

# Criminalization of Women Who Self-Induce Abortions in the United States

Respectfully submitted to  
The U.N. Working Group on Discrimination Against Women in Law and Practice

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by

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## I. Introduction

Women's right to decide whether to carry a pregnancy to term is protected by both their human rights and the U.S. Constitution. Nevertheless, American women<sup>1</sup> have faced arrest, criminal prosecution, and jail for attempting to exercise their right to seek an abortion.

This report uncovers the looming threat to women's human rights posed by 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. Until this threat is eliminated from U.S. state laws, women are unable to enjoy their rights to non-discrimination, self-determination, security of the person, health, and to be free from cruel, inhuman or degrading treatment.

This report also lays bare the prevailing myth perpetuated by abortion opponents that criminalization of abortion protects women from unscrupulous actors and only affects health care providers. This myth re-emerged in the public discourse in March of 2016, when then-candidate Donald Trump was asked about his promise to "ban abortion" during a nationally televised town hall meeting. 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."<sup>2</sup> Despite later claims that he intended to say that abortion providers, not women, should face punishment, President Trump's initial support of a criminal punishment for women who seek abortions was revealingly in-step with the pattern emerging throughout the country.

In fact, the harshest prosecution in U.S. history of a woman for having an abortion occurred during Trump's running mate's tenure as governor of Indiana. At the time of Trump's statement, she was serving the third year of a twenty year sentence behind bars for having

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<sup>1</sup> We recognize that many people who are not women — including transmasculine, intersex, and non-binary individuals — can become pregnant. While there is less research available as to issues arising when trans or gender nonconforming people end their pregnancies, we believe that they are vulnerable to the same human rights violations based on their capacity to become pregnant, and may be more likely to seek self-directed care.

<sup>2</sup> Matt Flegenheimer & Maggie Haberman, *Donald Trump, Abortion Foe, Eyes Punishment for Women, Then Recants*, The NY Times, Mar. 30, 2016. <http://nyti.ms/2qQ5qTO>.

ended a pregnancy.<sup>3</sup> For his part, Vice President Mike Pence has been open in his hostility toward abortion rights, assuring the 2016 Voter Values Summit that he would "see *Roe vs. Wade* consigned to the ash heap of history where it belongs."<sup>4</sup> Following the January 2017 inauguration, he became the highest ranking U.S. official to speak at the annual anti-abortion March for Life, proclaiming that "life is winning again in America."<sup>5</sup>

The picture for women is grim. Even during the Obama administration, politically-motivated prosecutors across states experimented with a variety of laws to punish women who ended their own pregnancies, resulting in at least five felony arrests. With conservative lawmakers emboldened to pass abortion restrictions by the promise of *Roe's* demise, and prosecutors enflamed by rhetoric calling for criminalization, women find themselves more vulnerable to harsh punishment for their reproductive decisions and outcomes than they have ever been.

## II. Factual Background

### A. Legal Status and Accessibility of Abortion in the United States

In 1973, the U.S. Supreme Court decided *Roe v. Wade*,<sup>6</sup> 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 a woman'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 women's experiences of ending pregnancies where abortion was criminalized.

The constitutional protections of the right to seek an abortion have been upheld in subsequent Supreme Court jurisprudence,<sup>7</sup> but the U.S.'s federalist structure permits states to place restrictions on the abortion procedure so long as the regulation does not have the "purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion for a non-viable fetus."<sup>8</sup> Thus, fueled by conservative backlash against liberalization of abortion access, states have turned their focus to narrowing the legal parameters for abortion provision to make it difficult or impossible for women to obtain abortion care. The result is a complex web of laws and regulations that, taken together, drastically restrict women's access to legal, affordable clinic-based reproductive health care.<sup>9</sup> This Working Group noted the trend during

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<sup>3</sup> 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>.

<sup>4</sup> Seema Mehta, *Roe vs. Wade will be Overturned if Donald Trump Wins*, *Mike Pence Says*, *Los Angeles Times*, July 29, 2016, <http://lat.ms/2ptHMI2>.

<sup>5</sup> Lauren Gambino, *Mike Pence Proclaims 'Life is Winning Again in America'*, *The Guardian*, Jan. 27, 2017, <http://bit.ly/2ptYk2y>.

<sup>6</sup> 410 U.S. 113 (1973).

<sup>7</sup> See, e.g., *Whole Woman's Health v. Hellerstedt*, 579 U.S. \_\_\_\_ (2016).

<sup>8</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992).

<sup>9</sup> According to the Guttmacher Institute, such restrictions may include bans on public insurance (Medicaid) coverage for most abortions, restrictions on private insurance coverage of abortion, mandatory counseling that requires providers to give inaccurate or misleading information, lengthy waiting periods between counseling and the procedure requiring multiple trips to a clinic or overnight travel. Elizabeth Nash et al., Guttmacher Institute, *Policy Trends in the States: 2016*, Jan. 3, 2017, <http://bit.ly/2q1Mhxh>.

its most recent visit to the U.S., observing that “although women have a legal right to terminate a pregnancy under federal law, ever increasing barriers are being created to prevent their access to abortion procedures.”<sup>10</sup>

Hyper-regulation of abortion provision has dramatically increased since 2011, as states have adopted over 300 restrictions on abortion.<sup>11</sup> State regulations passed during this six year period alone account for 30% of all in abortion-related legislation<sup>12</sup> since 1973. These laws, known as Targeted Regulation of Abortion Providers (TRAP) laws, place burdensome, costly, and medically-unnecessary restrictions on facilities, jeopardizing the ability of many facilities to remain open. For instance, Texas House Bill 2, the law at the center of the recent U.S. Supreme Court decision in *Whole Woman’s Health v. Hellerstedt*, was passed under pretext of protecting women’s health and safety, but in fact, within two years of the law taking effect, only 19 clinics out of 41 remained open due to the onerous facility demands the law created.<sup>13</sup>

As the Working Group noted following its country visit in 2015, “these restrictions have a disproportionate and discriminatory impact on poor women,” particularly immigrant women residing in the Rio Grande Valley.<sup>14</sup> The U.S. Supreme Court ultimately struck down many provisions of the Texas law in 2016, echoing many of the concerns raised by the Working Group. Even so, low-income women and immigrant women, particularly in rural areas, continue to struggle to obtain clinic-based care due to high costs, long distances, and immigration checkpoints.

