



Columbia
Law School

HUMAN RIGHTS
INSTITUTE



COLUMBIA LAW SCHOOL

HUMAN RIGHTS CLINIC



Gendered Prosecutions: An Overview of Trials Targeting Women and Girls Around the World

November 2021

*The TrialWatch Program
at Columbia Law School's Human Rights Institute
& Human Rights Clinic*

TRIALWATCH WOMEN & GIRLS REPORT
A CLOONEY FOUNDATION **FOR** JUSTICE INITIATIVE

ABOUT THE AUTHORS

The **Columbia Law School Human Rights Institute and the Human Rights Clinic** work to advance human rights around the world and to train the next generation of strategic advocates for social justice. The Institute serves as the focal point of international human rights education, scholarship, and practice at Columbia Law School. The Clinic works in partnership with civil society organizations and communities to carry out human rights investigations, legal and policy analysis, litigation, report-writing, and advocacy. The Institute and Clinic are partners in the Clooney Foundation for Justice's TrialWatch Initiative.

ABOUT THE CLOONEY FOUNDATION FOR JUSTICE'S TRIALWATCH INITIATIVE

TrialWatch is an initiative of the **Clooney Foundation for Justice**. Its mission is to expose injustice, help to free those unjustly detained and promote the rule of law around the world. TrialWatch monitors criminal trials globally against those who are most vulnerable — including journalists, protesters, women, LGBTQ+ persons and minorities — and advocates for the rights of the unfairly convicted. Over time, TrialWatch will use the data it gathers to publish a Global Justice Ranking exposing countries' performance and use it to support advocacy for systemic change.

TABLE OF CONTENTS



EXECUTIVE SUMMARY	3
CRIMINALIZATION OF ABORTION	5
STATUTES THAT PUNISH WOMEN FOR REPRODUCTIVE CHOICES	5
TRIALWATCH CASE STUDY: EL SALVADOR	9
PROSECUTIONS OF THOSE WHO SUPPORT AND PROVIDE ASSISTANCE FOR REPRODUCTIVE RIGHTS	10
MORALITY CRIMES	13
'ERRANT WOMEN': PROSECUTIONS FOR 'RUNNING AWAY'	13
WOMEN & GIRLS TARGETED FOR THEIR SEXUALITY & SEXUAL CONDUCT	15
GENDER STEREOTYPING IN COURT	19
HUMAN RIGHTS LAW AND JUDICIAL STEREOTYPING	19
GENDER AND VIOLENT OFFENSES	20
GENDER AND DRUG OFFENSES	23
GENDER IN REPRODUCTIVE FREEDOM CASES	24
CONCLUSION	28

EXECUTIVE SUMMARY



Women are the fastest-growing section of the world's prison population. While still a small fraction of the overall prison population in most countries, over 740,000 women around the world are incarcerated—a population growth of over 100,000 in one decade.¹ In the United States alone, the number of incarcerated women increased by more than 700% between 1980 and 2019.²

Gender plays a role at every stage of women or girls' experience with the criminal system, from arrest through incarceration. It can also play a significant role in informing the type of crimes with which women and girls are charged.³ Certainly, not all offences that result in their imprisonment are unique to women or girls; however, women and girls (including trans and nonbinary women and girls) are often the subject of discriminatory laws that target their bodies and seek to limit their autonomy on the basis of gender or gender-stereotypes—for example, indecency laws or laws that criminalize abortion. Not only do these laws seek to regulate bodies and private conduct but they also shape women's economic and social opportunities, access to public life, and their enjoyment of critical protected rights like freedom of expression and many socio-cultural rights. As such, these laws and practices not only reflect societal bias but may also constitute unlawful gender discrimination.

Gender also impacts how women and girls are treated in criminal proceedings—and by judges in particular—even where the offense for which they are being prosecuted is not unique to women and girls. The Clooney Foundation for Justice's TrialWatch Initiative, which monitors criminal trials that may violate the fair trial rights of women and girls, amongst others, has evaluated several trials where female defendants faced discrimination in court on account of their gender, often combined with race, ethnicity, and class. In cases monitored to date, TrialWatch has documented a range of ways in which women and girls faced a gendered and harmful experience when charged and prosecuted—from the manner in which criminal investigations are handled to the reliance on gender stereotypes in court proceedings, leading to discriminatory results.

This introductory report is the first in a TrialWatch series on prosecutions targeting women and girls, in collaboration with universities around the world and led by Columbia Law School. This introduction provides an overview of some of the ways gendered

¹ PENAL REFORM INTERNATIONAL, *Issue Briefing on Women*, <https://www.penalreform.org/issues/women/issue/> (accessed Sept. 28, 2021). The majority of women in prison have been convicted of drug-related offenses, a trend particularly prominent in the United States where the rise in the female prison population has been attributed to harsher drug sentencing laws and post-conviction barriers to reentry for women in particular.

² THE SENTENCING PROJECT, *Incarcerated Women and Girls* (2020), <https://www.sentencingproject.org/publications/incarcerated-women-and-girls/>

³ This report reviews prosecutions of "women and girls", a grouping that may include individuals who are non-binary or trans and experience these prosecutions as well on account of their identity or perceived gender. It does not address prosecutions specific to the LGBTQI community based on their sexual identity, which are also an area of TrialWatch work.

prosecutions manifest themselves in courtrooms around the world.⁴ Highlighted here are three interrelated issues that TrialWatch has documented to date in the prosecution of women and girls: (a) the criminalization of abortion; (b) prosecutions for ‘morality crimes’; and (c) pervasive in the above and many other prosecutions against women: gender stereotyping in court.

⁴ This report, authored by Columbia Law School’s Human Rights Institute and Human Rights Clinic under the direction of Sarah Mehta, is based on research conducted from 2019-2021 by the following students: Megan Scott-Busenbark, Nick Chun, Antonio Ceasar R. Manila, Nicole O’Donnell, Andie Reyes, Sophia Tarazi, and Sahana Thirumazhusai.

CRIMINALIZATION OF ABORTION



Women's bodies are often the subject of legal control and controversy, and laws that restrict access to and criminalize abortion and other reproductive services are one way that laws can explicitly and disproportionately target women and girls. These criminal laws not only have significant implications for the health, safety, and economic opportunities of women and girls but may also result in severe penalties for those who nevertheless seek abortion services or who are believed to have done so by aggressive prosecutors. This section addresses (a) the state of the law on abortion around the world; (b) a case study of trials from El Salvador, punishing women for obstetric emergencies; and (c) prosecutions of human rights defenders, doctors, and others for participating in abortion and other reproductive health services.

A. STATUTES THAT PUNISH WOMEN FOR REPRODUCTIVE CHOICES

In general, the current global trend is towards decriminalization of abortion: Argentina⁵, Mexico⁶, and San Marino⁷ all decriminalized in the last year, Ecuador decriminalized abortion in cases of rape⁸, and Colombia's Constitutional Court is expected to order decriminalization in a case now pending before it.⁹ Jamaica, which punishes abortion with life in prison, is also considering a referendum to decriminalize abortion.¹⁰ Nevertheless, the majority of countries around the world still have some legal restrictions on abortion and in some countries, the restrictions are multiplying and incur significant penalties. In February 2021, Honduras amended its constitution to completely prohibit abortion.¹¹ In the

⁵ *Argentina legalises abortion in landmark moment for women's rights*, THE GUARDIAN (Dec. 30, 2020), <https://www.theguardian.com/world/2020/dec/30/argentina-legalises-abortion-in-landmark-moment-for-womens-rights>.

⁶ Lizbeth Diaz and Laura Gottesdiener, *Mexico's top court decriminalizes abortion in 'watershed moment'*, REUTERS (Sept. 8, 2021), <https://www.reuters.com/world/americas/mexico-supreme-court-rules-criminalizing-abortion-is-unconstitutional-2021-09-07/>.

⁷ Angelo Amante, *San Marino votes to legalise abortion in historic referendum*, REUTERS (Sept. 27, 2021), <https://www.reuters.com/world/europe/san-marino-votes-legalise-abortion-historic-referendum-official-results-show-2021-09-26/>.

⁸ *Ecuador's high court backs decriminalizing abortion for rape*, ASSOCIATED PRESS (Apr. 28, 2021), <https://apnews.com/article/guillermo-lasso-ecuador-courts-39ea79427c9abed11d859970dbdef80f>.

⁹ CAUSA JUSTA, *Demanda de inconstitucionalidad del artículo 122 de la Ley 599 de 2000 del Código Penal*, <https://www.womenslinkworldwide.org/files/3133/resumen-de-la-demanda-aborto-en-colombia-causa-justa.pdf> (accessed Nov. 8, 2021); Jesse Levine, *Reproductive Rights in Colombia: Expanding Legal Access to Abortion on the Basis of Human Rights*, COLUMBIA POLITICAL REVIEW (Oct. 2, 2021), <http://www.cpreview.org/blog/2021/10/reproductive-rights-in-colombia-expanding-legal-access-to-abortion-on-the-basis-of-human-rights>.

¹⁰ Lillian Perlmutter, *Jamaica Could Finally Decriminalize Abortion*, VICE NEWS (Apr. 13, 2021), <https://www.vice.com/en/article/bvzq5d/jamaica-could-finally-decriminalize-abortion>.

¹¹ UNITED NATIONS OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, *Honduras: UN experts deplore further attacks against right to safe abortion*, (Jan. 19, 2021), <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=26675&LangID=E>; Natalie Alcoba, *Honduras hardened its abortion ban. These women remain undeterred*, AL JAZEERA (Feb. 7,

United States, while abortion remains a constitutional right,¹² there is a patchwork of state laws regulating abortion, with numerous new restrictions introduced in 2021. Between January and June 2021, 90 new restrictions were adopted by state legislatures around the United States,¹³ including a law in Texas that came into effect in September 2021 (currently in litigation¹⁴) and is the most restrictive in the United States and has been compared to the total bans in Honduras and El Salvador.¹⁵

The UN Human Rights Committee has made clear that states should not “apply criminal sanctions against women and girls undergoing abortion or against medical service providers assisting them in doing so, since taking such measures compel women and girls to resort to unsafe abortion.”¹⁶ The Committee on the Elimination of Discrimination against Women (CEDAW) has similarly said that denial of safe abortion, criminalization of abortion, and forced continuation of pregnancy are “are forms of gender-based violence that, depending on the circumstances, may amount to torture or cruel, inhuman or degrading treatment.”¹⁷ Human rights bodies have also made clear that complete bans on abortion are inconsistent with human rights law and standards.¹⁸

2021), <https://www.aljazeera.com/news/2021/2/7/honduras-hardened-abortion-ban-these-women-remain-undeterred>.

¹² *Roe v. Wade*, 410 U.S. 113 (1973).

