

ABORTION IN LATIN AMERICA AND THE CARIBBEAN: A COMPARATIVE STUDY OF DOMESTIC LAWS AND RELEVANT JURISPRUDENCE FOLLOWING THE ADOPTION OF THE AMERICAN CONVENTION ON HUMAN RIGHTS

*Ligia M. De Jesus**

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* Associate Professor of Law, Ave Maria School of Law; LL.M., Harvard Law School (2004). The author wishes to thank Ave Maria School of Law for supporting this project with a summer research grant. She also wishes to thank Anthony Tannus Wright, María Laura Farfán, Cintia Bayardi, Sandy Pineda, Siomara Umaña, and Eduardo Aguilera for their assistance in reviewing Latin American codes and judgments.

I. INTRODUCTION

By ratifying the American Convention on Human Rights (ACHR),¹ Latin American and Caribbean states made a commitment to protect prenatal life from the moment of conception.² Whether the ACHR prohibits all abortions, however, is arguably unclear; the issue has been indirectly addressed in *Artavia Murillo v. Costa Rica*, a case on reproductive technologies before the Inter-American Court of Human Rights,³ and in several petitions on abortion⁴ before the Inter-American system of human rights.⁵

According to Article 31(3)(b) of the Vienna Convention on the Law of Treaties, subsequent state practice is a primary means of interpretation of treaties.⁶ This article examines state practice on abortion subsequent to the adoption of the ACHR; it argues that the same demonstrates that states parties interpret the Convention as prohibiting elective abortion under most

1. American Convention on Human Rights art. 4(1), Nov. 21, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123.

2. For the purposes of this paper, Latin American and Caribbean states will include countries in Latin America and the Caribbean that have ratified the Convention on the Rights of the Child and the American Convention on Human Rights (a total of twenty-four nations as of June 2014): Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Grenada, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay, Trinidad & Tobago. This classification does not include countries in the region that have not ratified the American Convention on Human Rights: Antigua and Barbuda, Bahamas, Belize, Cuba, Guyana, St. Kitts and Nevis, Saint Lucia and St. Vincent, and the Grenadines—Canada and the United States, although members of the Organization of American States (OAS), have not ratified the American Convention either. *B-32: American Convention on Human Rights—“Pact of San Jose, Costa Rica,”* INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, <http://www.cidh.oas.org/Basicos/English/Basic4.Amer.Conv.Ratif.htm> (last visited Oct. 25, 2013) [hereinafter *American Convention on Human Rights*]. It does not include foreign territories in the geographic region such as Puerto Rico, Guadeloupe or French Guyana.

3. *Artavia Murillo et al. v. Costa Rica*, Preliminary Objections, Merits, Reparations and Costs, Judgment, Inter-Am. Ct. H.R. (Ser. C) No. 257 (Nov. 28, 2012).

4. By “abortion” this paper will generally refer to induced abortion, that is, the intentional or voluntary act of causing the death of a human fetus or embryo by any means, distinct from spontaneous abortion or involuntary miscarriage. JAMES B. TUBBS JR., *A HANDBOOK OF BIOETHICS TERMS* 3 (2009).

5. See e.g., *On the Matter of B., Provisional Measures, Resolution of the Court*, (Inter-Am. Ct. H.R. May 29, 2013), available at http://www.corteidh.or.cr/docs/medidas/B_se_01.pdf (last visited Oct. 25, 2013); see also Ligia M. De Jesus, *Post Baby Boy v. United States Developments in the Inter-American System of Human Rights: Inconsistent Application of the American Convention’s Protection of the Right to Life from Conception*, 17 L. & BUS. REV. AM. 435 (2011) (an overview of abortion petitions in the Inter-American system of human rights from its inception until 2012).

6. Vienna Convention on the Law of Treaties, May 22, 1963, 1155 U.N.T.S. 331, 8 I.L.M. 679.

circumstances and as precluding the creation of abortion rights. This article documents regional state practice evinced by a large body of authoritative domestic statutes and jurisprudence on abortion. In examining state practice, this author carries out a comparative analysis of relevant national constitutions, federal and state statutes (that prevail over lesser regulations or administrative directives), and domestic high court decisions on abortion, adopted after states' signature or ratification of the American Convention. Content and language in these statutes and high court decisions is described in detail in the following sections.⁷

II. ABORTION PROHIBITIONS AND EXCEPTIONS IN LATIN AMERICA AND THE CARIBBEAN

A. *Abortion Defined*

After their corresponding signature or ratification of the American Convention, all Latin American and Caribbean states have adopted or preserved criminal statute provisions on abortion; that is, all states treat abortion, in principle, as a criminal offense.⁸ Abortion is usually classified as a "crime against persons," a "crime against human life," or a "crime against personal integrity" under Latin America and the Caribbean criminal statutes. It is generally listed under the same categories as crimes such as homicide, manslaughter, and murder.⁹ For instance, in Argentina, Brazil, Ecuador, and Venezuela, abortions are categorized as "crimes against

7. An analysis of whether or not current state practice and *opinio juris* rise to the level of regional custom is beyond the scope of this paper, which focuses on state practice for the purposes of treaty interpretation only. Regional and local custom can be a source of customary international law. See *Right of Passage Over Indian Territory* (Port. v. India), 1960 I.C.J. 6 (Apr. 12); see *Haya de la Torre Case* (Colo. v. Peru), 1951 I.C.J. 266, ¶ 276 (June 13). The latter established that "constant and uniform usage" practiced by the states in question, along with express agreement (as opposed to tacit assent inferred from lack of opposition) is required for the recognition of a regional norm of customary international law, thus setting a higher threshold that is difficult to meet, albeit not impossible.

8. The great majority of current criminal law provisions on abortion in Latin American and the Caribbean were adopted after each state's corresponding date of signature or ratification of the American Convention: 1970–1973 in Costa Rica, Ecuador, El Salvador and Guatemala; 1983–1987 in Barbados, Argentina, Haiti and Grenada; 1991–2000 in Peru, Honduras, Dominican Republic, Colombia and Venezuela; 2000–present in Brazil (2004), Nicaragua (2007), Mexico (1931–2008), Paraguay (1997–2008), Panama (2007–2010), Chile (1874–2011), Uruguay (1998–2012). See *American Convention on Human Rights*, *supra* note 2. Criminal Code provisions on abortion of Bolivia (1972), Jamaica (1861), and Dominica (1873) precede their date of signature or ratification of the American Convention, but are still effective to date.

9. Translations to English in this paper are the author's, unless specifically indicated so.

persons.”¹⁰ Common law Caribbean countries like Dominica and Trinidad and Tobago generally prohibit abortion in their national “Offenses against the Person” Acts.¹¹ In Brazil, Costa Rica, and Ecuador abortion is listed under “crimes against life.”¹² El Salvador’s legislators entitled the criminal code chapter on abortion as “crimes against the life of the developing human being.”¹³ Criminal laws of most countries, such as those of Guatemala, Mexico, and Panama list abortion under crimes against life (or human life) and crimes against personal integrity.¹⁴ The Nicaraguan Criminal Code adds “personal security” and devotes an entire chapter to “abortion, genetic modification and injuries to the unborn”¹⁵ Peru classifies abortion under “crimes against life, the body and health.”¹⁶ The Uruguayan code uses interesting language: It characterizes abortion as a

10. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 88 (Arg.), *available at* http://www.oas.org/dil/esp/Codigo_Penal_de_la_Republica_Argentina.pdf (last visited Sept. 25, 2013); CÓDIGO PENAL [C.P.] [CRIMINAL CODE] art. 121–128 (Braz.), *available at* http://www.planalto.gov.br/ccivil_03/decreto-lei/del2848.htm (last visited Sept. 25, 2013); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] tit. VI, ch. I (Ecuador), *available at* http://www.oas.org/juridico/MLA/sp/ecu/sp_ecu-int-text-cp.pdf (last visited Oct. 13, 2013); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] tit. IX (Venez.), *available at* http://www.oas.org/dil/esp/Codigo_Penal_Venezuela.pdf (last visited Oct. 13, 2013).

11. Convention on the Rights of the Child, Committee on the Rights of the Child: Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Initial Reports of States Parties Due in 1993: Dominica, paras. 95–98, U.N. Doc. CRC/C/8/Add.48 (Oct. 15, 2003), *available at* <http://tb.ohchr.org/default.aspx?Symbol=CRC/C/8/Add.48> (last visited Oct. 13, 2013); The Offences Against the Person Act [TOAPA] §56 (Trin. & Tobago), *available at* <http://cyber.law.harvard.edu/population/abortion/Trinidad.abo.htm> (last visited Oct. 13, 2013).

12. CÓDIGO PENAL [C.P.] [CRIMINAL CODE] arts. 121–28 (Braz.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 110 (Costa Rica), *available at* http://www.oas.org/dil/esp/Codigo_Penal_Costa_Rica.pdf (last visit Oct. 13, 2013); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] tit. VI, ch. I (Ecuador).

13. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] tit. I, ch. II (El Sal.), *available at* http://www.oas.org/dil/esp/Codigo_Penal_El_Salvador.pdf (last visited Oct. 13, 2013).

14. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] tit. I, ch. III (Guat.), *available at* http://www.oas.org/dil/esp/Codigo_Penal_Guatemala.pdf (last visited Oct. 13, 2013); Código Penal Federal [CPF] [Federal Criminal Code] tit. XIX, ch. VI, Diario Oficial de la Federación [DO], 14 de Agosto de 1931 (Mex.), *available at* <http://www.oas.org/dil/esp/C%C3%B3digo%20Penal%20Federal%20Mexico.pdf> (last visited Oct. 13, 2013); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] tit. I, ch. I (Pan.), *available at* http://www.oas.org/juridico/mla/sp/pan/sp_pan-int-text-cp.pdf (last visited Oct. 13, 2013).

15. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] tit. I, ch. I (Nicar.), *available at* http://www.oas.org/juridico/mla/sp/nic/sp_nic_Nuevo_Codigo_Penal_%20Nicaragua_2007.pdf (last visited Oct. 13, 2013).

16. *See* CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] libro I, tit. I (Peru), *available at* http://www.oas.org/dil/esp/Codigo_Penal_Peru.pdf (last visited Oct. 12, 2013).

crime “against the physical and moral personhood of man.”¹⁷ Bolivia adds the designation of a crime “against the dignity of the human being”¹⁸ Chile classifies abortion under crimes “against the safety of families, public morality and sexual integrity”¹⁹

Regardless of the language of the section where abortion is compartmentalized, abortion is commonly described as the intentional or deliberate destruction of an unborn child. When defined, the term abortion is usually described as the intentional or deliberate destruction of an unborn child in Latin America and the Caribbean criminal statutes. For instance, Grenada’s criminal code defines the crime as follows: “The offence of causing abortion can be committed by causing a woman to be prematurely delivered of a child, with intent unlawfully to cause or hasten the death of the child”²⁰ The Bolivian Criminal Code defines abortion as any act causing the death to a fetus or causing his premature birth.²¹ Costa Rica’s criminal code is also defined in similar terms.²² Honduran criminal law defines abortion as intentionally causing the “death of a human being at any time during pregnancy or labor”²³ Guatemala and Mexico have broadened the definition of abortion to extend throughout gestation.²⁴ The Paraguayan criminal code defines abortion as “killing a fetus” and a fetus is defined as the human embryo beginning at conception up to labor.²⁵ Dominica’s “Offenses against Persons Act” characterizes abortions under twenty-eight weeks of gestation (called the point of viability) as an “unlawful miscarriage” and abortions beyond the twenty-eight week as the offense of “child destruction”²⁶ Suriname’s penal code defines it as the

17. See CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] Libro II, tit. XII (Uru.), available at http://www0.parlamento.gub.uy/Codigos/CodigoPenal/Cod_Pen.htm (last visited Oct. 12, 2013).

18. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] Libro II, tit. VIII (Bol.), available at http://www.oas.org/dil/esp/Codigo_Penal_Bolivia.pdf (last visited Oct. 12, 2013).

19. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] Libro II, tit. VII (Chile), available at http://www.oas.org/dil/esp/Codigo_Penal_Chile.pdf (last visited Oct. 12, 2013).

20. CRIMINAL CODE § 247(2) (Gren.), available at <http://cyber.law.harvard.edu/population/abortion/Grenada.abo.htm> (last visited Oct. 12, 2013).

21. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 263 (Bol.).

22. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 118 (Costa Rica).

23. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 126 (Hond.), available at http://www.oas.org/dil/esp/Codigo_Penal_Honduras.pdf (last visited Oct. 12, 2013).

24. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 133 (Guat.); Código Penal Federal [CPF] [Federal Criminal Code] art. 329, Diario Oficial de la Federación [DO], 14 de Agosto de 1931 (Mex.).

25. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] L. 3.440/08, arts. 14(18), 109 (Para.).

26. The Offences Against the Person Act [TOAPA] §§ 8, 56 (Dominica), available at <http://cyber.law.harvard.edu/population/abortion/Dominica.abo.html> (last visited Oct. 12, 2013).

willful interruption of a pregnancy or causing the expulsion or death of a fetus.²⁷

As illustrated above, the language used in Latin American and Caribbean criminal statutes stands as evidence of a regional understating of abortion as a crime and a violation of the right to life and personal integrity. In addition, it is noteworthy that definitions of abortion in most domestic codes explicitly recognize the unborn child's personhood and humanity and treat him as a holder of rights, particularly the right to life.

B. Involuntary Miscarriage/Spontaneous Abortion Distinguished

Spontaneous abortion/involuntary miscarriage is clearly distinguished from procured/induced abortion in Latin America and the Caribbean Criminal Codes and is not punishable by law given the lack of intent to produce the death of an unborn child. In Spanish, the word abortion ("aborto") is commonly used to designate the death of a human embryo or fetus before birth, regardless of whether the death is spontaneous or induced. According to the Royal Spanish Academy Dictionary, the term abortion implies the natural or induced death of the fetus, not necessarily the crime of induced abortion, forced abortion, or fetal homicide.²⁸ For that reason, statutory language in Latin American and Caribbean criminal codes distinguishes "aborto involuntario," "culposo," and "espontáneo" (Spanish terms for involuntary, negligent, or spontaneous abortion) from "aborto inducido," "procurado," and "provocado" (Spanish terms for induced, elective abortion).²⁹ The former terms are universally accepted as non-criminal, while the latter ones usually constitute a crime.

No Latin American or Caribbean criminal statute punishes a woman for the miscarriage of her unborn child, despite the possibility that the mother's conduct may have unintentionally contributed to it (e.g., "aborto imprudente" in Nicaragua).³⁰ For instance, Mexico's Federal Criminal Code explicitly provides that a miscarriage resulting from a woman's imprudence is not punishable.³¹ Similarly, nearly all criminal laws in Mexico provide exemptions for involuntary miscarriages, even if caused by

27. SURIN. PENAL CODE, arts. 309(1), 355 (Surin.), available at http://www.wipo.int/wipolex/en/text.jsp?file_id=209840#LinkTarget_4806 (last visited Oct. 12, 2013).

28. *Diccionario de la lengua española [Dictionary of the Spanish Language]*, REAL ACADEMIA ESPAÑOLA, <http://lema.rae.es/drae/?val=aborto> (last visited Oct. 12, 2013).

29. *Id.*

30. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 145 (Nicar.).

31. Código Penal Federal [CPF] [Federal Criminal Code], art. 333, Diario Oficial de la Federación [DO], 14 de Agosto de 1931 (Mex.).

negligence or imprudence.³² Similarly, El Salvador, Guatemala, and Nicaragua provide exceptions for involuntary miscarriage.³³ Also on an interesting note, Chile's Decreto 216/03 mandates burial of fetal remains and their surrender for burial as well as the issuance of a fetal death certificate.³⁴

Miscarriage as a result of medical treatment or during a medical procedure is not punishable under any criminal statute in the region. Certain Latin American and Caribbean criminal codes explicitly provide exemptions for medical doctors from criminal liability for miscarriages resulting from lifesaving or therapeutic medical treatment on pregnant women. For example, Guatemalan law, shield physicians from criminal liability for abortion when performing a lifesaving medical procedure on the mother without the intent to "directly provoke" fetal death.³⁵ The laws of Paraguay and Dominica have similar provisions.³⁶ Grenada's criminal code also provides an exemption for conduct that is carried out "in good faith and without negligence for the purpose of medical or surgical treatment of a pregnant woman," even if it results in a miscarriage, premature delivery, or the child's death.³⁷ It also provides for a good faith presumption for the physician: "[I]ntent to cause death shall not be presumed from the fact that the act was or appeared likely to cause death."³⁸

32. See DIANA ORTIZ TRUJILLO & SANTIAGO MAQUEDA, UNITED MEXICAN STATES—DEFENDING THE HUMAN LIFE IN LATIN AMERICA 44–45 (2012), available at <http://www.aul.org/wp-content/uploads/2012/07/mexico-la.pdf> (last visited Oct. 12, 2013); Código Penal Para el Estado de Morelos [CP] [Criminal Code for the State of Morelos] art. 119 (Mex.), available at <http://www.morelos.gob.mx/10consejeria/files/Codigos/CodigoPenal.pdf> (last visited Oct. 26, 2013) (note that miscarriages are not punishable even if the mother's negligence is "notorious" in Morelos).

33. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 137 (El Sal.); see CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 139 (Guat.); see CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 145 (Nicar.).

34. Decreto No. 216-03, 18 Junio 1970, CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art 49 (Chile).

35. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 137 (Guat.).

36. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] L. 1.160/97, art. 349 (Para.), available at http://www.oas.org/dil/esp/Codigo_Penal_Paraguay.pdf (last visited Sept. 25, 2013); CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] L. 3.440/08, art. 109 (3) (Para.), available at <http://www.hsph.harvard.edu/population/domesticviolence/paraguay.penalcode.08.doc> (last visited Sept. 25, 2013); TOAPA § 8(1) (Dominica).

37. Criminal Code § 250(2) (Gren.), available at <http://cyber.law.harvard.edu/population/abortion/Grenada.abo.htm> (last visited Oct. 12, 2013).

38. Criminal Code § 250(1) (Gren.).

C. Forced Abortion

The majority of Latin American and Caribbean criminal statutes refer to forced abortion as “aborto sin consentimiento de la mujer,” meaning an abortion caused by a third party without the mother’s consent, e.g., in Ecuador, Peru, and Uruguay.³⁹ In some countries like Brazil, Ecuador, El Salvador, and Paraguay, forced abortion is defined as one where the mother’s consent is absent, and where fraud, grave threats, or violence have been used against her.⁴⁰ In Latin America and the Caribbean, forced abortion has been punishable by imprisonment before and after the adoption of the American Convention, a clear indicator that it may be considered a human rights violation under that treaty. Chile categorizes forced abortion as a “crime against humanity” and imposes severe penalties that compare to those for genocide or war crimes.⁴¹

In addition to the standard criminal penalties for abortion, aggravated penalties may apply to parties that caused or participated in a forced abortion.⁴² Such laws exist in Bolivia, Guatemala, Mexico, and Nicaragua.⁴³ In Argentina, Brazil, Colombia, Costa Rica, Suriname, and Venezuela they are even more severe.⁴⁴ Furthermore, some criminal codes, such as the Guatemalan, Nicaraguan, and Mexican codes mandate additional penalties for an abortion that is the result of fraud, threats, or

39. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 441 (Ecuador); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 116 (Peru); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 325 (Uru.).

40. CÓDIGO PENAL [C.P.] [CRIMINAL CODE] arts. 126, 128 (Braz.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 441 (Ecuador); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 134 (El Sal.); CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 349 (Para.).

41. Law No. 20.357, Junio 26, 2009, Tipifica Crímenes de Lesa Humanidad y Genocidio y Crímenes y Delitos de Guerra, art. 5(4) (Chile), available at <http://www.leychile.cl/Navegar?idLey=20357> (last visited Sept. 25, 2013).

42. See CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] arts. 263–64 (Bol.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 135 (Guat.); Código Penal Federal [CPF] [Federal Criminal Code] art. 330, Diario Oficial de la Federación [DO], 14 de Agosto de 1931 (Mex.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 144 (Nicar.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 135 (Guat.); See CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 145 (Nicar.); Código Penal Federal [CPF] [Federal Criminal Code] art. 330, Diario Oficial de la Federación [DO], 14 de Agosto de 1931 (Mex.).

43. See CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] arts. 263–64 (Bol.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 135 (Guat.); Código Penal Federal [CPF] [Federal Criminal Code] art. 330, Diario Oficial de la Federación [DO], 14 de Agosto de 1931 (Mex.); see CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 144 (Nicar.).

44. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 85 (Arg.); CÓDIGO PENAL [C.P.] [CRIMINAL CODE] arts. 125, 126 (Braz.); L. 599, julio 24, 2000, 44097 DIARIO OFICIAL [D.O.], art. 125–26 (Colom.), available at http://www.oas.org/dil/esp/Codigo_Penal_Colombia.pdf (last visited Sept. 25, 2013); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 118 (1) (Costa Rica); see SURIN. PENAL CODE, art. 356 (Surin.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 434 (Venez.).

violence to the mother.⁴⁵ Nicaraguan law establishes aggravated professional sanctions for physicians who engage in forced abortions, such as suspension of professional authorization to practice medicine or the ability to provide any health care services for up to ten years.⁴⁶

Criminal laws of Panama and Venezuela also provide for aggravated penalties for husbands or co-habitants.⁴⁷ Panama, Paraguay, Peru, Suriname, and Venezuela have additional punishments when a forced abortion results in the mother's death.⁴⁸ Moreover, Ecuador's criminal code provides for aggravated penalties for perpetrators of sexual assault or human trafficking where a victim becomes pregnant as a result of the crime and subsequently aborts her child.⁴⁹

D. Fetal Homicide

Fetal homicide or "aborto preterintencional" and "aborto culposo" has been regarded as a crime in the majority of Latin American and Caribbean countries after adoption of the ACHR.⁵⁰ The crime is usually defined as a miscarriage resulting from acts of violence against a pregnant woman, e.g., in Bolivia.⁵¹ Imprisonment usually applies only when the perpetrator is aware of the woman's pregnancy or her state of pregnancy is noticeable, as in Argentina, Bolivia, Chile, Guatemala, Honduras, and Peru.⁵² Other countries, however, punish fetal homicide even in cases where a woman's state of pregnancy is unknown, but only when culpability, negligence, or imprudence exists, which is a requirement in Bolivia, Colombia, Ecuador,

45. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 135 (Guat.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 144 (Nicar.); Código Penal Federal [CPF] [Federal Criminal Code] art. 330, Diario Oficial de la Federación [DO], 14 de Agosto de 1931 (Mex.).

46. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 144 (Nicar.).

47. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 143 (Pan.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 434 (Venez.).

48. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 143 (Pan.); CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 349 (Para.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 116 (Peru); SURIN. PENAL CODE, arts. 309(1), 355 (Surin.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 434 (Venez.).

49. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 30-A(5) (Ecuador).

50. See RH Reality Check, *The Politics of Abortion in Latin America*, MY.FIREDOGLAKE.COM (July 18, 2012), <http://my.firedoglake.com/rhrealitycheck/2013/07/18/the-politics-of-abortion-in-latin-america/> (last visited Oct. 10, 2013).

51. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 267 (Bol.).

52. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 87 (Arg.); CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 268 (Bol.); CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] arts. 342-43 (Chile); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 139 (Guat.); CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 132 (Hond.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 118 (Peru).

El Salvador, and Nicaragua.⁵³ The criminal codes of some states also include aggravated penalties for a husband or unmarried partner who causes a miscarriage through acts of violence against his pregnant wife or partner, e.g., Panama, Paraguay, Uruguay, and Venezuela.⁵⁴

In addition to imprisonment sanctions, some countries, like Bolivia, establish community service penalties.⁵⁵ Others, like Costa Rica and Peru, explicitly mandate fines or civil sanctions for fetal homicide.⁵⁶ Some criminal codes, such as Nicaragua's, apply professional sanctions for medical malpractice cases resulting in abortion, which is treated as fetal homicide for statutory purposes.⁵⁷ Moreover, an act of violence against a pregnant woman that ultimately results in an abortion can receive an aggravated penalty in domestic violence trials in Bolivia and Costa Rica.⁵⁸

In addition, Dominica's Offences against the Person Act prohibits the execution of pregnant women,⁵⁹ which would be akin to a state-sponsored fetal homicide. "[W]here a woman convicted of an offence punishable with death is found, in accordance with the provisions of the Act, to be pregnant, the sentence to be passed on her shall be a sentence of imprisonment for life instead of sentence of death."⁶⁰ Jamaica's Offences against the Person Act

53. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 268 (Bol.); L. 599, julio 24, 2000, 44097 DIARIO OFICIAL [D.O.], arts. 125–26 (Colom.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 442 (Ecuador); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 137 (El Sal.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 145 (Nicar.).

54. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 143 (Pan.); CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 349 (Para.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 327 (Uru.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 434 (Venez.).

55. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 268 (Bol.).

56. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 122 (Costa Rica); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 118 (Peru).

57. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 145 (Nicar.).

58. Ley No. 1.674, Ley Contra La Violencia en La Familia o Domestica, art. 10 (Bol.), available at <http://www.unhcr.org/refworld/category,LEGAL,,,BOL,3db922817,0.html> (last visited Sept. 25, 2013); Ley No. 8589, Penalizacion de La Violencia Contra Las Mujeres, art. 8(c) (Costa Rica), available at http://www.oas.org/dil/esp/Ley_Penalizacion_violencia_mujeres_Costa_Rica.pdf (last visited Sept. 25, 2013).

59. La pena de muerte en el sistema interamericano de derechos humanos: De restricciones a abolición [The Death Penalty in the Inter-American System of Human Rights: From Restrictions to Abolition], Inter-Am. Comm'n H.R., OEA/Ser.L/V/II, Doc. 68 at 37 (2011), available at <http://www.oas.org/es/cidh/docs/pdfs/penademuerte.pdf> (last visited Sept. 25, 2013) [hereinafter The Death Penalty in the Inter-American System of Human Rights].

60. Convention on the Rights of the Child, Committee on the Rights of the Child: Consideration of Reports Submitted by States Parties Under Article 44 of the Convention: Initial Reports of States Parties Due in 1993: Dominica, paras. 95–98, chap. 10:31, art. 3(1)(c), U.N. Doc.

contains a similar provision.⁶¹ A state report to the Convention on the Rights of the Child (CRC) Committee expressed that the intention here was to preserve the life of the unborn child.⁶²

E. Fetal Injury

Many Latin American and Caribbean countries now typify fetal injury as a crime for which victims and their family members may be entitled to compensation, as illustrated below; imprisonment sanctions may apply. Provisions on fetal injury are usually found in newer criminal statutes, adopted subsequent to the ratification of the ACHR: the Peruvian criminal code, for instance, was amended in 2002 to include fetal injury.⁶³

The crime of fetal injury is usually defined as injuries perpetrated on a fetus, resulting in harmful consequences to his health or development, either as a result of violent acts against a pregnant woman or medical malpractice, e.g., Colombia's criminal statutory definition.⁶⁴ Nicaragua and El Salvador define fetal injury more narrowly as any act causing bodily harm that gravely affects fetal development or provokes serious or permanent physical or mental injury in an unborn child.⁶⁵ Penalties consist of imprisonment, and oftentimes, professional sanctions for physicians or health professionals, e.g., in Colombia and Nicaragua.⁶⁶ El Salvador punishes fetal injury with additional civil fines.⁶⁷

Further, the laws of several Latin American and Caribbean countries protect the unborn child's personal integrity by prohibiting prenatal paternity testing, embryonic research, and cloning or genetic modification. For instance, Ecuador's Code of Childhood and Adolescence orders that no paternity deoxyribonucleic acid (DNA) tests be performed on an unborn child, perhaps as a precautionary measure to avoid injury or other health

CRC/C/8/Add.48 (Oct. 15, 2003), available at <http://tb.ohchr.org/default.aspx?Symbol=CRC/C/8/Add.48> (last visited Oct. 13, 2013).

61. The Death Penalty in the Inter-American System of Human Rights, *supra* note 61.

62. United Nations Human Rights Convention on the Rights of the Child, Sept. 2, 1990, available at <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CRC.aspx> (last visited Oct. 13, 2013).

63. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 124-A (Peru).

64. L. 599, julio 24, 2000, 44097 DIARIO OFICIAL [D.O.], arts. 125–26 (Colom.).

65. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 148 (Nicar.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] arts. 138–39 (El Sal.).

66. L. 599, julio 24, 2000, 44097 DIARIO OFICIAL [D.O.], arts. 125–26 (Colom.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] arts. 148–49 (Nicar.).

67. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] arts. 138–39 (El Sal.).

risks for the fetus.⁶⁸ Similarly, the Mexican state of Guanajuato specifically prohibits paternity actions for unborn children, possibly for the same reason.⁶⁹ Peru's Code of Children and Adolescents protects the unborn child's life from embryonic research or genetic modification that may be contrary to its integrity and development.⁷⁰ Ecuador's Constitution and the criminal codes of Panama and Guatemala contain similar provisions.⁷¹ Chile's Human Genome Act prohibits human cloning, whether reproductive or therapeutic, embryonic stem cell research, and any research that involves the "destruction, death, severe or permanent injury in a human being."⁷² El Salvador's Act on Comprehensive Protection of Children and Adolescents prohibits genetic or medical research that may place the human embryo's "life, physical integrity or dignity" at risk, as well as ethnic, cultural, or social practices that may have a similar effect, and includes a mandatory reporting requirement.⁷³ Fines may apply for fetal injury resulting from genetic modification.⁷⁴

F. Elective Abortion

1. Criminal Sanctions for Mothers and Abortionists

Elective abortion has been generally regarded as a criminal offence in every Latin American and Caribbean criminal code—even since the time of

68. Código de La Niñez y Adolescencia, art. 131(2) & (6) (Ecuador), *available at* http://www.law.yale.edu/rcw/rcw/jurisdictions/ams/ecuador/Ecuador_Code.htm (last visited Sept. 25, 2013).

69. Código Civil Del Estado De Guanajuato, art. 363, 30 de Junio de 2008 (Mex.), *available at* <http://www.ordenjuridico.gob.mx/estatal.php?liberado=si&edo=11> (last visited Oct. 3, 2013).

70. Código de los Niños y Adolescentes, art. 1 (Peru), *available at* http://www.oas.org/dil/esp/Codigo_de_la_Ninez_y_la_Adolescencia_Peru.pdf (last visited Oct. 3, 2013).

71. CONSTITUCIÓN DE LA REPUBLICA DE ECUADOR, ch. 6, art. 66, 2008, *available at* <http://www.asambleanacional.gov.ec/documentos/Constitucion-2008.pdf> (last visited Sept. 25, 2013); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 145 (Pan.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 225(c) (Guat.).

72. Law No. 20.120, Sobre La Investigacion Cientifica en el ser Humano, su Genoma, y Prohibe La Clonacion Humana, arts. 5, 6, 10(2) & 17 (Chile), *available at* <http://www.conicyt.cl/fonis/files/2013/03/Ley-20.120-sobre-Investigaci%C3%B3n-en-seres-Humanos-Genoma-y-Clonaci%C3%B3n-Humana.pdf> (last visited Oct. 3, 2013).

73. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 141 (El Sal.).

74. American Declaration of the Rights and Duties of Man, May 2, 1948, OAS Res. by the Ninth International Conference of American States, XXX/Ser.L/V/I.4, rev. 13, *available at* <http://www.cidh.oas.org/Basicos/English/Basic2.american%20Declaration.htm> (last visited Oct. 3, 2013).

adoption of the American Declaration on the Rights and Duties of Man,⁷⁵ which preceded the American Convention—and continues to be regarded as a crime in modern statutes, one that entails criminal/civil penalties and professional sanctions, as will be explained in the following paragraphs. The fact that elective abortion continues to be generally regarded as a criminal offense constitutes reliable evidence that Latin American and Caribbean states have interpreted the ACHR to prohibit at least most instances of elective abortion.

Elective abortion, i.e., the induced or procured abortion of an unborn child upon the mother's request or otherwise involving her consent, is called "aborto inducido" (induced abortion), "aborto consentido" (consensual abortion), or "aborto con consentimiento de la mujer" (abortion involving a woman's consent) in Latin American and Caribbean criminal statutes. Mothers who intentionally abort their own children are, in general, criminally liable regardless of whether they induced their own abortion or had the abortion performed by a third party.⁷⁶

Criminal penalties generally consist of imprisonment and are relatively light. Criminal statutes of most Latin American and Caribbean countries impose six months to three years imprisonment for women, e.g., in Bolivia, Brazil, Colombia, Costa Rica, Panama, and Suriname.⁷⁷ Criminal codes of Argentina, Chile, and Trinidad and Tobago establish similar imprisonment penalties of up to four years.⁷⁸ Penalties range from a maximum of five to nine years in the Dominican Republic, El Salvador, Haiti, and Honduras, and a maximum of ten years in Grenada.⁷⁹

75. See generally Ligia M. De Jesús, *Revisiting Baby Boy v. United States: Why the IACHR Resolution did not Effectively Undermine the Inter-American System on Human Rights' Protection of the Right to Life from Conception*, 23 FLA. J. INT'L L. 221, 221–76 (2011) (describing criminal sanctions for elective abortion in Latin American and Caribbean criminal statutes in 1946).

