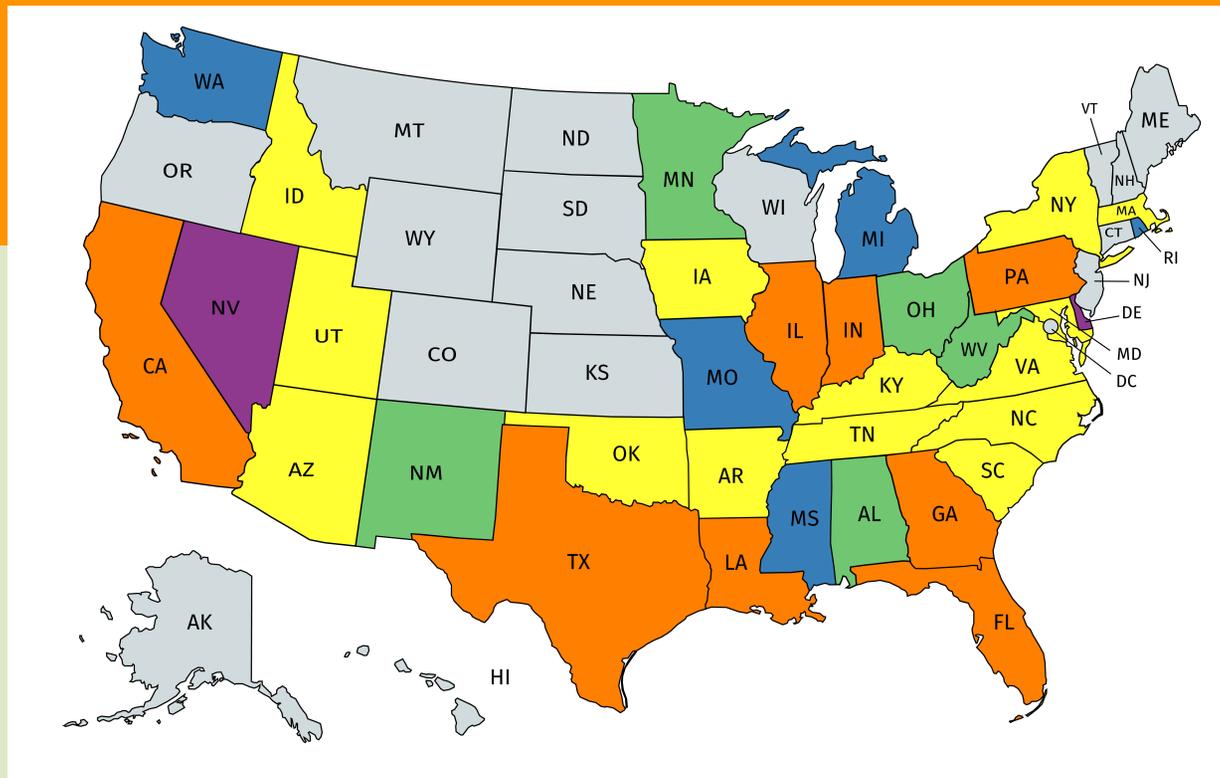


ROE'S UNFINISHED PROMISE:

DECRIMINALIZING ABORTION ONCE AND FOR ALL



THE SIA LEGAL TEAM

Movement Lawyers | RJ Values | Bold Vision

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OUR VISION

The SIA Legal Team uses a variety of law and policy tools to ensure that people throughout the United States can end pregnancies outside the formal medical system with dignity and be safe from the threat of arrest for themselves or anyone who helps them. The Team envisions a future in which people will have the necessary rights and supports to choose the method, timing, companion, and setting for an abortion that's right for them. This would include provider-directed abortion care in a clinical setting and supported or self-directed abortion care in a home setting.

THE AUTHORS

This report was written and edited by Farah Diaz-Tello, Melissa Mikesell, and Jill E. Adams with the research assistance of many law students and volunteers. Mistakes contained herein are the sole responsibility of the authors.

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THIS REPORT

The SIA Legal Team endeavors alongside many allies to liberate self-induced abortion from the constraints of misunderstanding and the restraints of criminalization. This report comes in response to requests from the field for a comprehensive resource to help people better understand the legal landscape of self-induced abortion and what can be done to improve it. Other resources are available at www.SIALegalTeam.org. This report was last updated in November 2017.

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ABOUT THIS REPORT

CRIMINALIZING ABORTION – NOT JUST A PRE-ROE PHENOMENON

The U.S. Supreme Court's decision in *Roe v. Wade*¹ is powerful precedent affirming that the Constitution protects people's decision to seek an abortion. By striking down criminal abortion laws, *Roe* created the promise of a future in which anyone who decides to end a pregnancy is able to do so safely, with dignity, and free from arrest. But, even with this powerful precedent, a number of people who have been arrested – and some even jailed – for ending their own pregnancies. Such arrests typically target people who are marginalized in our society, especially people living in poverty and people of color, who may experience a multitude of push factors (e.g., lack money, transportation, or immigration documentation) or pull factors (e.g., cultural tradition, need for privacy, or religious belief) that lead them toward non-clinical abortion care. The laws used to criminalize people for self-inducing abortion are either revived from antiquity or contorted beyond their legislative intent by overzealous prosecutors. While a few states have explicit bans on self-induced abortion, the bigger threat stems from roughly 40 other different types of laws that politically motivated prosecutors wield as weapons against people who end their own pregnancies. Combine prosecutorial discretion with judges who are interested in overturning *Roe* with attempts to create legal rights for fetuses from the earliest stages of development and renewed attempts to outlaw abortion, and we have a justice system primed to punish people who have abortions.

THREAT HEIGHTENED BY ATTACKS ON CLINICAL CARE AND PROVIDERS

Attacks on people who have abortions are clearly connected to attacks on abortion providers. As the idea that fetuses should have rights is used to diminish pregnant people's humanity and civil rights, abortion providers and people who have abortions become targets for arrest, prosecution, and incarceration. The uncertain landscape for access to clinic-based abortion, and the increase in hostility toward people who have self-induced abortions on the part of prosecutors seeking ever-harsher sentences, has made addressing the looming threat of criminalization an urgent matter for pregnant people in the U.S., their families, and communities.

THE PATH FORWARD

Whether people are criminalized by laws prohibiting self-induced abortion or other types of laws improperly applied to pregnant people, the effect is the same: taking matters into one's own hands converts a constitutional right into a crime. It is time for lawmakers, law enforcement, and judges to fulfill *Roe*'s unfinished promise, upholding pregnant peoples' constitutional protections in health-related matters. While we have our work cut out for us, we see a future in which everyone in the U.S. has access to pregnancy-related care that meets their needs, supports their health, and respects their dignity, including a full range of safe, effective, and affordable abortion methods. We are pleased to share this report with you in order to chart the constitutional, human rights, and policy advocacy channels available to make this a reality.

In Solidarity, The SIA Legal Team

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1. ROE'S PROMISE: PAST AND FUTURE

THE PROMISE OF ROE

In 1973, the U.S. Supreme Court decided *Roe*, the landmark case articulating constitutional protections for the right to end a pregnancy. This case struck down criminal laws banning all abortions other than those required to save someone's life because they unconstitutionally infringed upon the fundamental right to privacy. From this case emerged a promise of greater reproductive freedom and an end to the fear and secrecy that had plagued many people's experiences of ending pregnancies where abortion was criminalized. While we think about *Roe* in terms of access to abortions in medical facilities and decriminalizing the doctors who perform abortions, *Roe* is also important in other ways. *Roe* recognized that fetuses are not persons and that at no point in pregnancy does the government's interest in the potential life of the fetus outweigh its interest in the health and life of the pregnant person. While the case permits the government to put some limits on abortion access, *Roe* does not authorize the criminal prosecution of people seeking abortion care.² The liberty rights articulated in *Roe* must also protect people who exercise their right to choose abortion from criminal investigation.

LOOMING THREAT

Even though *Roe* addressed the criminalization of abortion providers, it still failed to fully decriminalize abortion. As we will discuss in this report, although *Roe* did not authorize criminal prosecutions of pregnant people, those who end their own pregnancies by self-inducing abortion are vulnerable to being prosecuted under a patchwork of antiquated criminal abortion laws, fatally ambiguous "unborn victims of violence" laws susceptible to being twisted beyond their intended use, and other criminal laws prone to misuse by prosecutors.

PUNISHING PEOPLE FOR ABORTION

What makes criminal abortion laws unique from other regulations on how abortions are performed is that the government does not merely seek to force someone to continue an unwanted pregnancy, it punishes that person with jail time for failing to do so. In punishing people for abortions, the government threatens "the most elemental liberty interests"³ and marks the person with a stigma of criminalization that is permanent, consequential, and demeaning – even if the investigation never results in criminal charges.

THE FUTURE PROMISE OF ROE

Roe's promise has been an illusory one for many in the U.S. – particularly for people who are cash poor and for those who live in states that make it nearly impossible to obtain abortions. In addition to denying access to abortions, *Roe's* promise has failed those who, even in the decades since this landmark ruling, have been subject to physical examinations or bedside interrogations for suspected self-induced abortions. It is time to eliminate the threat of prosecution from U.S. state laws, so pregnant people can fully enjoy their human rights to non-discrimination, self-determination, security of their person, health, and to be free from cruel, inhuman, or degrading treatment.

2. CRIMINALIZATION OF ABORTION

MYTH OF PROTECTING PREGNANT PEOPLE

This report also lays bare the prevailing myth perpetuated by abortion opponents that criminalization of abortion protects pregnant people from unscrupulous actors and only affects healthcare providers. In fact, the evidence shows us that criminalizing abortion actually puts people at risk. Threatening people with jail for ending their own pregnancies may frighten some people from getting important medical care. If someone has decided to self-induce abortion, they need to have accurate information and be able to seek medical care if they need it, without fear of arrest.

POLITICAL PRESSURE FOR ARREST

The paternalistic myth of protecting people through criminalization re-emerged in the public discourse in March of 2016, when then-candidate Donald Trump was asked during a nationally televised town hall meeting about his promise to “ban abortion.” Trump responded, “You go back to a position like they had where [women] would perhaps go to illegal places. But you have to ban it.” Pressed on the point of what this would mean for women who have abortions, he stated, “there has to be some form of punishment.” Despite later claims that he intended to say that abortion providers, not pregnant people, should face punishment, President Trump’s initial support of a criminal punishment for those who seek abortions was revealingly in-step with the pattern emerging throughout the country.⁴

VULNERABLE TO HARSH PUNISHMENT

The harshest SIA prosecution in U.S. history occurred in Indiana during Vice President Pence’s tenure as Governor. At the time of then-candidate Trump’s statement about punishing people for abortions, a woman named Purvi Patel was serving the third year of a 46-year sentence behind bars for having ended a pregnancy with abortion pills purchased from an online pharmacy. Politically motivated prosecutors across the U.S. have experimented with a variety of laws to punish those who end their own pregnancies, resulting in at least five felony arrests. And, prosecutors may now be inflamed by rhetoric calling for criminalization.⁵

NOT A “WOMEN’S” ISSUE

Many people who can become pregnant are not women: transgender men, intersex, non-binary, or other gender-nonconforming individuals have the capacity for pregnancy and therefore a need for abortions. We use gender-neutral terms and inclusive terminology whenever possible in this report. This includes the use of “they” and “their” as third-person singular pronouns. We are careful about the words we use, because seeking reproductive healthcare may be difficult or traumatizing for trans and gender non-confirming people, who may experience discomfort with bodily processes they do not identify with, or health settings that may be misgendering or non-affirming. Such experiences may result in trans or gender-nonconforming people seeking care outside of the formal medical system and becoming ensnared in criminal prosecutions.