¹³ GUTTMACHER INSTITUTE, *State Policy Trends at Midyear 2021: Already the Worst Legislative Year Ever for U.S. Abortion Rights* (July 1, 2021), <https://www.guttmacher.org/article/2021/07/state-policy-trends-midyear-2021-already-worst-legislative-year-ever-us-abortion>

¹⁴ Sophie Reardon, *Federal appeals court temporarily allows Texas abortion law to continue*, CBS NEWS (Oct. 9, 2021), <https://www.cbsnews.com/news/texas-abortion-law-continues-federal-appeals-court-rules/>; Paige Alexandria, *Cruel and Violating: How Texas' Abortion Law Assaults Our Fundamental Rights*, ACLU (Sept. 23, 2021), <https://www.aclu.org/news/reproductive-freedom/cruel-and-violating-how-texas-abortion-law-assaults-our-fundamental-rights/>.

¹⁵ Daniela Santamariña, Youjin Shin, Sammy Westfall & Ruby Mellen, *How abortion laws in the U.S. compare to those in other countries*, WASHINGTON POST (Sept. 27, 2021), <https://www.washingtonpost.com/world/interactive/2021/us-abortion-laws-worldwide/>; UN OFFICE OF THE HIGH COMMISSIONER FOR HUMAN RIGHTS, *United States: UN experts denounce further attacks against right to safe abortion and Supreme Court complicity*, Press Release, (Sept. 14, 2021), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=27457&LangID=E>.

¹⁶ UN HUMAN RIGHTS COMMITTEE, *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*, CCPR/C/GC/36, Oct. 28, 2018, https://www.ohchr.org/Documents/HRBodies/CCPR/CCPR_C_GC_36.pdf

¹⁷ UN COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, General recommendation No. 35 on gender-based violence against women, updating general recommendation No. 19, (2017), para. 18, https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_35_82_67_E.pdf

¹⁸ See generally, UN COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, *Concluding Observations on the Combined Seventh and Eight Periodic Reports of Peru*, U.N. Doc. CEDAW/C/PER/CO/7-8 (July 24, 2014) at para 36 (urging Peru to “[e]xtend the grounds for legalization of abortion to cases of rape, incest and severe foetal impairment”); CEDAW COMMITTEE, *Statement on Sexual and Reproductive Health and Rights: Beyond 2014 ICPD Review* (Feb. 10-28, 2014) (“States parties should legalize abortion at least in cases of rape, incest, threats to the life and/or health of the mother, or severe foetal impairment.”); *L.C. v. Peru*, CEDAW Committee, Commc’n No. 22/2009, U.N. Doc. CEDAW/C/50/D/22/2009 (finding that Peru should have provided access to an abortion given that there were “sufficient reasons to state that continuing the pregnancy would put the girl’s physical and mental health at serious risk”); *K.L. v. Peru*, Human Rights Committee, Commc’n No. 1153/2003, para 6.4, U.N. Doc. CCPR/C/85/D/1153/2003 (finding violation of right to privacy due to failure to permit abortion, despite satisfying domestic law requirements);

Nevertheless, countries continue to criminalize abortion. The penal codes of several countries ban and criminalize abortion with no exception, although some of these countries do permit abortion in practice in exceptional circumstances. These include Andorra,¹⁹ Aruba,²⁰ Congo (Brazzaville),²¹ Dominican Republic,²² El Salvador,²³ Egypt,²⁴ Honduras,²⁵ Iraq,²⁶ Jamaica,²⁷ Laos,²⁸ Madagascar,²⁹ Malta,³⁰ Mauritania,³¹ Nicaragua,³² Palau,³³ the

V.D.A. v. Argentina, Human Rights Committee, Commc'n No. 1608/2007, para 9.3, U.N. Doc. CCPR/C/101/D/1608/2007 (finding Article 17 violation where judiciary enjoined abortion that was 'nonpunishable' under domestic law); Mellet v. Ireland, Human Rights Committee, Commc'n No. 2324/2013, paras 7.7- 7.11, U.N. Doc. CCPR/C/116/D/2324/2013 (finding a violation of the right to be free of cruel, inhuman, or degrading treatment, specifically stating that "a woman's decision to request termination of pregnancy is an issue which falls under the scope of [Article 17]. In the present case, the State party interfered with the author's decision not to continue her non-viable pregnancy . . . [and] the failure of the State party to provide the author with the services that she required constituted discrimination."); Whelan v. Ireland, Human Rights Committee, Commc'n No. 2425/2014, paras. 7.7- 7.12, U.N. Doc. CCPR/C/119/D/2425/2014 (finding that Ireland's limited exception to abortion ban resulted in violation of Articles 7, 17, and 26); Human Rights Committee, General Comment No. 36 on Article 6: Right to Life, para. 8, U.N. Doc. CCPR/C/GC/36 (2018) ("States parties must provide safe, legal and effective access to abortion where the life and health of the pregnant woman or girl is at risk, or where carrying a pregnancy to term would cause the pregnant woman or girl substantial pain or suffering, most notably where the pregnancy is the result of rape or incest or where the pregnancy is not viable.").

¹⁹ Principality of Andorra, Penal Code (2005), arts. 107-109,

<https://www.legislationline.org/documents/section/criminal-codes/country/46/Andorra/show>.

²⁰ Government of Aruba, Afbreking van zwangerschap (2012) Title XIX, Article 2:270, <http://deugdelijkbestuuraruba.org/wp-content/uploads/2016/04/Nieuw-Wetboek-v-Strafrecht-27-4-12.pdf>

²¹ Journal Officiel de la République Démocratique du Congo, Code Penal Congolais, Décret du 30 janvier 1940 tel que modifié et complété à ce jour, Mis à jour au 30 novembre 2004, Arts. 165-66, <http://www.droit-afrique.com/upload/doc/rdc/RDC-Code-1940-penal-MAJ-2004.pdf>.

²² Penal Code of the Dominican Republic (1884, modified by laws 1690 of April 8, 1948, 224 of June 26, 1984, and 46-99 of May 20, 1999), Article 317, <https://ihl-databases.icrc.org/ihl-nat/0/FD47C9D7F49A6983C1256D5200296030>.

²³ Penal Code of El Salvador, 1998, Articles 133, 135-36.

²⁴ Government of Egypt, Law No. 58 01 The Year 1937 Promulgating The Penal Code, Articles 206-264, <http://hrlibrary.umn.edu/research/Egypt/criminal-code.pdf>.

²⁵ Constitution of the Republic of Honduras (1982, amended 2021), Article 67, <https://constitutionnet.org/sites/default/files/Honduras%20Constitution.pdf>.

²⁶ Government of Iraq, Penal Code, No. 111 of 1969, Articles 417-18, <https://www.refworld.org/docid/452524304.html>; see also, UN World Health Organization, Global Abortion Policies Database, *Country Profile: Iraq* (May 2017), <https://abortion-policies.srhr.org/country/iraq/>.

²⁷ Government of Jamaica, Offences Against the Person Act of 1864, Articles 72-73, https://moj.gov.jm/sites/default/files/laws/Offences%20Against%20the%20Person%20Act_0.pdf.

²⁸ Lao People's Democratic Republic Penal Code (2005), Article 92.

²⁹ Government of Madagascar, Criminal Code (2001), Article 317, <https://resourceequity.org/record/1612-madagascar-penal-code/>.

³⁰ Criminal Code of the Republic of Malta (1854, as amended 2021), Sections 241-244A, https://www.legislationline.org/download/id/9619/file/Malta_CC.pdf.

³¹ Journal Officiel de la République Islamique de Mauritanie Ordonnance n° 83.162 (1983), Article 293, <https://acjr.org.za/resource-centre/penal-code-of-mauritania/view>

³² Government of Nicaragua, Penal Code, Law No. 641 (amended Nov. 18, 2006), Articles 143-146, https://www.poderjudicial.gob.ni/pjupload/noticia_reciente/CP_641.pdf

³³ Palau National Code Annotated (PNCA)/17 PNCA, Section 201, <https://www.oecd.org/site/adboecdanti-corruptioninitiative/46816862.pdf>.

Philippines,³⁴ Suriname,³⁵ Tonga³⁶ and Vatican City,³⁷ which impose criminalize penalties on women who obtain abortions without exception.³⁸ Although it currently bans abortion without exception, Haiti introduced a new penal code, which would go into effect in 2022, that would allow abortions in the first 12 weeks of pregnancy, when the physical or mental health of the mother is threatened, or in cases of rape and incest.³⁹ In many other countries, the relevant statutes only permit abortion if necessary to save the life of the mother (for example, Guatemala⁴⁰, Lebanon⁴¹ and Sri Lanka⁴²) or on other grounds such as preserving the health of the mother, as in Pakistan⁴³.

In Senegal, as in Egypt⁴⁴ and Madagascar⁴⁵, abortion is illegal under all circumstances even though the medical ethics code permits physicians to perform an abortion to save the

³⁴ The Revised Penal Code of the Philippines (1930), No. 3815, Articles 256, 258-59, https://www.un.org/depts/los/LEGISLATIONANDTREATIES/PDFFILES/PHL_revised_penal_code.pdf

³⁵ UN World Health Organization, "Global Abortion Policies Database," (2017), <https://abortion-policies.srhr.org/country/suriname/>; Guttmacher Institute, Abortion in Latin America And the Caribbean (2018), https://www.guttmacher.org/sites/default/files/factsheet/ib_awn-latin-america.pdf

³⁶ Government of Tonga, Criminal Offences Act, Ch. 10.09, Sections 103-105 (rev. 2016), https://ago.gov.to/cms/images/LEGISLATION/PRINCIPAL/1924/1924-0010/CriminalOffencesAct_2.pdf; see also United Nations Office of the High Commissioner for Human Rights, "Committee on the Rights of the Child examines report of Tonga," May 14, 2019, <https://www.ohchr.org/en/NewsEvents/Pages/DisplayNews.aspx?NewsID=24611&LangID=E>.

³⁷ Code of Canon Law, Can. 1398, https://www.vatican.va/archive/cod-icuris-canonici/eng/documents/cic_lib6-cann1364-1399_en.html

³⁸ See generally CENTER FOR REPRODUCTIVE RIGHTS, THE WORLD'S ABORTION LAWS, available at [https://maps.reproductiverights.org/worldabortionlaws?category\[294\]=294](https://maps.reproductiverights.org/worldabortionlaws?category[294]=294) (accessed September 28, 2021); *Abortion rights around the world*, FRANCE24 (Dec. 30, 2020), <https://www.france24.com/en/live-news/20201230-abortion-rights-around-the-world>; Daniela Santamariña, Youjin Shin, Sammy Westfall & Ruby Mellen, *How abortion laws in the U.S. compare to those in other countries*, THE WASHINGTON POST (Sept. 27, 2021), <https://www.washingtonpost.com/world/interactive/2021/us-abortion-laws-worldwide/>. In practice, some countries with complete bans in their penal codes may nevertheless not prosecute or make some exceptions for abortion performed to save the life of the mother—for example, Egypt and Tonga.

³⁹ MADRE, *The Road to Gender Justice in Haiti: Progress on Haiti's Penal Code*, Oct. 19, 2020, <https://www.madre.org/press-publications/madre-article/road-gender-justice-haiti-progress-haiti%E2%80%99s-penal-code>; *An analysis of Haiti's new penal code: Advances and Weaknesses*, HAITIAN TIMES (July 17, 2020), <https://haitiantimes.com/2020/07/17/an-analysis-of-haitis-new-penal-code-advances-and-weaknesses/>.

