

Criminalization of Self-Induced Abortion in the United States

Report to the U.N. Working Group on Discrimination Against Women

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Executive Summary

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In the United States, women have constitutional and basic human rights to decide whether to carry a pregnancy to term. Nevertheless, American women face arrest, prosecution, and even jail, for attempting to exercise their right to seek an abortion. This report to the U.N. Working Group on Discrimination Against Women describes the threat to women’s human rights posed by a patchwork of (1) antiquated state criminal abortion laws, (2) fatally ambiguous “unborn victims of violence” laws that are susceptible to being twisted beyond their intended use, and (3) other laws criminalizing a variety of other activities misused by prosecutors to punish women believed to have ended a pregnancy.

Despite claims that criminal abortion laws protect women from unscrupulous providers, criminal laws currently on the books can be and are used to prosecute women who have abortions. In recent years, politically-motivated prosecutors in several states have experimented with using these laws to punish women who ended their own pregnancies, resulting in at least five felony arrests in the past five years. Today, conservative lawmakers are increasingly emboldened to pass laws that narrow the legal parameters for abortion and make it more and more difficult for women to access legal clinic-based care. At the same time, prosecutors are inflamed by anti-abortion rhetoric to seek retribution against women who end their own pregnancies.

As a result, even as medication abortion has made it safer for women to self-induce abortion than ever before, women find themselves more vulnerable to harsh punishment for their reproductive decisions and outcomes than they have ever been. Until this threat is eliminated from U.S. state laws, women are unable to enjoy their rights to non-discrimination, self-determination, security of the person, health, and to be free from cruel, inhuman or degrading treatment.

Laws Used to Criminalize Women for Ending Their Own Pregnancies

The right to abortion is protected by the U.S. Constitution; nevertheless, women who have had abortions have been arrested and punished for ending their own pregnancies in many states. For the most part, the laws used to criminalize women for self-inducing abortion, are either revived from antiquity or contorted beyond their legislative intent by overzealous prosecutors. Such laws include:

- **Laws directly criminalizing self-induced abortions.** Generally, throughout history, even where abortion has been criminalized, it has not been considered a crime for women to end their own pregnancies. However, seven states retain laws criminalizing “self-abortion” or “soliciting” a criminal abortion. The constitutionality of several of these laws has been questioned, but others have been used to prosecute women in recent years.
- **Laws criminalizing harm to fetuses.** In the years following *Roe v. Wade*, there was a proliferation of laws, such as feticide or fetal assault laws, treating fetuses as separate legal entities. The stated intent of these laws is to protect pregnant women from violence, but in nearly every state where such a law exists, that law has been used to criminalize women for the outcome of their pregnancies. Thirty-eight states and the federal criminal code have laws criminalizing harm to fetuses. Of these eight states have laws that are susceptible to misuse because they do not contain language protecting pregnant women from prosecution, and two permit criminal prosecution of women. These laws are particularly dangerous because they punish loss of fetal life as tantamount to homicide.
- **Criminal abortion laws misapplied to women who self-induce.** Many states retain pre-*Roe* laws criminalizing abortion. While these laws have historically been understood to target people who provide abortions outside legal parameters —

not women receiving abortion care — fourteen states have laws with antiquated and ambiguous language that has been exploited by prosecutors to punish women who self-induce.

- **Various and sundry laws deployed when no other legal authorization to punish can be found.** Many women have avoided wrongful prosecution under laws like those listed above only to find themselves charged with an arcane crime like concealment of a birth, abuse of a corpse, or possession of a dangerous drug for having ended their own pregnancies. These charges represent grasping on the part of prosecutors to punish in spite of legislative unwillingness to create avenues to do so. This poses a pernicious and unpredictable threat in every state: once a prosecutor decides to punish a woman for ending a pregnancy, they are likely to be able to find some law they can use to do so.