3. THE MODERN SELF-INDUCED ABORTION

NOT A “BACK-ALLEY” ABORTION

Self-induced abortion (“SIA”) is not a “back-alley” abortion or “DIY” abortion, it is just an abortion. An abortion that occurs most commonly in someone’s home, done in privacy and in safety, sometimes with the help of a caregiver, friend, or family member. It may include the use of pharmaceutical pills, traditional herbs, or other means to end a pregnancy. While non-clinical abortion is as old as pregnancy itself, with the advent of new medical technologies, the possibility of safe home abortion is more attainable than ever before. Within this report we will generally use the term SIA to refer to the practice of self-administering pharmaceutical abortion pills. We will at times also use this term to describe other methods for ending one’s own pregnancy with or without the help of a third party. While we do not want to encourage any unsafe methods of ending pregnancies, we also want to ensure no person is stigmatized or prosecuted for ending a pregnancy, regardless of the method used.

THE PRACTICE

While it is difficult to get an accurate count of how many people in the U.S. self-induce or have attempted to end their own pregnancies, recent research suggests most people who self-induce pregnancies do so with abortion pills. A recent study of abortion patients in Texas found that 7% had taken or done something to try to end their current pregnancy before coming to the clinic.⁶

NEW REPRODUCTIVE TECHNOLOGY

There are currently two medications in widespread usage that can end a pregnancy. Mifepristone (also known as RU-486) is used in combination with misoprostol (commonly referred to by its brand name Cytotec), and together they are up to 98% effective in ending a pregnancy up to the 11th week. Misoprostol itself is up to 85% effective when used alone. Both drugs are considered essential medicines by the World Health Organization. Medication abortion is considered extremely safe: the rate and nature of complications is similar to that of spontaneous miscarriage. The most common complication is that the abortion does not work and the pregnancy continues, which can often be remedied with another dose of pills.⁷

BOTH/AND

Clinic-based abortions are an essential component of abortion care; nevertheless, some pregnant people seek abortions outside of the formal healthcare system. Because most people who need abortions receive them in a clinical setting, we recognize there is a need for *both* clinic-based *and* non-clinical abortion options. Nothing in this report is meant to lessen the need for, or public support for, clinical abortion care. This report is meant to highlight how some people in the U.S. are accessing self-directed abortion care and how the law can better support this abortion experience.

NECESSITY + PREFERENCE

A person's access to clinical abortion care is increasingly dependent on their ability to surmount legally devised hurdles, which are in turn dictated by the state in which they happen to live. But, lack of access to clinic-based abortion is not the only reason people may seek self-directed care. Some people may have different, deeply intimate reasons, including a preference for the more personal, spiritual, and/or private experience of being able to end a pregnancy at a time and with the companion of their choosing.⁸

INTERNATIONAL CONTEXT

Communities with strong self-help and community-based health practices around the world have been at the center of advances in SIA. In fact, the utility of misoprostol (originally developed as an ulcer-prevention medication) for safe abortion was discovered by community-based caregivers, not by the medical profession. In Brazil — where abortion is illegal but misoprostol was available in pharmacies — pregnant people realized that the medication could safely end a pregnancy and passed the information by word of mouth, causing a drop in abortion-related deaths. Studies of these practices show they are safe and effective.⁹

WHY “SIA?”

Many terms are used to describe the varied methods for non-clinical abortions — home abortion, abortion self-care, self-administered abortion, and plan c. We typically use the term “SIA.” As others explore language to describe these practices, we encourage the use of terms that avoid stigma and lift up the self-care and self-directed traditions practiced in many communities around the world.

COMMUNITY-BASED CARE

This community-based support has grown, and in locations where abortion is restricted but misoprostol is available, local and international networks help pregnant people obtain pills and information about how to safely end their own pregnancies. This international practice of community-based care has not replicated to the same degree in the U.S. because of the complex interplay of state and federal laws. There is a robust history of self-induced and community-based abortion across the U.S. From herbs used by indigenous cultures to pills and tinctures to “restore the menses” purveyed by early physicians, people in the U.S. have always sought ways to end untimely pregnancies, regardless of the legality of abortion.¹⁰

SELF-CARE LINKED TO LIBERATION

For some, the modern self-induced abortion is actually connected to the past. The practice of self-inducing abortion is a part of many long-standing traditions of care and cultural practices. Some communities have indicated that receiving home-based abortion from a non-clinical provider who provides a full-spectrum of reproductive care — including prenatal and postpartum care, miscarriage management, and general sexual wellness — is a critical part of quality healthcare. Other communities have reported that seeing an existing provider of non-western medical care, like an acupuncturist, would be an optimal way to receive abortion care. These communities also report that reclaiming or decolonizing these practices is an important part of overall liberation from oppression.¹¹

4. MAKING ABORTION A CRIME (AGAIN)

SIA can be a safe and satisfying experience. However, the threat of arrest may make what would be a dignified abortion experience, into a traumatizing or demoralizing one, particularly for those who live under heightened government surveillance or fear arrest because of identities they hold. This fear is justifiable given that someone searching on the Internet for information about proper dosage and typical side effects of abortion pills might turn up headlines about Purvi Patel, Jennie Linn McCormack, Kenlissia Jones, and others arrested and imprisoned for allegedly ending their own pregnancies. These women were prosecuted under a variety of laws including: laws directly criminalizing self-induced abortions, laws criminalizing harm to fetuses, criminal abortion laws misapplied to people who self-induce, and various and sundry laws deployed when no other legal authorization to punish could be found.

LAWS DIRECTLY CRIMINALIZING SIA

Laws that directly criminalize SIA present the most direct threat to those who end their own pregnancies. These statutes prohibit actions ranging from “self-abortion” to “soliciting,” or “submitting to” a criminal abortion and have penalties that range from misdemeanors to felonies.

LAWS CRIMINALIZING HARM TO FETUSES

Fetal harm laws are intended to protect pregnant people, but they have been twisted to punish them. In virtually every state with laws that punish harm to fetuses, prosecutors have attempted to use these laws to punish people for the outcomes of their pregnancies. Prosecutors have radically expanded these fetal protection laws to impose criminal liability on pregnant people – even when the law explicitly prohibits charging a pregnant person with a crime. These laws have been used to punish people for abortions as crimes tantamount to homicide.

MISAPPLIED CRIMINAL ABORTION LAWS

Some pre-*Roe* abortion laws were never repealed. In states where lawmakers have failed to update their criminal abortion laws after *Roe*, prosecutors have opportunistically sought to charge people under archaically worded statutes, making abortion a crime for pregnant people in a way it never was prior to *Roe*.

THE LEGAL LANDSCAPE

What follows is a summary of states with laws impacting SIA or where people have been investigated for a suspected abortion. There are **7 states** with laws directly criminalizing self-induced abortions, **11 states** with laws criminalizing harm to fetuses that lack adequate exemptions for the pregnant person, and **15 states** with criminal abortion laws that have been and could be misapplied to people who self-induce. There are also a number of laws deployed when no other legal authorization to punish can be found (obscure laws like disposal of human remains or concealing a birth), which have led to at least 18 arrests for SIA and criminal investigations in **19 states** for alleged self-induced abortions since 1973. As with any statute, there are a number of factors that influence how it will be interpreted, including its specific language, other statutes relating to the same subject matter, authoritative interpretations of the law, and whether the law conflicts with constitutional protections. As a result, in addition to other legal theories discussed in this report, some of these laws may be unenforced or unenforceable for several reasons.

STATE	SIA BAN	MISAPPLIED FETAL HARM LAW	POTENTIAL MISUSE OF CRIMINAL ABORTION LAW	ARREST OR INVESTIGATION
ALABAMA			X	
ALASKA				
ARIZONA	X		X	
ARKANSAS		X		X
CALIFORNIA				X
COLORADO				
CONNECTICUT				
DELAWARE	X			
FLORIDA				X
GEORGIA				X
HAWAII				
IDAHO	X			X

ILLINOIS				X
INDIANA				X
IOWA		X		X
KANSAS				
KENTUCKY			X	X
LOUISIANA				X
MAINE				
MARYLAND		X		X
MASSACHUSETTS		X	X	X
MICHIGAN		X		
MINNESOTA				
MISSISSIPPI		X		
MISSOURI		X		
MONTANA				
NEBRASKA				
NEVADA	X			
NEW HAMPSHIRE				
NEW JERSEY				
NEW MEXICO			X	
NEW YORK	X			
NORTH CAROLINA			X	X
NORTH DAKOTA				
OHIO			X	
OKLAHOMA	X	X	X	
OREGON				

PENNSYLVANIA				X
RHODE ISLAND		X		
SOUTH CAROLINA	X			X
SOUTH DAKOTA				
TENNESSEE			X	X
TEXAS				X
UTAH		X		X
VERMONT				
VIRGINIA			X	X
WASHINGTON		X		
WEST VIRGINIA			X	
WISCONSIN				
WYOMING				

5. LAWS DIRECTLY CRIMINALIZING SIA

OUTDATED LAWS STILL USED FOR ARREST

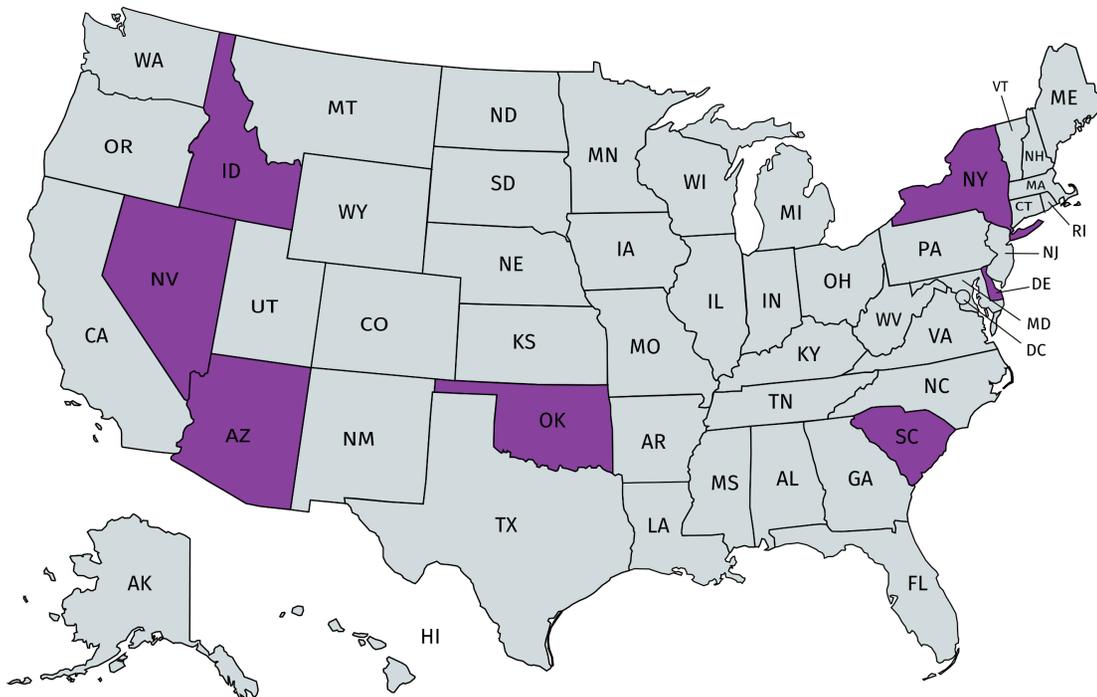
States with laws that directly criminalize SIA are spread across the U.S. and include Arizona, Delaware, Idaho, Nevada, New York, Oklahoma, and South Carolina. All are laws that have been retained from before the Supreme Court’s decision in *Roe* laid out the constitutional limits of the state’s ability to restrict abortion. But the fact that the laws are outdated and likely unconstitutional does not mean that they are inert: numerous pregnant people have been arrested under such laws, some of them recently.