⁴⁰ Government of Guatemala, Código Penal, Decreto No. 17-73, Título VII, Capítulo III, Artículos 133-140 (1973).

⁴¹ Government of Lebanon, Presidential Decree No. 13187 of the year 1967; see generally, International Commission for Jurists, *Accountability for Sexual and Gender-Based Violence in Lebanon: Guidance and Recommendations for Criminal Justice Actors* (2020), <https://www.icj.org/wp-content/uploads/2020/10/Lebanon-GBV-Guidance-Publications-Reports-Thematic-report-2020-ENG.pdf>.

⁴² Government of Sri Lanka, Penal Code, Chapter XVI, Articles 304 – 307 (1883).

⁴³ Pakistan Penal Code (Act XLV of 1860), Chapter XVI, Section 338A.

⁴⁴ Government of Egypt, Law No. 58.01 Penal Code (1937), Articles 61, 260-264, <https://www.refworld.org/docid/3f827fc44.html>; Code of Ethics, Regulation No. 238 of 21 March 2003 of the Ministry of Health and Population; United Nations World Health Organization Global Abortion Policies Database, Country Profile: Egypt (2017), <https://abortion-policies.srhr.org/country/egypt/>.

⁴⁵ Government of the Democratic Republic of the Congo, Ordonnance 70-158 Du 30 Avril 1970 Déterminant Les Règles de La Déontologie Médicale, 70–158, 1970, Art. 32, <https://abortion-policies.srhr.org/documents/countries/03-Democratic-Republic-of-the-Congo-Rules-of-Medical-Ethics-MoH-1970.pdf>.

life of the mother;⁴⁶ but the ethics code requires that two additional physicians including one who is court-approved affirm that the abortion is necessary to save the woman's life.⁴⁷

The criminal penalties for abortion and uncertainty about where and when abortion might be legal may have a significant chilling effect on women and girls in need of these services. And certainly, these laws do result in prosecutions of women and girls including those who, unable to access legal abortion services, resort to drastic means. In Senegal, for example, in the absence of legal, safe, and accessible abortion services, some girls and women have instead resorted to leaving the newborns to die.⁴⁸ While prosecutions for abortion in Senegal are rare overall, a 2014 FIDH report found that abortion and infanticide offences accounted for 38 percent of the female prison population, and infanticide alone accounted for 16 percent of the female pretrial detention population.⁴⁹

B. TRIALWATCH CASE STUDY: EL SALVADOR

In El Salvador, where abortion is banned in all circumstances, criminal penalties for an illegal abortion include up to eight years in prison (for the person obtaining an abortion⁵⁰); but alleged abortion is also often charged as “aggravated homicide,” which carries a potential penalty of up to 40 years in prison.⁵¹ According to one study of five judicial districts in El Salvador, between 1998 and 2014, 74 women were prosecuted under the statute criminalizing abortion and 23 were convicted; and between 1998 and 2016, 75 women were prosecuted for aggravated homicide (of an infant) and 34 were convicted.⁵² These statistics suggest that not only are women being prosecuted, but also that state authorities are taking advantage of more severe charges with higher punishments to penalize women who either undergo abortions—or may have miscarried or suffered other obstetric emergencies.

As in so many other cases implicating women's rights, there is a clear pattern of

⁴⁶ Article 305, Senegal Penal Code, <https://acjr.org.za/resource-centre/penal-code-of-senegal-1965/view>

⁴⁷ Maroussia Mbaye, *When shame kills: why do so many mothers in Senegal feel forced to murder their babies?* THE GUARDIAN (July 29, 2021), <https://www.theguardian.com/global-development/2021/jul/29/when-shame-kills-why-do-so-many-mothers-in-senegal-feel-forced-to-their-babies>; Nandini Archer, Alice Finden, Hannah Pearson, INTERNATIONAL CAMPAIGN FOR WOMEN'S RIGHT TO SAFE ABORTION, *The Laws, Trials, and Imprisonment for Abortion in Senegal* (2018), <http://www.safeabortionwomensright.org/wp-content/uploads/2018/04/The-law-trials-and-imprisonment-for-abortion-in-Senegal-April-2018.pdf>.

⁴⁸ *In Senegal, women kill own babies due to strict abortion laws*, REUTERS (Dec. 1, 2014), <https://www.reuters.com/article/us-senegal-women-abortion/in-senegal-women-kill-own-babies-due-to-strict-abortion-laws-idUSKCN0JF31220141201>; Allyn Gaestel & Ricci Shryock, *The Price of Senegal's Strict Anti-Abortion Laws*, THE NEW YORKER (Oct. 1, 2017), <https://www.newyorker.com/news/news-desk/the-price-of-senegals-strict-anti-abortion-laws>.

⁴⁹ FIDH, « JE NE VEUX PAS DE CET ENFANT, MOI JE VEUX ALLER A L'ECOLE » LA PROHIBITION DE L'INTERRUPTION VOLONTAIRE DE GROSSESSE AU SENEGAL, (2014), <https://www.fidh.org/IMG/pdf/senegalfemmes651f2014web.pdf>.

⁵⁰ El Salvador, Penal Code (1997), Legislative Decree 1030 of April 26, 1997, Chapter II, Article 133.

⁵¹ Jocelyn Viterna, & Jose Santos Guardado Bautista, *Pregnancy and the 40-Year Prison Sentence: How “Abortion Is Murder” Became Institutionalized in the Salvadoran Judicial System*, 19 HEALTH&HUM.R. 1(2017).

⁵² *Id.*

intersectional discrimination: the women who have the least access to safe and legal reproductive care—namely, poor women and/or members of minority communities—are also those most likely to be prosecuted for violating abortion and related restrictions. As the UN Human Rights Committee has observed, “lower income women rely on public hospitals, where health professionals are more likely than those in private clinics to report them to the police.”⁵³

In 2019, the American Bar Association Center for Human Rights monitored two trials in El Salvador as part of TrialWatch involving women prosecuted for “aggravated homicide.” The women, who were treated for obstetric emergencies after they gave birth in their homes, were charged despite a dearth of evidence, and subjected to lengthy pretrial detention. As documented in the reports (co-authored by staff at the ABA Center for Human Rights and Professor Juliet Sorensen), the trials were marred by numerous fair trial violations and also by the prosecution’s conduct in court, which relied on gender stereotypes around the trope of the ‘bad mother’ and constituted discrimination on the basis of gender and class.⁵⁴ On the basis of this monitoring, CFJ and the Center for International Human Rights at Northwestern University Pritzker School of Law subsequently filed an amicus curiae brief to the Inter-American Court on Human Rights arguing that in El Salvador, there is a “systemic pattern whereby women who suffer poor pregnancy outcomes are prosecuted for aggravated homicide,” a pattern that “violates (i) the right to be free from gender-based discrimination and (ii) the right to health, that common investigative practices violate (iii) the right to privacy, and that subsequent prosecutions frequently result in violations of (iv) the right to liberty and to a fair trial.”⁵⁵

C. PROSECUTIONS OF THOSE WHO SUPPORT AND PROVIDE ASSISTANCE FOR REPRODUCTIVE RIGHTS

Human rights defenders who advocate for greater respect for reproductive rights—often themselves women—have also faced criminal charges related to their efforts. As a previous UN Special Rapporteur on human rights defenders, Margaret Sekaggya, found in her reporting, human rights advocates have faced criminal sanctions for activities such as handing out information about abortion, referring women to appropriate medical facilities, and—in cases of medical professionals—when fulfilling their roles as health care

⁵³ See U.N. HUMAN RIGHTS COMMITTEE, *Concluding Observations on the Seventh Periodic Report of El Salvador*, para. 15, U.N. Doc. CCPR/C/SLV/CO/7 (May 9, 2018); see also AMNESTY INTERNATIONAL, *ON THE BRINK OF DEATH: VIOLENCE AGAINST WOMEN AND THE ABORTION BAN IN EL SALVADOR* (2014), at 11 (“[t]hose with the fewest resources suffer the most.”)

⁵⁴ Juliet Sorensen & American Bar Association Center for Human Rights, *TRIALWATCH, EL SALVADOR: THE CASE AGAINST EVELYN HERNANDEZ* (2020), available at https://www.americanbar.org/content/dam/aba/administrative/human_rights/el_salvador_case_against_evelyn_hernandez.pdf; Juliet Sorensen & American Bar Association Center for Human Rights, *TRIALWATCH, EL SALVADOR: THE CASE AGAINST DIANA* (2020), available at https://www.americanbar.org/content/dam/aba/administrative/human_rights/el_salvador_case_against_diana.pdf.

⁵⁵ THE CENTER FOR INTERNATIONAL HUMAN RIGHTS AT NORTHWESTERN UNIVERSITY PRITZKER SCHOOL OF LAW & THE CLOONEY FOUNDATION FOR JUSTICE, *Amicus Curiae Brief to the Inter-American Court on Human Rights, Re: Case of Manuela and Family v. El Salvador* (2021), <https://cfj.org/wp-content/uploads/2021/03/IACtHR-Amicus-Brief-Manuela-and-Family-v.-El-Salvador-FINAL.pdf>.

providers.⁵⁶

More recently, in 2019, the UN Special Rapporteur on human rights defenders observed that women who advocate for reproductive rights have faced “public morality” charges.⁵⁷ A 2021 Human Rights Watch report on Ecuador documented 148 criminal cases for illegal abortion between 2009-2019, of which 20 of those prosecuted were companions and eight were medical providers.⁵⁸ Similarly, in 2014, two women’s rights organizations in El Salvador requested a pardon for 17 women accused of having an abortion; in response, the advocates representing these women were threatened with criminal charges including “incitement to the crime of abortion.”⁵⁹ Since 2019, the Government of Andorra has been investigating and pursuing defamation charges against reproductive rights activist Vanessa Mendoza Cortésan for allegedly “insulting state institutions” in raising concerns regarding women’s access to abortion before the UN.⁶⁰ And in June 2021, a court in Egypt sentenced Ahmed Samir Santawy, an anthropology student, to prison for publishing “fake news” related to the Egyptian government’s handling of the pandemic; but he was initially detained in February 2021 after being questioned by national security officers and prosecutors for his research on women’s reproductive rights, including access to abortion.⁶¹

Aside from health care providers, families who assist a person in accessing abortion services may also be subject to criminal sanctions. In a 2018 case out of Indonesia, for example, even after a court acquitted a 15-year-old for having an illegal abortion after she was raped by her brother, the authorities continued to investigate the girl’s mother over whether she had helped her daughter to obtain the abortion.⁶²

⁵⁶ UNITED NATIONS GENERAL ASSEMBLY, REPORT OF THE SPECIAL RAPPORTEUR ON THE SITUATION OF HUMAN RIGHTS DEFENDERS, A/67/292, para. 36 (Aug. 10, 2012), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N12/459/42/PDF/N1245942.pdf?OpenElement>.