76. See CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 128 (Hond.).

77. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 263(2) (Bol.); CÓDIGO PENAL [C.P.] [CRIMINAL CODE] art. 124 (Braz.); L. 599, julio 24, 2000, 44097 DIARIO OFICIAL [D.O.], arts. 125–26 (Colom.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 119 (Costa Rica); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 141 (Pan.); SURIN. PENAL CODE, art. 355 (Surin.).

78. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 88 (Arg.); CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 344 (Chile); TOAPA §56 (Trin & Tobago).

79. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] arts. 21–22 (Dom. Rep.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 133 (El Sal.); Code Pénal Haïtien [CODE PÉNAL [C. PÉN]] art. 262 (Haiti), available at http://www.oas.org/juridico/mla/fr/hti/fr_hti_penal.html (last visited Oct. 3, 2013); CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] (Hond.); CRIMINAL CODE § 234 (Gren.); Conventions of the Right of the Child, Consideration of Reports Submitted by States Parties Under Articles 44 of the Convention, Gren., ¶ 50, U.N. Doc. CRC/C/3/ADdd.55 (Nov. 28, 1997), http://tb.ohchr.org/default.aspx?Symbol=_CRC/%20C/3/Add.55 (last visited Oct. 3, 2013).

The most severe penalties in the region are imposed by the Jamaican Offences against the Person Act of 1864, which is technically still valid today and punishes women who abort their children with life imprisonment and hard labor.⁸⁰ There is no evidence, however, that this provision is currently enforced. Likewise, Dominica punishes the crime of “child destruction,” i.e., abortions over twenty-eight weeks, which the Offenses against the Person Act identifies as the point of viability, with life imprisonment—the equivalent of infanticide or homicide in terms of punishment.⁸¹ Abortions under twenty-eight weeks of pregnancy are punishable with a penalty of ten years imprisonment.

On the other hand, some states establish significantly lighter sentences such as up to nine months in Uruguay, where the criminal code only applies beyond the first trimester, and up to two years in Nicaragua, Paraguay, Venezuela, and Peru, which also mandate community service.⁸² Imprisonment punishments are ordinarily equal for the mother who aborted her child and the individual who performed the abortion, in Argentina, Bolivia, Colombia, Grenada, Dominican Republic, El Salvador, Guatemala, and Haiti.⁸³ However, sanctions are generally more severe for abortionists in Ecuador, Nicaragua, Panama, Paraguay, Peru, Venezuela, and Uruguay,⁸⁴ but they are more severe for women in the criminal statutes of Chile⁸⁵ and Jamaica.⁸⁶

Individuals who perform elective abortions, regardless of their methods, are generally punished with imprisonment. Sentences range from a maximum of two to twelve years in different countries, e.g., up to two years in Dominica, Trinidad and Tobago, and Uruguay; up to thirty months

80. TOAPA § 72 (Jam.).

81. TOAPA §§ 8, 56 (Dominica).

82. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 325 (Uru.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 143 (Nicar.); CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] L. 3.440/08, art. 109(3) (Para.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 432 (Venez.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 114 (Peru).

83. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 88 (Arg.); CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 263 (Bol.); L. 599, julio 24, 2000, 44097 DIARIO OFICIAL [D.O.], art. 125–26 (Colom.); CRIMINAL CODE § 247(1) (Gren.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 317 (Dom. Rep.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 133 (El Sal.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 135 (Guat.); CODE PÉNAL [C. PÉN] art. 262 (Haiti).

84. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] arts. 443–44 (Ecuador); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] L. 641, ch. 2 (Nicar.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] arts. 141–42 (Pan.); CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] L. 3.440/08, art. 109(3) (Para.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 114 (Peru); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 325 (Uru.).

85. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] arts. 342–44 (Chile).

86. TOAPA §§ 72, 73 (Jam.).

in Venezuela; up to three years in Bolivia, Costa Rica, Jamaica, and Nicaragua; up to four years in Argentina, Peru, and Suriname; up to five years in Dominican Republic, Ecuador, and Paraguay; up to six years in Panama; up to eight years in Guatemala and Chile; and twelve years in El Salvador.⁸⁷ Parole requirements and civil fines may also apply in the Dominican Republic.⁸⁸

Healthcare professionals who perform abortions may be subject to aggravated jail penalties in most Latin American and Caribbean states. Aggravated prison sentences for performing or facilitating abortions may apply to any person who practices the healing arts,⁸⁹ including, in most countries, physicians,⁹⁰ surgeons,⁹¹ midwives,⁹² nurses,⁹³ pharmacists,⁹⁴ other healthcare personnel,⁹⁵ medical students, residents or interns,⁹⁶

87. TOAPA § 57 (Dominica); TOAPA § 57 (Trin. & Tobago); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 325 (Uru.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 433 (Venez.); CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 267 (Bol.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 118(2) (Costa Rica); TOAPA § 72 (Jam.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 143 (Nicar.); CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 88 (Arg.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 115 (Peru); SURIN. PENAL CODE, art. 357 (Surin.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 317 (Dom. Rep.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 443 (Ecuador); CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] L. 3.440/08 art. 109(3) (Para.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 142 (Pan.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 135 (Guat.); CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 342 (Chile); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 135 (El Sal.).

88. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 317 (Dom. Rep.).

89. See e.g., CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 352 (Para.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 435 (Venez.).

90. See e.g., CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 88 (Arg.); see CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 342–45 (Chile); CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 349 (Para.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 18, 317 (Dom. Rep.); CODE PÉNAL [C. PÉN] art. 262 (Haiti); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 446 (Ecuador); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 140 (Guat.); SURIN. PENAL CODE, arts. 309(2), 358 (Surin.).

91. See e.g., CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 86 (Arg.); CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 349 (Para.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] arts. 18, 317 (Dom. Rep.).

92. See e.g., CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 86 (Arg.); CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 349 (Para.); SURIN. PENAL CODE, arts. 309(2), 358 (Surin.).

93. See e.g., CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 18, 317 (Dom. Rep.).

94. See e.g., CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 86 (Arg.); CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 349 (Para.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 18, 317 (Dom. Rep.); CODE PÉNAL [C. PÉN] art. 262 (Haiti); SURIN. PENAL CODE, art. 309(2), 358 (Surin.).

95. See e.g., CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 18, 317 (Dom. Rep.); CODE PÉNAL [C. PÉN] CODE art. 262 (Haiti); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 140 (Guat.).

96. See e.g., CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 349 (Para.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 140 (Guat.).

assistants to a health professional,⁹⁷ and even drug manufacturers of abortifacients or salespersons.⁹⁸ Individuals who routinely perform abortions may receive additional jail sentences in Bolivia and Suriname.⁹⁹ The criminal laws of Jamaica and Haiti also provide for hard labor sanctions.¹⁰⁰

Courts may also apply civil fines and professional sanctions to individuals who perform elective abortions in many Latin American and Caribbean states. For instance, in Honduras, civil fines may apply for physicians, medical students, paramedics, nurses or midwives who engage in induced abortions.¹⁰¹ Costa Rica and Suriname also impose civil fines on those who perform abortions and those who advertise or sell abortifacient drugs, substances, instruments or procedures.¹⁰² Professional sanctions, including temporary suspension from professional practice, may apply to healthcare professionals, non-professional midwives, or pharmacists who “abuse their science or knowledge”¹⁰³ by performing or assisting in abortions in Argentina, Brazil, El Salvador, Guatemala, Mexico, Nicaragua, Peru, Suriname, and Venezuela.¹⁰⁴

In addition, some countries’ bilateral treaties include abortion as a crime that may warrant the extradition of perpetrators. For example, Ecuador has included abortion in several extradition treaties with other countries, including the United States, France, Bolivia, Peru, Colombia, and Venezuela under which abortionists, or mothers who get abortions abroad for the purposes of jurisdiction evasion, could be prosecuted.¹⁰⁵ Some

97. See e.g., CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 349 (Para.).

98. *Id.*

99. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 269 (Bol.); SURIN. PENAL CODE, art. 309(2) (Surin.).

100. TOAPA § 73 (Jam.); CODE PÉNAL [C. PÉN] art. 262 (Haiti).

101. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 127 (Hond.).

102. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 381(4) (Costa Rica); SURIN. PENAL CODE, art. 309(1) (Surin.).

103. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 86 (Arg.).

104. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] arts. 85, 86 (Arg.); CÓDIGO PENAL [C.P.] [CRIMINAL CODE] arts. 47(1), 56, 126 (Braz.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 135 (El Sal.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 140 (Guat.); Código Penal Federal [CPF] [Federal Criminal Code] art. 331, Diario Oficial de la Federación [DO], 14 de Agosto de 1931 (Mex.); see CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 143 (Nicar.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 117 (Peru); SURIN PENAL CODE, art. 309(3) (Surin.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 135 (Venez.).

105. Convention on the Right of Child, Consideration of Reports Submitted by States Parties Under Article 44 of the Convention, Trinidad & Tobago ¶ 490 at 139 U.N. Doc. CRC/C/83/Add.12

jurisdictions also establish criminal penalties for anyone who directly or indirectly cooperates with elective abortions, such as by counseling a woman to get an abortion, assisting her in obtaining an abortion, or paying for it directly. For instance, the Dominican Republic's criminal code provides for six months to two years imprisonment for any person who facilitates communication between an abortionist and a pregnant woman if the abortion actually takes place.¹⁰⁶ El Salvador similarly prohibits advising a pregnant woman to get an abortion, paying for a woman's abortion, or otherwise assisting her in getting the abortion—all of which can lead to jail sanctions.¹⁰⁷ Uruguay's criminal code also establishes jail penalties for those who participate directly or indirectly in an illegal induced abortion, that is, one that does not fit into the exceptions provided by law.¹⁰⁸

2. Aggravating and Mitigating Factors

Virtually all Latin American and Caribbean jurisdictions provide for aggravated penalties for abortionists when the procedure results in a woman's death or severe injury. According to Brazilian law, sentences are increased by one third if the mother is severely injured and duplicated if she dies as a result of the abortion.¹⁰⁹ Argentina, Bolivia, Costa Rica, Ecuador, Guatemala, Paraguay, Peru, Uruguay, and Venezuela contemplate similar criminal sanctions.¹¹⁰

The most common mitigating—not exculpatory—factor in the criminal laws of several Latin American and Caribbean countries is *honoris causa* motivation, that is, when a woman aborted or was assisted in aborting for the purpose of hiding her dishonor. This antiquated mitigating factor, based on the recognition of social stigma attached to unwed pregnancy in traditional societies, may still warrant a reduced sentence for mothers and abortionists in Ecuador, Uruguay, Bolivia, Chile, Costa Rica, and

(July 29, 2003), available at <http://tb.ohchr.org/default.aspx?Symbol=CRC/C/83/Add.12> (last visited Oct. 3, 2013).

106. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 317 (Dom. Rep.).

107. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 136 (El Sal.).

108. See CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 325 (Uru.).

109. CÓDIGO PENAL [C.P.] [CRIMINAL CODE] art. 127 (Braz.).

110. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 85 (Arg.); CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 264 (Bol.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 118(2) (Costa Rica); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 445 (Ecuador); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 136 (Guat.); CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 349 (Para.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 115 (Peru); see CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 326 (Uru.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 433 (Venez.).

Venezuela.¹¹¹ Judges are given discretion to waive all criminal responsibility for *honoris causa* motivation on a case-by-case basis in Guatemala¹¹² and in Uruguay, where the criminal code applies to cases beyond the first trimester.¹¹³

Perpetrators of incest, however, may not invoke this mitigating factor when they coerced their victim to abort in Uruguay.¹¹⁴ The Mexican Federal Criminal Code allows for a similar mitigating factor, namely a reduced sentence if the woman who aborted had a “good reputation;” her pregnancy was the product of an “illegitimate” relationship; and her state of pregnancy was unknown to others.¹¹⁵ In contrast, the new Honduran Criminal Code eliminated this factor during the 1996 reform.¹¹⁶ It was also eliminated as a mitigating factor in Nicaragua.¹¹⁷

A few Latin American and Caribbean jurisdictions also establish other circumstances, such as rape, physical or mental health condition of the mother, the unborn child’s disability, and parental poverty as mitigating factors. Rape or error in artificial insemination can be a mitigating factor in Peru, but a criminal police investigation is required in both instances.¹¹⁸ A mother’s grave or serious health condition can be a mitigating factor in Uruguay after the first trimester.¹¹⁹ In Guatemala, a mother’s pregnancy-related psychological disorder may decrease her sentence for induced abortion.¹²⁰ In Costa Rica, an abortion under six months gestation may lead to mitigated penalties.¹²¹ The Peruvian criminal code establishes mitigated penalties for an abortion where the perpetrator can prove a likelihood that a child would be born with serious physical or mental disabilities, but a

111. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 444 (Ecuador); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 328(1) (Uru.); CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 265 (Bol.); CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 344 (Chile); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 120 (Costa Rica); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 433 (Venez.).

112. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art 93(4) (Guat.).

113. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 328(1) (Uru.).

114. *Id.*

115. Código Penal Federal [CPF] [Federal Criminal Code] art. 332, Diario Oficial de la Federación [DO], 14 de Agosto de 1931 (Mex.).

116. See Decreto No. 144-83, 26 Sept. 1983, CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 129 (Hond.), available at http://www.oas.org/juridico/MLA/sp/hnd/sp_hnd-int-text-cp.pdf (last visited Oct. 13, 2013).

117. See CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 163 (Nicar.).

118. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 120 (Peru).

119. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 328(3) (Uru.).

120. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 134 (Guat.).

121. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 119 (Costa Rica).

medical diagnosis is required.¹²² Economic distress, or “*angustia económica*,” is a mitigating factor in Paraguay¹²³ and in Uruguay after the first trimester.¹²⁴

3. Attempted Abortion

Attempted abortion is non-punishable in most Latin American and Caribbean countries, with a few exceptions: In Argentina, Bolivia, Guatemala, and Haiti for example, criminal codes specifically state no penalty shall be imposed for attempted abortion.¹²⁵ On the other hand, the criminal statutes of Jamaica and Trinidad and Tobago impose criminal penalties for attempted abortion.¹²⁶ Paraguay punishes only the abortionist for attempted abortion, not the woman who seeks one.¹²⁷ Grenada punishes attempted forced abortion and attempted fetal homicide only.¹²⁸

4. Abortifacients

Generally, criminal codes in Latin America and the Caribbean prohibit abortions performed “by any method,”¹²⁹ specifically, many penalize pharmacists who facilitate abortions,¹³⁰ and some include specific provisions on abortions by abortifacient drugs or other substances. For instance, Dominica’s Offenses against the Person Act, like that of other Caribbean nations, prohibits giving a pregnant woman “any poison or other noxious thing” that would cause an abortion, and it establishes a penalty of two years imprisonment for individuals who violate this norm.¹³¹ Likewise,

122. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 120 (Peru).

123. See CARLOS AGUSTIN CACERES SARUBBI & CARMEN VIVIANA CHAVEZ DE TALAVERA, AMERICANS UNITED FOR LIFE, DEFENDING THE HUMAN RIGHT TO LIFE IN LATIN AMERICA 111 (2012), available at <http://www.aul.org/wp-content/uploads/2012/07/paraguay-la.pdf> (last visited Oct. 13, 2013).

124. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 328(4) (Uru.).

125. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 88 (Arg.); CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 263 (Bol.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 139 (Guat.); CODE PÉNAL [C. PÉN] art. 262 (Haiti).

126. TOAPA, § 72 (Jam.); TOAPA §§ 56, 57 (Trin. & Tobago).

127. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] L. 3.440/08, art. 109(3) (Para.).

128. CRIMINAL CODE § 247(1) (Gren.).

129. See e.g., CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 349 (Para.).

130. See e.g., CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 86 (Arg.); CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 349 (Para.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 18, 317 (Dom. Rep.); CODE PÉNAL [C. PÉN] art. 262 (Haiti); TOAPA § 57 (Trin. & Tobago).