MODERN ENFORCEMENT

It is difficult to say with certainty how many people have faced investigation or arrest under these antiquated laws, but as noted below, prosecutors have relied upon these statutes in the last decade. Laws criminalizing self-induced abortion are certainly the most direct threat faced by those who end their own pregnancies, but their danger is overshadowed by newer laws imposing harsher penalties opportunistically used by prosecutors in ways that were never intended by lawmakers. We include an incomplete list of modern prosecutions in the chart below. Because cases that do not come to the attention of the media or yield a written judicial opinion leave almost no record for researchers to find, It is possible there are other cases not listed here.

STATES WITH BANS ON THE BOOKS

The map below includes states that still have criminal SIA laws on the books. While enforcement of some of these statutes may be impacted by Attorney General opinions and case law, until these laws are repealed or enforcement enjoined, extreme prosecutors may seek to punish people who have abortions.



INVESTIGATIONS CAUSE HARM

Even when an arrest does not yield a conviction (as is often the case because of the evidentiary difficulties inherent in such prosecutions) the mere fact of having been arrested for a matter as stigmatizing and polarized as abortion can cause immeasurable damage to a person's life. For example, Jennie McCormack, a woman raising three children on less than \$250 a month, was charged under Idaho's law criminalizing self-induced abortions when she safely ended a pregnancy with pills she obtained online. While the charges were dropped due to insufficient evidence, Ms. McCormack was forced to quit her job at a dry cleaner because people refused to let her handle their dirty laundry.

McCormack told the Los Angeles Times in 2012, "My neighbors gave me nasty looks when I'd go out in public. They'd get all whispery: 'That's her.' My kids, they have friends that say stuff to them, and my older two, I feel that they're a little bit ashamed. And that's hard."¹²

SIA BANS ON THE BOOKS

The following chart includes a list of relevant laws, a summary of how these laws have been interpreted, and examples of modern enforcement of the statutes.

STATE LAW	RELEVANT LANGUAGE	ENFORCEMENT
<p>ARIZONA Ariz. Rev. Stat. 13-2640 (May be impacted by <i>McCormack v. Hiedeman</i>, 694 F.3d 1004, 1015 (9th Cir. 2012) and <i>McCormack v. Hiedeman</i>, 788 F.3d 1017 (9th Cir. 2015))</p>	<p><i>“A woman who solicits from any person any medicine, drug, or substance whatever, and takes it, or who submits to an operation, or to the use of any means whatever, with the intent to procure a miscarriage, unless it is necessary to preserve her own life, shall be punished by imprisonment in the state prison for not less than one nor more than five years.”</i></p>	
<p>DELAWARE 11 Del. Code § 652</p>	<p><i>“A female is guilty of self-abortion when she, being pregnant, commits or submits to an abortion upon herself which causes her abortion, unless the abortion is a therapeutic abortion.”</i></p>	<p>In 1977, in response to a constitutional challenge to Delaware’s abortion laws, the state attorney general issued a statement of policy opining that the self-abortion law is unconstitutional and declaring that it would not be enforced. Statement of Policy, Attorney General of Delaware (Mar. 24, 1977); <i>Delaware Women’s Health Org. v. Wier</i>, 441 F. Supp. 497, 499 n.9 (D. Del. 1977).</p>
<p>IDAHO Idaho Code Ann. § 18-606(2) (May be impacted by <i>McCormack v. Hiedeman</i>, 694 F.3d 1004, 1015 (9th Cir. 2012) and <i>McCormack v. Hiedeman</i>, 788 F.3d 1017 (9th Cir. 2015))</p>	<p><i>“Every woman who knowingly submits to an abortion or solicits of another, for herself, the production of an abortion, or who purposely terminates her own pregnancy otherwise than by a live birth, shall be deemed guilty of a felony . . .”</i></p>	<p>An Idaho mother named Jennie McCormack was arrested in 2011 after having ended a pregnancy with medication she obtained online. Ms. McCormack safely ended her pregnancy with abortion pills, but was reported to police by a family friend who told police about fetal remains on her property. She was charged with a crime that makes it a felony for women to “purposely terminates her own pregnancy.”</p>

<p>IDAHO (cont.)</p>	<p><i>Although § 18-606(2) is broad, § 18-608 permits abortion in certain circumstances and limits liability under § 18-606(2) for abortions that are “not authorized by statute.”</i></p>	<p>A magistrate judge dismissed the charge on evidentiary grounds, and Ms. McCormack filed a lawsuit challenging the constitutionality of the law. The Ninth Circuit concluded a portion of this statute facially unconstitutional in <i>McCormack v. Hiedeman</i>, 788 F.3d 1017 (9th Cir. 2015).</p>
<p>NEVADA <i>Nev. Rev. Stat. Ann. § 200.220</i> <i>(May be impacted by McCormack v. Hiedeman, 694 F.3d 1004, 1015 (9th Cir. 2012) and McCormack v. Hiedeman, 788 F.3d 1017 (9th Cir. 2015))</i></p>	<p><i>“A woman who takes or uses, or submits to the use of, any drug, medicine or substance, or any instrument or other means, with the intent to terminate her pregnancy after the 24th week of pregnancy, [unless she properly acts on the advice of a physician], and thereby causes the death of the child of her pregnancy, commits manslaughter . . .”</i></p>	
<p>NEW YORK <i>N.Y. Penal Law § 125.50 and N.Y. Penal Law § 125.55</i></p>	<p><i>“A female is guilty of self-abortion in the second degree when, being pregnant, she commits or submits to an abortifacient act upon herself, unless such abortifacient act is justifiable . . .”</i>; and</p> <p><i>“A female is guilty of self-abortion in the first degree when, being pregnant for more than twenty-four weeks, she commits or submits to an abortion act upon herself which causes her miscarriage, unless such abortifacient act is justified . . .”</i></p>	<p>In 2011 a young New York woman named Yaribely Almonte was charged with self-abortion in the first degree after her building superintendent found fetal remains in the trash. Ms. Almonte was interrogated by police and reported having drunk an herbal tea to induce an abortion. The use of traditional remedies or pharmaceuticals obtained abroad, whether to end a pregnancy or to treat other health concerns, is sometimes driven by barriers such as lack of access to health insurance and mistrust of the medical system. The charge was eventually dropped when the District Attorney acknowledged the difficulty of proving the source of a miscarriage, but not before Ms. Almonte’s name and pictures of her home appeared in the media.</p>

OKLAHOMA**63 Okla. Stat. § 1-733****21 Okla. Stat. § 862**

“No woman shall perform or induce an abortion upon herself, except under the supervision of a duly licensed physician. Any physician who supervises a woman in performing or inducing an abortion upon herself shall fulfill all the requirements of this article which apply to a physician performing or inducing an abortion.”

“Every woman who solicits of any person any medicine, drug, or substance whatever, and takes the same, or who submits to any operation, or to the use of any means whatever, with intent thereby to procure a miscarriage, unless the same is necessary to preserve her life, is punishable by imprisonment.”

While this statute was declared unconstitutional in *Henrie v. Derryberry*, 358 F. Supp. 719 (N.D. Okla. 1973), its application was not enjoined and the statute was not repealed. Additionally, later legislative acts and jurisprudence leave that finding of unconstitutionality unstable in the face of increased prosecutorial hostility toward women believed to have self-induced an abortion.

SOUTH CAROLINA**S.C. Code Ann. § 44-41-80(b)**

“[A]ny woman who solicits of any person or otherwise procures any drug, medicine, prescription or substance and administers it to herself or who submits to any operation or procedure or who uses or employs any device or any instrument or other means with intent to produce an abortion, unless it is necessary to preserve her own life, shall be deemed guilty of a misdemeanor . . .”

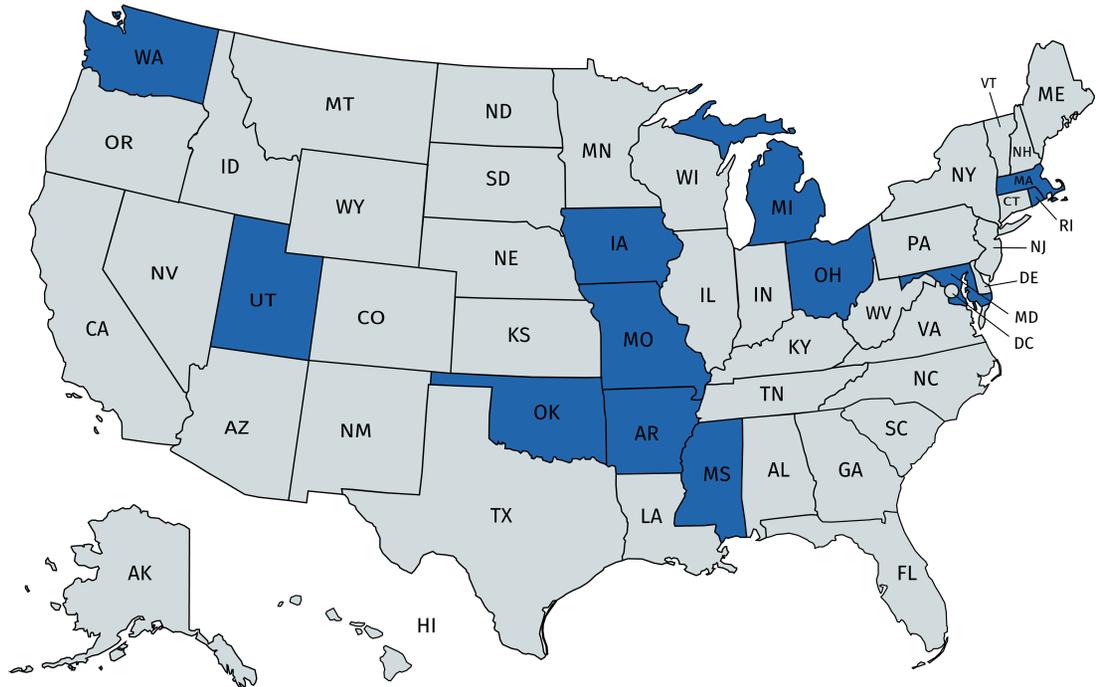
RECOMMENDATION

States should repeal all laws that criminalize self-induced abortion. Criminalization of abortion does not prevent people from attempting to end their own pregnancies. It only serves to foment mistrust of the medical system and prevent people from seeking care when they need it, and it inappropriately invites law enforcement into the healthcare setting. Whether styled as criminal self-abortion or procuring a miscarriage, laws singling out people for punishment for ending a pregnancy violate constitutional and human rights and should be repealed.