⁵⁷ UNITED NATIONS HUMAN RIGHTS COUNCIL, SITUATION OF WOMEN HUMAN RIGHTS DEFENDERS: REPORT OF THE SPECIAL RAPPORTEUR ON THE SITUATION OF HUMAN RIGHTS DEFENDERS, A/HRC/40/60, Jan. 10, 2019, para. 47, <https://undocs.org/A/HRC/40/60>

⁵⁸ HUMAN RIGHTS WATCH, “WHY DO THEY WANT TO MAKE ME SUFFER AGAIN?: THE IMPACT OF ABORTION PROSECUTIONS IN ECUADOR (2021), <https://www.hrw.org/report/2021/07/14/why-do-they-want-make-me-suffer-again/impact-abortion-prosecutions-ecuador#>

⁵⁹ IACHR, CRIMINALIZATION OF HUMAN RIGHTS DEFENDERS at 34 (2015), <http://www.oas.org/en/iachr/reports/pdfs/criminalization2016.pdf>.

⁶⁰ OMCT, *Threats and judicial harassment against Ms. Vanessa Mendoza Cortés*, (Oct. 10, 2020), <https://www.omct.org/en/resources/urgent-interventions/threats-and-judicial-harassment-against-ms-vanessa-mendoza-cort%C3%A9s>; AMNESTY INTERNATIONAL, *Andorra: Defamation charges against activist who raised rights concerns before UN Committee must be dropped* (Feb. 16, 2021), <https://www.amnesty.org/en/latest/press-release/2021/02/andorra-defamation-charges-against-activist-who-raised-rights-concerns-before-un-committee-must-be-dropped/>; *Andorre : la militante des droits des femmes Mendoza Cortés devant le juge*, LEFIGARO (Feb. 17, 2021), <https://www.lefigaro.fr/flash-actu/andorre-la-militante-des-droits-des-femmes-mendoza-cortes-devant-le-juge-20210217>.

⁶¹ Anna Koslerova, *A Student Researching Abortion Laws Is Now In One of the World's Strictest Prisons*, VICE NEWS (Apr. 29, 2021), <https://www.vice.com/en/article/xgxzkw/ahmed-samir-santawy-egypt>; Walid El Hour, *Egyptian student of gender and religion jailed for terrorism on visit home*, OPEN DEMOCRACY (Feb. 23, 2021), <https://www.opendemocracy.net/en/north-africa-west-asia/egyptian-student-gender-and-religion-jailed-terrorism-visit-home/>

⁶² *Indonesian court clears teenage rape victim jailed for abortion*, REUTERS (Aug. 29, 2018), <https://www.reuters.com/article/us-indonesia-rights/indonesian-court-clears-teenage-rape-victim-jailed-for-abortion-idUSKCN1LE18I>.

Prosecutions against women and girls for abortion—even if rare in some jurisdictions—push those who need reproductive services further to the margin of care and may have a chilling effect on service providers, community health advocates, and prevent those who need reproductive health services and their families from accessing life-saving care. They also serve to further expand the state’s control over women and girls’ bodies while denying them autonomy and other critical human rights.

MORALITY CRIMES



Criminal laws are often used to police social boundaries and norms, and those prohibiting ‘moral crimes’, while not exclusively impacting women and girls, often operate to reify gender roles and punish women and girls for conduct that is perceived as challenging patriarchal norms. ‘Morality crimes’ encompass a broad range of offences punishing conduct that may be “victimless” (i.e. where no third party was harmed) or consensual but serve to force compliance with certain societal expectations and often target the conduct of women and girls in particular. These offences may include, for example, conduct labeled “indecent” such as public dancing or allegedly inappropriate clothing, running away from home, adultery, or pre-marital sex. These offences, problematic in and of themselves, are sometimes used to deny women and girls other rights. The UN Office of the High Commissioner for Human Rights has observed, for instance, that “[s]tates often invoke ‘public morality’ to justify limitations on the rights to freedom of association and expression.”⁶³ ‘Public morality’ laws have also been used to target women’s rights advocates in countries whose national framework ostensibly guarantees sexual and reproductive rights.⁶⁴

This chapter addresses prosecutions of women and girls for (a) crimes that treat women and girls as deviant children, such as running away from home; and (b) criminal laws targeting women for their perceived sexuality or sexual activity.

A. ‘ERRANT WOMEN’: PROSECUTIONS FOR ‘RUNNING AWAY’

Women and girls are often treated as people whose conduct needs to be controlled and constrained by the law. Criminal laws that limit women and girls’ mobility punish women and girls for exercising their independence and also signal that they are dependent on men.

In the United States, such crimes often overlap with status offences, which involve conduct that is not criminal when the participants are adults but can lead to detention and other sanctions for those under 18 and often have a gendered element. According to a study on juvenile courts in 2009, girls accounted for 50 percent of the status offence cases brought to juvenile courts and 58 percent of cases for running away from home cases (around 55 percent as of 2016⁶⁵). At the same time, the rate at which girls were being brought to court for such offences outstripped the comparable rate for boys. For instance, between 1995 and 2009, the number of curfew violations cases for girls grew by 23 percent (compared to only one percent for boys) and the number of liquor law violations for girls grew by 41

⁶³ OHCHR, INFORMATION SERIES ON SEXUAL AND REPRODUCTIVE HEALTH AND RIGHTS: WOMEN HUMAN RIGHTS DEFENDERS, at 2 (2020), https://www.ohchr.org/Documents/Issues/Women/WRGS/SexualHealth/INFO_WHRD_WEB.pdf.

⁶⁴ UNITED NATIONS GENERAL ASSEMBLY, REPORT OF THE SPECIAL RAPPOURTEUR ON THE SITUATION OF HUMAN RIGHTS DEFENDERS, A/67/292, para. 36 (Aug. 10, 2012), <https://documents-dds-ny.un.org/doc/UNDOC/GEN/N12/459/42/PDF/N1245942.pdf?OpenElement>.

⁶⁵ OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, US DEPARTMENT OF JUSTICE, JUVENILE COURT STATISTICS 2016, <http://www.ncjj.org/pdf/jcsreports/jcs2016report.pdf>

percent (compared with six percent for boys)⁶⁶. A 2010 study similarly found that while girls accounted for 16 percent of the national juvenile detention population, they were 40 percent of those detained for a status offence.⁶⁷ A more recent 2016 investigation in Maryland found that girls were “more likely than boys to be taken before a judge for probation offenses such as running away, breaking curfew and defying their parents” and, if placed in detention, were committed in secure facilities “25 percent longer, on average, than boys, even though girls are less likely to be there for felonies or violent offenses.”⁶⁸

In recent years the number of children charged with and detained for status offences has declined; still, the gender-stereotypes that underlie the criminalization of girls remain.⁶⁹ Researchers have noted that since the juvenile justice system and these status offences were created in the 19th century, the system was designed and has operated “based largely on genderized norms that sought to define acceptable and unacceptable behavior for girls.”⁷⁰ And yet, it is often *because of* gendered experiences of violence at home that girls end up running away in the first place.⁷¹

Similar offenses—and similar gendered norms—exist around the world. Saudi Arabia has long been notorious for its guardianship system, under which women are required to have a male guardian’s permission for a variety of basic activities (only in 2021 did Saudi Arabia authorize women to live alone and independently without a male guardian’s prior permission).⁷² But many other countries also have laws that limit women’s mobility and authorize discriminatory criminal sanctions for women for exercising their right to freedom of movement.

A United Nations Office on Drugs and Crime report found that in 2007, 20 percent of incarcerated women in Afghanistan were charged with the crime of running away, a charge that was often combined with another offense, such as adultery or theft.⁷³ Despite a 2012

⁶⁶ COALITION FOR JUVENILE JUSTICE, *GIRLS, STATUS OFFENSES AND THE NEED FOR A LESS AND MORE EMPOWERING APPROACH* at 1-2 (2013), <https://juvjustice.org/sites/default/files/resource-files/SOS%20Project%20%20Girls.%20Status%20Offenses%20and%20the%20Need%20for%20a%20Less%20Punitive%20and%20More%20Empowering%20Approach.pdf> (citing NATIONAL CENTER FOR JUVENILE JUSTICE, *JUVENILE COURT STATISTICS 2009* (2012)).

⁶⁷ *Id.*

⁶⁸ Erica L. Green, *Lost girls: Young women face harsher punishment in Maryland’s juvenile justice system*, THE BALTIMORE SUN (Dec. 16, 2016), <https://www.baltimoresun.com/news/investigations/bal-juvenile-justice-gender-gap-20161216-story.html>.

⁶⁹ Samantha Ehrmann, Nina Hyland, and Charles Puzanchera, OFFICE OF JUVENILE JUSTICE AND DELINQUENCY PREVENTION, US DEPARTMENT OF JUSTICE, *GIRLS IN THE JUVENILE JUSTICE SYSTEM* (April 2019), <https://ojjdp.ojp.gov/sites/g/files/xyckuh176/files/pubs/251486.pdf>; Fanna Gamal, *Good Girls: Gender-Specific Interventions In Juvenile Court*, 35 COL.J.GEN.&L. 228 (2018);

⁷⁰ *Supra* note 66 at 2. See also Lindsay Rosenthal, VERA INSTITUTE OF JUSTICE, *Juvenile justice reform is not about boys vs. girls* (Sept. 15, 2015), <https://www.vera.org/blog/gender-and-justice-in-america/juvenile-justice-reform-is-not-about-boys-vs-girls>

⁷¹ Cheryl Corey, *Running Away Or Skipping School Could Get A Kid Locked Up. Now That's Changing*, NPR (Aug. 5, 2019), <https://www.npr.org/2019/08/05/740555026/running-away-or-skipping-school-could-get-a-kid-locked-up-now-thats-changing>; COALITION FOR JUVENILE JUSTICE, *Runaways & Ungovernability*, (accessed Nov. 8, 2021), <https://juvjustice.org/our-work/safety-opportunity-and-success-project/issue-areas/runaways>.

⁷² *Saudi Arabia allows adult women to live independently without male guardian approval*, DAWN (June 11, 2021), <https://www.dawn.com/news/1628787>.