131. TOAPA § 56 (Dominica); TOAPA § 57 (Trin. & Tobago).

the Dominican Republic prohibits the sale or use of any abortifacient substances.¹³² In addition, the highest courts of five Latin American countries, Argentina, Chile, Ecuador, Honduras, and Peru, have upheld bans on so-called emergency contraception due to its abortifacient effects, as described below. These prohibitions may reasonably indicate that the states in question have interpreted the Convention's protection of the right to life from conception as protecting the human embryo from fertilization onwards.

In *Portal de Belén–Asociación Civil sin Fines de Lucro v. Ministerio de Salud y Acción Social de la Nación*, the Argentinian Supreme Court revoked the Ministry of Health's authorization to produce, distribute, or sell an emergency contraception drug called Imediat due to its abortifacient effects and on the grounds that it violated the human embryo's right to life.¹³³ The Court declared that Argentina is under an international obligation, in virtue of its ratification of international treaties, including the ACHR, to protect human life from the moment of conception, holding that any method that prevents implantation of the embryo is considered to be abortifacient.¹³⁴

Both Chile's Supreme Court and its Constitutional Court rejected emergency contraception drugs as unconstitutional on two occasions.¹³⁵ First, in 2001, the Supreme Court reversed sanitary registration for Postinal, a drug that was determined to be an abortifacient and potentially in violation of the unborn's right to life under the ACHR, among others.¹³⁶ In 2008, the Constitutional Court banned the sale and distribution of the said "emergency contraception" in the country's public health facilities due to the drug's abortifacient effects by declaring the executive regulation unconstitutional, namely the "Normas Nacionales sobre Regulación de

132. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 317 (Dom. Rep.).

133. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 03/05/2002, "Portal de Belén–Asociación Civil sin Fines de Lucro c. Ministerio de Salud y Acción Social de la Nación s/amparo", [Fallos] (2001-D-(1-7)) (Arg.), available at <http://www.csjn.gov.ar/confal/ConsultaCompletaFallos.do?method=verDocumentos&id=516601> (last visited Oct. 13, 2013).

134. CSJN, 03/05/2002, "Asociación Civil sin Fines de Lucro," (2001-D-(4-7)).

135. See Corte Suprema de Justicia [C.S.J.] [Supreme Court], 30 de agosto 2001, "Philippi Izquierdo c. Laboratorio Chile S.A.," Rol de la causa: 2186-2001; Tribunal Constitucional [T.C.] [Constitutional Court], 18 abril 2008, Requerimiento de inconstitucionalidad deducido en contra de algunas disposiciones de las "Normas Nacionales sobre Regulación de la Fertilidad," aprobadas por el Decreto Supremo No. 48, de 2007, del Ministerio de Salud, Rol de la causa: 740-07 (Chile), available at http://www.tribunalconstitucional.cl/wp/descargar_expediente.php?id=34407 (the official website of the Constitutional Court; complete free access to its decisions) (last visited Oct. 13, 2013).

136. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 317 (Dom. Rep.).

Fertilidad” (National Norms on Fertility Regulation) on hormonal emergency contraception.¹³⁷

The Constitutional Court also held that persons under Chilean jurisdiction were entitled to life from conception, i.e., fertilization, and that when in doubt, judicial interpretation that favors the unborn’s right to life shall prevail over arguments that seek to obliterate that right.¹³⁸ The Court held the verdict had *erga omnes* effects; in other words, it was applicable to both individuals and governmental agencies.¹³⁹

Ecuador’s Constitutional Court also held an emergency contraception drug was unconstitutional by reversing sanitary registration and authorization for distribution of Postinor, given that its main component, Levonorgestrel, prevented implantation of the human embryo in the uterus.¹⁴⁰ This violated the right to life from conception, which is protected under Article 49 of the Ecuadorian Constitution.¹⁴¹ The Court also ordered a revision of similar drugs that had been previously registered by an agency of the Ministry of Health.¹⁴²

In 2009, Peru’s Constitutional Court banned the free distribution of the morning after pill as a national health policy in virtue of its national constitution and the ACHR,¹⁴³ to which Peru is a signatory.¹⁴⁴ It also ordered that laboratories that produced, sold, or distributed the drugs

137. Tribunal Constitucional [T.C.] [Constitutional Court], 18 de abril 2008, *Requerimiento de inconstitucionalidad deducido en contra de algunas disposiciones de las “Normas Nacionales sobre Regulación de la Fertilidad,”* aprobadas por el Decreto Supremo N° 48, de 2007, del Ministerio de Salud, Rol de la causa: 740-07 (Chile), *available at* http://www.tribunalconstitucional.cl/wp/descargar_expediente.php?id=34407 (last visited Sept. 25, 2013).

138. *Id.*

139. *Id.*

140. *Id.*

141. Tribunal Constitucional [T.C.] [Constitutional Court], 14 de junio 2006, “José Fernando Roser Rohde c. Instituto Nacional de Higiene y Medicina Tropical “Leopoldo Izquieta Pérez” y el Ministro de Salud S/ Acción de Amparo” Caso No. 0014-2005-RA (Ecuador), *available at* http://www.derechoecuador.com/index2.php?option=com_content&do_pdf=1&id=1994#anchor330581 (last visited Oct. 13, 2013).

142. *Id.*

143. American Convention on Human Rights, Nov. 21, 1969, O.A.S.T.S. No. 36, 1144 U.N.T.S. 123 (July 18, 1978); Jessica Moore, *Peru’s “right to life” for the zygote and ban on emergency contraception*, PAGE LINES PLATFORM (Mar. 25, 2010), <http://wordpress.sph.harvard.edu/hhropenforum/2010/03/25/perus-right-to-life-for-the-zygote-and-ban-on-emergency-contraception/> (last visited Oct. 13, 2013).

144. Tribunal Constitucional, [T.C.] [Constitutional Court], 16 de octubre 2009, ONG “Acción de Lucha Anticorrupción” Sentencia del Tribunal Constitucional, EXP. No. 02005-2009-PA/TC, para. 12 (Peru), *available at* <http://www.tc.gob.pe/jurisprudencia/2009/02005-2009-AA.htm> (the official website of the Constitutional Court; complete free access to its decisions) (last visited Oct. 13, 2013).

include on their labels that the product could inhibit the implantation of the embryo.¹⁴⁵

In 2011, the Constitutional Chamber of the Honduran Supreme Court gave a favorable consultative opinion on a bill prohibiting the use, distribution and commercialization of emergency contraception due to its abortifacient effects on the human embryo.¹⁴⁶ The Court ruled that the drug's potential to prevent implantation of the human embryo in the uterine lining would have an abortifacient effect, which would be incompatible with public policy granted in favor of the human embryo or zygote.¹⁴⁷ In 2009, the Ministry of Health had issued Executive Decree 2744, prohibiting emergency contraception along the same terms.¹⁴⁸

In addition, the Inter-American Commission on Human Rights has reported that emergency contraception is *de facto* unavailable in other countries like Costa Rica and Nicaragua, given a general understanding that the drug is illegal due to its abortifacient effects.¹⁴⁹ It is also *de facto* illegal in El Salvador, where the Children's Code indicates sexual and reproductive health services shall ensure and promote respect for human life from conception.¹⁵⁰

G. *Non-Punishable Abortions*

The following subsections illustrate that Latin American and Caribbean states contemplate limited exceptions to the rules regarding abortion as a criminal offense and waive criminal punishment for abortion or indirectly causing a miscarriage under limited circumstances, mostly

145. *Id.*

146. Corte Suprema de Justicia de la República de Honduras [CSJ] [Supreme Court of Justice of Honduras], Dictamen Decreto 54-2009, 21 de junio 2012 (Hond.), *available at* <http://proviadh.n.org/dictamen-de-la-pildora-del-dia-siguiente-pae/> (last visited Oct. 13, 2013).

147. *Id.*

148. Secretaría de Salud, Acuerdo No. 2744 (21 de octubre 2009) (Hond.), *available at* <http://www.poderjudicial.gob.hn/juris/Otros/Cr%C3%A9ase%20el%20Servicio%20Nacional%20Especializado%20de%20Inspecci%C3%B3n%20en%20todas%20las%20fronteras%20de%20la%20Rep%C3%BAblica%20de%20Honduras.pdf> (last visited Oct. 13, 2013).

149. *See* Acceso a la justicia de mujeres víctimas de violencia sexual en Mesoamérica [Access to Justice for Women Victims of Sexual Violence in Mesoamerica], Inter-Am. Comm'n H.R., OEA/Ser.L/V/II, Doc. 63 at ¶ 242 (2011), *available at* <http://www.oas.org/en/iachr/women/docs/pdf/WOMEN%20MESOAMERICA%20ENG.pdf> (last visited Oct. 14, 2013).

150. Decreto No. 839, 16 de Abril de 2009, Ley de Protección de la Niñez y Adolescencia [Law of Children and Adolescents] art. 19 (El. Sal.), *available at* <http://www.asamblea.gob.sv/eparlamento/indice-legislativo/buscador-de-documentos-legislativos/ley-de-proteccion-integral-de-la-ninez-y-adolescencia> (last visited Oct. 14, 2013).

when the mother is suffering from a life-threatening health condition.¹⁵¹ Other exceptions vary and their regulation is far from homogenous in the region. Less than half of all Latin American and Caribbean countries make criminal exceptions allowing the abortion of children conceived in sexual crimes such as rape and incest, generally requiring a criminal complaint and judicial authorization.¹⁵² Likewise, a minority of jurisdictions in the region allows induced abortion on the basis of health risks caused by pregnancy under certain circumstances, most of which only permit it if risk to the mother's health is "grave" or "serious" or if it cannot be avoided through any other means.¹⁵³ Even fewer states authorize eugenic abortion, i.e., the abortion of severely or terminally disabled children.¹⁵⁴

The existence of non-punishable abortions in some Latin American and Caribbean countries denotes that, although abortion is generally regarded as a crime, criminal punishment may be waived under certain circumstances. This does not imply that elective abortion is a constitutionally protected activity in these jurisdictions, or a constitutional right. Instances of non-punishable abortions are usually referred to as "supuestos de aborto no punible" (instances of non-punishable abortions) or "excusas absolutarias" (absolutory excuses) in some jurisdictions—situations where legislators recognize that a crime has been committed but waive criminal punishment for compassionate reasons.¹⁵⁵ Such situations are exceptions to legal norms on abortion, which continue to regard it as a crime in every Latin American and Caribbean jurisdiction.¹⁵⁶

As illustrated below, non-punishable abortions usually require judicial or medical authorization: They are not freely obtainable in every Latin American and Caribbean country. Non-punishable abortions do not require participation of public hospitals or state funding in the great majority of

151. See discussion *supra* Part II.F.1.

152. See discussion *supra* Part II.F.3.

153. See discussion *supra* Part II.F.2.

154. See discussion *supra* Part II.F.4.

155. See Javier Anzoátegui, *Muerte de una persona inocente*, 245 REVISTA JURIDICA LA LEY [L.L.] 1, 3 (2012) (analogy between non-punishable abortion and non-punishable crime of robbery or fraud between close relatives in Argentinian law).

156. See Richard Stith, *New Constitutional and Penal Theory in Spanish Abortion Law*, 35 AMER. J. COMP. L. 513-558 (1987) (Similarly, Spanish legal tradition speaks only of "excusing" abortion, under very limited circumstances, leaving the *figura legal* of abortion as a crime intact, although it may be excused and thus unpunished in select hardship circumstances, thus teaching that abortion even in those circumstances remains a legal wrong.). See also *Constitucionalización de las falacias. Antecedentes de una sentencia* 23-31, ed. Ilva Miriam Hoyos (Bogotá., Editorial Temis, S.A., 2005) (indicating that eventual exceptions for non-punishable abortions are compatible with criminal sanctions for abortion in general).

countries, but those few countries that do require some form of state cooperation allow for conscientious objection to perform them.¹⁵⁷ Therefore, the existence of criminal exceptions to abortion in some countries does not create de facto “abortion rights”;¹⁵⁸ the great majority of countries that allow exceptions fail to label abortion as a human right or to recognize the existence of a state duty to protect abortion-related activities.

1. “Life of the Mother” Exception

Over two-thirds of all Latin American and Caribbean countries waive punishment for abortion or indirectly causing a miscarriage where the mother is affected with a life-threatening condition,¹⁵⁹ which may indicate that some regional consensus, albeit no unanimity, exists on the validity of this exception under the ACHR. However, the State parties’ statutory definitions of abortion in this context vary and do not necessarily include intentional, voluntary abortion. As indicated below, some Latin America and Caribbean criminal codes have chosen to define the “life of the mother” exception as a life-saving medical intervention that indirectly provokes a miscarriage, where the purpose of terminating the pregnancy is to treat the pregnant woman, not to destroy the unborn child, who would be given neonatal care upon early delivery. Guatemala’s criminal code, for example, exempts physicians and mothers from criminal liability where a medical procedure indirectly causes fetal death but is solely intended to treat the mother’s life-threatening condition, requiring that “all scientific and technical alternatives” be considered.¹⁶⁰ Likewise, Dominica allows this exception when it can be proved that the act that caused the death of the

157. See Alejandro Freeland, *¡Vengo a ejercer mi derecho a abortar. Médico, proceda ya!* [Came to Exercise My Right to Have an Abortion. Doctor, Proceed Already!], TODO SOBRE LA CORTE.COM, <http://todosobrelacorte.com/2012/03/13/vengo-a-ejercer-mi-derecho-a-abortar-medico-proceda-ya/#more-5809> (last visited Oct. 14, 2013) (on distinction between a right to abortion and the criminal exception for abortion of children conceived in rape in Argentina).

158. By “abortion rights,” this paper alludes to a woman’s alleged human right to abort her child and an individual’s alleged human right to produce children by artificial reproduction, which would entail state obligations to facilitate and fund these activities and protect them as civil rights. See generally Emma Finney, *Shifting Towards a European Roe v. Wade: Should Judicial Activism Create an International Right to Abortion with A., B. And C. v. Ireland?*, 72 U. PITT. L. REV. 389 (2010) (illustrations of abortion rights advocacy); Chad M. Gerson, *Toward an International Standard of Abortion Rights: Two Obstacles*, 5 CHI. J. INT’L L. 753 (2005); Tatyana A. Margolin, *Abortion as a Human Right*, 29 WOMEN’S RTS L. REP. 77 (2008); Christina Zampas and Jaime M. Gher, *Abortion as a Human Right – International and Regional Standards*, 8 HUM. RTS. L. REV. 249 (2008).

159. See CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 165 (Nicar.) (eliminating exception in Nicaragua, where the old criminal code required the opinion of at least three physicians and patient’s consent).

160. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 139 (Guat.).

child was done “in good faith for the purpose only of preserving the life of the mother.”¹⁶¹ Paraguay also defines this exception as a situation involving a life-threatening condition of the mother where a medical procedure indirectly causes a miscarriage, but it was not intended to destroy the unborn child.¹⁶²

In any case, criminal statutes typically require that abortion under these circumstances be used only as a measure of last resort, and many require proof that there are no other means to save the mother’s life. For instance, Brazil’s criminal code calls this exception “aborto necessário,” allowing it only “if there is no other way to save the pregnant woman’s life,” and if the abortion is performed by a physician.¹⁶³ Peru, like Guatemala, designates the exception as “aborto terapéutico” (therapeutic abortion), and it requires that the abortion be the “only means” to save a pregnant woman’s life.¹⁶⁴ The criminal code of Venezuela contains similar language limiting the exception to life or death situations.¹⁶⁵ The criminal codes of Argentina, Bolivia, Costa Rica, and Ecuador contain broader language authorizing abortion if carried out to avoid “endangerment” to the life of the mother, rather than imminent death, but they add that the abortion shall be allowed only if the risk “cannot be avoided by any other means.”¹⁶⁶ Likewise, Uruguay’s criminal law requires “grave” risk to the woman’s life (beyond the first trimester) and requires that attempts be made to preserve the fetus’s life.¹⁶⁷

Generally, medical authorization or a formal recommendation by an ethics committee is required and, only in exceptional circumstances, judicial authorization. The Mexican Federal Criminal Code, which applies in federal jurisdiction only, e.g., maritime or military federal territory, and all Mexican states except for Guanajuato, Guerrero, and Querétaro, allow a “life of the mother” exception and require the favorable opinion of two medical doctors “where possible,” and if the delay would not pose a risk to

161. TOAPA § 8(1) (Dominica).

162. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 349 (Para.); CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] L. 3.440/08, art. 109(4) (Para.).