Women’s access to abortion care is increasingly dependent upon their ability to surmount legally-devised hurdles, which are in turn dictated by the state in which they happen to live. Only five states afford strong protections for the right to abortion, others impose varying degrees of restriction on abortion access.<sup>15</sup> But women in some parts of the country are simply running out of options for clinic-based care: seven states have restricted access to such a degree that only one clinic remains in operation.<sup>16</sup>

## B. Self-Induced Abortion Past and Present

Clinic-based abortions are an essential component of abortion care; nevertheless, some pregnant people seek abortions outside of the formal health care system. Self-induced abortion, which may include the use of pharmaceutical pills, traditional herbs, or other means to end a pregnancy, is as old as pregnancy itself. With the advent of new medical technologies, the possibility of safe home abortion is more attainable than ever before. Public health researchers have been exploring ways to improve abortion access in restrictive settings and

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<sup>10</sup> UN Working Group on the issue of discrimination against women in law and in practice finalizes country mission to the United States (Dec. 11, 2015), <http://bit.ly/2ptZLy9>.

<sup>11</sup> Guttmacher Institute, “Laws Affecting Reproductive Health and Rights: State Trends at Midyear, 2016,” July 21, 2016, <http://bit.ly/2q0OXe8>.

<sup>12</sup> *Id.*

<sup>13</sup> Fuentes et al., “Women’s experiences seeking abortion care shortly after the closure of clinics due to a restrictive law in Texas”, *American Journal of Public Health*, Vol. 106, No. 5, pp. 857-864, May 2016, <http://bit.ly/2qQaNCr>.

<sup>14</sup> UN Working Group on the issue of discrimination against women in law and in practice finalizes country mission to the United States (Dec. 11, 2015), <http://bit.ly/2ptZLy9>.

<sup>15</sup> NARAL Pro-Choice America, *State Governments*, <http://bit.ly/2r2MRMY>.

<sup>16</sup> Allison McCann, “The Last Clinics,” *Vice*, May 23, 2017, <https://news.vice.com/story/last-clinics-seven-states-one-abortion-clinic-left>.

supplant ineffective or dangerous means by disseminating information about how women can safely end a pregnancy on their own.<sup>17</sup>

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.<sup>18</sup> Misoprostol itself is up to 85% effective when used alone.<sup>19</sup> Both drugs are considered essential medicines by the World Health Organization.<sup>20</sup> Medication abortion is considered extremely safe: the rate and nature of complications is similar to that of spontaneous miscarriage.<sup>21</sup> Medication abortion is only legally available through a physician in the U.S.<sup>22</sup> and access in many places is also hampered by unnecessary state restrictions, dashing the medication's potential as a means to deliver care to women where there are no abortion providers.<sup>23</sup>

Women seeking care for themselves and their communities have been at the center of advances in self-induced abortion. In fact, the utility of misoprostol (originally developed as an ulcer-prevention medication) in causing miscarriages was discovered by women themselves. In Brazil — where abortion is illegal but misoprostol was available in pharmacies — women realized that the medication could safely end a pregnancy and passed the information by word of mouth, causing a drop in abortion-related deaths.<sup>24</sup> This community-based support has grown, and in locations where abortion is restricted but misoprostol is available, local and international feminist networks help women obtain pills and information about how to safely end their own pregnancies.<sup>25</sup>

International feminist networks have been stymied in providing support to U.S. women by the complex interplay of state and federal laws, but 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, women in the U.S. have always sought ways to end untimely pregnancies, regardless of the legality of abortion. Unfortunately, not all of these means were safe or effective, and, before the 1970s, the criminalization of abortion caused pervasive fear and mistrust that prevented women from

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<sup>17</sup> E.g., 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).

<sup>18</sup> 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).

<sup>19</sup> *Id.*

<sup>20</sup> World Health Org, WHO Model List of Essential Medicines (19th List, April 2015), 38-39, <http://bit.ly/2q4vW95>.

<sup>21</sup> 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).

<sup>22</sup> Mifepristone was approved for use in 2000 in a highly politicized process; Heather Boonstra, *Medication Abortion Restrictions Burden Women and Providers—and Threaten U.S. Trend Toward Very Early Abortion* By Heather D. Boonstra, *Guttmacher Policy Review*, Winter 2013, at 18, 19, <http://bit.ly/2sTKc4R>; R. Alta Charo, *A Political History of RU-486*, in *Biomedical Politics* in Institute of Medicine (US) Committee to Study Decision Making; (K.E. Hanna, ed. Washington (DC): National Academies Press (US); 199, <http://bit.ly/2qXPnzR>

<sup>23</sup> Heather Boonstra, *Medication Abortion Restrictions Burden Women and Providers—and Threaten U.S. Trend Toward Very Early Abortion*, *Guttmacher Policy Review*, Winter 2013, at 18, 18.

<sup>24</sup> Coeytaux et al, *supra* note TK, at 609

<sup>25</sup> See, e.g., *Women on Web*, <https://www.womenonweb.org/>.

being able to seek the safest possible means. Legal historians have theorized that maternal mortality due to unsafe criminalized abortion, which had a galvanizing effect on the medical community, was a motivating factor for the U.S. Supreme Court's decision in *Roe v. Wade*.<sup>26</sup> The decriminalization of abortion led to a significant decrease in abortion-related deaths.<sup>27</sup> It did not, however, end self-induced abortion, and the practice continues to play an important role in reproductive freedom to the present day.

