

## Background

For nearly fifty years, the Supreme Court acknowledged a Constitutionally protected right to end one's pregnancies safely, with dignity, and free of the threat of criminalization. That promise – never fully realized for too many individuals and communities – was rescinded with the decision in *Dobbs v. Jackson Women's Health Organization*, an abrupt culmination of years of whittling away of the right to abortion. With the door now open to unfettered state regulation of abortion, reproductive justice advocates must assess what options remain, and the risks people face in the new legal landscape.

Abortion with pills has long been a lifeline for people in restrictive settings, from the discovery of safe abortion protocols with misoprostol by women in Brazil, to the swift uptake of mifepristone and misoprostol by mail during the COVID-19 pandemic. The medical safety of these medications is no longer in question: the self-managed use of mifepristone and misoprostol or misoprostol-alone is recommended by the World Health Organization.<sup>1</sup> But their legal safety for users is likely to be challenged in unprecedented ways in coming months.

**When law or circumstance creates barriers to abortion care, people self-manage their abortions.<sup>2</sup> When the legal restrictions on abortion care are enforced through the criminal legal system, abortion seekers inevitably become targets of that system.**

If/When/How first documented this phenomenon in the 2017 report, *Roe's Unfinished Promise: Decriminalizing Abortion Once and for All*,<sup>3</sup> which identified a patchwork of laws and prosecutorial practices that criminalize people for self-managing abortions. While advocates have successfully reduced the number of jurisdictions that explicitly ban self-managed abortion to three in the intervening years,<sup>4</sup> the fact remains that abortion stigma, perpetuated by abortion restrictions, leads to criminalization even when there is no authorizing statute.

Criminalization permeates overall perceptions of abortion, making an otherwise safe process feel fraught with danger and compounding inequities in access to care with the threat of being turned over to law enforcement. This research builds upon the work begun in *Roe's Unfinished Promise*, and seeks to further understand the risks of criminalization by identifying and analyzing criminal investigations and prosecutions based on an actual or alleged self-managed abortion since the year 2000. Isolating 21st Century criminalization lends insight into what the criminalization of abortion is likely to look like in a post-*Roe* America. This brief provides preliminary findings from this research to illuminate the likely targets of criminalization and how these cases make their way into and through the criminal system.

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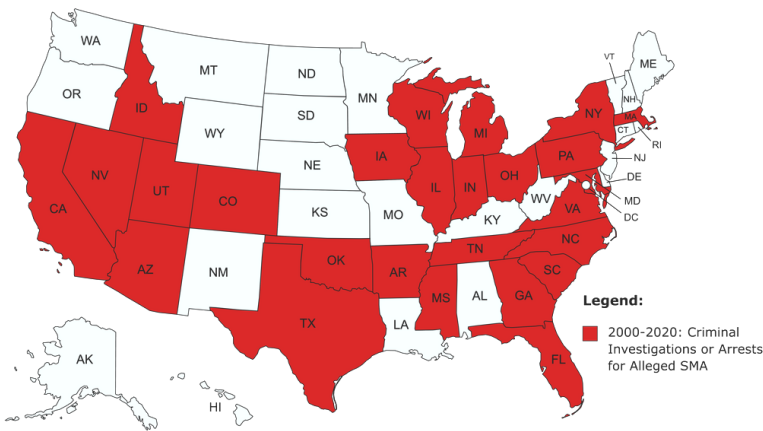
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## Data Sources & Methods

Beginning with 21 previously-documented cases, we identified new ones through extensive media and legal database research, outreach to lawyers, and public court records and data requests. We coded and wrote narratives from each case's publicly-available media reports and criminal records and then analyzed them using qualitative and quantitative methods, including descriptive and bivariable analyses to examine variable distribution and associations. Case coding and narratives were reviewed by a second member of the team, and questions were resolved through an iterative process. Despite our comprehensive methodology, the number of cases uncovered is likely an undercount: not all public records requests yielded data, not all cases are reported by media, and the possibility of unlawful charges makes case identification difficult.

