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Lawyering for
Reproductive
Justice

MAKING ABORTION A CRIME (AGAIN):

How Extreme Prosecutors Attempt to Punish People for Abortions in the U.S.

Even though abortion is legal in the U.S. and most home abortion is safe, effective, and private, some politically motivated prosecutors are seeking to punish people who end their own pregnancies.

THE LEGAL LANDSCAPE

No one should be arrested or jailed for ending their own pregnancy. But it's happening in states across the country where clinic-based abortion care is increasingly available only to those who possess the resources to overcome many barriers. Some pregnant people who would prefer clinic-based care, but cannot surmount these obstacles are self-administering abortion care, mostly by ingesting pharmaceutical pills purchased online or abroad. Others may end their own pregnancies because they prefer a private home-based abortion experience. Our research has uncovered 18 arrests of people who end their own pregnancies and those who have supported them. 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 arrest, pregnant people. Of course, someone doesn't 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 child care 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.

WHAT DOES CRIMINALIZING ABORTION LOOK LIKE?

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. Although courts have generally sided with people who end their own pregnancies, it is important to understand how extreme prosecutors have attempted to punish people for abortions. What follows is a hypothetical journey a person might take to end their own pregnancy. It summarizes how prosecutors might attempt to punish a pregnant person or their loved ones or caregivers who helped them along the way. Of course, not every state will have every one of these laws and not every prosecutor would charge someone with each of these crimes, but it shows the scope of laws that are being used by prosecutors.

Pregnant Person's Journey

Person becomes pregnant, decides to end the pregnancy outside the formal health system because the pregnant person:

- Cannot afford clinic-based care or take time off work;
- Does not have the proper documentation to pass an unavoidable immigration check point;
- Community or family has experienced reproductive oppression at the hands of the medical system or medical professionals;
- Feels self-directed care is safe and empowering.

1

Pregnant person buys abortion pills online, over the counter in a foreign pharmacy, or acquires them from a friend.

This person could face a variety of different drug charges for importing or possessing abortion pills.

3

Pregnant person ingests the abortion pills in the U.S. and successfully terminates the pregnancy.

In some states this person could face charges including feticide, attempted feticide, self-abortion or attempted self-abortion.

5

Person disposes of the products of conception.

Person could face a variety of different charges, including crimes for abuses against a corpse, disposing of fetal remains, or child neglect.

7

Person seeks medical help and divulges information about the pills taken.

While people should be encouraged to seek medical care if they are concerned for their health and should be warned of rare risks or side effect, most arrests for alleged self-induced abortion were made after someone sought medical attention.

9

Person offers a family member the extra abortion pills left over and tips on taking it.

Person could a variety of drug charges and/or be charged with engaging in the unauthorized practice of medicine.

11

People Who Help Along the Way

An abortion hotline volunteer advises the person about safe & effective ways to end a pregnancy outside of the formal health system.

This advocate could face a variety of different charges, including the unauthorized practice of medicine.

2

A doula stays with the person during the abortion, guiding on how to safely take abortion pills, sets a timer on when to take pills, and helps to make the person feel comfortable, supported, and safe.

In some states this advocate could face charges ranging from the unauthorized practice of medicine to violation of various abortion laws.

4

A friend babysits the person's other children while they take the abortion pills.

The friend could face a variety of different charges including accomplice liability.

6

Community health worker helps the woman dispose of the products of conception.

In some states the community health worker could face a variety of charges including crimes for abuses against a corpse, to disposing of fetal remains, to child neglect.

8

A health professional learns the person self-induced by taking pills at home and that the abortion was successful.

In some states, the health professional could be turned into a de facto law enforcement official and could face charges for tampering with evidence, obstruction of justice, or failing to report the abortion.

10

A family member accepts the left-over abortion pills to end their own pregnancy.

Family member could face a variety of charges for drug-related crimes, including solicitation.

12

RISK OF SURVEILLANCE

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 abuse, minors, LGBTQ folks, and communities of color who may have a warranted mistrust of the medical system based upon histories of medical experimentation or reproductive coercion. 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.

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.

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 mere existence of medication abortion is providing some legal authorities reason to conduct fishing expeditions to go after not only women who have clearly terminated a pregnancy, but also women whom they suspect have done so." When abortion is made a crime, every pregnancy loss becomes a potential trial.

A PROBLEM WITH A SOLUTION

We can halt the criminalization of abortion by engaging with lawyers, law students, and faculty to help us pursue litigation, scholarship, and policy advocacy strategies that will end criminalization and firmly establish its protections in constitutional and human rights law. For example, we are using legislation and litigation to: (1) repeal any pre-*Roe* abortion crimes still on the books, (2) ensure existing laws are used appropriately by making sure feticide laws can only be used to protect, not punish, pregnant people, and (3) stop legislatures from creating new ways to punish people who have abortions.

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