⁷³ U.N. OFFICE ON DRUGS & CRIME, *AFGHANISTAN, IMPLEMENTING ALTERNATIVES TO IMPRISONMENT*, IN

directive from the Attorney General's office noting that 'running away' has not been criminalized under Afghan law and prosecutors should not file criminal cases for this conduct, the Supreme Court in Afghanistan has distinguished between women who go to government authorities to report abuse (who are protected from prosecution) and those who leave home to participate in "moral crimes" (who are not protected).⁷⁴

Migrant women in particular may face discriminatory treatment under these laws that may both deter women from reporting abuse and also be used by employers to punish noncitizen employees in retaliation for running away or reporting abuse.⁷⁵ Human rights organizations reporting on domestic workers in the Middle East, for instance, have documented that migrant female workers who reported rape to the police or abandon abusive employers found themselves charged with running away from their employers or extramarital sex, or else held in administrative immigration detention for many months in retaliation.⁷⁶ In one 2017 report, the Philippines embassy in Doha, Qatar estimated that 120-140 Filipinos in Doha were being detained for moral or related crimes, including absconding or running away from their employer, immorality, or indebtedness.⁷⁷

B. WOMEN & GIRLS TARGETED FOR THEIR SEXUALITY & SEXUAL CONDUCT

In many countries, women and their sexual conduct (or conduct that is perceived as sexual) are the target of criminal laws that seek to enforce traditional and often patriarchal notions of family and sexuality. For instance, several countries have laws that criminalize extramarital sexual relations, and in countries that do enforce these laws, it is frequently women who are the target of prosecution even when they are the victim of crime. In 2020, Taiwan abolished its law criminalizing adultery; although the law was gender-neutral on its face, activists had documented that women were 20 percent more likely than men to be convicted of the charge.⁷⁸

LINE WITH INTERNATIONAL STANDARDS AND NATIONAL LEGISLATION, U.N. Doc. AFG/R87 (May 2008) at 29.

⁷⁴ CHR. MICHELSEN INSTITUTE, MISSING FROM THE PICTURE: MEN IMPRISONED FOR 'MORAL CRIMES' IN AFGHANISTAN (2018), <https://open.cmi.no/cmi-xmlui/handle/11250/2502350>.

⁷⁵ See UNITED NATIONS HUMAN RIGHTS COUNCIL, REPORT OF THE SPECIAL RAPPORTEUR ON THE HUMAN RIGHTS OF MIGRANTS, FRANÇOIS CRÉPEAU: MISSION TO QATAR, A/HRC/26/35/Add.1 (Apr. 23, 2014), paras. 51 & 57; Alice Su, *Abused Migrant Workers End Up in Prison After Trying to Flee*, THE NEW HUMANITARIAN (June 9, 2017), <https://deeply.thenewhumanitarian.org/refugees/articles/2017/06/09/abused-migrant-workers-end-up-in-prison-after-trying-to-flee-2>.

⁷⁶ AMNESTY INTERNATIONAL, *Saudi Arabia: Dozens of Sri Lankan women wrongfully detained for months due to abusive kafala system* (Apr. 15, 2021), <https://www.amnesty.org/en/latest/press-release/2021/04/saudi-arabia-dozens-of-sri-lankan-women-wrongfully-detained-for-months-due-to-abusive-kafala-system/>; AMNESTY INTERNATIONAL, "WHY DO YOU WANT TO REST?" ONGOING ABUSE OF DOMESTIC WORKERS IN QATAR (2020), <https://www.amnesty.org/en/wp-content/uploads/2021/05/MDE2231752020ENGLISH.pdf>; HUMAN RIGHTS WATCH, *#MeToo, Say Domestic Workers in the Middle East* (2017), <https://www.hrw.org/news/2017/12/08/metoo-say-domestic-workers-middle-east>.

⁷⁷ Ana P. Santos, *The Boyfriend System: Migrant Life in Qatar*, RAPPLER (Sept. 4, 2017), <https://pulitzercenter.org/stories/boyfriend-system-migrant-life-qatar>.

⁷⁸ Amy Quin, *Taiwan Court Strikes Down Law Criminalizing Adultery*, THE NEW YORK TIMES (May 29, 2020), <https://www.nytimes.com/2020/05/29/world/asia/taiwan-adultery.html>; Sophia Yang,

The UN Special Rapporteur on violence against women has observed that even where laws prohibiting extramarital sex are gender-neutral on their face, in reality, women are disproportionately prosecuted under these laws.⁷⁹ In Pakistan, for example, many women incarcerated as a result of engaging in extramarital sex “were charged with adultery after reporting rape . . . [or] . . . were accused of adultery after seeking a divorce.”⁸⁰ In Mauritania, for example, Human Rights Watch found that the criminalization of extramarital sex deterred many young girls and women from reporting rape and other abuse given the risk that they themselves would be charged with offences.⁸¹ In Iran, as of 2016, second to drug trafficking, the most common offense for which women were imprisoned was for the crime of “acts incompatible with chastity,” (which includes having sexual relations out of wedlock), according to the Iran Human Rights Documentation Center.⁸² The United Arab Emirates’ penal code specifically criminalizes “any sexual relationship outside marriage”⁸³ and survivors of rape sometimes fear that if they report their attacks, they will be prosecuted for committing adultery. In 2010, a criminal court in Abu Dhabi sentenced an 18-year-old Emirati woman to a year in prison for extramarital sex after reporting that she had been gang raped by six men.⁸⁴ Her attackers were convicted of lesser “moral crimes.”⁸⁵ More recently in 2016, a female British tourist was arrested in Dubai for extramarital sex after reporting to the police that she had been raped by a group of British men while in the UAE.⁸⁶

Over the years, Afghanistan has stood out as a country where a large number of women are incarcerated for moral crimes. Reports in 2009 and 2012 have documented that approximately 50 percent of women and girls in prison in Afghanistan were incarcerated for a ‘moral crime.’⁸⁷ And as recently as 2020, at least half of the 119 women in Herat Women’s

Taiwan grand justices rule adultery no longer a crime, TAIWAN NEWS (May 29, 2020), <https://www.taiwannews.com.tw/en/news/3941397>.

⁷⁹ UN GENERAL ASSEMBLY, REPORT OF THE SPECIAL RAPPORTEUR ON VIOLENCE AGAINST WOMEN, ITS CAUSES AND CONSEQUENCES, PATHWAYS TO, CONDITIONS AND CONSEQUENCES OF INCARCERATION FOR WOMEN at 8, A/68/340 (2013), <https://www.ohchr.org/documents/Issues/Women/A-68-340.pdf>.

⁸⁰ *Id.*

⁸¹ HUMAN RIGHTS WATCH, SUBMISSION TO THE COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN ON MAURITANIA, 80th Pre-Session (Feb. 12, 2021), <https://www.hrw.org/news/2021/02/12/human-rights-watch-submission-committee-elimination-discrimination-against-women>.

⁸² IRAN HUMAN RIGHTS DOCUMENTATION CENTER, *Infographic: Women in Prison* (July 8, 2016), <https://iranhrdc.org/infographic-women-in-prison/>.

⁸³ U.N. GAOR, 68th Sess., U.N. Doc. A/68/340, at 8 (Aug. 21, 2013).

⁸⁴ *Rape Victims Are Being Jailed Under Extramarital Sex Laws in the UAE*, VICE NEWS (Oct. 25, 2015), <https://www.vice.com/en/article/xw3gmw/rape-victims-are-being-jailed-under-extramarital-sex-laws-in-the-uae>; Nadya Khalife, *How the UAE condones sexual violence*, THE GUARDIAN (June 29, 2010), <https://www.theguardian.com/commentisfree/2010/jun/29/uae-rape-victims-women>.

⁸⁵ *Id.*

⁸⁶ *UK woman arrested in Dubai after reporting rape, group says*, CNN (Nov. 20, 2016), <https://www.cnn.com/2016/11/19/middleeast/dubai-british-tourist-rape-arrest-claim/index.html>; Radha Stirling, *If you're shocked by a woman being arrested after reporting gang-rape in Dubai, you should know how common these cases are*, THE INDEPENDENT (Nov. 17, 2016), <https://www.independent.co.uk/voices/dubai-woman-arrested-gang-rape-uae-sex-crime-local-laws-know-how-common-it-a7422336.html>.

⁸⁷ UNITED NATIONS OFFICE ON DRUGS AND CRIME, *Afghanistan: implementing alternatives to imprisonment, in line with international standards and national legislation* (New York, United Nations, 2008), para. 14 (noting that in 2007, there were 304 female prisoners out of 10,604 total, meaning that 152 women in Afghanistan were in prison due to committing moral crime(s) in 2007), https://www.unodc.org/pdf/criminal_justice/Afghanistan_Implementing_Alternatives_to_Imprisonment.p

Prison had been charged with "moral crimes" that include sex outside of marriage.⁸⁸ In Afghanistan, women and girls charged with moral offences are often subjected to intrusive "virginity tests," which are forced gynecological exams that are routinely ordered by judges and prosecutors.⁸⁹ A woman or girl who fails this test can be imprisoned for up to three months although in practice, advocates have observed, some women "are kept inside the jail for a year and a half -- for nothing."⁹⁰ In 2018, Afghanistan passed a law requiring a court order or the patient's consent to any virginity test; however, a 2020 investigation into the issue by Afghanistan's Independent Human Rights Commission found that over 92% of the 129 women interviewed had not consented to or received a court order for these tests.⁹¹

Finally, women and girls may be charged with other offences for conduct perceived to be 'promiscuous' or promoting 'immoral' or feminist views and conduct; these public morality laws are also opportunistically used to harass activists and journalists. In 2016, for example, Human Rights Watch documented the use of public morality laws in Sudan to charge women human rights activists and female anti-government protesters.⁹²

Authorities in Egypt have also used public morality and related laws to crack down on women exercising their right to freedom of expression and pursuing economic independence in ways frowned upon by patriarchal elements of society.⁹³ In 2020, TrialWatch monitored the trial of Ms. Haneen Hossam and Ms. Mawada al-Adham, who were charged with violating "family principles and values in Egyptian society" under Egypt's Anti-Cybercrime Law based on photos and videos they posted of themselves on social media. The images show the two women singing and dancing; Ms. Hossam also allegedly encouraged girls to hold meetings online. Both women were convicted and sentenced to two years in prison after the court found that they had "broadcast[ed] ... ideas opposing the customs and traditions of Egyptian society ... with the aim of achieving rapid material

df; HUMAN RIGHTS WATCH, "I HAD TO RUN AWAY": THE IMPRISONMENT OF WOMEN AND GIRLS FOR "MORAL CRIMES" IN AFGHANISTAN (2012) (finding 400 women and girls—half the female prison population—were imprisoned for moral crimes), <https://www.hrw.org/report/2012/03/28/i-had-run-away/imprisonment-women-and-girls-moral-crimes-afghanistan>.

⁸⁸ May Jeong, *They Killed Their Husbands. Now in Prison, They Feel Free*, THE NEW YORK TIMES, (Feb. 26, 2020), <https://www.nytimes.com/2020/02/26/magazine/afghan-women-prison.html>

⁸⁹ HUMAN RIGHTS WATCH, *Human Rights Watch Submission to the Universal Periodic Review of Afghanistan* (Dec. 16, 2018), <https://www.hrw.org/news/2018/12/16/human-rights-watch-submission-universal-periodic-review-afghanistan>.

⁹⁰ Malaka Gharib, *U.N. Calls for End to Virginity Tests*, NPR (Oct. 19, 2018), available at <https://www.npr.org/sections/goatsandsoda/2018/10/19/658155056/u-n-calls-for-end-to-v>.

⁹¹ Stefanie Gliniski, *Afghan women illegally forced into 'virginity tests'*, REUTERS (Oct. 19, 2020), <https://www.reuters.com/article/us-afghanistan-women-rights-trfn/afghan-women-illegally-forced-into-virginity-tests-idUSKBN274110>.