## Preliminary Results



Among the 61 cases, 89% (n=54) involved adults and 11% (n=7) involved minors.<sup>5</sup> The average age among the adult cases is 28.3 years and people of color are disproportionately represented when compared to the larger population with 44% non-Hispanic white, 41% minoritized racial and ethnic groups,<sup>6</sup> and 15% not reported. The majority of the adult cases that proceeded through court (56%) involved people living in poverty.<sup>7</sup>

**From 2000 to 2020, we identified 61 cases of people criminally investigated or arrested for allegedly ending their own pregnancy or helping someone else do so. These cases occurred across 26 states, the most of which emerged in Texas, followed by Ohio, Arkansas, South Carolina, and Virginia.**

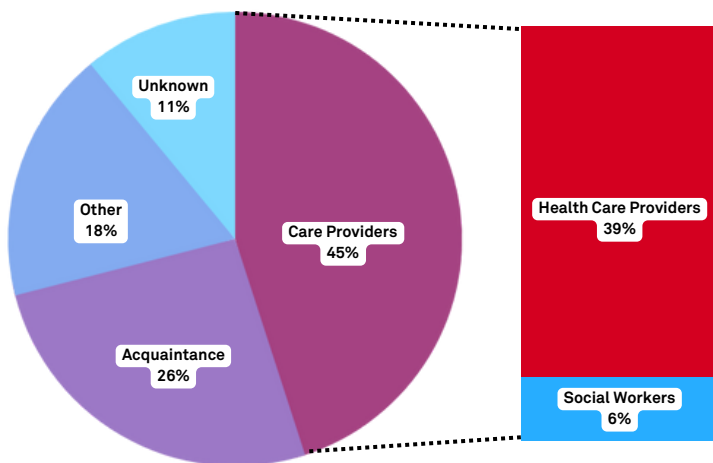
## SMA Involvement, Method, and Timing

While most adult cases (74%) involved the criminalization of the person for self-managing their own abortion, 26% of the adult sample involved people helping others self-manage. People used a variety of methods to self-manage, but the majority (52%) used medication abortion exclusively. None of the other methods mentioned had a frequency above 10%. Gestational age was mentioned in 87% of the adult cases; of these, the vast majority (87%) of criminalized SMA attempts occurred in the second and third trimesters.

## Criminal Intervention, Representation, & Outcomes

Among the adult sample, cases came to the attention of law enforcement most often by care professionals who are designated mandatory reporters (e.g. healthcare providers and social workers): 39% of the cases were reported to law enforcement by healthcare providers and 6% by social workers. About a quarter of cases (26%) were reported to law enforcement by acquaintances entrusted with information, such as friends, parents, or intimate partners, and 18% of cases came to the attention of police by other means, including police recovery of fetal remains, anonymous tips to police, or a 911 call. The law enforcement trigger was unknown in 11% of adult cases.

### How Adult Cases Came to the Attention of Law Enforcement

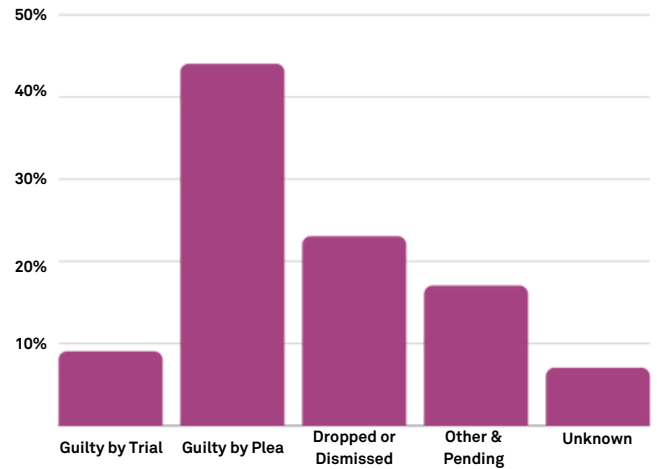


Once law enforcement became involved, the vast majority of adult cases (87%) led to an arrest; of these, 92% (n=43) proceeded through the criminal court process.

Regardless of how charges may have adjusted during the course of a case, 9% (n=4) of these 43 cases went to trial and ended with a guilty verdict, 44% (n=19) ended with a guilty plea, 23% (n=10) were dropped or dismissed by either the prosecutor or court, and 17% (n=7) ended with an “other” nonstandard outcome, such as the charges never

moving past the grand jury, the case still pending, or the charges only being dropped after the defendant completed mandated probation. The lower court outcome was unknown in 7% (n=3) of the cases.

### Lower Court Outcome for Subset of Arrests that Proceeded Through Court



The investigations and arrests identified were not isolated to states with statutes designed to criminalize self-managed abortion. Instead, prosecutors applied criminal laws meant to address mishandling of human remains, concealment of a birth, practicing medicine without a license, child abuse and assault, and murder and homicide to allegations of self-managed abortion. In particular, irrespective of case outcome, public records mentioned that murder or homicide was at least considered by law enforcement in 43% of all cases.

