the future.

The first ALI provision for a justifiable abortion is whether the continuation of the pregnancy would gravely impair the physical and/or mental health of the mother. In the Case of Beatriz, ten weeks into her pregnancy, doctors had told her that carrying this pregnancy to full term, while suffering from lupus disease, would place her life at serious risk. Pregnancy can exacerbate lupus, with adverse side effects on kidney function, which could potentially lead to end-stage renal disease.⁸³ In addition, pregnancies in women with lupus are at high risk for spontaneous abortion and premature delivery, intrauterine growth retardation, and a maternal complication called superimposed pre-eclampsia.⁸⁴ It is clear that, due to the circumstances, the continuation of this pregnancy would have gravely impaired the physical health of Beatriz. And, it is also clear that, pursuant to this justifiable abortion exception concerning a mother's health, women in Beatriz's shoes would be able to obtain restriction-free access to medically necessary abortions. Unfortunately, El Salvador does not have ALI-based abortion legislation, but understanding the rationale behind ALI's justifiable abortion idea will help shape future reform to ensure that women can have safe access to life-saving medical treatment.

The second ALI provision for a justifiable abortion is whether the child would be born with grave physical or mental defect. Early in Beatriz's pregnancy, her baby was discovered

⁸³ Jodi Jacobson, *An Abortion by Any Other Name: Beatriz and the Global Anti-Choice Spin Machine*, RH Reality Check (Jun. 4, 2013), <http://rhrealitycheck.org/article/2013/06/04/an-abortion-by-any-other-name-beatriz-and-the-global-anti-choice-spin-machine/>.

⁸⁴ *Id.*

to be anencephalic, lacking a portion of brain and skull, a condition incompatible with life.⁸⁵ Doctors knew that the fetus would not survive outside the womb and it was expected to die before it was born, or within a few hours or days after birth.⁸⁶ In fact, after 27 weeks of pregnancy and a c-section, Beatriz had a baby girl who only lived five hours and died outside the womb as expected.⁸⁷ Beatriz's pregnancy indicates that her situation clearly fell in scope with the idea that an abortion is justifiable when the child would be born with a grave physical or mental defect. However, even with the advice of Beatriz's doctors, El Salvador failed to realize that this fetus could not be saved. El Salvador will not be able to engage in penal reform unless they take into account Beatriz's situation and thoroughly understand that some abortions may be acceptable when the life of the fetus cannot be saved.

The third ALI provision for a justifiable abortion is not one particularly linked to the circumstances surrounding the case of Beatriz. The third situation in which the ALI Model Penal code believes that an abortion may be justifiable is when the pregnancy is a result of rape, incest, or other felonious intercourse. Although Beatriz was not a victim of felonious intercourse, many other women in El Salvador do not face the same luck. Last year the National Civil Police registered 1,346 rapes of women and girls.⁸⁸ These girls not only suffered sexual abuse at the hands of relatives, stepfathers or gang members, but

⁸⁵ *Supra*, note 1.

⁸⁶ *El Salvador must provide pregnant women with access to life-saving medical treatment*, AMNESTY INTERNATIONAL (Apr. 17, 2013), <http://www.amnesty.org/en/news/el-salvador-must-provide-pregnant-woman-access-life-saving-medical-treatment-2013-04-17>.

⁸⁷ Marcos Aleman, *Baby Born to Beatriz, El Salvador Woman Denied Life-Saving Abortion, Dies After C-Section Birth*, THE WORLD POST (Jun. 4, 2013), http://www.huffingtonpost.com/2013/06/04/beatriz-baby-dies-dead-el-salvador_n_3384635.html.

⁸⁸ *Twelve Facts about the Abortion Ban in El Salvador*, AMNESTY INTERNATIONAL (Sept. 25, 2014), <http://www.amnesty.org/en/news/twelve-facts-about-abortion-ban-el-salvador-2014-09-25>. Nearly two-thirds were aged under 15 or classified as "mentally incapacitated" and unable to give informed consent either because they were rendered unconscious or because of their mental health.

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they are also often silenced and prevented from seeking help by the stigma surrounding rape.⁸⁹ Moreover, they face the unwelcome prospect of giving birth to an unwanted baby due to El Salvador's total ban on abortion even in cases of rape, incest, deformed fetus or when the women's life is in danger. This ban on all access to abortion has led teenage pregnancy to become one of the leading causes of suicide among girls under 19 in the Central American country of 6 million people.⁹⁰

In the United States, these three justifications of abortion have positively started a trend toward State liberalization of abortion statutes.⁹¹ Similarly, the government of El Salvador must embrace any or all of the justifications described in ALI's Model Penal Code § 230.3, to reform its penal code and comply with its duties of protecting the rights and virtues of all its citizens, specifically its women.

VII. CONCLUSION

"The world cannot sit idly by and watch women and girls in El Salvador suffer and die. [This Note] is calling on the government of El Salvador to decriminalize abortion on all counts. The government must provide women and girls with access to safe and legal abortion services at least when the pregnancy is a risk to their lives, health, or when the pregnancy is a result of rape or in cases of severe fetal impairment."⁹² While the adoption of reproductive health policies in El Salvador is a step forward that may lead to greater respect and protection of women's rights, the criminalization of abortion continues to be an obstacle to Salvadoran women's full enjoyment of internationally recognized sexual and reproductive rights. Given that the circumstances differ for each woman who decides to terminate a pregnancy, the only person able to make that decision is the

⁸⁹ Anastasia Moloney, *Rape, Abortion Ban Drives Pregnant Teens to Suicide*, REUTERS (Nov. 12, 2014), <http://www.reuters.com/article/2014/11/12/us-el-salvador-suicide-teens-idUSKCN0IW1YI20141112>.

⁹⁰ *Id.*

⁹¹ *Supra*, note 90.

⁹² *Supra*, note 1.

woman herself. The state must guarantee that a woman's decision to have an abortion does not put her life in danger.

The case of Beatriz is a reality check for El Salvador to amend its unreasonable legislation on abortion and mimic after countries such as the United States in providing exceptions to women in certain extreme instances. Exceptions need to be placed in the Penal Code to facilitate the access to abortion for women when circumstances arise such as rape, deformed fetus or a mother's terminal illness. These exceptions ensure that at the very least women's fundamental rights are protected by their very own country. The case of Beatriz is the perfect example to urge El Salvador to seek help from International Organizations such as Amnesty International and the United Nations to develop a more appealing penal code that does not completely ban abortion violating both national and international rights for women. These international organizations have been urging Latin American countries to ease up on their strict paternalistic views regarding women and their reproductive health. We are in a modern world where society needs to think more freely and promote equality for all to ensure that there is prosperity within the State. Women of El Salvador need to have their fundamental rights protected and El Salvador must change its views towards its women by imposing a penal code that promotes equality, confidence and autonomy for these women.