⁹² HUMAN RIGHTS WATCH, "GOOD GIRLS DON'T PROTEST": REPRESSION AND ABUSE OF WOMEN HUMAN RIGHTS DEFENDERS, ACTIVISTS, AND PROTESTERS IN SUDAN (2016), <https://www.hrw.org/report/2016/03/23/good-girls-dont-protest/repression-and-abuse-women-human-rights-defenders>.

⁹³ TAHRIR INSTITUTE FOR MIDDLE EAST POLICY, *Egypt's TikTok Crackdown and 'Family Values'*, (Aug. 13, 2020), <https://timep.org/commentary/analysis/egypts-tiktok-crackdown-and-family-values/>; Tim Hume, *Egypt Jailed Two TikTok Users for 'Violating Family Values'*, VICE NEWS (July 28, 2020), <https://www.vice.com/en/article/pkymak/egypt-jailed-tiktok-haneen-hossam-mowada-al-adham>.

gain.”⁹⁴ While one of the two women was acquitted on appeal and the other had their sentence reduced to a fine,⁹⁵ they were then re-prosecuted on allegations of human trafficking. TrialWatch is also monitoring the proceedings against Russian women’s rights and LGBTI rights activist Yulia Tsvetkova, who is facing pornography charges for posting artistic images of female genitalia in what she has said is an effort to combat the objectification of women’s bodies.⁹⁶

The morality laws briefly discussed here not only have a disproportionate impact on women and girls but, as the latter cases demonstrate, are also used pretextually and selectively by state authorities to restrict speech and other human rights, using the language of values and morality.

⁹⁴ CLOONEY FOUNDATION FOR JUSTICE, *Statement on the Trial of Haneen Hossam and Mawada Al-Adham* (Sept. 9, 2020), <https://cfj.org/wp-content/uploads/2020/09/Statement-on-the-Trial-of-Haneen-Hossam-and-Mawada-Al-Adham.pdf>.

⁹⁵ *TikTok stars Hanin Hossam, Mawaddah Eladham referred to criminal trial for ‘human trafficking’*, EGYPT INDEPENDENT (March 15, 2021), <https://egyptindependent.com/tiktok-stars-hanin-hossam-mawaddah-eladham-referred-to-criminal-trial-for-human-trafficking/>.

⁹⁶ HUMAN RIGHTS EMBASSY, TRIALWATCH, *RUSSIAN FEDERATION V. YULIA TSVETKOVA* (2021), <https://humanrightsembassy.org/attachments/article/380/Preliminary%20report%20on%20the%20trial%20of%20Yulia%20Tsvetkova%20in%20Russian%20Federation.pdf>.

GENDER STEREOTYPING IN COURT



As earlier discussed, gender stereotypes may inform the type of charges women and girls face but they can also influence the way in which women and girls are treated during the court proceeding and the ultimate outcome of a case. When judges ascribe specific attributes, characteristics or roles to women and girls based on their gender, this can perpetuate harmful stereotypes, undermine judicial impartiality, and deny women the opportunity to be treated as individuals and have their defenses fairly presented in court. While women and girls can, at times, benefit from these stereotypes of women as ‘docile’ or ‘victims’, those who don’t conform to these stereotypes—including trans and nonbinary women and girls but also any woman or girl whose conduct is seen as violating the norm—may be subject to discrimination in court. This final chapter examines (a) the concept of judicial stereotyping; (b) how gender stereotyping comes into play in violent offences; (c) the impact of gender in drug cases; and (d) courts’ responses to women in reproductive freedom cases.

A. HUMAN RIGHTS LAW AND JUDICIAL STEREOTYPING

Human rights law requires that states eliminate harmful gender stereotyping, which can result in discrimination and a denial of women and girls’ human rights. Under the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW), state parties to the Convention have an obligation to take necessary measures to “achiev[e] the elimination of prejudices and customary and all other practices which are based on the idea of the inferiority or the superiority of either of the sexes or on stereotyped roles for men and women.”⁹⁷

Gender stereotyping has often harmed women and girls’ ability to get redress in court for violations of their rights. For example, in some cases, judges have dismissed the credibility of women and girls in rape trials where they focus on the conduct and appearance of the woman or girl instead of the conduct of the alleged attacker. In *Karen Tayag Vertido v. The Philippines*, the CEDAW Committee held that the Philippines violated its obligations under CEDAW when it relied on “gender-based myths and misconceptions”⁹⁸ to acquit a man of rape, based on what an “ideal victim” would have done. In its decision, the Committee “stress[ed] that stereotyping affects women’s right to a fair and just trial and that the judiciary must take caution not to create inflexible standards of what women or girls should be or what they should have done when confronted with a situation of rape based merely on preconceived notions of what defines a rape victim or a victim of gender-based violence,

⁹⁷ Convention on the Elimination of All Forms of Discrimination against Women, G.A.Res 34/180, Dec. 18, 1979, Article 5, <https://www.ohchr.org/EN/ProfessionalInterest/Pages/CEDAW.aspx>. The Convention on the Rights of Persons with Disabilities similarly requires that state parties take measures to address stereotyping on the basis of sex. Convention on the Rights of Persons with Disabilities, Art 8(1)

⁹⁸ *Karen Tayag Vertido v. The Philippines*, UN Committee on the Elimination of Discrimination against Women, UN Doc. CEDAW/C/46/D/18/2008 (Sept. 22, 2010), para. 8.6, <https://www.undocs.org/en/CEDAW/C/46/D/18/2008>.

in general.”⁹⁹

These stereotypes not only impact survivors of violence and other crimes looking for accountability but also deny women and girls accused of crimes their right to a fair hearing. A woman charged with a crime like drug trafficking, for example, may be chastised in court for being a “bad mother” or not complying with traditional gender norms. In its 2015 recommendation on access to justice, the Committee on the Elimination of Discrimination against Women warned:

Often, judges adopt rigid standards about what they consider to be appropriate behaviour for women and penalize those who do not conform to those stereotypes. Stereotyping also affects the credibility given to women’s voices, arguments and testimony as parties and witnesses. Such stereotyping can cause judges to misinterpret or misapply laws ... In all areas of law, stereotyping compromises the impartiality and integrity of the justice system, which can, in turn, lead to miscarriages of justice, including the revictimization of complainants.

Judges, magistrates and adjudicators are not the only actors in the justice system who apply, reinforce and perpetuate stereotypes. Prosecutors, law enforcement officials and other actors often allow stereotypes to influence investigations and trials, especially in cases of gender-based violence, with stereotypes undermining the claims of the victim ... Stereotyping can, therefore, permeate both the investigation and trial phases and shape the final judgement.¹⁰⁰

A 2018 report from Cornell Center on the Death Penalty Worldwide and World Coalition Against the Death Penalty identified several examples where courts used sexist language to describe female defendants and appeared to be both judging and punishing them for not complying with traditional gender roles—in India, for example, a court referred to a woman who killed her husband as the “kind of woman” who brings “shame” upon her family, village, and society; in Pakistan, a court denied a woman bail in a drug smuggling case, stating “Had the accused been concerned about her suckling baby, she would not have resorted to indulge in such activity which had afflicted the whole society and especially the younger generation.”¹⁰¹

B. GENDER AND VIOLENT OFFENSES

When women are charged with violent offences, in some cases, stereotypes regarding

⁹⁹ *Id.*

¹⁰⁰ UN COMMITTEE ON THE ELIMINATION OF DISCRIMINATION AGAINST WOMEN, CEDAW/C/GC/33, GENERAL RECOMMENDATION ON WOMEN’S ACCESS TO JUSTICE (July 23, 2015), paras. 26-27, https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/1_Global/CEDAW_C_GC_33_77_67_E.pdf.

¹⁰¹ CORNELL CENTER ON THE DEATH PENALTY WORLDWIDE AND WORLD COALITION AGAINST THE DEATH PENALTY, JUDGED FOR MORE THAN HER CRIME: A GLOBAL OVERVIEW OF WOMEN FACING THE DEATH PENALTY at 7 (2018), <https://www.deathpenaltyworldwide.org/wp-content/uploads/2019/12/Judged-More-Than-Her-Crime.pdf>.

women's expected behavior may lead judges to treat alleged violent conduct as more 'deviant.' And yet, in some cases, courts also fail to understand and account for women and girls' real experience of violence and abuse when raised as a defense—which the UN Committee on the Elimination of Discrimination against Women has found can amount to gender discrimination.¹⁰² A 2018 study from the Cornell Center on the Death Penalty Worldwide and World Coalition Against the Death Penalty found that although some gender stereotypes may benefit women in trials (where they are viewed primarily as caretakers, for example), women who are perceived to be violating or deviating from entrenched norms of "gender-appropriate behavior" are more likely to be sentenced more harshly and to receive the death penalty.¹⁰³ And repeating a theme throughout this report: the women most likely to get the harshest penalties are also disproportionately those disadvantaged by class and/or as members of minority communities.¹⁰⁴

One common example of this phenomenon is the way courts handle defenses based on domestic violence. The UN Special Rapporteur on Violence Against Women, Its Causes, and Consequences has observed that "[w]hile recognizing the gravity of their crimes, women's criminality under situations of extreme abuse and violence needs to be treated with diligence, and their cases must be assessed in light of mitigating circumstances."¹⁰⁵ Several UN Special Rapporteurs have observed that where survivors of domestic violence are subsequently involved in violence against their partner or the perpetrator of violence, that experience must be recognized by courts.¹⁰⁶ As the then Special Rapporteur on extrajudicial, summary or arbitrary executions, Agnes Callamard, wrote in 2017 on a gender-sensitive approach to arbitrary killings:

Women facing capital prosecution arising out of domestic abuse suffer from gender-based oppression on multiple levels. For instance, it is exceedingly rare for domestic abuse to be treated as a mitigating factor during capital sentencing proceedings. Even in those countries with discretionary capital sentencing, courts often ignore or discount the significance of gender-based violence.¹⁰⁷

¹⁰² Committee on the Elimination of Discrimination Against Women, *Belousova v. Kazakhstan*, U.N. Doc. CEDAW/C/61/D/45/2012, August 25, 2015; Committee on the Elimination of Discrimination Against Women, *S.T. v. Russia*, U.N. Doc. CEDAW/C/72/D/65/2014, April 8, 2019; See generally, Simone Cusack, *Eliminating Judicial Stereotyping* (2014) (final paper presented to the Office of the High Commissioner on Human Rights), <https://rm.coe.int/1680597b20>.

¹⁰³ CORNELL CENTER ON THE DEATH PENALTY WORLDWIDE AND WORLD COALITION AGAINST THE DEATH PENALTY, *JUDGED FOR MORE THAN HER CRIME: A GLOBAL OVERVIEW OF WOMEN FACING THE DEATH PENALTY* at 3-4 (2018), <https://www.deathpenaltyworldwide.org/wp-content/uploads/2019/12/Judged-More-Than-Her-Crime.pdf>.