The racial disparity in this consideration was striking and statistically significant: a homicide consideration was two times more frequent in cases involving people of color compared to those involving non-Hispanic white individuals ( $p < 0.01$ ). Finally, every criminal intervention has its own set of unquantifiable reverberations. In several cases, people lost custody of their existing children temporarily or permanently. In one case in which local authorities declined to prosecute after acknowledging the self-managed abortion was not unlawful, the woman was still turned over to immigration authorities for deportation.

## Criminal Intervention, Representation, & Outcomes (continued)

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Criminalization also led to people being shamed and ostracized in their communities, including needing to move due to threats at their homes or changing their names because they were unable to get or keep jobs. These experiences reinforce the harmful implications of the criminalization ecosystem that permeates people's lives whether or not their case ends in a prison sentence.

### Implications

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**These cases paint a picture of a legal landscape fraught with potential landmines for abortion seekers.**

People facing marginalization because of their race, poverty, and immigration status are more likely to lack access to abortion care in the formal medical system, and therefore more likely to self-manage. When they do so, they may be betrayed by people they trusted – either in their lives or in the health care system. Once this betrayal occurs, each next step in the process flows from the last, with seemingly few offramps. This research reinforces the findings of *Roe's Unfinished Promise*, that police and prosecutors overstep the authority conferred by criminal statutes, and find ways to punish people even where there is no authorizing statute. As “trigger bans” are being deployed across the country, this portends an increase in criminalization driven more by stigma than the letter of the law.

But these data also provide hope and a way forward for advocates. The outcomes of these cases demonstrate that even though prosecutors frequently bend the law to their purposes and juries are heavily biased against people alleged to have had abortions, forcing a review of the legality of the charges – either pretrial or upon appeal – can bring a case to a favorable outcome. With adequate training on the issues these cases raise, criminal defenders can identify unfair plea offers and fight charges. Even in the absence of *Roe's* protections, the law still matters, and advocates must demand its full protection.

**Critically, the ramifications of even just a criminal investigation point to a need for focused effort at forestalling unnecessary reports by health care providers and helping abortion-seekers understand how to safely self-manage and safeguard their privacy. As the state itself emerges as the primary danger people seeking abortions face, abortion support networks that can help people avoid and navigate potentially hazardous interactions will be pivotal.**

## References & Endnotes

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1. Abortion care guideline. Geneva: World Health Organization; 2022
2. Aiken A, et al. Motivations and Experiences of People Seeking Medication Abortion Online in the United States. *Perspectives on Sexual and Reproductive Health*, 2018; 50(4): 157–163. ; Fuentes L, et al. Texas women’s decisions and experiences regarding self-managed abortion. *BMC Women’s Health*, 2020;20(6).
3. Diaz-Tello F, et al. Roe’s Unfinished Promise: Decriminalizing Abortion Once and For All. The SIA Legal Team, 2017.
4. Nevada, Oklahoma, and South Carolina
5. Due to privacy considerations in the juvenile system, there is little publicly-obtainable information about cases involving minors. Consequently, much of the data analysis that includes specific information related to identity and court procedure only focused on the 54 adult cases.

6. This category includes 17% non-Hispanic Black, 4% non-Hispanic Asian, 2% non-Hispanic other, and 18% Hispanic.
7. Defined by qualifying for a public defender or pro bono attorney. In 23% of these cases, the individual had private counsel; in 21%, the type of representation was unknown.
8. Other categories included herbs or botanic medicinals, physical force, non-medical substance, object, other medication besides medication abortion, household or toxic poison, or a combination of methods.

## If/When/How Resources

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The **Repro Legal Helpline** is a secure, confidential, and free resource for legal info and advice. Our website, in English, Spanish, and simplified Chinese, answers questions about self-managed abortion, young people’s abortion access, legal rights, and the law. Call [844-868-2812](tel:844-868-2812) or go to [ReproLegalHelpline.org](https://ReproLegalHelpline.org).

The **Repro Legal Defense Fund** provides financial assistance to people criminalized for self-managed abortion and pregnancy loss and those who help them. We assist with the high cost of criminalization including bail and legal fees: [ReproLegalDefenseFund.org](https://ReproLegalDefenseFund.org).

The **Judicial Bypass Wiki** is a digital hub that provides state-by-state information and resources for young people seeking abortion care. It also provides tools for trusted allies and lawyers who support young people as they navigate the maze-like judicial bypass process in states that require parental involvement: [JudicialBypassWiki.IfWhenHow.org](https://JudicialBypassWiki.IfWhenHow.org).