While it is difficult to get an accurate count of how many women in the U.S. have attempted to end their own pregnancies, recent research from the Texas Policy Evaluation Project revealed that anywhere from 1.7% to 4.1% of Texan women (between 100,000 to 240,000) may have attempted to end a pregnancy on their own at some point.<sup>28</sup> One journalist found that in 2015 alone, there were over 700,000 internet searches for information on how to end a pregnancy, with the highest concentration of searches occurring in states with restrictive abortion laws.<sup>29</sup>

However, lack of access to clinic-based abortion is not the only reason people may seek self-directed care. Other reasons may include unnecessary hurdles created by lawmakers, such as waiting periods or mandatory ultrasounds, the difficulty in traveling long distances and incurring the cost of clinical care, or concerns about being exposed or intimidated by hostile clinic protesters.<sup>30</sup> Some people may have different, deeply personal reasons.<sup>31</sup> They may be members of communities that have experienced oppression at the hands of the medical profession, such as forced sterilization or unconsented medical testing, and thus distrust the formal medical system. Others may simply prefer the more personal and private experience of being able to end a pregnancy at a time and with the companion of their choosing.<sup>32</sup>

Whether people end their own pregnancies out of preference or necessity, historical and present trends indicate that criminalization is not a deterrent to self-induction. Perversely, criminalization may deter women from seeking care for complications because they fear being turned over to law enforcement. This fear is not unfounded — one study of arrests and detentions of women based on alleged actions or inactions during pregnancy found that in nearly a quarter of all cases, women were reported by health care or social work professionals when they sought help.<sup>33</sup> This was especially the case for women of color, who were more likely

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<sup>26</sup> Linda Greenhouse, *Misconceptions*, NY Times Opinionator, Jan. 23, 2013, <http://nyti.ms/2qpcel6> ("It's a case about the rights of doctors – fellow professionals, after all – who faced criminal prosecution in states across the country for acting in what they considered to be the best interests of their patients.")

<sup>27</sup> William Cates, Jr., David A. Grimes, *The Public Health Impact of Legal Abortion: 30 Years Later*, Perspectives on Sexual and Reproductive Health, Jan/Feb 2003, at 25, 27. ("The number of abortion-related deaths per million live births fell from nearly 40 in 1970 to eight in 1976.")

<sup>28</sup> Daniel Grossman et al., *Knowledge, Opinion, and Experience Related to Abortion Self-Induction in Texas*, Texas Policy Evaluation Project Research Brief, Nov. 17, 2015, <http://bit.ly/2qY8BVK>.

<sup>29</sup> Seth Stephens-Davidowitz, *The Return of the D.I.Y. Abortion*, NY Times, Mar. 5, 2016, <http://nyti.ms/2pu7a06>

<sup>30</sup> Daniel Grossman et al., *Self-Induction of Abortion Among Women in the United States*, Reproductive Health Matters, Vol. 18 (36), at 140, 146.

<sup>31</sup> Alison Ojanen-Goldsmith, *Beyond the Clinic: Preferences, Motivations, and Experiences with Alternative Abortion Care in North America*, 94 Contraception 387, 398-99 (2016).

<sup>32</sup> Grossman et al., *Self-induction of Abortion*, *supra* note 29, at 146.

<sup>33</sup> Lynn M. Paltrow & Jeanne Flavin, Arrests of and Forced Interventions on Pregnant Women in the United States, 1973-2005: Implications for Women's Legal Status and Public Health, *Journal of Health Politics, Policy and Law*, Vol. 38, No. 2, (Apr. 2013), 326-327, <http://bit.ly/2q0I3FU>.

to be turned over by the people they turned to for care.<sup>34</sup> This leads to racial disproportionalities in punishment; for instance, although Black people make up 15% of the population of the state of Florida, nearly 75% of the prosecutions of pregnant Floridians were against Black women.<sup>35</sup> With respect to self-induced abortion, this disparity is likely to be compounded by the fact that women of color are more likely to face barriers to clinic-based abortion, and are more likely to suffer adverse pregnancy outcomes that may bring them under scrutiny, even if the causes of poor pregnancy outcomes are structural and largely outside of their control.<sup>36</sup>

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 American women, their families, and communities.

### III. Criminalization of Self-Induced Abortion

The right to abortion is protected by the U.S. Constitution; nevertheless, women who have had abortions have been arrested and punished for ending their own pregnancies in many states. Such arrests typically target the women most marginalized in American society, especially low-income women and women of color. These women are the ones most likely to have factors — such as a lack of money, childcare, transportation, or legal immigrant status, or a mistrust of the medical system — that push or pull them toward self-induced abortion. The laws used to criminalize women for self-inducing abortion, either revived from antiquity or contorted beyond their legislative intent by overzealous prosecutors, include: (A) laws directly criminalizing self-induced abortions, (B) laws criminalizing harm to fetuses, (C) criminal abortion laws misapplied to women who self-induce, and (D) various and sundry laws deployed when no other legal authorization to punish can be found.

#### A. Laws That Directly Criminalize Women for Having Abortions

The most direct threat to women who end their own pregnancies are statutes explicitly criminalizing self-induced abortion (variously referred to as “self-abortion,” “soliciting,” or “submitting to a criminal abortion”). These statutes vary in the severity of punishment they prescribe and include misdemeanors and felonies. States with such laws are spread across the U.S. and include Arizona,<sup>37</sup> Delaware,<sup>38</sup> Idaho,<sup>39</sup> Nevada,<sup>40</sup> New York,<sup>41</sup> Oklahoma,<sup>42</sup> and South

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 311.

<sup>36</sup> Susan A. Cohen, *Abortion and Women of Color, The Bigger Picture*, *Guttmacher Policy Review*, Vol. 11(3), Summer 2008 at 2; Allison S. Bryant et al. *Racial/Ethnic Disparities in Obstetrical Outcomes and Care: Prevalence and Determinants*, 204 (4) *Am. J. Obstetrics & Gynecology* 335 (2010).

<sup>37</sup> See *Ariz. Rev. Stat. § 13-3604* (“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 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.”). This statute may be affected by the ruling in *McCormack v. Hiedeman*, 694 F.3d 1004, 1015 (9th Cir. 2012), see note TK *infra*.

<sup>38</sup> See 11 Del. Code § 652 (“A female is guilty of self-abortion when she, being pregnant, commits or submits to an

Carolina.<sup>43</sup> All are laws that have been retained from before the Supreme Court's decision in *Roe v. Wade* laid out the constitutional limits of the state's ability to restrict abortion.<sup>44</sup> But the fact that the laws are outdated and likely unconstitutional does not mean that they are inert: numerous women have been arrested under such laws, some of them recently.