¹⁰⁴ See Sabrina Mahtani, *The battle to save women on Death Row is part of the fight against gendered violence*, GAL-DEM (Oct. 7, 2021), <https://gal-dem.com/women-on-death-row/>.

¹⁰⁵ UNITED NATIONS HUMAN RIGHTS COUNCIL, *REPORT OF THE SPECIAL RAPPORTEUR ON VIOLENCE AGAINST WOMEN, ITS CAUSES AND CONSEQUENCES: MISSION TO TAJIKISTAN*, U.N. Doc. A/HRC/11/6/Add.2, (Apr. 29, 2009), para. 37.

¹⁰⁶ JAN ARNO HESSBRUEGGE, *HUMAN RIGHTS AND PERSONAL SELF-DEFENSE IN INTERNATIONAL LAW* at 251, (2017).

¹⁰⁷ HUMAN RIGHTS COUNCIL, *REPORT OF THE SPECIAL RAPPORTEUR ON EXTRAJUDICIAL, SUMMARY OR ARBITRARY EXECUTIONS ON A GENDER-SENSITIVE APPROACH TO ARBITRARY KILLINGS**, A/HRC/35/23 (June 6, 2017), para. 32.

When courts disregard or minimize defense evidence of violence and abuse, this may constitute gender discrimination and result in the most severe consequences for those whose defenses are ignored.

In 2018, a Sudanese teenager, Noura Hussein, was sentenced to death for the murder of her husband during an assault in which he was attempting to rape her.¹⁰⁸ Hussein, who was subject to a forced marriage at the age of 16 to an older man, had been previously raped by her husband with the assistance of his cousins, who held her down. Although the appeals court overturned the sentence and reduced it to five years in prison, the prosecution appealed this reduction. In India, the Supreme Court upheld the death penalty for a young woman who killed members of her family, observing, “In an educated and civilised society, a daughter plays a multifaceted and indispensable role in the family, especially towards her parents... She is a caregiver and a supporter, a gentle hand and responsible voice, an embodiment of the cherished values of our society and in whom a parent places blind faith and trust.”¹⁰⁹

A court in Timor-Leste similarly convicted a woman of aggravated homicide of her husband, a member of the armed services, and appeared to see the woman’s violation of her role as a wife as a key factor in its sentence: “We are giving a prison sentence of 15 years because you have taken the life of one of the nation’s people, As a wife, you must protect your husband.”¹¹⁰ The woman, who had been the victim of domestic violence and had acted in self-defense, filed for a retrial; the self-defense evidence was again rejected. She subsequently filed a complaint before the Committee on the Elimination of Discrimination Against Women, which found “a pattern of deeply held bias” in the trial proceedings. Specifically, the Committee found that the used of gender-stereotyped language in the trial and the outsized weight given to testimony by a male witness over the testimony of the woman was evidence of gender-based discrimination.¹¹¹

In a case monitored in Kyrgyzstan by the American Bar Association’s Center for Human Rights as part of TrialWatch, a survivor of domestic violence, Gulzhan Pasanova, was charged with the murder of her abusive husband. The prosecution case was built on a portrait of Pasanova as a bad wife, and throughout the trial, she was subjected to insults from the prosecutor as well as her husband’s relatives, and her testimony of the abuse she endured was discounted in the conviction. The TrialWatch Fairness Report on the case found that Ms. Pasanova’s trial and conviction violated her fair trial rights including her right

¹⁰⁸ Zeinab Mohammed Salih, *Sudan teen who killed rapist husband faces new calls for death penalty*, THE GUARDIAN (Aug. 24, 2018), <https://www.theguardian.com/global-development/2018/aug/24/sudan-teen-who-killed-rapist-husband-faces-new-calls-for-death-penalty>; *Noura in her own words: Teen who killed rapist husband shares her story*, CNN (June 21, 2018), <https://www.cnn.com/2018/06/21/africa/noura-hussein-asequals-intl/index.html>; *Noura Hussein: Sudan appeals court overturns death sentence*, AL JAZEERA (June 26, 2018), <https://www.aljazeera.com/news/2018/6/26/noura-hussein-sudan-appeals-court-overturns-death-sentence>.

¹⁰⁹ *Shabnam v. State of Uttar Pradesh*, Criminal Case Nos. 802-803 of 2015, (May 15, 2015).

¹¹⁰ *X v. Timor-Leste*, UN Doc. CEDAW/C/69/D/88/2015, 26 February 2018, <https://juris.ohchr.org/Search/Details/2638>.

¹¹¹ *Id.* at para. 6.5.

to freedom from gender discrimination.¹¹² Subsequently, CFJ and Covington & Burling sought relief from the UN Committee on the Elimination of Discrimination Against Women—not only for Ms. Pasanova, but also urging the Committee to engage with Kyrgyzstan on how its courts treat self-defense claims in the context of domestic violence.¹¹³

C. GENDER AND DRUG OFFENSES

Most women entering prison around the world have been convicted of drug-related offences. Courts nevertheless may still see women's participation in the drug trade as particularly errant given gender-stereotypes related to women and morality or expectations of women as mothers; these stereotypes may impact the fairness of their criminal trials but also have consequences for women's re-entry to the community and ability to retain custody of their children.¹¹⁴ A report from the Organization of American States and the Inter-American Commission of Women observed that women are often vilified for their participation in the drug trade because of gender stereotypes about women's role in the private sphere:

Traditional gender stereotypes dictate that women fulfill the role of a sacrificial care-giver in the private sphere – accordingly, they do not occupy public or visible spaces and do not engage in behaviours that would be seen as contradictory to this care-giving role, including consuming and/or transporting or selling drugs. When women break the law and are imprisoned, they defy and transgress these stereotypes and face a double punishment: they are both sanctioned by the law and condemned by a patriarchal society. In other words, the stigma attached to women who serve sentences for drug-related crimes, whether as producers, couriers, distributors or users, is necessarily compounded with gender discrimination.¹¹⁵

As in the previous sections, women and girls from minority and low-income communities may face additional obstacles in court and be subject to additional forms of stereotyping and discrimination. For example, migrant women traveling and working to support their families often facing discrimination in the formal labor market and lack necessary legal and

¹¹² AMERICAN BAR ASSOCIATION, TRIALWATCH, KYRGYZSTAN V. GULZHAN PASANOVA (2020), https://www.americanbar.org/content/dam/aba/administrative/human_rights/kyrgyzstan_vs_gulzhan_pasanova.pdf.

¹¹³ THE CLOONEY FOUNDATION FOR JUSTICE, *Kyrgyzstan Court Violated Domestic Abuse Survivor's Rights*, (Sept. 10, 2021), https://cfj.org/news_posts/kyrgyzstan-court-violated-domestic-abuse-survivors-rights/.

¹¹⁴ Kasia Malinowska-Sempruch & Olga Rychkova, OPEN SOCIETY FOUNDATIONS, THE IMPACT OF DRUG POLICY ON WOMEN (2020) at 9, 12-13, <https://www.opensocietyfoundations.org/uploads/05b0d17a-4337-460a-8950-7804d0ad26fe/impact-drug-policy-women-20160928.pdf>; Colette Youngers, Teresa García Castro & Maria Manzur, WOLA, WOMEN BEHIND BARS FOR DRUG OFFENSES IN LATIN AMERICA (Nov. 2020), at 20-21, <https://www.wola.org/wp-content/uploads/2020/11/Final-Women-Behind-Bars-Report.pdf>; WOLA, IMPRISONED AT HOME: WOMEN UNDER HOUSE ARREST IN LATIN AMERICA (2020), at 12, <https://www.wola.org/wp-content/uploads/2020/07/Imprisoned-at-Home.pdf>.

¹¹⁵ ORGANIZATION OF AMERICAN STATES AND THE INTER-AMERICAN COMMISSION OF WOMEN, *Women and drugs in the Americas: A policy working paper* (2014), <http://www.oas.org/en/cim/docs/womendrugamericas-en.pdf>.

social protections.¹¹⁶ As a result, migrant or foreign-born women may become involved in crime and may also be particularly vulnerable to exploitation in the drug trade.¹¹⁷ A recent report from the Cornell Center on Death Penalty Worldwide found that foreign women prosecuted for capital drug offences are at a significant disadvantage vis-à-vis men in their ability to get an interpreter and qualified legal representation—and thus, ultimately, to have a fair trial. However, courts may fail to recognize these intersectional issues and or consider them as mitigating evidence.

For example, according to a 2019 Amnesty International report on drug offences in Malaysia, although men made up the majority of those convicted of drug trafficking, women—and minority women in particular—had a distinct experience in sentencing. While 70% of men on death row in Malaysia in 2019 had been convicted of drug trafficking, for women the figure was 95%.¹¹⁸ Further, 86% of the women on death row in Malaysia were foreign nationals and 90% of the women convicted of drug trafficking in Malaysia were foreign-born. A recent in-depth study into women facing the death penalty for drug trafficking in Malaysia found that many women charged with drug trafficking became involved in the drug trade on an episodic basis due to economic insecurity and the difficulty of finding work as a woman. However, this nuanced and gendered experience was often ignored or misunderstood by courts: “Judges in these cases appear to have a preconceived stereotype of the impoverished and uneducated woman who is duped into couriering drugs, which seems to work against the many women who do not fall into this category.”¹¹⁹ For women who don’t fit into a gender-stereotype of the victim, courts appear unwilling to hear or grapple with the more complex evidence of how gender actually shapes women’s economic opportunities and responsibilities.

D. GENDER IN REPRODUCTIVE FREEDOM CASES

Finally, in cases related to abortion, miscarriage or even alleged child abuse, courts have also engaged in gender-stereotyping related to how a good mother should behave, resulting in unfair trial outcomes for some women.¹²⁰ As previously discussed, many

¹¹⁶ CORNELL CENTER ON DEATH PENALTY WORLDWIDE, “NO ONE BELIEVED ME”: A GLOBAL OVERVIEW OF WOMEN FACING THE DEATH PENALTY FOR DRUG OFFENSES (2021), <http://fileserv.idpc.net/library/No-One-Believed-Me.pdf>; Jennifer Fleetwood & Lizzie Seal, *Women, Drugs and the Death Penalty: Framing Sandiford*, 56 HOWARD J. CRIME & JUSTICE 358 (2017); Cornell Center on Death Penalty Worldwide, *Judged for More Than Her Crime*, *supra* n. 101 at 12; Lucy Harry, *Rethinking the Relationship between Women, Crime and Economic Factors: The Case-Study of Women Sentenced to Death for Drug Trafficking in Malaysia*, 10 LAWS 9. (2021), <https://doi.org/10.3390/laws10010009>.

¹¹⁷ *See generally*, CORNELL CENTER ON DEATH PENALTY WORLDWIDE, “NO ONE BELIEVED ME”, *supra*; LIZ HALES AND LORAIN GELSTHORPE, *THE CRIMINALIZATION OF MIGRANT WOMEN* (2012), https://domide.colmex.mx/Archivos/Doc_5136.pdf.