6. LAWS CRIMINALIZING HARM TO FETUSES

TREATING ABORTION AS HOMICIDE

Fetal harm laws vary in the degree of threat they pose to those who end or lose their pregnancies. Two states implicitly allow homicide charges against those who end or lose their pregnancies. Many of “fetal victim” laws contain provisions explicitly exempting pregnant people from criminal liability related to their own pregnancies; others are silent on the matter. When the law is silent on prosecuting pregnant people, it invites prosecutorial overreach. And even in states that explicitly prohibit charging a pregnant person with a crime, some prosecutors who are seeking to radically expand criminal liability for acts or omissions during pregnancy and pursued criminal charges against people who lost pregnancies.¹³



MODERN ENFORCEMENT

Shaded states on this map have laws that fail to adequately protect pregnant people from misuse of the law, or that create implicit authority for prosecution. Because these laws are homicide laws, they pose the greatest threat for harsh prison sentences. The harshest prosecution in U.S. history of a pregnant person in connection with a self-induced abortion was under a fetal homicide law that failed to explicitly exempt the pregnant person from liability.

THE ABSURD MISAPPLICATION OF FETAL HARM LAWS TO ABORTION

Prior to *Roe*, most states adhered to the common law “born alive” rule, which limited criminal liability for harm to fetuses. A person could only be charged with homicide for injuries inflicted in utero if the pregnant person delivered an infant that lived for some amount of time before dying. If the fetus died *in utero*, the injury was a crime, but not homicide. In the late 1970s, lawmakers began a trend of changing criminal laws to increase punishment for harm to fetuses,¹⁴ either by creating new crimes with fetal victims (such as feticide or fetal assault), redefining ‘persons’ or ‘victims’ to include fetuses,¹⁵ or both.¹⁶ As of this writing, at least 38 states and the federal criminal code have laws criminalizing harm to fetuses.¹⁷ These laws have garnered widespread support, because they are usually passed in the name of protecting pregnant people and often arise in the wake of high-profile acts of violence against a pregnant person. In practice, however, these laws make people vulnerable to prosecution.

**ARBITRARY
ENFORCEMENT IS A
NEAR CERTAINTY AS
LAW ENFORCEMENT
RELY ON
STEREOTYPES AND
STIGMA TO DISCERN
“INNOCENT” FROM
“GUILTY”
PREGNANCY LOSSES.**

THE IMPOSSIBLE BURDEN

By creating a “crime” for harm to a fetus, even acts or omissions that are negligent may be considered a crime if they cause the death of the fetus. While criminally prosecuting people who intentionally terminate pregnancies is an improper use of state power, these laws are also problematic because they are likely to result in the arrest and prosecution of people who suffer spontaneous miscarriages and stillbirths. Laws must be clear and narrow enough not to imperil people engaged in ordinary, non-criminal behavior. But there is still much that is unknown about pregnancy, and in practice it is difficult or impossible to prove what caused a fetal demise. This baseline of uncertainty leaves prosecutors to grasp for criminal intent using factors such as a person’s feelings of ambivalence about their pregnancy, previous visits to abortion clinics, and knowledge of their menstrual cycles.

TWO CATEGORIES OF LAWS POSE THE GREATEST RISK

Two categories of fetal harm laws pose the greatest risk of arrest: laws that implicitly permit selective criminalization of SIA and laws that fail to explicitly exclude pregnant people from liability. Eleven states have such laws. What follows is a comparison of these two categories of fetal harm laws, a sample of the statutory language used to extend liability to pregnant people, and a discussion of how these laws have been used in arrest.

	STATUTES IMPLICITLY PERMITTING SELECTIVE CRIMINALIZATION	STATUTES FAILING TO EXCLUDE PREGNANT PEOPLE
HOW SIA IS CRIMINALIZED	<p>A small number of states have passed statutes that imply they may be used against the pregnant person in some circumstances. For example, Utah’s law was adopted in order to close the “loophole” to ensure that people who tried to end their pregnancies would be punished. Oklahoma’s statute contains similar language.</p> <p>In their attempt to single out people who end their own pregnancies, they created a law so impermissibly vague and broad many other people could get swept up.</p>	<p>Many state laws create criminal liability for harm to fetuses without mentioning the pregnant person. Some prosecutors have seized upon the silence to create uncertainty as to whether pregnant people are considered victims or perpetrators under the law. This contravenes due process protections and principles of statutory interpretation, which dictate that laws must clearly describe the prohibited act or outcome and that ambiguities must be resolved in favor of the accused. Most U.S. courts faced with such a prosecution have agreed that, absent explicit statutory authorization, laws protecting fetuses may not be used to punish the people who carry them. However, these fundamental principles do not always succeed in preventing unlawful arrests and prosecutions, particularly given the general antipathy toward people who have abortions.</p>
SAMPLE STATUTORY LANGUAGE	<p>UTAH <i>Utah Code § 76-5-201(3)(b) & (4)(b)</i></p> <p><i>“[a] woman is not guilty of criminal homicide of her own unborn child if the death of her unborn child: . . . (b) is not caused by an intentionally or knowing act of the woman.”</i></p>	<p>INDIANA <i>Indiana Code 16-34 (also known as § 35-42-1-6)</i></p> <p><i>“[A] person who knowingly or intentionally terminates a human pregnancy with an intention other than to produce a live birth or to remove a dead fetus.”</i></p>

	STATUTES IMPLICITLY PERMITTING SELECTIVE CRIMINALIZATION	STATUTES FAILING TO EXCLUDE PREGNANT PEOPLE
ARRESTS	<p>Oklahoma’s and Utah’s laws remain untested thus far, but as these states race to restrict clinic-based abortion, it is only a matter of time until the next arrest.</p>	<p>Purvi Patel was charged with feticide for allegedly having taken pills she obtained from the internet to end her pregnancy. Ms. Patel came to the attention of law enforcement when she sought emergency help for a severe hemorrhage at a Catholic hospital. The ob/gyn treating her, who is a member of an anti-abortion professional society, summoned police to her hospital room. Ms. Patel suffered a 3:00 a.m. bedside interrogation without an attorney present as she recovered. After a spectacle of a trial in which she was cast as cold, calculating, and selfish by prosecutors, she was convicted and sentenced to 46 years, 20 of which would have been served behind bars. Fortunately, on appeal, the Court of Appeals of Indiana ruled that neither Indiana’s feticide law nor its criminal abortion laws were intended to punish people for self-inducing abortions. She was released after three years of incarceration. While Ms. Patel’s conviction was overturned and the proper interpretation of the feticide statute largely resolved by the appellate process, her case shows the uncertainty these laws create.</p>

RECOMMENDATIONS

States should eliminate the threat of wrongful and discriminatory prosecutions by clarifying ambiguous laws. People have been arrested for fetal harm crimes even when the law clearly prohibits arrests of pregnant people. When the law creates a separate victim status for fetuses in the criminal law, pregnant people become susceptible to improper law enforcement involvement, including arrest, interrogation, and prosecution, for any pregnancy loss. States should fulfill their obligation to protect people from cruel and unnecessary criminal investigations by clarifying — either through legislative amendment or an authoritative interpretation — that laws criminalizing harm to fetuses are intended to protect pregnant people, and may not be applied to acts or omissions with respect to one’s own pregnancy.

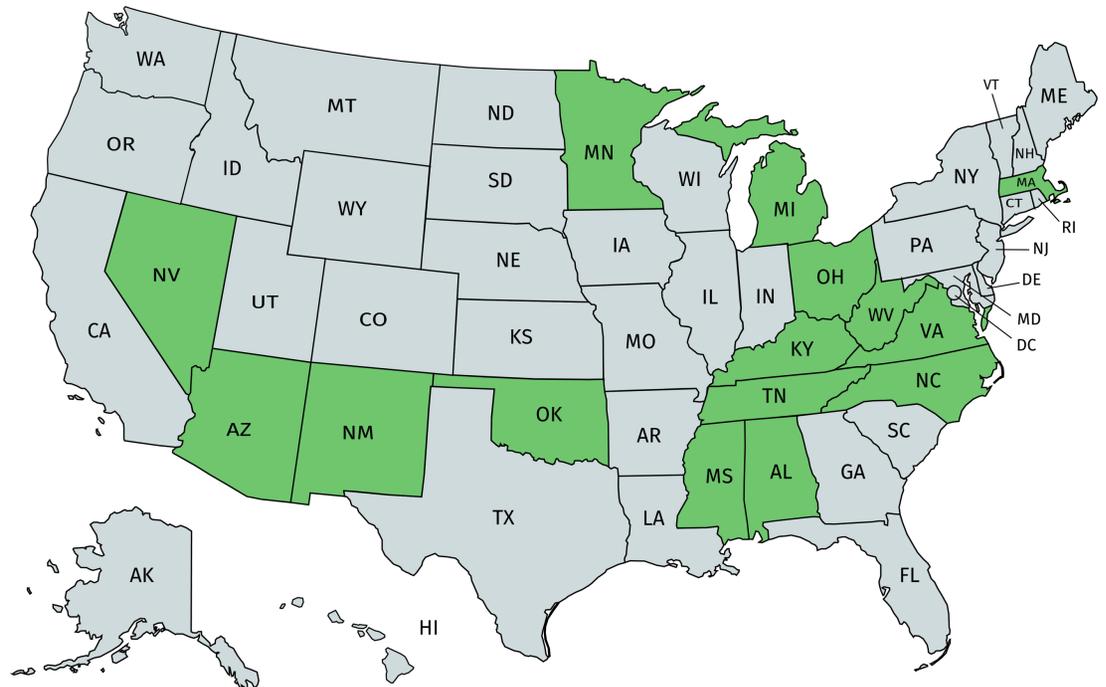
7. MISAPPLIED CRIMINAL ABORTION LAWS

EXPANDED FAR BEYOND INTENDED PURPOSE

Roe led to the repeal or reform of many — but not all — states’ criminal abortion laws. Some states kept their criminal abortion laws but added exceptions that provide access to abortion care under certain circumstances, or ceased enforcement of their laws pursuant to state court decisions ruling them unconstitutional. Other states passed “trigger laws” that ban abortion in the event that *Roe* is overturned. Historically, absent a clear indication otherwise, criminal abortion laws have been understood to apply only to people who provide abortions, not to people who have them. But where states have failed to update their criminal laws, prosecutors have opportunistically sought to charge people under archaically worded statutes, making abortion a crime for those who have abortions in a way it never was prior to *Roe*.

MODERN ENFORCEMENT

A prime example of such a prosecutorial abuse recently arose in Tennessee. Anna Yocca was arrested in 2015 for trying to end her pregnancy using a coat hanger.¹⁸ Fearing for her life after she began to hemorrhage, Yocca sought emergency medical assistance. She was stabilized, but later suffered an infection and underwent an emergency cesarean delivery of an extremely premature infant. She was turned over to law enforcement by hospital personnel, and was arrested under the charge of attempted homicide soon thereafter. This charge was correctly dismissed as improper because Tennessee’s fetal homicide law contains a prohibition on prosecuting the pregnant person. The prosecutor responded by charging Ms. Yocca with a slate of felonies, including aggravated fetal assault with a weapon, attempted criminal abortion, and attempted procurement of a miscarriage. The statute prohibiting abortion and procurement of miscarriage criminalizes “any person” who “performs an abortion” or “attempts to procure a miscarriage” unless the abortion conforms with statutory requirements.