For instance, an Idaho mother named Jennie McCormack was arrested in 2011 after having ended a pregnancy with medication she obtained online. Raising three children on only \$250 per month in child support payments, Ms. McCormack was unable to drive across state lines or afford the hundreds of dollars for an abortion at the nearest clinic. Using the internet, she was able to obtain a prescription for abortion pills from a physician outside the U.S. and received the pills in the mail. Ms. McCormack safely ended her pregnancy, 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."<sup>45</sup> A magistrate judge dismissed the charge on evidentiary grounds, and Ms. McCormack filed a lawsuit challenging the constitutionality of the law.

A federal circuit appeals court ruled in her favor, holding that criminalizing women for "submitting" to abortions that do not meet legal standards places an unconstitutional burden on the right to abortion by requiring that women know whether their health care provider is

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abortion upon herself which causes her abortion, unless the abortion is a therapeutic abortion."). 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); *Delaware Women's Health Org. v. Wier*, 441 F. Supp. 497, 499 n.9 (D. Del. 1977).

<sup>39</sup> See Idaho Code Ann. § 18-606(2) ("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 . . ."). Although § 18-606(2) is broad, § 18-608 permits abortion in certain circumstances and limits liability under § 18-606(2) to abortions that are not authorized by statute. *But see McCormack v. Hiedeman*, 694 F.3d 1004, 1015 (9th Cir. 2012), discussed *infra*.

<sup>40</sup> See Nev. Rev. Stat. Ann. § 200.220 ("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 . . .").

<sup>41</sup> See N.Y. Penal Law § 125.50 ("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 . . ."); and N.Y. Penal Law § 125.55 ("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 abortifacient act upon herself which causes her miscarriage, unless such abortifacient act is justified . . .").

<sup>42</sup> 63 Okla. Stat. § 1-733 ("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."); 21 Okla. Stat. § 862 ("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.

<sup>43</sup> See 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 . . .").

<sup>44</sup> What if *Roe* Fell?, *supra* note 1.

<sup>45</sup> *Id.* Code Ann. § 18-606(2) (2006).

compliant with relevant laws.<sup>46</sup> Though now considered unenforceable, the Idaho's statute remains in the code because a finding of unconstitutionality does not lead to automatic repeal. Thus, a shift in jurisprudence may bring the law back into operation. Additionally, this ruling may affect laws in other states within the same circuit (Arizona and Nevada), but a court cannot make such ruling without a judiciable case in controversy before it: that is, a woman potentially subject to arrest under similar laws in other states must assume the burden of raising a challenge to the law.

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.<sup>47</sup> Ms. Almonte was interrogated by police and admitted to having drunk an herbal tea to induce an abortion.<sup>48</sup> The herb she admitted to using is commonly available in *botánicas*, remedy shops prevalent in immigrant communities.<sup>49</sup> The use of traditional remedies or pharmaceuticals obtained abroad, whether to end a pregnancy or to treat other health concerns, is driven by barriers such as lack of access to health insurance and mistrust of the medical system.<sup>50</sup> 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.<sup>51</sup>

It is difficult to say with certainty how many other women have faced similar arrest, but these cases are representative of the present threat in antiquated laws. For some women, self-induced abortion is a method of last resort. But for others, even in places like New York City where abortion is legal and covered by public insurance for low-income people, self-induction is the abortion method of preference. The threat of criminalization only exacerbates the uneasy relationship many marginalized communities have with the formal medical system, pushing the practice further underground and leading to disproportionate punishment of those communities. Laws criminalizing self-induced abortion are certainly the most direct threat faced by women 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.

## B. Laws Criminalizing Harm to Fetuses

Prior to *Roe v. Wade*, 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

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<sup>46</sup> *McCormack v. Hiedeman*, 694 F.3d 1004, 1015 (9th Cir. 2012)

<sup>47</sup> NYPD: Manhattan Woman Charged With Performing Self-Abortion, CBS N.Y., Dec. 1, 2011, <http://cbsloc.al/2pxAnrZ>.

<sup>48</sup> N.Y. Penal Law § 125.55 *see supra* note 7 for text of statute.

<sup>49</sup> Carla Zanoni & Shayna Jacobs, *DA Drops Self-Abortion Charges Against Washington Heights Mother*, DNAInfo, (Jan. 3, 2012), <http://dnainfo.com/2qpsCbL>.

<sup>50</sup> *See* Anemona Hartocollis, *After Fetus is Found in Trash, a Rare Charge of Self-Abortion*, N.Y. Times, Dec. 1, 2011, <http://nyti.ms/2q1Nncz> (discussing how mistrust for the medical system is a common occurrence in the Latino community); Amy Gastelum, *Purvi Patel's legal team attacks evidence behind her controversial conviction for feticide, child neglect*, PRI, Oct. 2, 2015, <http://bit.ly/2q0DM5q> (discussing the related idea that mistrust can also stem from having come from a country in which abortion is illegal).

<sup>51</sup> DA Drops Self-Abortion Charges Against Manhattan Woman, CBS N.Y., Jan. 3, 2012, <http://cbsloc.al/2q0NpAS>.



causing a woman to lose a pregnancy if she 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, either by creating new crimes with fetal victims (such as feticide or fetal assault),<sup>52</sup> redefining ‘persons’ or ‘victims’ to include fetuses,<sup>53</sup> or both.<sup>54</sup> As of this writing, at least 38 states and the federal criminal code have laws criminalizing harm to fetuses.<sup>55</sup>

These laws have garnered widespread support because they are usually passed in the name of protecting pregnant women, and often arise in the wake of high-profile acts of violence against pregnant women. In practice, however, these laws make women vulnerable. Research has shown that in virtually every state in which the law punishes harm to fetuses, prosecutors have attempted to use these laws to punish women for the outcomes of their pregnancies.<sup>56</sup> On their face, these laws vary in the degree of threat they pose to women who end or lose their pregnancies, but prosecutors seeking to radically expand criminal liability for women have permitted such arrests even when the law explicitly prohibits charging women with a crime.<sup>57</sup> Many of fetal victim laws contain provisions explicitly exempting pregnant women from criminal liability related to their own pregnancies;<sup>58</sup> others are silent on the matter, inviting prosecutorial overreach, and a small few explicitly target women who end or lose their pregnancies for homicide charges.