¹¹⁸ AMNESTY INTERNATIONAL, *FATALLY FLAWED: WHY MALAYSIA MUST ABOLISH THE DEATH PENALTY* (2019), at 19-20, <https://www.amnesty.org/en/documents/act50/1078/2019/en/>.

¹¹⁹ Lucy Harry, *supra* n. 116; *see also*, Colette Youngers, Teresa García Castro & Maria Manzur, WOLA, *WOMEN BEHIND BARS FOR DRUG OFFENSES IN LATIN AMERICA* (Nov. 2020), <https://www.wola.org/wp-content/uploads/2020/11/Final-Women-Behind-Bars-Report.pdf>.

¹²⁰ *See generally*, Ada Calhoun, *The Criminalization of Bad Mothers*, THE NEW YORK TIMES (April 25, 2012), <https://www.nytimes.com/2012/04/29/magazine/the-criminalization-of-bad-mothers.html>; Kasia Malinowska-Sempruch & Olga Rychkova, OPEN SOCIETY FOUNDATIONS, *THE IMPACT OF DRUG POLICY ON WOMEN* (2020), <https://www.opensocietyfoundations.org/uploads/05b0d17a-4337-460a-8950-7804d0ad26fe/impact-drug-policy-women-20160928.pdf>; Zoe Carpenter, *Ecuador’s Crackdown on*

countries around the world impose significant penalties on those who undergo an abortion or are believed to have done so; even when women and girls are not prosecuted for procuring an abortion, they may be prosecuted for homicide or endangering the fetus, including in circumstances where the death of the fetus resulted from a miscarriage, still birth or other emergency due to inadequate health care.

In its amicus brief to the Inter-American Court on Human Rights in the case of *Manuela and Family v. El Salvador*, CFJ raised concerns that low-income women, charged with homicide after obstetric emergencies, are denied the right to a fair trial based in part on gender-discriminatory stereotypes about how they should behave as mothers and whether they are perceived as ‘immoral.’¹²¹ The Inter-American Commission on Human Rights, which had previously reviewed the case, concluded that Manuela’s right to a fair trial had been violated throughout the proceedings as the reliance on gender stereotypes undermined her right to the presumption of innocence and to equality and non-discrimination under the law.¹²² The Commission pointed in particular to the criminal court’s judgment stating that “‘having the capacity to choose between having the baby, caring for the baby, feeding it, and living for it, as any biological mother would naturally do, she chose to behave contrary to nature itself.’”¹²³ Likewise, the Commission noted the extent to which the domestic court based its decision on the notion that “the pregnancy was the result of infidelity, for which reason the alleged victim wanted to discard its outcome.”¹²⁴ In similar cases monitored by TrialWatch in El Salvador, two women charged with homicide stemming from obstetric emergencies faced similar discrimination. For instance, in the case of Evelyn Hernandez, the prosecution appeared to assume that Ms. Hernandez as a mother could have been expected to provide medical assistance to her child despite the fact that the evidence showed she had passed out from blood loss.¹²⁵ Moreover, in an effort to support its theory that Ms. Hernandez had intentionally denied both neo- and post-natal care, the prosecution relied on tropes regarding extra-marital sex to try to establish that Ms. Hernandez had

Abortion Is Putting Women in Jail, THE NATION (May 7, 2019), <https://www.thenation.com/article/world/ecuador-abortion-miscarriage-prosecution/>; Andre Cohen, *Influencing and Challenging Judges and Their Decisions in Child Welfare Cases*, AMERICAN BAR ASSOCIATION (Sept 10, 2019), https://www.americanbar.org/groups/public_interest/child_law/resources/child_law_practiceonline/january---december-2019/influencing-and-challenging-judges-and-their-decisions-in-child-/; Linda C. Fentiman, *BLAMING MOTHERS: AMERICAN LAW AND THE RISKS TO CHILDREN’S HEALTH* (2017); Colette Youngers, Teresa García Castro & Maria Manzur, WOLA, *Women Behind Bars for Drug Offenses in Latin America* (Nov. 2020), <https://www.wola.org/wp-content/uploads/2020/11/Final-Women-Behind-Bars-Report.pdf>.

¹²¹ The Center for International Human Rights at Northwestern University Pritzker School of Law & the Clooney Foundation for Justice, *Amicus Curiae Brief to the Inter-American Court on Human Rights, Re: Case of Manuela and Family v. El Salvador*, (2021), <https://cfj.org/wp-content/uploads/2021/03/IACtHR-Amicus-Brief-Manuela-and-Family-v.-El-Salvador-FINAL.pdf>.

¹²² *Manuela and Family v. El Salvador*, Case 13.069, Inter-Am. Comm’n H.R., Report No. 153/18, OEA/Ser.L/V/II.170, doc. 175 at paras. 155-58 (2018).

¹²³ *Id.* at para. 77 (2018).

¹²⁴ *Id.* at para. 156.

¹²⁵ Juliet S. Sorensen, Alexandra Tarzikhan, and Staff at the American Bar Association Center for Human Rights, TRIALWATCH, *EL SALVADOR: THE CASE AGAINST EVELYN HERNANDEZ* at 22 (2020) (“[T]he prosecution jumped to the conclusion that the child would have lived but for Ms. Hernandez’s actions, disregarding evidence that Ms. Hernandez was incapacitated after giving birth.”), https://www.americanbar.org/groups/human_rights/reports/trial-observation-report--criminal-trial-of-evelyn-hernandez-in-/.

known about the pregnancy—which she denied. For instance, the prosecution argued that Ms. Hernandez “intended to commit a homicide by the hiding of her pregnancy and childbirth for fear that her parents [would] retaliate against her ... she had a boyfriend and hid the relation from her parents ... therefore she planned to murder her child.”¹²⁶ Likewise, in the case of “Diana,” the other trial TrialWatch monitored in El Salvador—and just as in Manuela’s case—the hospital shared with the prosecution information regarding Diana’s “sexual history and the presence of sexually transmitted diseases.”¹²⁷

Such discrimination does not only occur at trial: It can affect charging decisions. In the amicus brief to the Inter-American Court, for instance, CFJ and the Center for International Human Rights at Northwestern University Pritzker School of Law also analyzed 38 prosecutions of women for aggravated homicide and found that all the women prosecuted were indigent and poorly educated, as a result of which they were more likely to rely on public health services (who often lodged the complaints against these women with state authorities).¹²⁸ Here again, the intersection of class and gender leaves some women more vulnerable to prosecution and criminal penalties.

Further, in many countries, including the United States, race also plays a significant role in the criminalization of abortion, miscarriage, and other activities related to reproduction.¹²⁹ In the United States, for instance, 38 states have “fetal protection” or fetal homicide laws that apply uniquely to women and recognize the fetus as a victim; these laws have been used alongside manslaughter and murder to charge and convict women for the death of a fetus.¹³⁰ Black women in particular are disproportionately charged under these laws and are also disproportionately prosecuted for drug use while pregnant.¹³¹ (And by contrast, the biological father is rarely subject to this scrutiny or criminal prosecution.) Similar to the experience of poor women in El Salvador and around the world, poor women of color in the United States are more likely to rely on these public health services that may deliver lower standards of medical care and privacy.¹³² In 2001, the US Supreme Court ruled

¹²⁶ *Id.*

¹²⁷ Juliet S. Sorensen, Alexandra Tarzikhan, and Staff at the American Bar Association Center for HUMAN RIGHTS, TRIALWATCH, EL SALVADOR: THE CASE AGAINST DIANA (2020) at 24, https://www.americanbar.org/content/dam/aba/administrative/human_rights/el_salvador_case_against_diana.pdf.

¹²⁸ *Supra* n. 121, *citing* CENTER FOR REPRODUCTIVE RIGHTS, MARGINALIZED, PERSECUTED, AND IMPRISONED: THE EFFECTS OF EL SALVADOR’S TOTAL CRIMINALIZATION OF ABORTION (2014)

¹²⁹ Jason Williams, *Our System Criminalizes Black Pregnancy. As a District Attorney, I Refuse to Prosecute These Cases*, TIME MAGAZINE (May 14, 2021), <https://time.com/6049587/pregnancy-criminalization/>; Michele Goodwin, THE HASTINGS CENTER, HOW THE CRIMINALIZATION OF PREGNANCY ROBBS WOMEN OF REPRODUCTIVE AUTONOMY, Nov. 14, 2017, <https://onlinelibrary.wiley.com/doi/full/10.1002/hast.791>; AMNESTY INTERNATIONAL, CRIMINALIZING PREGNANCY: POLICING PREGNANT WOMEN WHO USE DRUGS IN THE USA (2017), <https://www.amnesty.org/en/documents/amr51/6203/2017/en/>;

¹³⁰ Jacey Fortin, *California’s Attorney General Condemns Murder Charges Over a Stillbirth*, THE NEW YORK TIMES (Aug. 11, 2020) (updated May 20, 2021), <https://www.nytimes.com/2020/08/11/us/chelsea-becker-california-stillbirth.html>.

¹³¹ Michele Goodwin, *supra* n. 129; AMNESTY INTERNATIONAL, *supra* n. 129; Vanessa Vecchiarello, *The Criminalization of Pregnancy and its Effects on Maternal Health: Understanding State Interventions* 47 FORDHAM URB. L.J. 1051 (2020); Madeleine Ripple, *Mapping the Criminalization of Black Motherhood* (Dec. 17, 2020), <https://storymaps.arcgis.com/stories/21302be7f2af4c4c9d4b11ace0853c7e>.

¹³² Michele Goodwin, *supra* n. 129.

unconstitutional a government policy of surreptitiously drug testing pregnant women in a South Carolina hospital; 29 of the 30 women referred to police for charges and prosecution through this testing policy were Black.¹³³ Years later, referrals by medical practitioners to state authorities continue to focus on Black women. In one study, 14.1 percent of Black women tested positive for drug and alcohol use during pregnancy, and 15.4 percent of white women tested positive for the same drug and alcohol use during pregnancy; however, while healthcare providers only reported 1.1 percent of white women to authorities, they reported 10.7 percent of Black women.¹³⁴ As these statistics suggest, race and class significantly impact the way women interact with the criminal legal system, starting from who gets referred to the authorities and to the quality of representation they receive. And around the world, it is women and girls from low-income, often minority communities who are the subject to the most punitive legal proceedings.

¹³³ *Ferguson v. City of Charleston*, 532 U.S. 67 (2001).

¹³⁴ Michele Goodwin, *Prosecuting the Womb*, 76 GEO. WASH. L. REV. 1657, 1672 (2008).

CONCLUSION



This broad survey is one small window into the ways in which gender has a significant and discriminatory impact on the experience of women and girls in criminal courts around the world. Many of the crimes and patterns described here also impact men, nonbinary and LGBTQI individuals, and others. But as the number of women tried and sentenced to prison for criminal offences continues to grow, understanding the way in which gender impacts women and girls' experience in court can also identify charges or patterns that result in gender discrimination and need to be addressed.

Subsequent reports from other TrialWatch partners will delve into the specific offences or fair trial violations that women and girls experience in court either on account of gender or with a disparate impact, due to gender.