This statute had never in Tennessee history been used to prosecute someone for their own abortion. In attempting to find a way to punish Ms. Yocca, the prosecutor departed from this longtime understanding and essentially treated her as though she were her own illegal abortion provider. Facing decades behind bars, she finally pleaded guilty to procurement of a miscarriage in January of 2017 and was released from jail after more than a year of incarceration.¹⁹

ARCHAIC LANGUAGE

Many criminal abortion laws are so old that their interpretation suffers due to the archaic language. For instance, Massachusetts criminalizes “Whoever, with intent to procure the miscarriage of a woman, unlawfully administers to her, or advises or prescribes for her, or causes any poison, drug, medicine or other noxious thing to be taken by her or, with the like intent, unlawfully uses any instrument or other means whatever, or, with like intent, aids or assists therein.” Prosecutors have attempted to apply such laws to those who self-induce abortion by ignoring the language clearly indicating the presence of another party who “administers to” or “prescribes for” them, arguing that a pregnant person may “unlawfully [use]” means to end a pregnancy. A total of fifteen states have provisions susceptible to similar misuse.²⁰

“PRACTICING MEDICINE” ON ONESELF

Kentucky’s abortion laws are particularly unclear and confusing, placing people at risk of improper prosecution. The Occupations and Professions Code, which governs physicians and other health professions, provides that “no person other than a licensed physician shall perform an abortion.” In context, such a law would ordinarily be understood to require that only physicians — and not laypeople or other healthcare providers — may perform abortions on someone else. But the code further provides that “An abortion may be performed in this state only under the following circumstances [. . .] During the first trimester of pregnancy by a woman upon herself upon the advice of a licensed physician or by a licensed physician.” No explicit prohibitions on self-induced abortion exist in Kentucky law, yet under this law an overzealous prosecutor could arrest someone for what amounts to unlawful practice of medicine *on themselves*.²¹ Of course, in any other medical context this would not be a crime and would be outside the scope of these laws, which are generally intended to prohibit people from misleading or harming the public by claiming to be licensed professionals. We are not aware of any other medical scenario where a person faces arrest for performing a medical procedure on themselves.

RECOMMENDATIONS

States should ensure that their laws comport with constitutional standards. Many states retain antiquated laws or have passed newer laws that impose limits that are impermissible according to Supreme Court jurisprudence. Where such laws exist, states should undertake to reform them to ensure people are able to seek care. This is especially important for criminal abortion laws, which create uncertainty among providers and are misused by prosecutors against people who end their own pregnancies.

8. PROSECUTIONS WITHOUT LEGAL AUTHORITY

POLITICALLY MOTIVATED PROSECUTORS

So great is the zeal to punish people who end their own pregnancies that prosecutors will often try to find a crime that fits, even if no other statutory authority exists. People who end their own pregnancies may find themselves arrested for homicide, but eventually prosecuted for improper disposal of human remains once it becomes clear that no state law would support charging someone with ending a pregnancy. It is difficult, if not impossible, to address every possible law that could be used by a prosecutor committed to punishing someone for ending a pregnancy. At the heart of these prosecutorial abuses is the idea that abortion is a crime — a notion that was historically only applicable to people who provide abortions, but has now seeped into criminalizing people who seek abortions. This underlying notion is one that states can eliminate by removing criminal abortion laws and ensuring that procedures administered by healthcare professionals are governed with medically necessary health regulations rather than criminal laws, clearly demarcating the healthcare realm from the realm of criminal prosecution.

MODERN ENFORCEMENT

This is the precise situation Anne Bynum, an Arkansas woman, found herself in after ending her pregnancy using abortion pills. After the delivery of a stillborn fetus, she fainted, and then reported to the hospital with the remains several hours later.

Arkansas law does not permit “unborn victim” charges against the pregnant person, and no statutory authority for a criminal abortion charge exists. She was, therefore, charged with the arcane crimes of abuse of a corpse and concealing a birth, both of which are felonies. The abuse of a corpse charge was dismissed at trial, but she was convicted of concealing a birth and sentenced to six years in prison.²² Over-regulation of the disposal of fetal remains has recently gained prominence as a tactic to control abortion providers, raising concerns that such laws may be used to punish people who end their own pregnancies. Other states have laws similar to Arkansas’s that prohibit “concealment of a birth,” arcane laws passed in earlier centuries to punish unwed mothers and cast criminal doubt on perinatal deaths.²³ Prosecutors who have been thwarted in charging people who end their own pregnancies with harsher fetal homicide or assault laws have responded by penalizing possession of abortion pills as “dangerous drugs,” as recently occurred in Georgia,²⁴ or punishing the act of providing them to a loved one as unlawful practice of pharmacy, as happened to a Pennsylvania mother who helped her daughter have a safe abortion with pills.²⁵

**PROSECUTORS WHO HAVE
BEEN THWARTED IN
CHARGING PEOPLE WITH
HARSHER CRIMES
RESORT TO “SPAGHETTI
CHARGING” – THROWING
OUT CHARGES UNTIL
SOMETHING STICKS.**

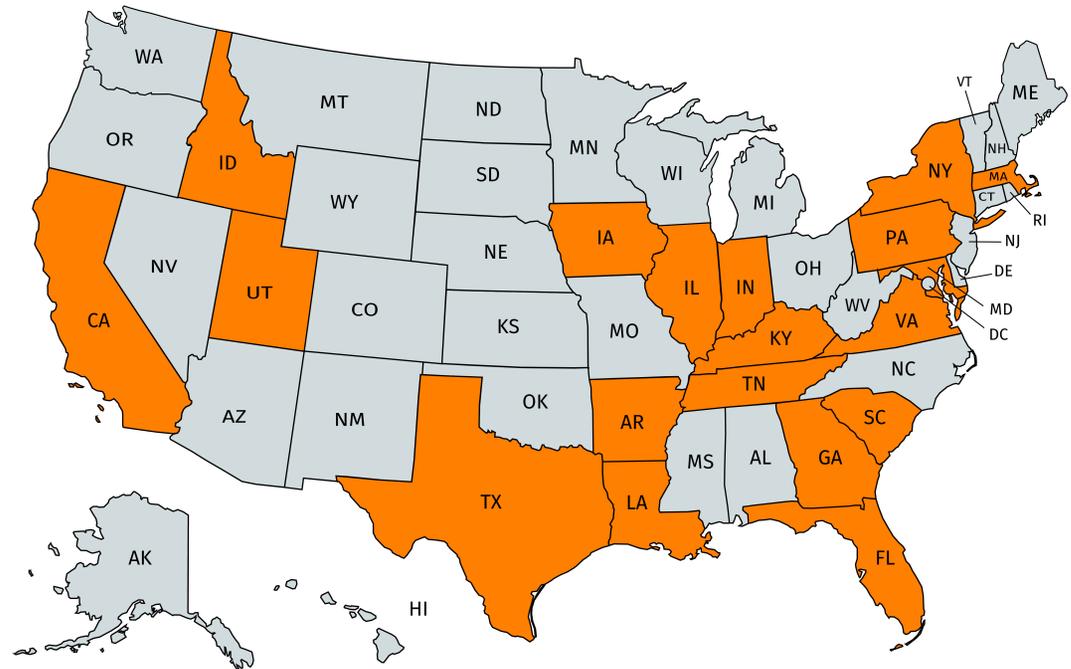
9. VICTIMS OF UNLAWFUL INVESTIGATION

18 ARRESTS, INVESTIGATIONS IN 19 STATES

The SIA Legal Team’s research has uncovered **18 arrests** of people who end their own pregnancies and those who have supported them. These investigations and arrests spread across the country. One thing is consistent through all of these cases: when a prosecutor wants to punish someone, they will find a way to do it. In many cases, this has meant relying upon antiquated laws or laws meant to protect, not punish, pregnant people. Of course, someone does not have to go to jail for it to do harm. Even misdemeanor charges can mean that a person loses their job, especially for people doing low-wage care work like childcare and home medical assistance. In many states, records searches used by employers will show an arrest and what the arrest was for, even if the person is never formally charged. There is often no way to get this mark off their record.

PUBLIC HEALTH CONCERNS OF CRIMINALIZING ABORTION

Criminalization poses serious threats to people’s health and the health system itself. Threatening people with criminal punishment erodes trust in the medical system, making people less likely to seek help when they actually need it. Most of the people arrested for self-induced abortion came to the attention of law enforcement when they sought emergency medical help. A critical element of safe self-induced abortion is that people are able to seek medical assistance when it becomes necessary and be open with their providers about what happened. Criminalization actually makes people less safe and harms the confidential doctor-patient relationship by creating uncertainty as to whether law enforcement needs to be involved. In the worst circumstances, this leads people to be treated as suspects instead of patients, subject to bedside interrogations in hospitals when they should be healing.



WHO GETS HURT BY INVESTIGATIONS AND ARREST?

While ethnographic data are still being collected, we know anecdotally that many people who self-administer abortion care do so because they cannot afford the cost or the exposure of clinic-based care. Many people in this group are immigrants, people who have experienced sexual violence, minors, LGBTQ folks, and people of color, who may have a warranted mistrust of the medical system based upon histories of medical experimentation or reproductive coercion, and those who society does not recognize as deserving of sexual agency (for example the disability community or youth). In the coming years and months, based upon the current political climate, it is possible there will be an increased profile of self-induced abortion. This means it is possible law enforcement officials and other agencies could pay more attention to the suspected practices and people, resulting in more arrests, incarcerations, and deportations.

IMPLICATIONS FOR UNINTENDED PREGNANCY LOSS

For every person who gets caught up in the legal system for a suspected abortion, there will be another ensnared for a pregnancy loss that was not intended. As the Guttmacher Institute reports, the fact that abortion pills are virtually undetectable in someone's body has given police and prosecutors reason to "conduct fishing expeditions" against both those who have ended their own pregnancies as well as those merely suspected of doing so.²⁶ When abortion is made a crime, every pregnancy loss becomes a potential trial. This burden falls most heavily on those who lack resources for optimal pregnancy outcomes, including people of color and people living in poverty, who may lack prenatal care, adequate nutrition, or other resources.

RECOMMENDATIONS

While a few states have explicit bans on self-administered abortion care, there are roughly 40 other different types of laws that politically motivated prosecutors may wield against people who end their own pregnancies and those who help them. Lawmakers should adopt laws prohibiting prosecutors from investigating or arresting anyone for a suspected abortion.²⁷

10. BEYOND ROE: POWERFUL NEW THEORIES

Roe provides critical protections for people seeking abortions, but these are not the only protections from criminalization afforded by the Constitution. Although *Roe* provides an avenue for challenging these laws, *Roe* is a floor, and not a ceiling, for any constitutional analysis. Criminalization jeopardizes people's most fundamental liberty rights and marks them with stigma that is permanent, significant, and demeaning. Consequently, although states generally have broad discretion in defining the boundaries of acceptable behavior through criminal laws, the Constitution places limits on criminalization. It provides protection from state overreach in who may be criminalized, which acts may be considered a crime, and the process used to investigate and prosecute the crime. This is especially so where criminalization is being used for an impermissible purpose like coercing a person's abortion decision.

