

Prosecuting Women for Self-Inducing Abortion: Counterproductive and Lacking Compassion

By Andrea Rowan

From the beginning of 2011 through August 2015, states enacted 287 new legal restrictions on access to abortion care.¹ For women in large swaths of the United States, access to abortion services is more limited now than at any time since *Roe v. Wade*. The goal of antiabortion advocates is to make abortion impossible to obtain by layering multiple restrictions, even though many claim that their motivation is only to protect women's health. Attempts to stop abortion by making it illegal or hard to obtain, however, have never succeeded in ending abortion, either in the United States before *Roe v. Wade* or in other countries where it is currently banned or severely restricted by law. The primary result of abortion restrictions is to expose women to more health hazards. Women will self-induce if that is their only option, despite the fact that it puts their health at risk—and in many cases, their liberty, as well.

Since *Roe v. Wade*, a number of women have been prosecuted in the United States for self-inducing abortion under a variety of state statutes, ranging from fetal homicide to failure to report an abortion to the coroner. Recently, the issue has gained greater attention because of several well-publicized cases in which women were prosecuted—and even imprisoned—for self-inducing an abortion or being suspected of doing so. Despite claims from antiabortion advocates and lawmakers that abortion restrictions are intended to only criminalize providers of abortion care, some prosecutors have exercised their discretion under current state laws to penalize women who end their pregnancies on their own. Moreover, these laws are even being used to pursue women who are merely suspected of having self-induced an abortion, but in fact had suffered miscarriages.

HIGHLIGHTS

- *The current climate of hostility toward abortion rights in large swaths of the United States has left some women—particularly those who are low-income or otherwise disadvantaged—with no practical option for terminating their pregnancies but to do so on their own, which puts them at risk of legal prosecution and even imprisonment.*
- *Laws that criminalize women for self-inducing abortion also ensnare other women, including those who spontaneously miscarry and pregnant women who need addiction support services, which creates barriers to women's access to recommended and necessary medical care.*
- *Jailing women who self-induce has no societal purpose nor any benefit for women's health; by contrast, women and society would benefit from improved access to comprehensive reproductive health services, including affordable, legal and supportive abortion care and contraceptive care to prevent future unintended pregnancies.*

As the legal barriers to abortion care mount, reproductive health advocates expect that more women may resort to inducing abortion themselves. Not only can self-inducing put a woman's health at risk, but punitive laws and overzealous prosecutors can place these women in double jeopardy. Moreover, this hostile climate might deter women who miscarry or pregnant women with substance abuse problems from seeking needed health care or social services for fear of falling under legal suspicion and potentially being reported to the authorities.

Punishing Women

Women are not commonly charged in the United States for the crime of self-inducing an abortion, and they have rarely been convicted; however,

attempts to charge and convict women for self-inducing are not at all new. In Florida in the early 1990s, for example, a pregnant 19-year-old shot herself in the abdomen to end her pregnancy. A friend told a newspaper that the woman had been turned away from an abortion clinic because she could not afford to pay for the abortion.² (Florida is one of the 33 states that prohibit state Medicaid dollars from covering abortion services in almost all cases.³) The prosecutor charged the woman with third-degree murder and manslaughter, and her case was appealed up to the Florida Supreme Court.^{2,4} That court ruled that established U.S. legal precedent precluded a woman from being prosecuted in the death of her own fetus and dismissed all the charges.⁴

More recently, however, a new jurisprudence has begun to emerge. In Utah in 2009, a 17-year-old woman paid a man \$150 to beat her in an attempt to induce an abortion.⁵ The teenager, who was living in poverty at the time, would have had to negotiate

own hands; however, doing so has exposed them to the risk of criminal prosecution. Mifepristone, also known as Mifeprex or RU-486, was developed in the early 1980s and is the backbone of the most effective medication abortion regimens available.¹⁰ The American College of Obstetricians and Gynecologists recommends that mifepristone be used in conjunction with another drug called misoprostol (also commonly referred to as Cytotec) for the most effective medication abortion protocol with the fewest side effects.^{11,12} Misoprostol can also be safely used on its own to induce an abortion, although it is less effective than the combination protocol (see box, page 72).

Compared with the traditional and often extreme methods women have used to terminate unwanted pregnancies themselves, such as inserting sticks or toxic liquids into the vagina, self-induced medication abortion can lower the physical risks that women face. In countries where misoprostol is available over-the-counter, women are able to

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Utah's waiting period and strict parental involvement law, and afford the cost of an abortion at a clinic given Utah's ban on using state Medicaid funds to cover abortion.⁶ She was charged with solicitation to commit murder in juvenile court; however, the charge was eventually dropped by a judge who ruled that a woman could not be prosecuted for seeking an abortion.⁷ In 2010, in a direct response to this case, the state legislature amended the Utah criminal code to give the state the power to prosecute women who seek to terminate pregnancies outside of legal medical channels for abortion.^{5,8} Thirty-eight states including Utah now allow a person to be charged with homicide if she or he is deemed responsible for the unlawful death of a fetus, and not all of these laws clearly exempt the pregnant woman herself from being charged.⁹

The advent of medication abortion has further allowed some women to take matters into their

obtain it with relative ease. In countries where misoprostol is not readily available, women can use the Internet to obtain it (and possibly mifepristone), although sometimes from dubious sources.