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<sup>52</sup> *E.g.*, Mich. Comp. Laws §§ 750.322 (creating a crime for the “wilful killing of an unborn quick child by any injury to the mother of such child”) and (Mich. Comp. Laws §§ 750.323; creating a crime of manslaughter of a “quick child or mother from the use of medicine or instrument.”); R.I. Gen. Laws § 11-23-5 (criminalizing “wilful killing of an unborn quick child by any injury to the mother of the child”); Wash. Rev. Code Ann. § 9A.32.060 (including “intentionally and unlawfully kill[ing] an unborn quick child by inflicting any injury upon the mother of such child” under the definition of manslaughter); Ind. Code § 35-42-1-6 (“A person who knowingly or intentionally terminates a human pregnancy with an intention other than to produce a live birth or remove a dead fetus commits feticide.”); 18 Pa. Cons. Stat. § 2603 (“An individual commits criminal homicide of an unborn child if the individual intentionally, knowingly, recklessly or negligently causes the death of an unborn child. . . .”); Iowa Code § 707.7 (“Any person who intentionally terminates a human pregnancy, with the knowledge and voluntary consent of the pregnant person, after the end of the second trimester of the pregnancy where death of the fetus results commits feticide.”); Wis. Stat. Ann. § 940.01(1)(b)(“whoever causes the death of an unborn child with intent to kill that unborn child, kill the woman who is pregnant with that unborn child or kill another is guilty of a Class A felony”); Wash. Rev. Code Ann. § 9A.32.060 (1)(b)(“A person is guilty of manslaughter in the first degree when [...] He or she intentionally and unlawfully kills an unborn quick child by inflicting any injury upon the mother of such child.”)

<sup>53</sup> *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).

<sup>54</sup> *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.) and 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”).

<sup>55</sup> Nat’l Conference of State Legislatures, *Fetal Homicide State Laws*, Mar. 4, 2015 <http://bit.ly/2qToXCL>.

<sup>56</sup> See Paltrow & Flavin, *supra* note 33.

<sup>57</sup> Andrea Grimes, *Pregnant Texans are Being Charged with Crimes that Don’t Exist*, *Rewire*, Oct. 16, 2014, <http://bit.ly/2px7wmX>.

<sup>58</sup> *E.g.*, Tenn. Code Ann. § 39-13-107(c) (“Nothing in subsection[ . . . ] shall apply to any act or omission by a pregnant woman with respect to an embryo or fetus with which she is pregnant, or to any lawful medical or surgical procedure to which a pregnant woman consents, performed by a healthcare professional who is licensed to perform such procedure.”)

## i) Fetal Victim Laws That Fail to Explicitly Exempt Pregnant Women From Liability

Many state laws create criminal liability for harm to fetuses, but make no mention of pregnant women.<sup>59</sup> Ignoring the statutes' intended aim of protecting pregnant women who are victims of violent crimes, prosecutors seize upon the silence to create uncertainty as to whether pregnant women 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.<sup>60</sup> However, these fundamental principles do not always succeed in preventing unlawful arrests and prosecutions, particularly given the general antipathy toward women who have abortions.

One example arises in the state of Indiana, which has a feticide statute that criminalizes "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."<sup>61</sup> This statute was passed in 1979 after an incident in which a pregnant bank teller was shot in the abdomen by a robber and survived, but tragically lost her twin pregnancy. Although this law was intended to protect pregnant women, has been used against them. Thirty-four years after the passage of Indiana's feticide law, Purvi Patel was charged with feticide for allegedly having taken pills she obtained from the internet to end her pregnancy.<sup>62</sup>

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 a.m. bedside interrogation without an attorney present as she recovered from surgery to remove a retained placenta. 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 women for self-inducing abortions. She was released after three years of incarceration,

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<sup>59</sup> Such states include Indiana, Iowa, Massachusetts, Michigan, Mississippi, Rhode Island, Washington, and Wisconsin, described above.

<sup>60</sup> See, e.g. *Arms v. State*, 471 S.W.3d 637, 643 (Ark. 2015) (rejecting a prosecutorial attempt to reinterpret a statute prohibiting introducing a drug into the body of another person to apply to the relationship between the pregnant woman and a fetus); *State v. Louk*, 786 S.E.2d 219 (W. Va. 2016) (overturning a conviction for negligent homicide of a woman who experienced a drug overdose during pregnancy and gave birth to a child who died several days after birth); *People v. Jorgensen*, 41 N.E.3d 778 (N.Y. 2015) (overturning a manslaughter conviction of a woman involved in a car accident for giving birth to a baby who died shortly after emergency delivery); *State v. Stegall*, 828 N.W.2d 526, 528 (N.D. 2013) (holding child endangerment statute does not apply to acts committed on an unborn child, regardless of whether the child is subsequently born alive or dies in utero); *Cochran v. Commonwealth*, 315 SW3d 325, 328 (Ky 2010) (recognizing that criminalizing harm to a fetus would yield a "plainly unconstitutional result").

<sup>61</sup> IC 16-34 (also known as § 35-42-1-6).

<sup>62</sup> See Emily Bazelon, *Purvi Patel Could Be Just the Beginning*, N.Y. Times, Apr. 1, 2015, <http://nyti.ms/2pifkxs>; and *Purvi Patel is released after feticide conviction overturned*, Indianapolis Star, Sept. 1, 2016, Patel <http://indy.st/2qQ1O4f>.

mere days after her state's governor, Mike Pence, was named the Vice-Presidential candidate. With a felony conviction on her record<sup>63</sup> and her name notorious in local and national media, it is unlikely Ms. Patel will ever be truly free of the stigma related to her unlawful 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 that can stem from laws created to address fetuses but fail to account for the people within whom they reside. Such unresolved ambiguity in laws makes these laws susceptible to abuse in absurd ways: prosecutors argued that Indiana's feticide law could even be used to charge a woman with a felony for merely *trying* to end her pregnancy, even if the fetus survived.<sup>64</sup>

## ii) Laws Permitting Selective Criminalization of Pregnant Women

While nearly all state appellate courts asked to consider whether "unborn victim" laws that are silent about whether pregnant women can be prosecuted can be used to punish women for their pregnancy outcomes have dismissed such attempts as prosecutorial overreach, a small number of states have passed statutes that permit "unborn victim" laws to be used against women in some circumstances.