Anti-Abortion Rhetoric and Laws that Restrict Access

Prosecutions under laws like those described above come amid attacks on access to clinic-based abortion. The willingness of many abortion opponents to decrease access to abortion and to criminalize and punish women who have them was illustrated in March of 2016, when then-candidate Donald Trump was asked about a campaign promise to “ban abortion.” When asked what that would mean for women who have abortions, he stated, “there has to be some form of punishment.” Vice President Mike Pence also has been open in his hostility toward abortion rights, assuring the 2016 Voter Values Summit that he would see *Roe vs. Wade*, which struck down criminal laws banning all abortions other than those required to save a woman’s life, “consigned to the ash heap of history where it belongs.”

In addition to direct attempts to overturn *Roe v. Wade*, access to abortion in the U.S. has been severely undermined by targeted regulation of abortion providers (TRAP) laws. These laws target abortion providers with burdensome, costly and medically unnecessary restrictions on abortion facilities. TRAP laws have resulted in a complex web of laws and regulations that, taken together, drastically restrict women’s access to legal, affordable clinic-based reproductive health care. Although the Supreme Court’s recent decision in *Whole Woman’s Health v. Hellerstedt* struck down examples of the most extreme forms of TRAP laws, state hyper-regulation of abortion provision

continues. As a result, women's access to clinical abortion care increasingly depends on the state in which they live. Seven states have restricted access to such a degree that only one clinic remains in operation.

Self-Induced Abortion

Even before TRAP laws began closing abortion clinics, some pregnant people sought abortions outside of the formal health care system. Reasons for self-induction include unnecessary hurdles created by lawmakers, such as waiting periods or mandatory ultrasounds, the difficulty in traveling long distances and incurring the cost of clinical care, or concerns about being exposed or intimidated by hostile clinic protesters. Some people may have different, deeply personal reasons. They may be members of communities that have experienced oppression at the hands of the medical profession, such as forced sterilization or unconsented medical testing, and thus distrust the formal medical system. Others may simply prefer the more personal and private experience of being able to end a pregnancy at a time and with the companion of their choosing.

Self-induced abortion, which may include the use of pharmaceutical pills, traditional herbs, or other means to end a pregnancy, is as old as pregnancy itself. With the advent of new medical technologies, including medication abortion, the possibility of safe home abortion is more attainable than ever before. Public health researchers have been exploring ways to improve abortion access in restrictive settings and supplant ineffective or dangerous means by disseminating information about how women can safely end a pregnancy on their own.

While it is difficult to get an accurate count of how many women in the U.S. have attempted to end their own pregnancies, recent research from the Texas Policy Evaluation Project revealed that anywhere from 1.7% to 4.1% of Texan women (between 100,000 to 240,000) may have attempted to end a pregnancy on their own at some point. One journalist found that in 2015 alone, there were over 700,000 internet searches for information on how to end a pregnancy, with the highest concentration of searches occurring in states with restrictive abortion laws.

Criminalization of Self-Induction Increases Health Risks

Whether people end their own pregnancies out of preference or necessity, historical and present trends indicate that criminalization is not a deterrent to self-induction. Perversely, criminalization may deter women from seeking care for complications because they fear being turned over to law enforcement. This is especially the case for women of color, who are more likely to be turned over by the people they turn to for care. With respect to self-induced abortion, this disparity is likely to be compounded by the fact that women of color are more likely to face barriers to clinic-based abortion, and are more likely to suffer adverse pregnancy outcomes that may bring them under scrutiny, even if the causes of poor pregnancy outcomes are structural and largely outside of their control.

Recommendations

- States should repeal all laws that criminalize self-induced abortion.
- States should eliminate the threat of wrongful and discriminatory prosecutions by clarifying ambiguous laws to ensure protection of pregnant women.
- States should ensure their laws comport with constitutional and human rights standards.
- States and the federal government should ensure access to clinic-based abortion care.
- States should review regulations imposed upon medication abortion and reform laws that unnecessarily restrict access to abortion pills.