163. CÓDIGO PENAL [C.P.] [CRIMINAL CODE] art. 128 (Braz.).

164. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 119 (Peru).

165. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 435 (Venez.).

166. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 86(1) (Arg.); CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 266 (Bol.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 121 (Costa Rica); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 447(1) (Ecuador).

167. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 328(3) (Uru.); Ley No. 18.987, Interrupcion Voluntaria Del Embarazo [Law No. 18.987, Voluntary Interruption of Pregnancy] art. 6(A) (Uru.), available at <http://www.parlamento.gub.uy/leyes/ AccesoTextoLey.asp?Ley=18987&Anchor=> (last visited Oct. 13, 2013).

the mother's life.¹⁶⁸ Colombia requires a determination that carrying a pregnancy to term "represents a risk" to the life of the mother, as certified by one physician.¹⁶⁹ Similarly, the Barbados Medical Termination of Pregnancy Act requires the opinion of two physicians, acting in "good faith, that the continuance of the pregnancy would involve risk to the life of the pregnant woman."¹⁷⁰ Further, abortions after twenty weeks gestation may require the recommendation of three physicians and the determination that the abortion is "immediately necessary to save the life of the pregnant woman."¹⁷¹ Panama requires "grave" or serious medical circumstances that endanger the mother's life, to be determined by a multi-disciplinary commission, appointed by the Minister of Health, and allows physicians who conscientiously object to abortion to refuse to perform the procedure.¹⁷² The Bolivian criminal code requires judicial authorization.¹⁷³

2. "Health of the Mother" Exception

Less than half of all jurisdictions in the region allow abortion on the basis of health risks caused by pregnancy, which indicates no regional consensus exists so far on this exception. As in the "life of the mother" exception, the definition of "abortion" in this context varies and does not necessarily include the intentional destruction of an unborn child. At least one state defines abortion as indirectly causing the death of the unborn during the course of medical or surgical treatment on a pregnant woman; not as producing the intentional death of the unborn child.¹⁷⁴

Most of the countries that allow this exception only permit it if risk to the mother's health is "grave" or "serious" and if the risk cannot be avoided through any other means. For instance, in Peru, which designates this exception as "aborto terapéutico," requires that abortion be the "only way" to avoid "grave and permanent injury" to the mother's physical health.¹⁷⁵ The criminal codes of Argentina, Bolivia, Costa Rica, and Ecuador require proof that the risk to the mother's health cannot be avoided by any means

168. Código Penal Federal [CPF] [Federal Criminal Code], art. 334, Diario Oficial de la Federación [DO], 14 de Agosto de 1931 (Mex.); see TRUJILLO & MAQUEDA, *supra* note 34, at 44–46.

169. Corte Constitucional [C.C.] [Constitutional Court], Sala Plena, mayo 10, 2006, Sentencia C-355/2006, Gaceta de la Corte Constitucional [G.C.] (t. Tercero) (Colom.), available at <http://www.alcaldiabogota.gov.co/sisjur/normas/Normal.jsp?i=21540> (last visited Oct. 13, 2013).

170. Medical Termination of Pregnancy Act (Act No. 4 of 1983) § 4(1)(a) & (5) (Barb.).

171. *Id.* § 6.

172. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 144 (Pan.).

173. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 266 (Bol.).

174. CRIMINAL CODE § 250(2) (Gren.).

175. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 119 (Peru).

other than abortion.¹⁷⁶ Less than half of all the Mexican states allow for this exception, and those that do only allow it upon a serious or grave health condition.¹⁷⁷ The Barbados Medical Termination of Pregnancy Act requires a determination that the mother may suffer “grave permanent injury” to her physical or mental health for an abortion after the twenty week gestation period.¹⁷⁸ Uruguay’s criminal code requires the existence of “grave” health-related reasons beyond the first trimester and mandates that attempts be made to preserve the fetus’s life if possible without causing harm to the mother’s health.¹⁷⁹

Generally, a formal medical recommendation is required, and under limited circumstances, judicial authorization. For example, Colombia’s Constitutional Court decision established a requirement of certification by one physician.¹⁸⁰ The Barbados Medical Termination of Pregnancy Act requires a good faith opinion of one physician that the continuance of the pregnancy would involve risk to the health of the mother.¹⁸¹ Moreover, the Act instructs that the physician carrying out the risk assessment “must take into account the pregnant woman’s social and economic environment, whether actual or foreseeable,”¹⁸² meaning that other factors such as level of poverty could indirectly become justification for an abortion where health risks exist.¹⁸³ Under this exception, abortions after the twenty-week gestation period may require the recommendation of three physicians that the abortion is “immediately necessary . . . to prevent grave permanent injury to the physical and mental health of the woman.”¹⁸⁴ Lastly, Bolivia requires judicial authorization before any abortions are performed.¹⁸⁵

176. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 86(1) (Arg.); CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 266 (Bol.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 121 (Costa Rica); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 4417(1) (Ecuador).

177. TRUJILLO & MAQUEDA, *supra* note 34, at 45.

178. Medical Termination of Pregnancy Act (Act No. 4 of 1983) § 6 (Barb.).

179. Law No. 18.987 Voluntary Interruption of Pregnancy, art. 6(A).

180. Constitutional Court, mayo 10, 2006, Sentencia C-355/2006, G.C. (t. Tercero) (Colom.).

181. Medical Termination of Pregnancy Act (Act No. 4 of 1983) § 4(1)(a) (Barb.).

182. *Id.* § 4(3).

183. *See* TRUJILLO & MAQUEDA, *supra* note 34, at 44–46 (Poverty may be a lawful exception for abortion in the Mexican state of Yucatán.).

184. Medical Termination of Pregnancy Act (Act No. 4 of 1983) § 6 (Barb.).

185. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 266 (Bol.).

3. Abortion of Children Conceived by Rape and Incest

Less than half of all Latin American and Caribbean countries make exceptions for the abortion of children conceived during sexual crimes, which means no regional consensus exists, at least of yet, on this exception. Children who were conceived in the commission of sexual crimes such as rape and incest may be aborted under limited circumstances, and only in certain countries.¹⁸⁶

The criminal codes of Barbados and Bolivia exempt mothers and any party involved in the abortion of a child conceived in the commission of any sexual crime.¹⁸⁷ The codes of Brazil, Panama, and Uruguay specifically refer to “rape” only.¹⁸⁸ Judges in Costa Rica are given discretion to waive all criminal responsibility for this factor on a case-by-case basis only.¹⁸⁹ In addition, the Brazilian criminal code waives culpability for this factor but only as long as a physician performed the abortion.¹⁹⁰ Ecuador’s criminal law allows abortion of children conceived by rape of a mentally disabled woman only.¹⁹¹

In addition, the highest courts of Argentina and Colombia have recently created a new rape exception in their jurisdictions, as described below. The criminal code of Argentina formerly allowed abortions as the result of a rape of a mentally disabled or insane woman.¹⁹² This was a response to the eugenic abortion exception that was intended to prevent the birth of mentally disabled children.¹⁹³ In 2012, however, the Argentinian Supreme Court interpreted the criminal code to allow the abortion of children conceived by rape on any pregnant woman or child, regardless of

186. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 142 (1) (Pan.).

187. Medical Termination of Pregnancy Act (Act No. 4 of 1983) § 4(2) (Barb.); CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 266 (Bol.).

188. CÓDIGO PENAL [C.P.] [CRIMINAL CODE] art. 128 (Braz.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 142(1) (Pan.); Law No. 18.987, Voluntary Interruption of Pregnancy, art. 6(C) (Uru.).

189. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 93(5) (Costa Rica).

190. CÓDIGO PENAL [C.P.] [CRIMINAL CODE] art. 128 (Braz.).

191. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 447(2) (Ecuador).

192. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 86(2) (Arg.).

193. See MARÍA LAURA FARÁN BETRÁN, AMERICANS UNITED FOR LIFE, DEFENDING THE HUMAN RIGHT TO LIFE IN LATIN AMERICA: THE PROTECTION OF THE HUMAN RIGHT TO LIFE IN THE REPUBLIC OF ARGENTINA – THE GUARANTEE OF THE ENFORCEABILITY OF THE WHOLE SYSTEM OF HUMAN RIGHTS 139–40 (2012), available at <http://www.aul.org/contents-defending-the-human-right-to-life-in-latin-america/> (citing Senate commission report on abortion exceptions) (last visited Sept. 25, 2013).

their mental health.¹⁹⁴ It also held that judicial authorization should not be required; only a sworn affidavit by the woman is necessary stating she was a victim of sexual assault.¹⁹⁵ The Court recognized an individual right of conscientious objection to abortions, but suggested institutions may not have a right to object to performing abortions.¹⁹⁶

Even though the Argentinian Supreme Court has federal jurisdiction, its decisions do not generally have *erga omnes* effects, i.e., they only bind the parties to a particular dispute.¹⁹⁷ In this case, however, where the issue involved the Province of Chubut the court ordered that all Argentinian provinces issue their own protocols or regulations allowing for the abortion of children conceived in rape, and that both provincial and federal courts abstain from denying access to the said abortions—a mandate strongly criticized by Argentinian jurists and scholars.¹⁹⁸ As of May 2013, less than

194. See Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 13/03/2012 “F. A.L. /s medida autosatisfactiva” “Considerando 29[Fallos] (Arg.).

195. CRISTINA FERNÁNDEZ DE KIRCHNER ET AL., PAUTAS DE INTERVENCIÓN EN ABORTOS NO PUNIBLES, GUÍA TÉCNICA PARA LA ATENCIÓN INTEGRAL DE LOS ABORTOS NO PUNIBLES [INTERVENTION GUIDELINES IN ABORTIONS NOT PUNITIVE, TECHNICAL GUIDE FOR COMPREHENSIVE ATTENTION OF ABORTIONS NOT PUNISHABLE] 1, 7 (2010), available at <http://www.msal.gov.ar/saludsexual/pdf/Guia-tecnica-web.pdf> (last visited Oct. 13, 2013).

196. See Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 13/03/2012 “F. A.L. /s medida autosatisfactiva” “Considerando 29” [Fallos] (Arg.), <http://www.csjn.gov.ar/confal/ConsultaCompletaFallos.do?method=verDocumentos&id=13517> (last visited Oct. 13, 2013).

197. *Argentina: Resistencia a aplicar la despenalización del aborto en caso de violación* [Argentina: Resistance to Implementing the Decriminalization of Abortion in Case of Rape], ZENIT.ORG (April 18, 2012), <http://www.zenit.org/es/articles/argentina-resistencia-a-aplicar-la-despenalizacion-del-aborto-en-caso-de-violacion> (last visited Jan. 21, 2014) [hereinafter *Argentina: Resistance to Implementing the Decriminalization of Abortion in Case of Rape*] (Law Professor Jorge Scala on the non-binding effects of the Argentinian Supreme Court judgment); *Argentina: Juristas: fallo abortista de la Corte no aplica obligatoriamente* [Argentina: Lawyers: Court Abortion Ruling Does Not Necessarily Apply], VIDA HUMANA INTERNACIONAL (Mar. 19, 2012), <http://vidahumana.org/aborto/consecuencias/testimonios-de-mujeres/item/1707-argentina-juristas-fallo-abortista-de-la-corte-no-aplica-obligatoriamente> (last visited Jan. 21, 2014) (Argentinian scholars on lack of binding effects of judgment on provinces other than Chubut, *erga omnes* effects for *amparo* actions only); see also *Radio 10: El Puente* (Interview with Eugenio Raúl Zafaroni, Supreme Court Justice Mar. 14, 2012), <http://www.radio10.com.ar/> (last visited Jan. 21, 2014) (where Supreme Court Justice Eugenio Raúl Zafaroni states: “No es obligatoria nuestra jurisprudencia en el resto de los tribunales” [our jurisprudence is not binding on the rest of the courts] in regards to the F.A.L. decision).

198. See Piero A. Tozzi, Sebastián Marcilese et al., *El activismo judicial en Latinoamérica Análisis a raíz de la reciente jurisprudencia argentina proaborto* [Judicial Activism in Latin America: Analysis Following the Recent Argentinian Pro-abortion jurisprudence] 13 EL DERECHO [E.D.] 1, 1–7 (Mar. 5, 2013); *Argentina: Resistencia to Implementing the Decriminalization of Abortion in Case of Rape*, *supra* note 198; *Análisis del fallo de la Corte Suprema sobre abortos no punibles en argentina* [Analysis of the Supreme Court Ruling on Non-Punishable Abortions in Argentina], CENTRO DE

half of all provinces have passed regulations,¹⁹⁹ and some lower courts have refused to comply with the Supreme Court decision.²⁰⁰

Similarly, rape used to be the only mitigating factor in Colombia, where penalties could be lessened up to three-quarters of the full prison term established for abortions, and judges had discretion to waive criminal penalties under “extraordinary circumstances.”²⁰¹ In 2006, Colombia’s Constitutional Court derogated the criminal code provision on mitigating factors and turned it into a stipulation on exceptions to criminal abortion, adding an exception for the abortion of children conceived as a result of artificial insemination error.²⁰² In the judgment, the Court included a rape exception to the code on elective abortion, stating that abortion would not constitute a crime when pregnancy results from sexual assault, rape, or any non-consensual sexual act but only if it was properly denounced before authorities.²⁰³

Countries that allow this exception generally require a criminal complaint and judicial authorization. Bolivia’s code requires, at the very least, that the victim press the criminal charges and that the abortion be judicially authorized.²⁰⁴ Barbados law requires only a “written statement of a pregnant woman stating that she reasonably believes that her pregnancy was caused by an act of rape or incest.”²⁰⁵ The Colombian Constitutional Court decision also includes this requirement,²⁰⁶ unlike the Argentinian decision, under which only a sworn affidavit by the alleged victim is

BIOÉTICA PERSONA Y FAMILIA (2012), <http://centrodebioetica.org/2012/03/analisis-del-fallo-de-la-corte-suprema-sobre-abortos-no-punibles-en-argentina/> (last visited Jan. 21, 2014).

199. See Mariana Iglesias, *Aborto no punible: la mayoría de las provincias no cumple el fallo de la Corte* [Legal Abortion: Most Provinces Do Not Meet the Court’s Decision], CLARÍN (Mar. 13, 2013), http://www.clarin.com/sociedad/mayoria-provincias-cumple-fallo-Corte_0_881911861.html (last visited Oct. 12, 2013); Argentina: *Resistance to Implementing the Decriminalization of Abortion in Case of Rape*, *supra* note 198.

200. See *Argentine Court Blocks Abortion for Rape Victim*, FOX NEWS LATINO (Oct. 9, 2012), <http://latino.foxnews.com/latino/lifestyle/2012/10/09/argentine-court-blocks-abortion-for-rape-victim/> (last visited Oct. 12, 2013).

201. L. 599, julio 24, 2000, 44097 DIARIO OFICIAL [D.O.], arts. 125–26 (Colom.).

202. See Constitutional Court, mayo 10, 2006, Sentencia C-355/2006, G.C. (t. Tercero) (Colom.). A handful of Mexican states also contemplate a criminal law exception for abortions of children conceived as a result of artificial insemination error. See TRUJILLO & MAQUEDA, *supra* note 34, at 44–46 (citing Baja California Sur (§ 252), Chihuahua (§ 219), Colima (§ 190), Federal District (§ 148), Guerrero (§ 121), Morelos (§ 119), San Luis Potosí (§ 130), Tabasco (§ 136), and Veracruz (§ 154)). Chihuahua and Veracruz allow these abortions during the first trimester only.

203. Constitutional Court, mayo 10, 2006, Sentencia C-355/2006, G.C. (t. Tercero) (Colom.).

204. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 266 (Bol.).