The SIA Legal Team sees the future promise of applying these constitutional protections to prevent states from forcing pregnant people to continue an unwanted or mistimed pregnancy by punishing them with arrest and incarceration for failing to do so. What follows is a summary of some promising new theories for challenging these overreaching laws.

UNDUE BURDENS

The traditional abortion jurisprudence provides a starting point for challenging laws and prosecutions for SIA. Courts reviewing prosecutions have used the undue burden analysis, taking into considered all of the cumulative burdens experienced by a person seeking abortion care outside of the formal medical system. This should be expanded to include a critical examination of the compound restrictions that erect barriers limiting access to clinic-based abortion care and stigmatizing those seeking abortions. Such an analysis ought to additionally address the cumulative effects of discrimination and surveillance. Because criminalization of abortion is often as much about a person's identities (especially with regards to race, gender, and sexuality) as their actions, it is relevant to examine the various systems and policies that combine to form cumulative burdens, including hyper-regulation of abortion, public programs that intrude into the lives of low-income individuals, and over-policing of trans, immigrant and communities of color.²⁸

CRUEL AND UNUSUAL PUNISHMENT

The Constitution places limits on the form and degree of punishment, prohibiting "cruel and unusual punishment." It forbids punishment that is grossly disproportionate to the severity of the crime and imposes limits on what acts or omissions may be punished. While courts generally give deference to legislatures on determining degree of punishment (e.g. length of a sentence or amount of a fine), they may strike down policies imposing punishments that fail to make a measurable contribution to the acceptable goals of punishment: retribution for wrongdoing, and prevention of harm. But there is no legitimate basis for the government to punish someone based on their constitutionally-protected decision to end a pregnancy, and criminalization only creates more harm by driving people away from healthcare when they need it most.²⁹

FREEDOM IN MEDICAL DECISIONMAKING

Everyone has a fundamental right to decide what happens to their body, and to refuse unwanted medical care. Even if the recommended medical care would save their life, the state can step in to force care only under extremely rare circumstances, and cannot punish people for not accepting care. These rights protect people in all the decisions they make about pregnancy, including decisions about labor and delivery. While courts have not yet had the opportunity to apply these concepts to self-induced abortion, they should logically extend to a right not to be punished for medical self-care.³⁰

GOVERNMENT INTRUSION

People suspected of a crime are protected from unauthorized government intrusions into the privacy of their home, property, and sensitive information in which they have a reasonable expectation of privacy. These protections are based in tenets established in *Griswold v. Connecticut*: privacy, intimate association, and reproduction. Because self-induced abortion implicates all of these, it may be possible to challenge laws and prosecutions on the grounds that such a prosecution violates the person's Fourth Amendment rights.³¹ The Fourth Amendment safeguards some deeply personal matters, like contraception, from government intrusion by the criminal law entirely.²⁶ Because the criminalization of SIA necessarily requires intrusion into highly sensitive medical information to prove the crime and turns health care providers into informants against their patients, these crimes are ripe for challenge under the Fourth Amendment.

Additionally, case law also recognizes the potential for self-incrimination that coercive interrogations can create, giving rise to the right to counsel during police interrogations under custody and the right to remain silent. People suspected of SIA are often subjected to humiliating interrogations in healthcare settings when they are in critical condition and do not have access to an attorney. The only way to avoid the constitutional problems inherent in these proceedings would be to read *Miranda* rights to everyone seeking care for a miscarriage, defeating the purpose of healthcare provider-patient confidentiality.

HUMAN RIGHTS THEORIES

In June of 2017, three special mandate holders from the United Nations Office of the High Commissioner for Human Rights issued an open letter to the government of New York urging the legislature to adopt a pending legal reform that would have decriminalized SIA. These human rights experts expressed concern that criminalization of SIA violates women's right to be free from discrimination, the right to the highest attainable standard of health, and the right to bodily integrity. This change would be "a hopeful signal that much needed reform can and should be initiated." While the bill at issue has not yet passed, attention from the U.N. can bolster human rights claims made by groups advocating for law reform.³²

Some legal thinkers have posited ways to apply international human rights concepts in U.S. Courts.³³ For example, the Supreme Court's decision in *Obergefell v. Hodges*,³⁴ which articulated a concept of equal dignity that appears to be a contemporary articulation of a human rights frame, may provide a mechanism to leverage a human rights analysis in the U.S. courts.³⁵ Additionally, U.S. state and federal courts may take statements of human rights experts or tribunals into account in making their own decisions, and they have done so with regard to determining societal standards of acceptable punishment. Developing human rights arguments framing criminalization of SIA as a form of torture or cruel, inhuman, and degrading treatment can provide authority for U.S. courts' to decide criminalization is illegitimate.³⁶

COERCION

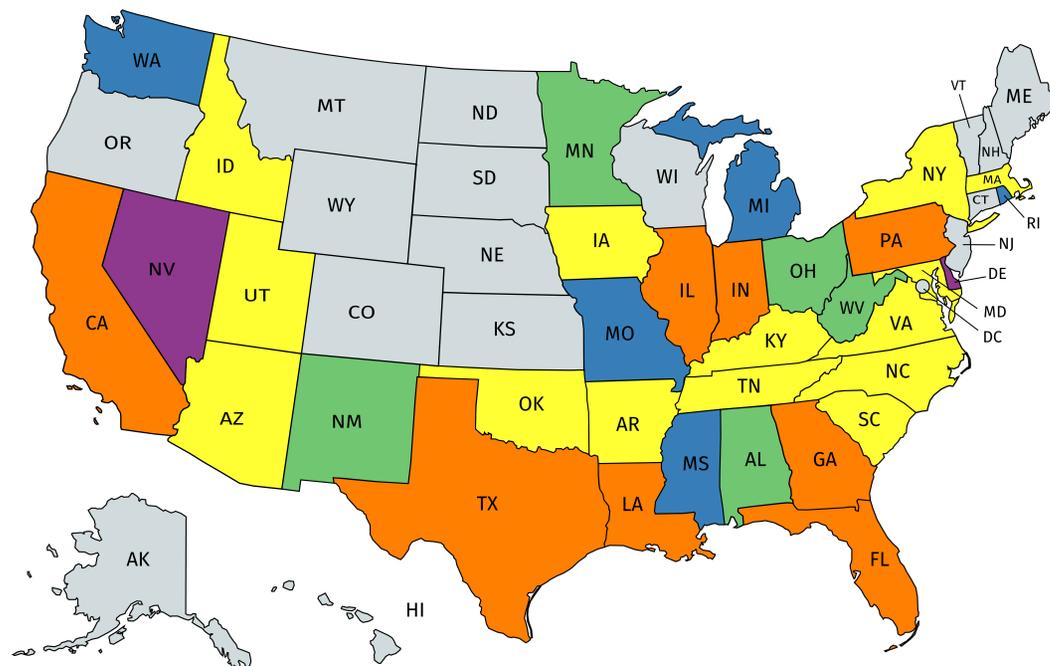
Members of the Supreme Court in both *Roe* and *Harris v. McRae* articulated a constitutionally protected right to privacy that encompassed the choice to end a pregnancy that is to be made free from government interference. Justice Brennan's dissent in *McRae* reminds us that government must "refrain from wielding its enormous power and influence in a manner that might burden the pregnant woman's freedom to choose whether to have an abortion."³⁷ Similarly Justice Ginsburg has written the abortion decision must be "uncoerced" and "unsteered" by the government.³⁸ When the State makes SIA a crime, and threatens a person with arrest and prosecution for having an abortion, there can be no doubt the government is coercing a person's abortion decision.

RELIGIOUS CHALLENGES

For some, sincerely held religious beliefs may require they reject an abortion provided by a doctor in favor of an abortion provided by a spiritual non-physician provider. Any criminal law that results in requiring abortions be provided only by a doctor could be challenged under free exercise of religion clause(s) of U.S. and state constitutions as well as federal and state Religious Freedom Restoration Acts.³⁹ Additionally, because many of the laws discussed in this report have imbued a fetus with religiously-based rights as separate and unique human beings, it may be possible to decriminalize abortion under U.S. and state constitutions that prohibit the establishment of religion.⁴⁰

PUTTING THESE THEORIES INTO PLAY

As lawyers and advocates develop strategies to put these theories into play, this map articulates all of the ways states in the U.S. put people who have abortions in non-clinical settings in legal jeopardy.



KEY TO THIS MAP

- Yellow:** States with multiple types of laws or laws and a criminal investigation(s)
- Purple:** States directly criminalizing SIA
- Blue:** States criminalizing harm to fetuses potentially misused in SIA prosecutions
- Green:** States with criminal abortion laws potentially misused in SIA prosecutions
- Orange:** States with unlawful investigations or arrests

11. FULFILLING THE PROMISE

The potential for criminal charges creates understandable distrust in the institutionalized healthcare system. It exacerbates rampant inequities by further punishing people who may self-induce because they cannot afford or access a clinic-based abortion. Distrust in the institutionalized medical system is only deepened when political leaders suggest punishment for abortion is appropriate. Such prosecutions are sometimes vindictive, often political, and always a violation of fundamental rights. What follows are some recommendations for the movement, for advocates, and for lawyers who can all be a part of finishing the promise and fully decriminalizing abortion.

RECOMMENDATIONS FOR THE MOVEMENT

Many stakeholders within the legal and reproductive health, rights, and justice movement(s) are exploring how to initiate, grow, or contribute to a variety of efforts designed to expand protections for those who end their own pregnancies and to build support for a self-directed abortion experience. What follows are recommendations from people who are either impacted by SIA criminalization or who center those most impacted in their work. These insights can inform efforts to shift law, policy, and public opinion in favorable ways that support people who end pregnancies outside the formal medical system and help to shift them from a place of desperation to a position of empowerment.

1. AVOID HARM TO EXISTING PRACTICE

People are finding ways to research, obtain, and end their own pregnancies, with or without the help of others. When designing advocacy strategies, movement stakeholders can help ensure the needs and interests of these communities are represented in any strategy by keeping in contact with those who are most likely to be impacted by the criminalization of abortion.

2. CONNECT TO ADVOCACY ON OVER-CRIMINALIZATION

For some people, the analysis of criminalization of SIA turns on the illegitimacy of criminalizing a constitutionally protected right. But, the criminalization of people who have non-clinical abortions fits into a larger analysis of over-criminalization in general, and communities of color specifically. Criminalization of self-managed abortion is just one of many means of criminalizing black and brown bodies, including immigration crackdowns, the “war on drugs,” and civil child welfare penalties. It may, therefore, be helpful to connect conversations around the criminalization of SIA to larger conversations within the RJ framework that focus on community resistance and community self- help. Additionally, SIA may connect to larger narratives about reproductive rights, social justice, gender equity, economic security, and more. It can also be linked to conversations about the criminalization of mothers, abortion stigma, abortion funding bans, TRAP laws, and more.

3. DECRIMINALIZATION ALONE IS NOT ENOUGH

In order to ensure everyone in has access to pregnancy-related care that meets their needs, supports their health, and respects their dignity, it is not enough to simply ensure people do not go to jail for their abortions. People must also have the financial and practical supports to have the abortion experience that best meets their needs.