For example in Utah, "[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."<sup>65</sup> The law also provides that abortions (as opposed to "homicide of an unborn child") can only be performed by physicians.<sup>66</sup> Taken together, a woman who undertakes an act that she either intends or knows will end her pregnancy can be prosecuted for homicide. This law is notable because it was amended in 2010 after a high-profile case in which a young woman paid a man to beat her until she miscarried. She was unsuccessful in ending the pregnancy, but was charged with solicitation of murder in the juvenile court.<sup>67</sup> She appealed the ruling on the basis that she had solicited not a homicide, but an abortion (which was explicitly exempt from criminalization under Utah statute), leading to dismissal of the charge. Days later, a conservative state representative vowed to close the "loophole" to ensure that other women who tried to end their pregnancies would be punished.<sup>68</sup> As the legislature passed the harsher law amid public outrage, the Utah Supreme Court overturned the dismissal and the young woman faced retrial. Fearing a lengthy prison term, she pleaded guilty to solicitation of a crime.<sup>69</sup>

Oklahoma also includes the killing of an unborn child under its definition of homicide.

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<sup>63</sup> Ms. Patel was also charged with child neglect leading to death based on a theory that she had delivered a live infant. Even though the evidence presented at trial included a long-discredited "fetal lung float test," a jury found that Ms. Patel delivered a live but fatally premature infant. The appellate court, forced to give deference to this finding, nevertheless ruled that the state had failed to prove that Ms. Patel did anything after the birth that contributed to the death of the infant, meaning that the most she could have been convicted for was child neglect without the penalty enhancement for a resulting death. Her sentence was reduced accordingly.

<sup>64</sup> See Bazelon, *supra* note 35.

<sup>65</sup> Utah Code § 76-5-201 (3)(b) & (4)(b).

<sup>66</sup> Utah Code § 76-7-301 (1)(a)(i).

<sup>67</sup> *State in Interest of J.M.S.*, 280 P.3d 410 (2011).

<sup>68</sup> Nina Liss-Schultz, *She was Desperate. She Tried to End Her Own Pregnancy. She Was Thrown In Jail.* Mother Jones, May/June 2017, <http://bit.ly/2r9UTiX>.

<sup>69</sup> *Id.*

Its statute provides only partial protection for pregnant women, stating: “Under no circumstances shall the mother of the unborn child be prosecuted for causing the death of the unborn child *unless the mother has committed a crime that causes the death of the unborn child.*”<sup>70</sup> (emphasis added) The use of the term “crime” creates circular reasoning, as even acts or omissions that are negligent may be considered a crime if they cause the death of the fetus.

These laws attempt to single out women who end their pregnancies for punishment as murderers, while exempting women who experience pregnancy losses caused by merely negligent or reckless acts from prosecution. While criminally prosecuting women who intentionally terminate pregnancies is an improper use state power, these laws are also problematic because they are likely to result in the arrest and prosecution of women who did not seek to end their pregnancies. Laws must be clear and narrow enough not 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 woman’s feelings of ambivalence about her pregnancy, previous visits to abortion clinics, and knowledge of their menstrual cycles. Arbitrary enforcement is a near certainty as law enforcement rely on stereotypes and stigma to discern “innocent” from “guilty” pregnancy losses. 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.

### C. Laws Criminalizing Abortion Providers Misapplied to Criminalize Women

*Roe v. Wade* 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.<sup>71</sup> Historically, absent a clear indication otherwise (such as in sec. III(A) above) criminal abortion laws have been understood to apply only to people who provide abortions, not to women who have them.<sup>72</sup> But where states have failed to update their criminal laws, prosecutors have opportunistically sought to charge women under archaically-worded statutes, making abortion a crime for women in a way it never was prior to *Roe*.

A prime example of such a prosecutorial abuse recently arose in Tennessee. Anna

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<sup>70</sup> Okla. State. Ann. tit. 21, § 691(d).

<sup>71</sup> See, e.g., Center for Reproductive Rights, *What If Roe Fell?*, <http://bit.ly/2rVW7NU>; Guttmacher Institute, *Abortion Policy in the Absence of Roe (as of May 1, 2017)* <http://bit.ly/2rLT6lx>.

<sup>72</sup> See, e.g., *State v Ashley*, 701 So. 2d 338, 342-43 (Fla. 1997) (overturning conviction of woman who shot herself in the abdomen, causing an injury to the fetus, who died a short time after a live birth); *Hillman v. State*, 232 Ga. App. 741 (refusing to extend Georgia’s felony abortion statute to abrogate the common law principle that the woman who had the abortion was neither accomplice nor perpetrator); *State v. Barnett*, 249 Or. 226, 229 437 P.2d 821, 822 (1968); *State v Carey*, 56 A 632 (Conn 1904) (“At common law an operation on the body of a woman quick with child, with intent thereby to cause her miscarriage, was an indictable offense, but it was not an offense in her to so treat her own body, or to assent to such treatment from another [. . .] It was in truth a crime which, in the nature of things, she could not commit.”)

Yocca was arrested in 2015 for trying to end her pregnancy using a coat hanger.<sup>73</sup> 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 pregnant women. The prosecutor responded by charging Ms. Yocca with a slate of felonies, including aggravated fetal assault with a weapon,<sup>74</sup> attempted criminal abortion, and attempted procurement of a miscarriage.<sup>75</sup> 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 but had never in Tennessee history been used to prosecute a woman for her 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.