205. Medical Termination of Pregnancy Act (Act No. 4 of 1983) § 4(2) (Barb.).

206. Constitutional Court, mayo 10, 2006, Sentencia C-355/2006, G.C. (t. Tercero) (Colom.).

necessary.²⁰⁷ Uruguay's abortion law requires a criminal complaint and allows the abortion only within the first fourteen weeks of pregnancy.²⁰⁸ Panama requires a criminal complaint also, corroborated in summary instruction with judicial authorization, and that such abortions are only to be performed within the first two months of pregnancy.²⁰⁹ In addition, the Panamanian criminal code also specifically recognizes the right of physicians, or other health care personnel, to refuse to perform such abortions for reasons of conscience, whether religious in nature or not.²¹⁰

The Federal Criminal Code of Mexico and the codes of several Mexican states include a rape exception.²¹¹ Criminal laws of certain states require that the pregnancy do not exceed seventy-five to ninety days for such abortions.²¹² Judicial authorization is required in Aguascalientes, Baja California, Baja California Sur, Guerrero, and Hidalgo.²¹³ Criminal charges and/or criminal investigations are required in Aguascalientes and Quintana Roo.²¹⁴

4. Eugenic Abortion

Only six states out of twenty-five states parties to the ACHR authorize eugenic abortion, or the abortion of severely or terminally disabled children, under limited circumstances, which indicates no regional consensus exists, as of yet, on this exception. A claim of a regional consensus for this exception is thus highly unlikely. Uruguay's abortion law allows for abortion of children who suffer from malformations that are

207. Corte Suprema de Justicia de la Nación [CSJN] [National Supreme Court of Justice], 13/03/2012 "F. A.L. /s medida autosatisfactiva" "Considerando 29[Fallos] (Arg.).

208. Law No. 18.987, Voluntary Interruption of Pregnancy, art. 6(C) (Uru.); See CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 328(2) (Uru.).

209. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 144 (Pan.).

210. *Id.*

211. Código Penal Federal [CPF] [Federal Criminal Code] art. 333, Diario Oficial de la Federación [DO], 14 de Agosto de 1931 (Mex.); see TRUJILLO & MAQUEDA, *supra* note 34, at 46 (citing Campeche (§ 298), Federal District (§ 148), Durango (§ 352), Guanajuato (§ 163), Jalisco (§ 229), Mexico (§ 251), Michoacán (§ 290), Morelos (§ 119), Nayarit (§ 338), Nuevo León (§ 331), Puebla (§ 343), Querétaro (§ 142), San Luis Potosí (§ 130), Sinaloa (§ 158), Sonora (§ 269), Tabasco (§ 136), Tamaulipas (§ 361), Tlaxcala (§ 279), Yucatán (§ 393), Zacatecas (§ 312)).

212. TRUJILLO & MAQUEDA, *supra* note 34, at 46 (citing Hidalgo (§ 158), Coahuila (§ 361), Colima (§ 190), Chiapas (§ 136 bis), Chihuahua (§ 219), Oaxaca (§ 316), and Quintana Roo (§ 97)).

213. *Id.* (citing Aguascalientes (§ 9), Baja California (§ 136), Baja California Sur (§ 252), Guerrero (§ 121), and Hidalgo (§ 158)).

214. *Id.* (citing Aguascalientes (§ 9) and Quintana Roo (§ 97)).

“incompatible with extrauterine life.”²¹⁵ The Barbados Medical Termination of Pregnancy Act authorizes first trimester abortions of children who may “suffer such physical or mental abnormalities as to be seriously handicapped.”²¹⁶ Certainty of the said disability is not required, but only that a medical practitioner, in good faith, finds a “substantial risk” thereof.²¹⁷ This exception in Barbados, however, only allows for abortion of fetuses of not more than twelve weeks gestation; the statute also provides that any person may object to participate in an abortion to which he or she has a conscientious objection.²¹⁸

The Constitutional Courts of Colombia and Brazil have created this exception in their jurisdictions. Colombia’s Court added a eugenic abortion exception to the criminal code in Article 122 that prohibits elective abortion, waiving criminal punishment when the unborn child suffers from serious malformation that is incompatible with viability, as certified by a physician.²¹⁹ Brazil’s Federal Supreme Tribunal, its highest court on constitutional issues,²²⁰ created an exception for anencephalic children, specifically, in 2012.²²¹ The Tribunal based its decision on the premise that the interruption of pregnancy due to anencephaly is not to be considered an abortion since anencephalic fetuses do not have “the ability or natural capacity to be a person” and therefore, cannot be victims of the crime of abortion.²²² The decision creates jurisprudence and is binding on all Brazilian States.²²³

There was no consensus, however, on the judgment’s reasoning; the sharply divided court yielded almost as many separate opinions as judges.

215. Law No. 18.987, Voluntary Interruption of Pregnancy, art. 6(B) (Uru.).

216. Medical Termination of Pregnancy Act (Act No. 4 of 1983) § 4(1)(b) (Barb.).

217. *Id.*

218. *Id.* § 10.

219. Constitutional Court, mayo 10, 2006, Sentencia C-355/2006, G.C. (t. Tercero) (Colom.).

220. Functioning of the Supreme Court, S.T.F., http://www2.stf.jus.br/portalStfInternacional/cms/verConteudo.php?sigla=portalStfSobreCorte_en_us&idConteudo=120283 (last visited Oct. 11, 2013).

221. S.T.F., Inteiro Teor do Acórdão, Arguição de Descumprimento de Preceito Fundamental 54, Relator: Marco Aurélio, Supremo Tribunal Federal Jurisprudencia [S.T.F.J.], 12.04.2012, 4 (Braz.), available at http://redir.stf.jus.br/paginadorpub/paginado3707334r.jsp?docTP=TP&docID=_ (last visited Oct. 11, 2013).

222. *Id.*

223. For more on the legal weight of Supreme Federal Court decisions, see Maria Angela Jardim de Santa Cruz Oliveira & Nuno Garoupa, *Stare Decisis and Certiorari Arrive to Brazil: A Comparative Law and Economics Approach*, 26 EMORY INT’L L. REV. 556 (2012), available at http://www.law.emory.edu/fileadmin/journals/eilr/26/26.2/Oliveira_Garoupa.pdf (last visited Oct. 11, 2013).

Chief Justice Cezar Peluso wrote a dissenting opinion in which he manifested his complete disagreement with the verdict, and affirmed that the anencephalic fetus is a bearer of life, and aborting him is therefore prohibited conduct.²²⁴ He characterized appeals to personal autonomy and individual freedom as “void” and discriminatory against disabled fetuses and emphasized that the tribunal did not have the legitimate authority to create new legal measures.²²⁵

Likewise, Judge Ricardo Lewandowski dissented based on balance of powers arguments, indicating that the issue should have been decided by Parliament, which had previously rejected legislative bills on anencephaly and abortion, and that the Court exceeded its jurisdiction by legislating this instance of non-punishable abortion.²²⁶ He also disagreed with the majority opinion’s substantive arguments, indicating that the decision may entail future disentanglement of the right to life for other unborn children suffering from serious congenital malformations and chromosomal abnormalities.²²⁷ Concurring Judge Gilmar Mendes agreed with the majority but conceded that the termination of pregnancy involving an anencephalic fetus was, indeed, an abortion.²²⁸

Panama’s criminal code suggests a eugenic exception by allowing abortion for a “serious” health condition that “endangers” the unborn child’s life.²²⁹ Facially, the provision seems incoherent since an abortion would end the endangered life of the child anyway, a result that the code seeks to avoid. In the Article’s context, which refers to health-related issues, it appears to be referring to either induced labor for the sake of the child’s health or to children affected with conditions designated as “incompatible with life,” meaning a fatal condition with very small chances of survival, like anencephaly or Trisomy 18.²³⁰ In any case, the code requires authorization by a multi-disciplinary commission, appointed by the Minister of Health, which would determine whether or not the child’s condition is serious enough.²³¹ The code also allows physicians who conscientiously object to abortion to refuse to perform the procedure.²³²

224. S.T.F., Inteiro Teor do Acórdão, Argüição de Descumprimento de Preceito Fundamental 54, Relator: Marco Aurélio, S.T.F.J., 12.04.12, 392, 396 (Braz.).

225. *Id.* at. 362, 396.

226. *Id.* at 246.

227. *Id.* at 247.

228. *Id.* at 267.

229. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 144 (Pan.).

230. *Id.*

231. *Id.*

232. *Id.*

The Mexican Federal Criminal Code contains a similar exception that applies “when the unborn child’s life is endangered.”²³³ However, it only requires the favorable opinion of two physicians, where possible, if the delay would not pose a health risk.²³⁴ Less than half of all Mexican states allow eugenic abortions.²³⁵ The Federal District requires a terminal genetic condition that threatens the child’s survival after birth,²³⁶ a couple of states require “serious eugenic considerations,”²³⁷ and other states allow eugenic abortion upon a finding of genetic or congenital pathologies that cause physical or mental disability.²³⁸

5. First Trimester Abortions

Uruguay is the only national jurisdiction in Latin America and the Caribbean to have legalized first trimester abortions. Other than that state, there has been virtually no regional support for this category of non-punishable abortions. In October 2012, the Uruguayan Legislature adopted, by a narrow vote, the Voluntary Interruption of Pregnancy Act, legalizing elective abortions during the first trimester of pregnancy.²³⁹ More radical legislative projects were rejected in year’s prior, notably in 2008, when then-President Tabaré Vasquez, a socialist and former obstetrician, vetoed the legislation, invoking article 4(1) of the ACHR.²⁴⁰

233. Código Penal Federal [CPF] [Federal Criminal Code], art. 334, Diario Oficial de la Federación [DO], 14 de Agosto de 1931 (Mex.).

234. *Id.*

235. TRUJILLO & MAQUEDA, *supra* note 34, at 44–46 (citing Baja California Sur (§ 252), Coahuila (§ 361), Colima (§ 190), Chiapas (§ 136 bis), Chihuahua (§ 148), Guerrero (§ 121), Mexico (§ 251), Morelos (§ 119), Oaxaca (§ 316), Puebla (§ 343), Quintana Roo (§ 97), Veracruz (§ 154), and Yucatán (§ 393)).

236. *Id.* (citing Federal District (§ 148)).

237. *Id.* (citing Oaxaca (§ 316), and Puebla (§ 343)).

238. *Id.* (citing Baja California Sur (§ 252), Coahuila (§ 361), Colima (§ 190), Chiapas (§ 136 bis), Chihuahua (§ 148), Guerrero (§ 121), Mexico (§ 251), Morelos (§ 119), Oaxaca (§ 316), Puebla (§ 343), Quintana Roo (§ 97), Veracruz (§ 154), and Yucatán (§ 393)).

239. *See* Law No. 18.987, Voluntary Interruption of Pregnancy (Uru.)

240. Jeremy McDermott, *Uruguay's President Tabare Vazquez Resigns from Socialist Party over Abortion Vote*, THE TELEGRAPH (Dec. 5, 2008, 7:11 PM), <http://www.telegraph.co.uk/news/worldnews/southamerica/uruguay/3568036/Uruguays-President-Tabare-Vazquez-resigns-from-Socialist-party-over-abortion-vote.html> (last visited Oct. 13, 2013); *see generally* Communication from the Presidencia de la República Oriental del Uruguay [Presidency of the Oriental Republic of Uruguay] to the Presidente de la Asamblea General [President of the General Assembly] (Nov. 14, 2008), available at http://www.presidencia.gub.uy/_Web/proyectos/2008/11/s511_00001.PDF (last visited Feb. 5, 2011); Brief of Amici Curiae, Inter-Am. Ct. H.R., FN 39, available at <http://www.adfmedia.org/files/ivf-costaricaamicus-english.pdf> (last visited Oct. 13, 2013).

The Voluntary Interruption of Pregnancy Act waives criminal penalties for all abortions performed during the first twelve weeks of pregnancy, and it establishes several mandatory requirements for legal abortions, in the absence of which the procedure would be illegal.²⁴¹ Requirements include that the medical consultation or evaluation be carried out in a public hospital or a government affiliated institution; that the woman inform the physician of the reasons why she wishes to terminate the pregnancy, whatever the nature (for statistics collection purposes); that a three member interdisciplinary committee counsel the woman considering abortion; a five-day waiting period; and ratification of the decision to abort by signing informed consent documents.²⁴² Abortions beyond twelve weeks of pregnancy may only be performed under circumstances of grave risk to the mother's health or life, fetal malformation or rape (up to fourteen weeks only, for the latter).²⁴³

The Uruguayan Legislature included several restrictions on first trimester abortions in the Act, such as citizenship and residence requirements for women requesting abortions, perhaps in order to prevent "abortion tourism," as well as prohibition of economic profit from abortions in the public health system or affiliated hospitals.²⁴⁴ In addition, the Act establishes that first trimester abortions shall not be used as a means of birth control.²⁴⁵ Further, the Act allows for conscientious objection of physicians or health care personnel, which requires minimal formalities and is characterized as portable (applicable in every health institution where the objector works); exceptions are only made for circumstances of grave risk to the mother's life or health.²⁴⁶ Institutional objection, however, is limited to health care institutions that conscientiously objected before the law became effective; objecting institutions must establish a referral mechanism in accordance with Health Department regulations.²⁴⁷

Elective abortion during the first trimester of pregnancy has also been legalized in Mexico's Federal District, i.e., Mexico City. In 2007, the City's legislative assembly amended the District's criminal code and health act, redefining abortion as the interruption of pregnancy after the twelfth

241. See generally Law No. 18.987, Voluntary Interruption of Pregnancy.

242. *Id.* art. 3.

243. *Id.* art. 6.

244. *Id.* art. 9.

245. *Id.* art. 1.

246. *Id.* art. 11.

247. *Id.* art. 10.

week of gestation,²⁴⁸ in contrast with virtually all Mexican states, which define abortion as the death of an unborn child from conception throughout pregnancy,²⁴⁹ even before implantation in the maternal womb.²⁵⁰ The

248. Decreto por el Que se Reforma el Código Penal Para el Distrito Federal y se Adiciona la Ley de Salud Para el Distrito Federal [Decree to Reform the Criminal Code for the Federal District Law is Added to the Federal District Health Law], *Diario Oficial de la Federación* [DO], 26 de Abril de 2007 (Mex.), available at http://www.catedradh.unesco.unam.mx/SeminarioCETis/Documentos/Doc_basicos/5_biblioteca_virtual/6_derechos_sexuales_rep/3.pdf (last visited Oct. 13, 2013).

249. See Código Penal Para el Estado de Aguascalientes [CP] [Criminal Code for the State of Aguascalientes] art. 101, *Diario Oficial de la Federación* [DO], 20 de Mayo 2013 (Mex.); Código Penal Para el Estado de Baja California [CP] [Criminal Code for the State of Baja California] art. 132, *Diario Oficial de la Federación* [DO], 17 de Diciembre de 2010 (Mex.); Código Penal Para el Estado de Baja California Sur [CP] [Criminal Code for the State of Baja California South] art. 249, *Diario Oficial de la Federación* [DO], 20 de Marzo de 2005 (Mex.); Código Penal Para el Estado de Chihuahua [CP] [Criminal Code for the State of Chihuahua] art. 143, *Diario Oficial de la Federación* [DO], 27 de Diciembre del 2006 (Mex.); Código Penal Para el Estado de Coahuila [CP] [Criminal Code for the State of Coahuila] art. 357, *Diario Oficial de la Federación* [DO], 28 de Mayo de 1999 (Mex.); Código Penal Para el Estado de Colima [CP] [Criminal Code for the State of Colima] art.187, *Diario Oficial de la Federación* [DO], 25 de Noviembre de 2010 (Mex.); Código Penal Para el Estado Libre de Mexico [CP] [Criminal Code for the Free State of Mexico] art. 248, *Diario Oficial de la Federación* [DO], 20 de Marzo de 2000 (Mex.); Código Penal Para el Estado de Guanajuato [CP] [Criminal Code for the State of Guanajuato] art. 158, *Diario Oficial de la Federación* [DO], 2 de Noviembre de 2001 (Mex.); Código Penal Para el Estado de Guerrero [CP] [Criminal Code for the State of Guerrero] art. 116, *Diario Oficial de la Federación* [DO] 14 de Noviembre de 1986 (Mex.); Código Penal Para el Estado de Hidalgo [CP] [Criminal Code for the State of Hidalgo] art. 154, *Diario Oficial de la Federación* [DO], 09 de Junio de 1990 (Mex.); Código Penal Para el Estado Libre y Soberano de Jalisco [CP] [Criminal Code for the Free and Sovereign State of Jalisco] art. 227, *Diario Oficial de la Federación* [DO], 2 de Septiembre de 1982 (Mex.); Código Penal Para el Estado de Michoacán [CP] [Criminal Code for the State of Michoacán] art. 285, *Diario Oficial de la Federación* [DO], 7 de Julio de 1980 (Mex.); Código Penal Para el Estado de Morelos [CP] [Criminal Code for the State of Morelos] art. 115, *Diario Oficial de la Federación* [DO] (Mex.); Código Penal Para el Estado de Nayarit [CP] [Criminal Code for the State of Nayarit] art 335, *Diario Oficial de la Federación* [DO] art. 335 (Mex.); Código Penal Para el Estado de Nuevo León [CP] [Criminal Code for the State of Nuevo Leon] art. 327, *Diario Oficial de la Federación* [DO], 5 de julio de 2011 (Mex.); Código Penal Para el Estado de Oaxaca [CP] [Criminal Code for the State of Oaxaca] art. 312, *Diario Oficial de la Federación* [DO], 9 de Septiembre de 2006 (Mex.); Código de Defense Social Para el Estado Libre y Soberano de Puebla [CP] [Criminal Code for the Free and Sovereign State of Puebla] art. 339, *Diario Oficial de la Federación* [DO], 24 de Septiembre de 1986 (Mex.); Código Penal Para el Estado de Querétaro [CP] [Criminal Code for the State of Querétaro] art. 136, *Diario Oficial de la Federación* [DO], 23 de Julio de 1987 (Mex.); Código de Defense Social Para el Estado Libre y Soberano de Quintana Roo [CP] [Criminal Code for the Free and Sovereign State of Quintana Roo] art. 92 *Diario Oficial de la Federación* [DO], 13 de Diciembre de 2010 (Mex.); Código de Defense Social Para el Estado San Luis Potosi [CP] [Criminal Code for the State of San Luis Potosi] art. 128, *Diario Oficial de la Federación* [DO], 30 de Septiembre de 2000 (Mex.); Código de Defense Social Para el Estado de Sinaloa [CP] [Criminal Code for the State of Sinaloa] art. 154, *Diario Oficial de la Federación* [DO], 28 de Octubre de 1992 (Mex.); Código de Defense Social Para el Estado de Sonora [CP] [Criminal Code for the State of Sonora] art. 265, *Diario Oficial de la Federación* [DO], 24 de Marzo de 1994 (Mex.); Código de Defense Social Para el Estado de Tabasco [CP] [Criminal Code for the State of Tabasco] art. 130, *Diario Oficial de la Federación* [DO], 5 de Febrero de 1997 (Mex.);

decision legalized abortion on request during the first trimester, but the City's law continues to penalize second and third trimester abortions that do not involve health risks, rape, or disability of the unborn child.²⁵¹