4. CENTER LEADERSHIP OF IMPACTED GROUPS

While ethnographic data are still being collected, we know anecdotally that many people who self-administer abortion care do so because they cannot afford the cost or the exposure of clinic-based care. Many people in this group are immigrants, survivors of sexual violence, queer and transmasculine folks, or minors; and, a disproportionate number are people of color. Follow the leadership and respect the needs of the people who are at risk as well as the organizations that work with these groups. Seek to buffer vulnerable groups, for example by having others with greater privilege and security take bigger risks. While some groups may prefer to lead from behind, they should be involved and credited for their leadership as appropriate.

5. LEAVE NOBODY BEHIND

A singular focus on decriminalizing self-administered abortion with pills could stigmatize other methods of SIA and leave people vulnerable to arrest. A variety of impediments and motivations lead people to SIA, but too narrow a focus on barriers to clinic-based abortion care foreclose opportunities to guide conversations toward proactive expansion of abortion autonomy rather than reactive defense against restrictions.

6. PREPARE PROVIDERS

Raising awareness of SIA could raise the specter of abortion providers as complicit in the provision of medications or even in the provision of post-abortion care. Such suspicions could trigger “stings” against providers. The movement may need to equip providers with messaging and legal information to respond to suspected stings in a manner that protects their practices and reputations.

vulnerable to arrest. A variety of impediments and motivations lead people to SIA, but too narrow a focus on barriers to clinic-based abortion care foreclose opportunities to guide conversations toward proactive expansion of abortion autonomy rather than reactive defense against restrictions.

7. DON'T FOSTER FALSE SECURITY

It is possible that any effort to publicly emphasize the illegitimacy of criminalization will mislead some people into thinking that the law is more easily circumvented than is actually the case and ensnare them in the legal system. SIA advocates should avoid representations that might lead people to believe the law is more easily circumvented than is actually the case. Furthermore, advocacy efforts and awareness campaigns should be accompanied by reliable information about the laws, rights, and risks. There should be a safety net of lawyers, bail funds, and support networks for people who get ensnared in the legal system, as well as their family members.

8. RE-CENTER THE CONVERSATION

Until recently, the public debate about abortion has largely ignored the viewpoint of the people having abortions and the kind of experiences they would like to have. Supporting decriminalization of abortion presents an opportunity to center the conversation on the people who have or need abortions.

9. EMPOWER PEOPLE WITH BODY KNOWLEDGE

Many people who interact with those who are considering ending a pregnancy report these individuals are either acting from a place of desperation or lack sufficient knowledge of their bodies and how abortion pills work. With accurate information, effective methods, reliable support, and protective laws, these same people could take control over their health decisions from a place of strength and security instead.

RECOMMENDATIONS FOR LAWYERS

1. BUILD OFF PRIOR CASE LAW

While a few states have explicit bans on self-administered abortion care, there are roughly 40 other different types of laws that politically motivated prosecutors may wield against people who end their own pregnancies and those who help them. Fortunately, courts reviewing such prosecutions have generally sided with people who end their own pregnancies, creating strong precedent in favor of interpretation of laws that protects pregnant people from improper criminalization.⁴¹

2. CHART A NEW PATH

Laws that criminalize people who end their own pregnancies are different from laws that regulate how abortions are performed by providers in clinical settings.⁴² Therefore, lawyers would be wise to look beyond rights adjudicated in cases about clinical abortion regulation. For example, SIA criminalization may not serve a legitimate goal of criminal punishment, as required by the Eighth Amendment. The procedural and evidentiary hurdles to proving guilt in a SIA case may give rise to erroneous deprivation in violation of the Fourth Amendment. Furthermore, by converting private medical matters into evidence of a criminal act, a Fifth Amendment violation may be worthy of exploration. Lastly, pregnant people have a right to freedom in medical decision making throughout pregnancy, which includes the right to opt to treat themselves and refuse medical treatment by another person. This right may be violated when someone is threatened with arrest for ending their own pregnancy, rather than submitting to another person to do so.

3. AVOID ARGUMENTS THAT HEIGHTEN TWO-TIER SYSTEMS

Avoid arguing claims in a particular case that could elevate the conditions or choices of that defendant to the detriment of others who engage in SIA. For example, focusing solely on insurmountable legal restrictions that kept a defendant from accessing clinical care could create a harmful precedent limiting reliable defenses only to those who can prove they could not overcome legal barriers. This outcome could lead those who end pregnancies at home for personal or cultural reasons defenseless.

4. SEEK TO SERVE CLIENTS AND COMMUNITIES

Engage with members of communities disproportionately impacted by SIA criminalization to understand the oppressive policies, conditions, and biases making them vulnerable to ensnarement. Avoid tensions between legal strategies to win a case and community organizing strategies to protect vulnerable groups from State overreach.

5. BE A PART OF THE SOLUTION

Lawyers have many important roles to play in efforts to decriminalize non-clinical abortion. To learn more and get involved, visit www.SIALegalTeam.org.

POLICY RECOMMENDATIONS

1. REPEAL ALL LAWS THAT CRIMINALIZE SIA

Criminalization of self-induced abortion does not prevent people from attempting to end their own pregnancies. It only serves to foment mistrust of the medical system and prevent people from seeking care when they need it, and inappropriately invites law enforcement into the healthcare setting. Whether styled as criminal self-abortion or feticide, laws singling out pregnant people for punishment for ending a pregnancy violate a person's human and constitutional rights and should be repealed.

2. ELIMINATE THE THREAT OF WRONGFUL AND DISCRIMINATORY PROSECUTIONS

When the law creates a separate victim status for fetuses in the criminal law, pregnant people become susceptible to law enforcement involvement, including arrest, interrogation, and prosecution, for any pregnancy loss. States should fulfill their obligation to protect people from cruel and unnecessary criminal investigations by clarifying — either through legislative amendment or other authoritative interpretations — that laws criminalizing harm to fetuses are intended to protect pregnant people, and are not applicable to acts or omissions with respect to one’s own pregnancy.

3. STATES SHOULD ENSURE THEIR LAWS COMPORT WITH CONSTITUTIONAL STANDARDS

Many states retain antiquated laws or have passed newer laws that impose limits that are impermissible according to Supreme Court jurisprudence. Where such laws exist, states should undertake to reform them to ensure that people are able to seek care. This is especially important for criminal abortion laws, which create uncertainty among providers and are misused by prosecutors against people who end their own pregnancies.

4. ENSURE MEANGINGFUL ACCESS TO CLINIC-BASED ABORTION CARE

Abortion is already a two-tiered system in many parts of the U.S. with services available only to those with resources. As SIA becomes more visible, accepted, and protected, it may increasingly become the default for people without the means to afford clinic-based care. A bifurcation in abortion care could arise – between affluent people with access to clinics and poor people without. Rather than exacerbate this inequity, we can lessen it by insisting on a both/and vision for a future when pregnant people have access to affordable, available, legal self-directed and provider directed options. While we work to improve the experience with SIA, we can support other efforts to lift funding bans and remove TRAP laws. The goal of any strategy must be to get people their preferred care. Advocates can reduce the risk of two-tiered systems by not only fighting to decriminalize abortion, but also to remove barriers on federal and state public funding for abortion services and unnecessary and onerous regulation on the federal and state impacting access to facility-based care for those who seek it.

5. REFORM LAWS THAT UNNECESSARILY RESTRICT ACCESS TO ABORTION PILLS

Abortion with pills is extremely safe, but medically unnecessary regulations make the medications expensive to obtain through clinical channels and difficult to obtain through non-clinical channels. Increasing access to abortion pills and accurate information about how to use them can improve maternal health outcomes from self-managed abortion and reduce barriers for people living in rural areas, immigrants, those who lack insurance coverage and are cash-poor, and others for whom clinic-based care is inaccessible or inappropriate.

6. CALL IT WHAT IT IS – JAIL TIME FOR ABORTIONS

Making abortion a crime does not stop people from having abortions. As such, when anti-abortion advocates and lawmakers talk about abolishing abortion, they are really talking about sending people who have abortions to jail. Advocates may wish to bring to light the contradictions of their actions with their disingenuous claims to oppose the criminalization of people who self-induce abortion.

7. DISCREDIT TRAP LAWS

If people can safely and effectively end pregnancies in their own homes without being examined by a medical professional, they certainly do not need an anesthesiologist, a 48-hour waiting period, double-wide corridors, or a provider with hospital admitting privileges. Therefore, in advocating for the decriminalization of SIA, advocates also have an opportunity to discredit TRAP laws and show the absurdity of the over-regulation of abortion.

8. HIGHLIGHT COMMUNITIES IMPACTED

When advocating for the decriminalization of abortion, there is an opportunity to not only improve abortion access, but also to promote a racial and economic justice narrative. For example, advocates can highlight which communities are disproportionately impacted by abortion restrictions and penalties. For so long as oppressive policies push immigrants, LGBTQ, and people of color into poverty and under police surveillance, these communities will continue to bear the brunt of SIA's criminalization.

9. DE-BUNK THE MYTH OF PROTECTING PREGNANT PEOPLE

Prosecutors sometimes try to justify SIA arrests by falsely claiming that criminalization will deter unsafe activities. But, they fail to point out how unsafe being arrested, going to prison, or being deported would be. Lawmakers who truly care about the safety of people who practice SIA would work to promote policies that protect their rights and avoid the harms caused by involvement in the criminal justice system.

10. EMPHASIZE HARM REDUCTION

Decriminalizing SIA will reduce many predictable yet avoidable harms. For example, we can reduce maternal mortality/morbidity from unsafe methods and side effects from incorrect dosages; public shaming and employment challenges stemming from arrests for SIA; incarceration, detention, or deportation that can separate families and curtail parental rights; increased or sustained poverty that can result from having to carry a pregnancy to term; retraumatization for sexual assault survivors and parties who have had negative experiences with the medical system; and expensive black markets that distribute pills of unknown quality.

CONCLUSION

The SIA Legal Team is working to realize *Roe*'s promise by putting an end to the unlawful and unfair criminalization of people who end pregnancies outside the formal medical system. By plotting the legal and policy landscape of non-clinical abortion, the Team has illuminated the areas that need to be repealed, reformed, or reimagined. These efforts contribute to a future in which everyone has safe, legal, affordable access to abortion care that is right for them – whether that is in a clinic or at home.