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."<sup>76</sup> Prosecutors have attempted to apply such laws to women who self-induce by ignoring the language clearly indicating the presence of another party who "administers to" or "prescribes for" them, arguing that a woman herself may "unlawfully [use]" means to end a pregnancy. A total of fourteen states have provisions susceptible to similar misuse.<sup>77</sup>

Kentucky's abortion laws are particularly unclear and confusing, placing women 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."<sup>78</sup> In context, such a law would ordinarily be understood to require that

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<sup>73</sup> Katie Mettler, *Tennessee Woman Who Attempted Coat Hanger Abortion Faces Three New Felony Charges*, The Wash. Post, Nov. 18, 2016, <http://wapo.st/2qqolPR>.

<sup>74</sup> 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).

<sup>75</sup> See 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]).

<sup>76</sup> Mass. Gen. Laws. Ann. 272 § 19.

<sup>77</sup> See also Ala. Code § 13A-13-7; Ariz. Rev. Stat. § 13-3603; Ky. Rev. Stat. § 311.750; 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.

<sup>78</sup> Ky. Rev. Stat. § 311.750.

only physicians — and not laypeople or other health care providers — may perform abortions on women. 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 a woman for what amounts to unlawful practice of medicine *on herself*, which would not be a crime in any other medical context.

In fact, in 1978, a college student named Marla Pitchford was charged under this law for ending a pregnancy using a knitting needle in what was believed to be the first criminal prosecution for a self-induced abortion.<sup>79</sup> Media noted that the recently-enacted law “was intended to protect women from illegal medical procedures, but in this case Miss Pitchford was charged with illegally performing an abortion on herself.”<sup>80</sup> Ms. Pitchford was acquitted by reason of insanity, and the Assistant Commonwealth Attorney described the law as a “poorly written law which needs some clarification.”<sup>81</sup> No clarification has come in the nearly forty years that have elapsed, but the impulse to punish women who end their own pregnancies has grown.

#### D. Abortion Prosecutions Absent Statutory Authority

So great is the zeal to punish women who end their own pregnancies that prosecutors will often try to find a crime that fits, even if no other statutory authority exists. Women may find themselves arrested for homicide, but eventually prosecuted for improper disposal of human remains once it becomes clear that no charges can lie for ending a pregnancy.

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.<sup>82</sup> 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.<sup>83</sup>

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

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<sup>79</sup> Michael Sneed, Kentucky Jury Acquits Coed in Self-Abortion, Chicago Tribune, Aug. 31, 1978, <http://trib.in/2qRzleJ>.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.*

<sup>82</sup> 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”).

<sup>83</sup> Patty Wooten, Judge acquits woman of abuse of corpse, jury convicts her of concealing birth, SearkToday, (Mar. 6, 2016), <http://bit.ly/2qZUCQ2>.

women who end their own pregnancies.<sup>84</sup> Other states have laws similar to Arkansas's that prohibit "concealment of a birth,"<sup>85</sup> arcane laws passed in earlier centuries to punish unwed mothers and cast criminal doubt on perinatal deaths. Prosecutors who have been thwarted in charging women with harsher fetal homicide or assault laws have responded by penalizing possession of abortion pills as "dangerous drugs," as recently occurred in Georgia,<sup>86</sup> 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.<sup>87</sup>

It is difficult, if not impossible, to address every possible law that could be used by a prosecutor committed to punishing a woman for ending her pregnancy. At the heart of these prosecutorial abuses lies 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 women 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 within health regulations rather than criminal laws, clearly demarcating the healthcare realm from the realm of criminal prosecution.

#### IV. Human Rights Jurisprudence

State laws criminalizing abortion restrict women's rights to nondiscrimination on the basis of sex, self determination, health, security of the person, and freedom from torture and cruel, inhuman, and degrading treatment. As the Special Rapporteur on Health has noted, women are generally more likely to experience infringements of their rights under the gendered social, legal and economic context in which sexuality, fertility, pregnancy and parenthood occur.<sup>88</sup> Antiquated criminal abortion laws, "unborn victims of violence" laws, and other criminal laws exclusively regulate the conduct of women by singling out those who seek to end their pregnancies for prosecution. The CEDAW Committee has made clear that state actions of this kind violate women's right to be free from non-discrimination under the law.<sup>89</sup> Most importantly, it has consistently criticized countries that criminalize women who have

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<sup>84</sup> *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").

<sup>85</sup> 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").

<sup>86</sup> Abby Phillip, *Murder charges dropped against Georgia woman jailed for taking abortion pills*, Washington Post, June 10, 2015, <http://wapo.st/2rqydei>.

<sup>87</sup> Emily Bazelon, *A Mother in Jail for Helping Her Daughter Have an Abortion*, New York Times Magazine, Sept. 22, 2014, <http://nyti.ms/2reNxOM>.

<sup>88</sup> Special Rapporteur on Health, U.N. General Assembly, Right of everyone to the enjoyment of the highest attainable standard of physical and mental health, U.N. Doc. No. A/66/254, para. 16 (Aug. 3, 2011),

<sup>89</sup> CEDAW General Recommendation No. 24, para. 31(c) (recommending that "When possible, legislation criminalizing abortion should be amended, in order to withdraw punitive measures imposed on women who undergo abortion").

abortions.<sup>90</sup>

Criminalization generates and perpetuates stigma around reproductive decision-making and restricts women's ability to make full use of available sexual and reproductive health care services and information.<sup>91</sup> The Working Group has strongly and consistently criticized State policies that deny women's access to essential health services, including abortion, as manifestations of gender discrimination.<sup>92</sup> Under CEDAW, sex-based distinctions in the provision of healthcare and family planning constitute discrimination against women and violate the principles of equality of rights and respect for human dignity.<sup>93</sup> Restrictions or bans on services attributable only to women are discriminatory per se.<sup>94</sup>

Furthermore, criminal laws and other legal restrictions facilitate and justify State control over women's lives and violate women's liberty and autonomy. Criminalizing certain avenues for ending a pregnancy profoundly undermines women's control of their reproductive decision-making.<sup>95</sup> Control over one's own body, including the decision whether to terminate a pregnancy or carry it to term, is an essential element of liberty. By severely restricting women's decision-making about their sexual and reproductive health, under threat of prosecution, these laws infringe on women's ability to make crucial decisions about their emotional, physical, economic, and social well being.<sup>96</sup> These law therefore detract from "a woman's autonomy to determine her life's course, and thus to enjoy equal citizenship stature."<sup>97</sup>