The President of the National Human Rights Commission and the "Procurador General de la República" (Attorney General) challenged the law in May of 2007 before the federal Supreme Court.²⁵² In 2009, the Court upheld the legislative reform in a split decision with no majority opinion.²⁵³ There were as many dissenting opinions as judges, which showed strong discomfort with even the narrow reasoning in upholding the law. The minority opinion dissented on the basis of existing constitutional protection of the unborn child.²⁵⁴ Nonetheless, there was significant consensus on the idea that abortion legalization remains a matter of state sovereignty in Mexico, as stated in Mexico's treaty reservations to the ACHR in this regard.²⁵⁵ In reaction to the verdict, at least sixteen Mexican states adopted amendments to their constitutions recognizing a right to life

Código de Defense Social Para el Estado de Tamaulipas [CP] [Criminal Code for the State of Tamaulipas] art. 356, Diario Oficial de la Federación [DO], 20 de Diciembre de 1986 (Mex.); Código de Defense Social Para el Estado de Yucatán [CP] [Criminal Code for the State of Yucatán] art. 389, Diario Oficial de la Federación [DO], 30 de Marzo de 2000 (Mex.); Código de Defense Social Para el Estado de Zacatecas [CP] [Criminal Code for the State of Zacatecas] art. 310, Diario Oficial de la Federación [DO], 4 de Agosto de 2012, (Mex.).

250. See e.g., Código de Defensa Social Para el Estado de Chiapas [CP] [Criminal Code for the State of Chiapas] art. 178, 1 de Mayo de 2013 (Mex.), available at <http://www.ordenjuridico.gob.mx/fichaOrdenamiento.php?idArchivo=20584&ambito=estatal> (last visited Oct. 13, 2013).

251. The District had previously adopted an act that created several exceptions for abortion in Mexico City ("health of the mother" exception, abortion of children conceived in rape, eugenic abortion, error in artificial insemination), coined the "Ley Robles" for its author, then-Mexico City Governor Rosario Robles Berlanga. See Decreto por el que se Reforman y Adicionan Diversas Disposiciones del Código Penal para el Distrito Federal y del Código de Procedimientos Penales para el Distrito Federal [Decree to Amend and Add Several Provisions of the Criminal Code of the Federal District and Criminal Procedure Code of the Federal District], Gaceta Oficial de la Federación, 24 de Agosto de 2000 (Mex.), available at http://www.paot.org.mx/centro/gaceta/2000/agosto_24_148.pdf (last visited Oct. 10, 2013).

252. Acción de inconstitucionalidad 146/2007 y su acumulada 147/2007, Suprema Corte de Justicia de la Nación [SCJN] [Supreme Court], 8 (Mex.), available at <http://www.equidad.scjn.gob.mx/IMG/pdf/ENGROSECOSSxcdO-146-07.pdf> (last visited Oct. 10, 2013).

253. See generally *id.* at 1–208.

254. See generally *id.* at 394.

255. *Id.* at 174–75.

from conception,²⁵⁶ many of which specifically expressed their rejection of the federal Supreme Court decision in their legislative records.²⁵⁷

6. Judicial Activism for Abortion Rights in Colombia

Support for the creation of constitutional abortion rights at the domestic level has been almost non-existent in the region. Most national courts in Latin America and the Caribbean have been unwilling to create or recognize alleged abortion rights in their jurisprudence. Even some of the most liberal of court opinions on abortion, like Mexican Supreme Court President Guillermo Ortiz Mayagoitia's judgment in 2008, failed to recognize the existence of abortion rights when prompted to do so.²⁵⁸

Colombia remains the only jurisdiction where individual Constitutional Court judges have advocated for the creation of abortion rights in a series of judgments on implementation "sentencias de tutela," the legal weight of which is questionable. Before the C-355 judgment in 2006 that created multiple exceptions to criminal abortion, the Colombian Constitutional Court had upheld abortion bans in four previous decisions.²⁵⁹ It had also recognized the right to life from the moment of conception, the legal personhood of the unborn child as a subject of human rights, and the unborn's entitlement to constitutional protection under "amparo" (a constitutional writ) in several previous decisions.²⁶⁰

With a new composition in 2006, Colombia's Constitutional Court departed from its previous jurisprudence and suddenly expanded Article

256. *Abortion Rights in Mexico Steps Forward and Back*, THE ECONOMIST (Sept. 30, 2011), <http://www.economist.com/blogs/americasview/2011/09/abortion-rights-mexico> (last visited Oct. 10, 2013).

257. See e.g., *Exposición de Motivos; Reforma y Adición al Artículo 7, Fracción XI, de la Constitución Política del Estado Libre y Soberano de Nayarit y Cómputo y Declaratoria de Aprobación de la Reforma*, *Periodico Oficial, Organó del Gobierno del Estado de Nayarit*, 2–3 (2009) (Mex.), available at <http://ordenjuridicodemo.segob.gob.mx/Estatal/NAYARIT/Decretos/DECNAY50.pdf> (last visited Oct. 10, 2013).

258. See generally *Acción de inconstitucionalidad 146/2007 y su acumulada 147/2007*, *Suprema Corte de Justicia de la Nación [SCJN] [Supreme Court]*, 1–208 (Mex.), available at <http://www.equidad.scjn.gob.mx/IMG/pdf/ENGROSECOSSxdO-146-07.pdf> (last visited Oct. 10, 2013).

259. Camila Herrera Pardo & Gabriel Mora Restrepo, *Americans United for Life, Between False Assertions and Flaws in Argumentation: The So-Called "Abortion Case" in the Colombian Constitutional Court*, in *Defending the Human Right to Life in Latin America*, 81, 81–93 (2012), available at <http://www.aul.org/wp-content/uploads/2012/07/colombia-la.pdf> (last visited Oct. 10, 2013).

260. Procuraduría General de la Nación, *Informe de Vigilancia a la Sentencia C-355 de 2006 [Attorney General of the Nation]*, Bogota, D.C., 15 de agosto de 2010, 6.

122 on induced abortion by creating several exceptions to criminal abortion (e.g., life, health of the mother, eugenic abortion, rape or incest, and IVF error, called “forced insemination”) in decision C-355.²⁶¹ Nevertheless, the C-355 Constitutional Court decision affirmed that the state has a duty to protect unborn life, since life is a fundamental right according to the Constitution, and that it may opt to do so through criminal law.²⁶²

Dissenting judges Rodrigo Escobar Gil and Marco Gerardo Monroy Cabra, as well as many other respected commentators, harshly criticized the Court’s judicial activism and politically motivated support for abortion in the decision.²⁶³ Subsequently, some members of the Constitutional Court, notably Humberto Sierra Porto, now a judge at the Inter-American Court of Human Rights,²⁶⁴ expanded the scope of C-355 in a series of judgments on implementation, which among others, referred to abortion as a “fundamental right” and restricted conscience rights of physicians and health care institutions, particularly those of religious institutions that morally object to performing abortions.²⁶⁵

Whether these judgments actually have the authority to expand C-355 is highly debatable, since, according to national statutes, implementation judgments do not have *erga omnes* effects, nor create jurisprudence unless ratified by the Constitutional Court *en banc*.²⁶⁶ The Ministry of Social

261. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 118 (Costa Rica), available at http://www.oas.org/dil/esp/Codigo_Penal_Costa_Rica.pdf (last visited Oct. 13, 2013).

262. *Id.* at VI, 10, 10.1 ¶ 9.

263. Procuraduría General de la Nación, Informe de Vigilancia a la Sentencia C-355 de 2006 [Attorney General of the Nation], Bogota, D.C., 15 de agosto de 2010, 15; *Experto desenmascara estrategia del lobby del aborto en Colombia*, ACIPRENSA (Sept. 27, 2013, 3:39 P.M.), <http://www.aciprensa.com/noticias/experto-desenmascara-estrategia-del-lobby-del-aborto-en-colombia-76130/#.Ub9oe2zD8dU> (last visited Oct. 13, 2013).

264. *Experto desenmascara estrategia del lobby del aborto en Colombia*, ACIPRENSA (Sept. 27, 2013, 3:39 P.M.), <http://www.aciprensa.com/noticias/experto-desenmascara-estrategia-del-lobby-del-aborto-en-colombia-76130/#.Ub9oe2zD8dU> (last visited Oct. 13, 2013).

265. *See generally* Procuraduría Delegada para la Defensa de los Derechos de la Infancia, la Adolescencia y la Familia, Informe de Vigilancia a la Implementación de la Sentencia C-355 de 2006, Bogota, D.C., diciembre de 2012, <http://www.Procuraduria.gov.co/portal/media/file/II%20Informe%20de%20Vigilancia%20Superior%20de%20la%20Implementaci%C3%B3n%20de%20la%20Sentencia%20C-355%20de%202006.pdf> (last visited Oct. 13, 2013).

266. *See* L. 270, marzo 7, 1996, 42.745 DIARIO OFICIAL [D.O.], art. 48(2) (Colom.), available at http://www.secretariasenado.gov.co/senado/basedoc/ley/1996/ley_0270_1996.html (last visited Oct. 13, 2013) (establishing that sentencias de tutela have binding effects on the parties only); L. 2591, noviembre 19, 1991, 40.195 DIARIO OFICIAL [D.O.], art. 34 (Colom.), available at http://www.secretariasenado.gov.co/senado/basedoc/decreto/1991/decreto_2591_1991.html (last visited Oct. 13, 2013) (requiring ratification of the Constitutional Court *en banc* for creation of jurisprudence); DIEGO EDUARDO LOPEZ MEDINA, EL DERECHO DE LOS JUECES 59–60 (2d ed., 2006), available at <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&ved=0CCwQFjAA>

Protection also issued several resolutions mandating that non-punishable abortions be performed by any hospital within five days of their request,²⁶⁷ and by imposing further restrictions on the right to conscientious objection in Decree 4444 of 2006.²⁶⁸ These, however, were suspended in 2009, and subsequently derogated in 2013 when Colombia's highest administrative court, the Council of State, ruled the decree illegal.²⁶⁹

7. Clinic Regulations, Counseling Requirements, and Informed Consent

Countries with the largest number of exceptions to criminal abortion, namely Barbados, Colombia, and Uruguay, regulate abortion practices and require informed consent and counseling of pregnant women, which shows that not even the most liberal jurisdictions allow unrestricted abortion or treat abortion as a human right. The Barbados Medical Termination of Pregnancy Act provides for supervision of abortion clinics and facilities by stating that “the Chief Medical Officer or other person authorized by him in writing, may at all reasonable times enter any premises for the purpose of ascertaining whether there has been any contravention of this Act or the regulations.”²⁷⁰ The Barbados Medical Termination of Pregnancy Regulations of 1983 mandates that any medical practitioner who carries out abortions must “be familiar with counseling functions with particular reference to family life education and child-birth.”²⁷¹ Specifically, a physician who performs abortions must counsel the woman requesting the abortion, or at least ensure that a person authorized by the Minister prior to performing any abortion has counseled her.²⁷²

A counselor must also advise the woman on alternatives to abortion (such as adoption or foster care), on the possible immediate and long-term

&url=http%3A%2F%2Fxa.yimg.com%2Fkq%2Fgroups%2F13032377%2F154718976%2Fname%2Ffel%2Bderecho%2Bde%2Blos%2Bjueces.doc&ei=sKRYUv26IYXG9gS0q4GwBQ&usg=AFQjCNFV4I2RN4nc7AsJP9HL2tvzWBsUGw&sig2=OfAZAAwPuiBaFmR-q6-Jog&bvmbv=53899372,d.eWU (last visited Oct. 13, 2013).

267. Procuraduría General de la Nación, Informe de Vigilancia a la Sentencia C-355 de 2006 [Attorney General of the Nation], Bogota, D.C., 15 de agosto de 2010, 34–41.

268. See generally *id.* at 30–33.

269. *Colombia: High Court Strikes Down Decree Mandating Hospitals Perform Abortions*, PNCIUS.ORG (April 2013), <http://www.pncius.org/homepage-newsletter.aspx?id=70> (last visited Oct. 13, 2013); see also *Declaran nulo el decreto que quiso reglamentar el aborto en Colombia [Colombia: High Court Strikes Down Decree Mandating Hospitals Perform Abortions]*, ANÁLISIS DIGITAL (Mar. 20, 2013), <http://www.analisisdigital.org/2013/03/20/declaracion-nulo-el-decreto-que-quiso-reglamentar-el-aborto-en-colombia/> (last visited Oct. 13, 2013).

270. Medical Termination of Pregnancy Act (Act No. 4 of 1983) § 13 (Barb.).

271. *Id.* § 4.

272. *Id.* § 4(2).

effects of abortion, on methods of contraception, and the availability of family planning services.²⁷³ The Act allows the Minister to place residence requirements on women seeking abortions,²⁷⁴ probably in order to avoid abortion tourism or evasion of foreign abortion laws. Abortionists who violate informed consent or parental consent regulations, or perform second trimester or late-term abortions outside of hospitals, may be subject to imprisonment and fines.²⁷⁵

Colombia's General Attorney's Office (Procuraduría) has issued guidelines for implementation of the Constitutional Court decision C-355 regarding informed consent.²⁷⁶ According to the guidelines, a woman requesting an abortion should be given information regarding the risks of abortion as opposed to childbirth; she should be given counseling encouraging her to carry her pregnancy to term and alternatives to abortion, such as medical treatment or adoption; she should also be offered ultrasound images of her unborn child.²⁷⁷

In addition, Uruguay's abortion law, authorizing first trimester abortions, mandates counseling of every single woman or adolescent considering abortion.²⁷⁸ The Voluntary Interruption of Pregnancy Act requires physicians to refer women to a three-member committee, integrated by a gynecologist, a social worker, and a mental health professional.²⁷⁹ The committee is required by law to inform the woman about potential risks of the abortion procedure and alternatives to abortion, including adoption or social welfare government programs that may help alleviate the mother's poverty.²⁸⁰ The committee is also required to ensure that the woman considering abortion is not being coerced or pressured by third parties, to provide her with information on family planning methods, and even to interview the unborn child's father, with her consent.²⁸¹ According to the Act, counseling must aim to help the woman overcome the situation that led her to choose abortion, and ensure she is making an

273. *Id.* § 3.

274. *Id.* § 12(b).

275. Medical Termination of Pregnancy Act (Act No. 4 of 1983) §§ 8, 9, 14 (Barb.).

276. Procuraduría General de la Nación, Informe de Vigilancia a la Sentencia C-355 de 2006 [Attorney General of the Nation], Bogota, D.C., 15 de agosto de 2010, 188.