ENDNOTES

1. *Roe v. Wade*, 410 U.S.113 (1973).
2. *McCormack v. Hiedeman*, 694 F.3d 1004 (9th Cir. 2012). For more information on the criminalization of SIA, see National Institute for Reproductive Health, *When Self-Abortion is a Crime: Laws That Put Women at Risk* (June 2017), <https://www.nirhealth.org/decriminalize/>.
3. *Hamdi v. Rumsfeld*, 542 U.S. 507, 529 (2004) (freedom from bodily restraint and unnecessary physical confinement is “one of the most elemental of liberty interests”).
4. Matt Flegenheimer & Maggie Haberman, *Donald Trump, Abortion Foe, Eyes Punishment for Women, Then Recants*, The NY Times, Mar. 30, 2016. <http://nyti.ms/2qQ5qTO>.
5. Nicky Woolf, *Purvi Patel Found Guilty of Feticide and Child Neglect Over Unborn Baby’s Death*, The Guardian, Feb. 4, 2-15, <http://bit.ly/2q4tzDf>.
6. Daniel Grossman et al., *Knowledge, Opinion, and Experience Related to Abortion Self-Induction in Texas*, Texas Policy Evaluation Project Research Brief (Nov. 17, 2015), available at: <http://bit.ly/2qY8BVK>.
7. Francine Coeytaux, Leila Hessini & Amy Allina, *Bold Action to Meet Women’s Needs: Putting Abortion Pills in U.S. Women’s Hands*, 25(6) Women’s Health Issues 608, 609 (2015); Abigail Aiken et al., *Self-Reported Outcomes and Adverse Events After Medical Abortion Through Online Telemedicine: Population Based Study in the Republic of Ireland and Northern Ireland*, 357 BMJ j2011 (2017) (finding that “self-sourced medical abortion using online telemedicine can be highly effective and outcomes compare favourably with in clinic protocols”).
8. Daniel Grossman et al., *Self-Induction of Abortion Among Women in the United States*, Reproductive Health Matters, Vol. 18 (36), at 140.
9. Francine Coeytaux et al., *Facilitating Women’s Access to Misoprostol Through Community-Based Advocacy in Kenya and Tanzania*, 125 Int. J. Gynecology & Obstetrics 53 (2014).
10. Alison Ojanen-Goldsmith, *Beyond the Clinic: Preferences, Motivations, and Experiences with Alternative Abortion Care in North America*, 94 Contraception 387, 398-99 (2016).
11. The SIA Legal Team, *SIA In Our Communities: A Conversation* (Nov. 2017).
12. Kim Murphy, *Idaho woman's case marks a key abortion challenge*, Los Angeles Times, June 16, 2012.
13. Andrea Grimes, *Pregnant Texans are Being Charged with Crimes that Don’t Exist*, Rewire, Oct. 16, 2014, <http://bit.ly/2px7wmX>.
14. E.g., Mich. Comp. Laws §§ 750.322 and Mich. Comp. Laws §§ 750.323; R.I. Gen. Laws § 11-23-5; Wash. Rev. Code Ann. § 9A.32.060; Ind. Code § 35-42-1-6; Iowa Code § 707.7; Pa. Cons. Stat. § 2603; Wis. Stat. Ann. § 940.01(1)(b); Wash. Rev. Code Ann. § 9A.32.060 (1)(b).
15. E.g. Tenn. Code Ann. § 39-13-214 (“[A]nother” and “another person” include a human embryo or fetus at any stage of gestation in utero, when any such term refers to the victim of any act made criminal by this part”). Other states have high court decisions expanding existing homicide laws to include fetuses, e.g., *Commonwealth v. Lawrence*, 536 N.E.2d 571, 583 (Mass. 1989) (expanding definition of murder under the common law), *Commonwealth v. Cass*, 467 N.E.2d 1324, 1324 (Mass. 1984) (expanding definition of vehicular homicide at common law to include fetal victims).
16. E.g., Miss. Code Ann. § 97-3-37 (“[T]he term “human being” includes an unborn child at every stage of gestation from conception until live birth and the term “unborn child” means a member of the species homo sapiens, at any stage of development, who is carried in the womb.); Miss. Code Ann. § 97-3-19 (defining first-degree murder as [t]he killing of a human being without the authority of law by any means or in any manner [. . .] [w]hen done with deliberate design to effect the death of an unborn child”).

17. Nat'l Conference of State Legislatures, *Fetal Homicide State Laws*, Mar. 4, 2015 <http://bit.ly/2qToXCL>.
18. Katie Mettler, *Tennessee Woman Who Attempted Coat Hanger Abortion Faces Three New Felony Charges*, Washington Post, Nov. 18, 2016, <http://wapo.st/2qpoIPR>.
19. Tenn. Code Ann. § 39-13-102; § 39-13-107 (2014). From June of 2014 to June of 2016, Tennessee law permitted assault charges for 'unlawful' acts or omissions of a pregnant woman with respect to an embryo or fetus she carried, specifically targeting women illegally used narcotics and gave birth to babies with neonatal abstinence syndrome. As of this writing, the fetal assault provision no longer applies "to any act or omission by a pregnant woman with respect to an embryo or fetus with which she is pregnant." Tenn. Code Ann. § 39-13-107(c)(2016); Tenn. Code Ann. § 39-15-201(b)(1) ("Every person who performs an abortion commits the crime of criminal abortion, unless such abortion is performed in compliance with the requirements [of the statute]"); (b)(2) (Every person who attempts to procure a miscarriage commits the crime of attempt to procure a miscarriage, unless the attempt to procure a miscarriage is performed in compliance with the requirements [of the statute]").
20. Ala. Code § 13A-13-7; Ariz. Rev. Stat. § 13-3603; Ky. Rev. Stat. § 311.750; Mass. Gen. Laws. Ann. 272 § 19; Mich. Comp. Laws §§ 750.323, 750.14; Minn. Stats. Ann. § 145.412; Miss. Code Ann. § 97-3-3; Nev. Rev. Stat. § 201.120; N.M. Stat. Ann. § 30-5-3; N.C. Gen. Stat. Ann. §§ 14-44, 14-45; 21 Okla. Stat. Ann. § 861; Tenn. Code. Ann. § 39-15-201; Va. Code Ann. § 18.2-71; W. Va. Code Ann. § 61-2-8.
21. Ky. Rev. Stat. § 311.750; Michael Sneed, *Kentucky Jury Acquits Coed in Self-Abortion*, Chicago Tribune, Aug. 31, 1978, <http://trib.in/2qRzleJ>.
22. Ark. Code § 5-60-101("A person commits abuse of a corpse if, except as authorized by law, he or she knowingly: (1) Disinters, removes, dissects, or mutilates a corpse; or (2) (A) Physically mistreats or conceals a corpse in a manner offensive to a person of reasonable sensibilities. . . ."); Ark. Code § 5-26-203 ("A person commits the offense of concealing birth if he or she hides the corpse of a newborn child with purpose to conceal the fact of the child's birth or to prevent a determination of whether the child was born alive"); Patty Wooten, *Judge Acquits Woman of Abuse of Corpse, Jury Convicts Her of Concealing Birth*, SearkToday, (Mar. 6, 2016), <http://bit.ly/2qZUCQ2>.
23. *E.g.*, 210 ILCS 85/11.4, requires registration of fetal death, ("Disposition of fetus. A hospital having custody of a fetus following a spontaneous fetal demise occurring after a gestation period of less than 20 completed weeks must notify the mother of her right to arrange for the burial or cremation of the fetus. Notification may also include other options such as, but not limited to, a ceremony, a certificate, or common burial or cremation of fetal tissue"); IC 16-21-11-6, requires fetal burial, ("If the parent or parents choose a means of final disposition other than the means of final disposition that is usual and customary for the health care facility, the parent or parents are responsible for the costs related to the final disposition of the fetus"); 18 Pa. Cons. Stat. § 5510 (2015) ("Except as authorized by law, a person who treats a corpse in a way that he knows would outrage ordinary family sensibilities commits a misdemeanor of the second degree"); Nev. Rev. Stat. § 201.150 ("Every person who shall endeavor to conceal the birth of a child by any disposition of its dead body, whether the child died before or after its birth, shall be guilty of a gross misdemeanor").
24. Abby Phillip, *Murder Charges Dropped Against Georgia Woman Jailed for Taking Abortion Pills*, Washington Post, June 10, 2015, <http://wapo.st/2rqydei>.
25. Emily Bazelon, *A Mother in Jail for Helping Her Daughter Have an Abortion*, NY Times Magazine, Sept. 22, 2014, <http://nyti.ms/2reNxOM>.
26. Andrea Rowan, *Prosecuting Women for Self-Inducing Abortion: Counterproductive and Lacking Compassion* (September 2015), <https://www.guttmacher.org/gpr/2015/09/prosecuting-women-self-inducing-abortion-counterproductive-and-lacking-compassion>.
27. See Jill E. Adams, Melissa Mikesell & The SIA Legal Team, *Primer on Self-Induced Abortion* (2016).
28. Jill E. Adams & Melissa Mikesell, *And Damned If They Don't: Prototype Theories to End Punitive Policies Against Pregnant People Living In Poverty*, 18 Geo. J. Gender & L. 283, 323-24 (2017).
29. *Id.* at 328.

29. *Lawrence v. Texas*, 539 U.S. 558, 575-76 (2003) (“When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and in the private spheres. . . . The stigma this criminal statute imposes, moreover, is not trivial. The offense, to be sure, is but a class C misdemeanor, a minor offense in the Texas legal system. Still, it remains a criminal offense with all that imports for the dignity of the persons charged.”); 92 *Ingraham v. Wright*, 430 U.S. 651, 667 (1977) (internal citations omitted); see also *Bearden v. Georgia*, 461 U.S. 660, 669 (1983) (“The State, of course, has a fundamental interest in appropriately punishing persons-rich and poor-who violate its criminal laws.”); *Robinson v. California*, 370 U.S. 660, 8 (1962). *Coker v. Georgia*, 433 U.S. 584, 592 (1977).
30. Yvonne Lindgren, *The Doctor Requirement: Griswold, Privacy, and At-Home Reproductive Care*, Constitutional Commentary, Volume 32, Number 2 (Summer 2017).
31. *Id.*
32. A copy of this report is available on the SIA Legal Team’s website at: <https://tinyurl.com/ya47tmgn>
33. Cynthia Soohoo & Suzanne Stolz, *Bringing Theories of Human Rights Change Home*, 77 Fordham L. Rev. 459, 497 (2008).
34. *Obergefell v. Hodges*, 135 S. Ct. 2584, 2585 (2015).
35. See, e.g., Laurence H. Tribe, *Equal Dignity: Speaking Its Name*, 129 Harv L. Rev. F. 16, 20 (2015).
36. Cynthia Soohoo & Farah Diaz-Tello, *Torture and Ill-Treatment, Forced Sterilization and Criminalization of Self-Induced Abortion*, Am. U. Wash. Coll. Law Ctr. for Human Right and Humanitarian Law, Anti-Torture Initiative, Gender Perspectives on Torture: Reflections on the Special Rapporteur’s 2016 Thematic Report (publication forthcoming).
37. *Harris v. McRae*, 448 U.S. 297, 330 (1980) (Brennan, J., dissenting).
38. Ruth B. Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade*, 63 N.C. L. Rev. 375 (1985). Available at: <http://scholarship.law.unc.edu/nclr/vol63/iss2/4>
39. See, e.g., *Harris v. McRae*, supra note 37 at 320–321 (requiring a challenge of an abortion law under the free exercise clause provide a basis for a religious belief that would require such a practice); Note, *Compulsory Medical Treatment and the Free Exercise of Religion*, 42 IND. L. J. 386 (concluding the free exercise clause may provide a basis for refusing an objected medical treatment unless there is a compelling government interest for requiring an objected medical treatment).
40. See e.g., David R. Dow, *The Establishment Clause Argument for Choice*, 20 Golden Gate U. L. Rev. (1990); John M. Cummings Jr., *The State, the Stork, and the Wall: The Establishment Clause and Statutory Abortion Regulation*, 39 Cath. U. L. Rev. 1191 (1990).
41. See, e.g., *McCormack v Hiedeman*, 694 F.3d 1004; see also *Patel v. State*, 60 N.E.3d 1041 (Ind. Ct. App. 2016); *State v. Ashley*, 701 So. 2d 338, 341–42 (Fla. 1997).
42. See e.g., Lindren, supra note 30, at 355 and Adams & Mikesell, supra note 28, at 324-328.