When Self-Abortion is a Crime: Laws that Put Women at Risk

Executive Summary

Today, most Americans agree that when a woman has decided to have an abortion, she should be able to access that care safely, affordably, without embarrassment, in her community.[i] Many millions of women have had abortions over the last four centuries of American history, whether legal or not. Whenever safe abortion provided by a heath care professional was illegal, inaccessible, unaffordable or otherwise out of reach, women have induced their own abortions. Indeed, in the 18th and 19th centuries, self-induced abortion was the most common form of abortion.[ii] The legal status of abortion has changed over time—from legal to illegal and back to legal, but even when abortion was generally illegal, few states ever criminalized a woman's decision to induce her own abortion and those statutes were virtually never enforced.[iii]

Although some women have safely and effectively self-induced with herbs or drugs, self-induced abortion has also been associated with serious injury and death.[iv] Moreover, the lack of access to safe, legal abortion historically has disproportionately harmed women of color.[v]

In 1973, when the Supreme Court's decision in *Roe v. Wade* made abortion legal across the country, it was widely believed that the resulting arrival of safe and accessible abortion would put an end to the conditions that had historically led women to take matters into their own hands. But as we approach the 45th anniversary of *Roe*, our country sits at a new crossroads on abortion.

Over the last four decades, women's constitutional rights to privacy, autonomy, liberty, and bodily integrity have been recognized and upheld, and are well understood to protect women's ability to decide to terminate a pregnancy.[vi] At the same time, and with a marked acceleration in the past decade, state legislators in many parts of this country have created a patchwork of multiple, often-onerous restrictions on the provision of abortion care, such that while abortion remains technically legal, it is not always accessible or affordable for women who need it. In addition, many women lack insurance coverage for abortion or face other barriers to care. However, today there are more methods of self-induction that may be safe and effective.[vii] In particular, due to the availability of medication abortion, self-induced abortion through drugs has become both safer and more accessible to women in many parts of the world.[viii] But in 2017, if a woman does end her own pregnancy, particularly if she is low-income or a woman of color, she may have opened herself up to an entirely different kind of risk – criminal prosecution and jail.

New York is one of handful of the states that criminalizes self-induced abortion, with laws from the 1800s still on the books today. Across the country, those opposed to abortion and those seeking to deny women the right to make their own decisions about their bodies and pregnancies have increasingly used laws like New York's to investigate, prosecute, and incarcerate women.[ix] As a result, New York now sits at the forefront of the newest attack on women's rights: the investigation and prosecution of women for

their behavior while pregnant.[x] This phenomenon also has a disparate impact on women of color and low-income women, who are far more likely to be targeted for investigation and prosecution related to self-induced abortion and other pregnancy outcomes.

Laws that threaten women with jail time for self-inducing an abortion do not deter women from ending their pregnancies; they serve only to harm women by deterring them from seeking out accurate information about their options in advance or health care if they need it afterwards. These laws impact families and communities as well, as mothers face potential incarceration and separation from their children, and pregnant women seeking any kind of healthcare confront suspicion and the potential of attracting an investigation by law enforcement into their homes and private lives.

There has never been a clear legal rationale supporting state laws that criminalize self-induced abortion, since such laws intrude directly on women's fundamental constitutional rights without making women who need access to abortion any safer or deterring women from self-inducing when necessary. Rather than continuing to criminalize self-induced abortion, policymakers could instead consider pursuing a range of alternative solutions to address both the lack of access to abortion care and the harm to women that comes from criminal prohibitions, including:

- ✓ decriminalizing self-induced abortion;
- ✓ increasing access to abortion services;
- ✓ providing public education about where and how to find legal, safe, accessible abortion services; and
- ✓ expanding access to contraception.

The complicated history of self-induced abortion in the United States leaves one fact entirely clear: Women have always self-induced when the situation requires it, and criminalizing their conduct does nothing but create risks for them and their families. Instead of maintaining these criminal laws, policymakers should consider creating policies that support all women's access to comprehensive reproductive health care and that enable all women to actually choose whether and when to become a parent.

Endnotes

[i] National Institute for Reproductive Health, Analysis of Voters' Opinions on Abortion Restrictions and Affirmative Policies, Jan. 20, 2016, *available at* https://www.nirhealth.org/wp-content/uploads/2016/01/Memo-NIRH-Poll_Final_3.pdf.

[ii] LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND THE LAW IN THE UNITED STATES, 1867-1973 8-9 (1998); *see also* MOHR, *supra* note : JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY 4 (1978), at 4.

[iii] JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY 145 (1978) (noting that in the first wave of criminal laws, between 1840 and 1860, only three states "struck the immunities traditionally enjoyed by American women in cases of abortion"); *but see id.* at 227 (noting that more states criminalized the women seeking abortion in the 1870s).

[iv] *See* Waldo L. Fielding, *Repairing the Damage, Before Roe*, N.Y. TIMES, June 3, 2008 ("The familiar symbol of illegal abortion is the infamous "coat hanger" — which may be the symbol, but is in no way a myth. In my years in New York, several women arrived with a hanger still in place. Whoever put it in — perhaps the patient herself — found it trapped in the cervix and could not remove it.").

[v] *See* Loretta J. Ross, *African-American Women and Abortion*, *in* ABORTION WARS: A HALF CENTURY OF STRUGGLE, 1950-2000 161, 171 (Rickie Solinger ed., 1998); Linda J. Greenhouse, *Constitutional Question: Is There a Right to Abortion?*, N.Y. TIMES, Jan. 25, 1970, at 30 ("[M]ore than 90 percent of legal abortions in New York City hospitals [before 1970] were performed on white women, while nonwhite women account for a large proportion of deaths from bungled, illegal abortion.")

[vi] *See* Whole Woman's Health v. Hellerstedt, 136 S. Ct. 2292, 2310 (2016); Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 468 (1972); Griswold v. Connecticut, 381 U.S. 479 (1965);

[vii] Some international studies have shown that self-abortion through medication can be safe and effective when taken according to evidence-based recommendations. *See Safe abortion: technical and policy guidance for health systems*, WORLD HEALTH ORG. (2012), *available at* http://apps.who.int/iris/bitstream/10665/70914/1/9789241548434_eng.pdf?ua=1 at 23. The World Health Organization has recognized that women can manage use of the mifepristone and misoprostol combination without direct supervision of a health care provider when they have accurate information and access to a health care provider should they need or want it at any stage of the process. *Id.* at 23,46. The World Health Organization has also stated that mifepristone is not available, misoprostol used alone can be a safe and effective method to end a pregnancy. *Id*.

[viii] *See Safe abortion: technical and policy guidance for health systems*, WORLD HEALTH ORG. (2012), *available at* http://apps.who.int/iris/bitstream/10665/70914/1/9789241548434_eng.pdf?ua=1 at 23. *But see Information Sheet: Safe and unsafe induced abortion: Global and regional levels in 2008, and trends during 1995–2008*, WORLD HEALTH ORG. (2012), *available at* http://apps.who.int/iris/bitstream/10665/75174/1/WHO_RHR_12.02_eng.pdf.

[ix] Jill E. Adams & Melissa Mikesell, Primer on Self-Induced Abortion, THE SIA LEGAL TEAM (2017), https://www.law.berkeley.edu/wp-content/uploads/2016/01/Primer-on-Self-Induced-Abortions.pdf

[x] *See id.*; Dorothy Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 HARV. L. REV. 1419 (1991).