277. *Id.*; Procuraduría Delegada para la Defensa de los Derechos de la Infancia, la Adolescencia y la Familia, Informe de Vigilancia a la Implementación de la Sentencia C-355 de 2006, Bogota, D.C., diciembre de 2012, 125–26.

278. Law No. 18.987, Voluntary Interruption of Pregnancy, art. 3

279. *Id.*

280. *Id.*

281. *Id.* art. 4.

informed decision.²⁸² A five-day waiting period must elapse before a woman considering abortion can sign informed consent documents and proceed to abort her child.²⁸³

Likewise, the Mexico City legislative decree that legalized first trimester abortions requires that doctors give pregnant women considering abortion “objective, true, sufficient and opportune” information on the procedure, its risks, effects and consequences, as well as information alternatives to abortion, and economic support programs so that women may adequately give informed consent.²⁸⁴ Some local jurisdictions may require counseling as well. For instance, Yucatán’s family law requires that women with unwanted pregnancies be given counseling that aims at “protecting both the mother’s rights as well as those of the product of conception,” and that the state seek adoptive families for women who chose not to abort.²⁸⁵

8. Abortions on Pregnant Children and Disabled Women

Some Latin American and Caribbean jurisdictions prohibit all elective abortions on pregnant children and disabled women after their ratification of the ACHR. For instance, all abortions on pregnant children under sixteen years in Bolivia, and under fourteen years in Brazil, are considered forced abortions.²⁸⁶ Cases of abortion on minors being prosecuted as child abuse have been reported in Jamaica.²⁸⁷ Parents who facilitate their child’s induced abortion may get aggravated penalties in El Salvador, even if the

282. *Id.* art. 3.

283. Law No. 18.987 Voluntary Interruption of Pregnancy, art. 3.

284. See Decree to Reform the Criminal Code for the Federal District Law is Added to the Federal District Health Law, art. 16, *Diario Oficial de la Federación* [DO], 26 de Abril de 2007 (Mex.); Código Penal Para el Distrito Federal [CP] [Penal Code for the Federal District] art. 148, *Diario Oficial de la Federación* [DO], 14 de Agosto de 1931 (Mex.).

285. *Ley Para la Protección de la Familia Del Estado De Yucatán* [Law for the Protection of the Family of the State of Yucatán] art. 28, September 8, 1999, available at <http://www.ordenjuridico.gob.mx/estatal.php?liberado=si&edo=31> (last visited Oct. 13, 2013).

286. CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 263 (Bol.); CÓDIGO PENAL [C.P.] [CRIMINAL CODE] art. 126 (Braz.).

287. Adam Gabbatt, *Jamaican Doctor Arrested for Performing Abortion on 12-year-old*, THE GUARDIAN (July 13, 2012), <http://www.guardian.co.uk/world/2012/jul/13/doctor-arrested-illegal-abortion-jamaica> (last visited Oct. 12, 2013).

child is not a minor.²⁸⁸ These provisions may also apply to abortions on mentally disabled women.²⁸⁹

Even states that allow non-punishable abortions on pregnant children or mentally disabled women, e.g., for rape, generally require parental consent or the consent of a legal guardian,²⁹⁰ with the exception of Colombia, where minors over the age of fourteen are presumed to be able to give informed consent and do not require parental consent, according to the Constitutional Court's decision in C-355.²⁹¹ On the other hand, Uruguay's abortion law requires a guardian's consent and judicial authorization for abortions on mentally disabled women.²⁹²

9. Full Abortion Bans

Since signature or ratification of the ACHR, seven Latin American and Caribbean countries have adopted or reaffirmed their full abortion bans, that is, criminal statutes that prohibit abortion under any circumstances, with no exceptions. These countries are: Chile, Dominican Republic, El Salvador, Haiti, Honduras, Nicaragua, and Suriname.²⁹³ Most of these states have national constitutions that explicitly recognize and protect the unborn child's right to life from conception.²⁹⁴

288. CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 136 (El Sal.).

289. CÓDIGO PENAL [C.P.] [CRIMINAL CODE] art. 126 (Braz.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 327 (Uru.).

290. See e.g., Medical Termination of Pregnancy Act (Act No. 4 of 1983) § 8(2) (Barb.); CÓDIGO PENAL [C.P.] [CRIMINAL CODE] art. 128 (Braz.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 447(2) (Ecuador); Law No. 18.987, Voluntary Interruption of Pregnancy, art. 7.

291. Constitutional Court, mayo 10, 2006, Sentencia C-355/2006, G.C. (t. Tercero) (Colom.); L. 599, julio 24, 2000, 44097 DIARIO OFICIAL [D.O.], arts. 125–26 (Colom.).

292. Law No. 18.987, Voluntary Interruption of Pregnancy, art. 8.

293. See CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] arts. 342–45 (Chile); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 317 (Dom. Rep.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 133–41 (El Sal.); CODE PÉNAL [C. PÉN] art. 262 (Haiti); see CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] arts. 126–32 (Hond.); CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 143–49 (Nicar.).

294. See *Derecho de Familia y Niñez [Family and Child Law]*, DEPARTAMENTO DE DERECHO INTERNACIONAL [DEPARTMENT OF INT'L LAW] (2012), http://www.oas.org/dil/esp/derecho_de_familia.htm (last visited Jan. 21, 2014) (Constitutional provisions recognizing a right to life from conception were adopted in 1980 in Chile [signed the American Convention In 1969, ratified it in 1990], 1982 in Honduras [signed the American Convention In 1969, ratified it in 1977], 1983 in El Salvador [signed the American Convention In 1969, ratified it in 1978], and 2010 in Dominican Republic [signed the American Convention In 1977, ratified it in 1978]); see also *American Convention on Human Rights*, *supra* note 2.

The criminal laws of Trinidad & Tobago and Jamaica do not contemplate any exceptions for the crime of abortion.²⁹⁵ However, their corresponding Ministries of Health have temporarily created non-punishable exceptions to the crime via executive policies or protocols (life of the mother exception in Trinidad & Tobago and life, health, and rape exceptions in Jamaica), according to official state reports to the Committee on the Elimination of Discrimination against Women.²⁹⁶ Jamaica's Parliament has been repeatedly advised to legalize abortion by its Abortion Policy Advisory Group, of which current Inter-American Judge Margarette Macauley was, incidentally, a member,²⁹⁷ but the legislature has yet to create any legal exceptions to its full abortion ban.²⁹⁸

Legislatures in Chile, Dominican Republic, El Salvador, and Nicaragua eliminated all exceptions to abortion prohibitions between 1997 and 2006. El Salvador's old criminal code established rape, life and eugenic exceptions, which were derogated upon the code's reform in 1997.²⁹⁹ Chile derogated its "therapeutic abortion" provision in 1989 and replaced it with Article 119 of the Health Code, which provides that no action or medical interventions may legally seek to provoke an abortion, thus allowing only those life-saving medical interventions that treat the mother's condition, not those that end the fetus's life (principle of double

295. See TOAPA, 1973, § 72 (Jam.); TOAPA §§ 56, 57 (Trin. & Tobago).

296. See Comm. on the Elimination of Discrimination against Women, *Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Initial Report of States Parties: Trinidad and Tobago*, DACCESS-DDS-NY.UN.ORG para. 351-54 (Feb. 6, 2001), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/249/01/IMG/N0124901.pdf?OpenElement> (last visited Oct. 13, 2013); Comm. on the Elimination of Discrimination against Women, *Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Fifth Periodic Report of States Parties: Jamaica*, AACCESS-DDS-NY.UN.ORG para. 267 (Feb. 18, 2004), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/249/01/IMG/N0124901.pdf?OpenElement> (last visited Oct. 13, 2013).

297. Judge Margarette May Macaulay, Corte Interamericana de Derechos Humanos [Inter-American Court of Human Rights] (Jam.), at 2, available at <http://www.corteidh.or.cr/tablas/MMM.pdf> (last visited Oct. 14, 2013).

298. See Comm. on the Elimination of Discrimination against Women, *Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Combined sixth and seventh periodic report of States parties: Jamaica*, ¶ 281, U.N. Doc. CEDAW/C/JAM/6-7 (Jan. 7 2011), available at <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N11/203/02/PDF/N1120302.pdf?OpenElement> (last visited Oct. 14, 2013) (stating that "Abortion is not legal in Jamaica" but parliamentary discussions are taking place in light of the Abortion Policy Advisory Group's recommendations).

299. United Nations, Dept. of Economic and Social Affairs, Population Division, Volume 1 of *Abortion Policies: A Global Review* 137 (United Nations Publications 2001), available at <http://www.un.org/esa/population/publications/abortion/profiles.htm> (last visited Oct. 14, 2013).

effect).³⁰⁰ Several initiatives to amend the Code to create non-punishable exceptions have been rejected.³⁰¹ In Nicaragua, Article 165 of the criminal code, a provision dating from 1893 that permitted so-called “therapeutic abortion” (characterized as abortion upon a mother’s life-threatening health condition, to be decided by three physicians and the woman’s husband or closest relative), was abolished by the National Congress in October 2006.³⁰²

In 1985, the Honduran Legislature rejected previously approved exceptions to criminal abortion in the criminal code, thus effectively eliminating all cases of legal abortion. Derogated provisions in the 1983 criminal code, Articles 130 and 131, allowed for legal abortion in cases of rape where the mother was mentally disabled or a minor under fifteen years of age.³⁰³ It also allowed for therapeutic abortion and eugenic abortion, that is, the abortion aimed at “preventing the birth of a potentially defective being,”³⁰⁴ however, these articles were declared unconstitutional (violating the Constitution’s right to life provisions) and were derogated by the National Congress before they became effective in 1985, during a period of *vacatio legis*.³⁰⁵

Haiti’s criminal code has prohibited abortion under all circumstances since the nineteenth century and still prohibits it today, without

300. See CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] art. 342 (Chile) (citing Law No. 19927 art. 1(4), Enero, 14, 2004, DIARIO OFICIAL [D.O.] (Chile)); Law No. 18.826, Agosto 24, 1989, Reemplázase el artículo 119 del Código Sanitario por el siguiente: "Artículo 119- No podrá ejecutarse ninguna acción cuyo fin sea provocar un aborto", (Chile), available at <http://www.leychile.cl/Navegar?idNorma=30202&buscar=ley+18.826> (last visited Oct. 14, 2013); CODIGO SANITARIO [COD. SANIT] [HEALTH CODE] art. 119 (Chile), available at http://www.sernac.cl/wpcontent/uploads/leyes/df/DFL725_Codigo_Sanitario.pdf (last visited Oct. 14, 2013).

301. See e.g., *Triunfo pro-vida en Chile: Rechazan aborto terapéutico* [Pro-life Victory in Chile: Rejected Therapeutic Abortion], ACIPRENSA (April 9, 2012), <http://www.aciprensa.com/noticias/triunfo-pro-vida-en-chile-rechazan-aborto-terapeutico/#.UZpiiGzD8dU> (last visited Oct. 13, 2013); *Chile: Senate Defeats Pro-Abortion Bills*, PARLIAMENTARY NETWORK FOR CRITICAL ISSUES (May 2012), <http://www.pncius.org/newsletter.aspx?id=59> (last visited Oct. 13, 2013).

302. National Assembly of the Republic of Nicaragua, La Gaceta, DIARIO OFICIAL [D.O.], Law No. 603, Derogation of art. 165 of the current Criminal Code (Nov. 14, 2006), at p. 224 (citing CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 143-149 (Nicar.)).

303. See CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] arts. 130–31 (1985) (Hond.), available at http://www.oas.org/juridico/MLA/sp/hnd/sp_hnd-int-text-cp.pdf (last visited Oct. 12, 2013).

304. *Id.*

305. See Decreto No. 13-85, 13 Feb. 1985, CÓDIGO PENAL [CÓD. PEN.] [CRIMINAL CODE] (Hond.).

exceptions.³⁰⁶ Likewise, criminal codes of Dominican Republic and Suriname do not make any exceptions for non-punishable abortions, thereby prohibiting abortion under all circumstances.³⁰⁷

III. CONCLUSION

An analysis of Latin American and Caribbean state practice following adoption and ratification of the ACHR reveals that states have overwhelmingly understood the Convention to prohibit elective abortion, with very limited and narrow exceptions, mostly for involuntary miscarriage and for direct or indirect abortion when a pregnant woman is affected by a life-threatening medical condition. Abortion rights, as such, have had no legal recognition in the region outside of Colombia. The fact that abortion has become universally categorized as a criminal practice and a violation of the unborn child's right to life and personal integrity in Latin American and Caribbean domestic jurisdiction since the adoption of the American Convention is a solid indicator that the state parties understand the Convention as prohibiting abortion. In the great majority of states, criminal and civil penalties apply for non-elective abortion, including forced abortion, fetal homicide, and fetal injury. Some states outlaw the use, distribution, or sale of abortifacient substances, including emergency contraception, which the highest courts of five Latin American countries have found to be an abortifacient.

Elective induced abortion is consistently punished by law in Latin America and the Caribbean. Mothers who intentionally abort their children may be subject to imprisonment. However, most jurisdictions establish mitigating factors that may reduce imprisonment sentences, such as *honoris causa* motivation, rape, physical or mental health condition of the mother, the unborn child's disability, and parental poverty, among others. Individuals who perform elective abortions or facilitate abortions may also be subject to civil and/or professional sanctions. Virtually all jurisdictions

306. See CODE PÉNAL [C. PÉN] art. 262 (Haiti); Comm. on the Elimination of Discrimination against Women, *Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Combined Initial, Second, Third, Fourth, Fifth, Sixth and Seventh Periodic Reports of States Parties: Haiti*, DACCESS-DDS-NY.UN.ORG 89 (July 9, 2008), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/249/01/IMG/N0124901.pdf?OpenElement> (last visited Oct. 13, 2013).

307. See CÓDIGO PENAL [C. PEN.] [CRIMINAL CODE] art. 317 (Dom. Rep.); see Comm. on the Elimination of Discrimination against Women, *Consideration of Reports Submitted by States Parties Under Article 18 of the Convention on the Elimination of All Forms of Discrimination against Women, Third Periodic Reports of States Parties: Suriname*, DACCESS-DDS-NY.UN.ORG 48 (June 9, 2005), <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N01/249/01/IMG/N0124901.pdf?OpenElement> (last visited Oct. 13, 2013).

provide for aggravated penalties for abortionists when the procedure results in the woman's death or severe injury.

Spontaneous abortion is clearly distinguished from induced abortion in Latin American and Caribbean criminal codes. Involuntary miscarriage is not punishable by law in any jurisdiction, even when a mother's conduct may have unintentionally caused or contributed to the abortion. Likewise, involuntary miscarriage resulting from proper medical treatment on a pregnant woman is not punishable under any of the region's criminal statutes.

Criminal law exceptions for abortion are limited and inconsistent. Grounds for non-punishable abortions exist only under limited circumstances, mostly when the mother's life is endangered, with no consensus emerging over other scenarios like the mother's health, rape, incest or fetal disability. Non-punishable abortions usually require proof, for example, that there are no other means to avoid harm to the mother's life or health, that abortion is a measure of last resort, or that sexual assault has been reported to law enforcement. Judicial authorization, medical opinion, or ethics committee opinions supporting the abortion may be required.

After signature and ratification of the ACHR, at least seven Latin American and Caribbean countries have adopted full abortion bans through their legislatures, that is, criminal norms that prohibit abortion under any and all circumstances. Furthermore, some Latin American jurisdictions have prohibited all abortions on pregnant children. Expansion of non-punishable abortions in the region has been irregular, partial, and often advanced by the judiciary, rather than through democratic processes. Some Latin American courts have played a peculiar, quasi-legislative role in creating non-punishable exceptions to criminal abortion: High courts were responsible for the creation of multiple exceptions in Colombia, a eugenic abortion exception in Brazil, an exception for the abortions of children conceived by rape in Argentina, and the legalization of first trimester abortions in Mexico City. Only Uruguay's legislature has substantially expanded non-punishable abortion to first-trimester abortions.

No Latin American or Caribbean state has so far categorically recognized abortion as a fundamental right that the state must protect or subsidize. Even Barbados, Colombia, and Uruguay, the states with the largest number of criminal law exceptions to abortion, have placed a great deal of legal requirements for non-punishable abortions, the absence of which would make the procedure illegal. No Latin American or Caribbean state allows abortion upon request or mandates government funding of abortions.