Criminalization also discourages women who may face criminal prosecution for having abortions from seeking medical help if complications arise.<sup>98</sup> The Special Rapporteur on Health has stated that "criminal laws with respect to abortion may amount to violations of [State obligations] to respect, protect and fulfil the right to health."<sup>99</sup>

The arrest, detention and criminal prosecution of women for self-inducing abortion can also constitute torture or cruel, inhuman or degrading treatment. Where women are unable to access clinical-based abortion care or it is unacceptable for cultural or other reasons, criminalization of self-induction operates as an absolute ban on abortion. The Committee on Torture<sup>100</sup> and the Special Rapporteur on Torture<sup>101</sup> have expressed concerns that restrictions

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<sup>90</sup> See, e.g., CEDAW, *Concluding Observations: Burkina Faso*, U.N.CEDAW/C/BFA/CO/6, para. 40 (2010); CEDAW, *Concluding Observations: Liechtenstein*, U.N.CEDAW/LIE/CO/3, para. 26 (2007); CEDAW, *Concluding Observations: Nicaragua*, U.N.CEDAW/C/NIC/CO/6, para. 18 (2007); CEDAW, *Concluding Observations: Mauritius*, U.N.CEDAW/C/MAR/CO/5, para. 31 (2006); CEDAW, *Concluding Observations: Chile*, U.N.CEDAW/C/CHI/Co/4, para. 20 (2006); Statement on sexual and reproductive health and rights: Beyond 2014 ICPD Review (2014).

<sup>91</sup> Special Rapporteur on Health, para. 17.

<sup>92</sup> *Id.*, para. 24. See also, Committee on the Elimination of Discrimination Against Women, General Recommendation 24 (1999) on women and health, para. 11.

<sup>93</sup> Convention on the Elimination of Discrimination Against Women, Art. 12.1.

<sup>94</sup> Human Rights Council, Report of the Working Group on the issue of discrimination against women in law and in practice, para. 78 (Apr. 8, 2016).

<sup>95</sup> Special Rapporteur on Health, *supra* note 88, para. 21.

<sup>96</sup> International Convention on Civil and Political Rights, Art. 9.

<sup>97</sup> *Gonzales v. Carhart*, US Supreme Court, p. 4 (2007) (Ginsburg, J., dissenting), Special Rapporteur on Health, para. 21 (stating that criminal abortion laws "impinge women's dignity and autonomy by severely restricting decision-making by women in respect to their sexual and reproductive health.")

<sup>98</sup> Special Rapporteur on Health, para. 34, 41 (stating that fear of criminal prosecution and stigma deter women from accessing health services and care including treatment for medical complications from abortion).

<sup>99</sup> Special Rapporteur on Health, para. 21.

<sup>100</sup> CAT/C/PER/CO/4, para. 23.

<sup>101</sup> Human Rights Council, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Juan E. Méndez, para. 49-50 (Feb., 1 2013)



and absolute bans on abortion may constitute torture or ill treatment. Criminalization of self-induction stigmatizes the women who have them as well as women who are suspected of self-inducing. This discourages women from seeking medical help for complications and places them at risk for harassment and mistreatment in healthcare settings when they do seek help.

There is also a danger of torture or ill-treatment when medical settings are turned into sites for criminal investigation.<sup>102</sup> The Special Rapporteur on Torture has repeatedly expressed concern about withholding medical care to serve law enforcement purposes and has identified extracting confessions in order to prosecute illegal abortions as a form of torture.<sup>103</sup> Similarly bedside interrogations that take place immediately after medical treatment raise due process and ill-treatment concerns.

## V. Conclusions and Recommendations

It raises grave concern that those who seek self-induced abortions are prosecuted and punished as criminals in many states in the United States. Whether women are directly criminalized by laws prohibiting self-induced abortion or indirectly through improper use of “unborn victim” laws or laws criminalizing abortion provision, the effect is the same: taking matters into one’s own hands converts a constitutional right into a crime. Such prosecutions, with or without statutory authority, are sometimes vindictive, often political, and always a violation of fundamental rights. 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. This concern is only deepened under the new political leadership.

We therefore recommend that:

- States should repeal all laws that criminalize self-induced abortion. Criminalization of self-induced abortion does not prevent women from attempting to end their own pregnancies. It only serves to foment mistrust of the medical system and prevent women 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 women for punishment for ending a pregnancy violate women’s human right to be free from discrimination and should be repealed.
- States should eliminate the threat of wrongful and discriminatory prosecutions by clarifying ambiguous laws. When the law creates a separate victim status for fetuses in the criminal law, women become susceptible to law enforcement involvement, including arrest, interrogation, and prosecution, for any pregnancy loss. States should fulfil their obligation to protect women from cruel and unnecessary criminal investigations by clarifying — either through legislative amendment or a statement on the part of the

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<sup>102</sup> Human Rights Council, General Recommendations of the Special Rapporteur on torture, E/CN.4/2003/68, para. 26(n) (2003)

<sup>103</sup> SRT Report , para. 44

state attorneys general — that laws criminalizing harm to fetuses are intended to protect pregnant women, and are not applicable to acts or omissions with respect to one's own pregnancy.

- 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 that women are able to seek care. This is especially important for criminal abortion laws, which create uncertainty among providers and are misused by prosecutors against women who end their own pregnancies.
- States and the federal government should ensure access to clinic-based abortion care. Many women resort to self-induced abortion because they lack access to clinic-based care. Barriers on public funding for abortion services and unnecessary and onerous regulation on the federal and state level exacerbate this dilemma especially for women living in poverty, and should be eliminated to maximize access to facility-based care for those who seek it.
- States should review regulations imposed upon medication abortion and reform laws that unnecessarily restrict access to abortion pills. Abortion with pills is considered safe, especially when women have information about contraindications and complications, and when they are able to seek follow-up care without fear. Improving access to abortion medications can improve maternal health outcomes and reduce barriers to care for women living in poverty, immigrant women, rural women, and others for whom clinic-based care is inaccessible or inappropriate.