However, the availability of abortifacients does not shield women from prosecution. There have been at least half a dozen U.S. cases where women have been arrested and charged after attempting to self-induce an abortion using illicitly obtained abortifacients. For instance, in 2004, one woman in South Carolina was charged with illegal abortion and failure to report the abortion to the coroner after using an abortifacient.²¹ In a 2007 case in Massachusetts, a woman was charged with illegal procurement of a miscarriage; however, because of the state's inability to assess whether the fetus met its definition of viability at the time of the abortion, she was not charged with murder.²² In Idaho in 2011, a woman was charged with unlawful abortion and

Mifepristone and Misoprostol

Medication abortion is widely used in many countries where abortion is legal. In the United States, medication abortion accounted for 23% of all nonhospital abortions in 2011.¹³ The evidence-based mifepristone-misoprostol protocol recommended by the American College of Obstetricians and Gynecologists has been found to be safe and effective in multiple trials.¹² For example, the most recent study published in 2015 found that medication abortion using the evidence-based protocol was effective in 97.7% of procedures.¹⁴

Overseas, the ability to obtain a medication abortion using the mifepristone-misoprostol combination varies by country.¹⁵ Because the primary use for mifepristone is abortion, it is not approved in many countries with strict abortion laws; however, misoprostol is used to prevent or treat several conditions unrelated to abortion, such as

treatment of postpartum hemorrhage, and is available over the counter in many countries. Accordingly, the World Health Organization has developed protocols for the safe use of misoprostol alone for abortion in settings where it is the only drug available.¹⁶

As misoprostol is currently licensed in approximately 90 countries across the world, and is temperature-stable and inexpensive, it has become the method of choice for self-induced abortions for women in many countries with no other options.¹⁷ In fact, in Latin American countries where abortion is highly restricted and where almost all abortions are illegal and unsafe, women's use of misoprostol—as opposed to some traditional means of self-inducing an abortion—may be associated with a possible decline in the severity of complications from self-induced abortion.¹⁸

Still, misoprostol-only medication abortion is not as effective as the combination protocol.¹⁹ This means that women using it alone are at higher risk of needing follow-up medical attention. Similarly, women who misdate their pregnancy and are too far along to effectively use misoprostol run the risk of incomplete abortion, which will require additional care.

Misoprostol is not available over the counter in the United States, but it can be obtained from other countries and over the Internet. As more states erect more barriers to safe abortion care from health care professionals, some U.S. women are effectively finding themselves in the same legal quandary as women living in countries where abortion is illegal and are discovering that self-administering misoprostol is a way to take matters back into their own hands.²⁰

the prosecutor threatened to charge her under the state's newly enacted 20-week ban on abortion.²³ In a case in Pennsylvania in 2013, a mother who had ordered abortifacients off the Internet for her daughter was reported by hospital staff after they sought medical attention for side effects; she was eventually charged with "providing abortion without a medical license, dispensing drugs without being a pharmacist, assault and endangering the welfare of a child."²⁴ And in 2015, a Georgia woman was arrested and charged with murder after she gave birth on her way to the hospital after taking abortifacients she ordered off the Internet.²⁵

Conviction and punishments varied in these recorded cases. In the South Carolina and

Pennsylvania cases, both women were convicted; the woman in South Carolina was sentenced to jail time and a fine, but was let out on time served, while the Pennsylvania woman began a 9–18-month jail sentence in September 2014.^{5,24} In Massachusetts, the defendant was given probation and ordered to attend counseling.²⁶ In the Idaho case, the charges were dropped due to lack of evidence.²³ The murder charges were eventually dropped in the Georgia case as well, although the woman is still facing a misdemeanor charge of possession of a dangerous drug.²⁵

Beyond Abortion

While it is unknown how many women in the United States have actually been charged for

self-inducing using medication abortion, it is likely a small number. However, 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.

This phenomenon has been playing out for some time and most starkly in other countries where abortion is illegal altogether. For instance, El Salvador has been one of the most aggressive countries in terms of accusing, prosecuting and imprisoning women believed to have medically self-induced an abortion. An estimated 129 women in El Salvador were charged with self-inducing an abortion between 2000 and mid-2011,²⁷ and at least 26 were convicted of homicide and impris-

convergence of widespread fetal homicide laws and overly aggressive and ideological prosecutors. In large part, enforcement of fetal homicide laws relies on medical professionals' reporting to authorities women whom they suspect may have self-induced an abortion. Thus, these laws can pit women seeking care against the health care providers they need to help them, and can create situations in which women are forced to weigh the costs of forgoing critical postmiscarriage care against the possibility of being reported to the authorities.

For example, in 2010, a pregnant woman in Iowa sought medical attention after falling down the stairs. A hospital worker reported her to law enforcement, and claimed the patient told her she was trying to induce an abortion—something

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oned;²⁸ however, some of these women emphatically assert that they did not know they were pregnant or that they miscarried without attempting to self-induce.

For example, in 2012, one Salvadoran woman was sentenced to 40 years in prison for aggravated homicide after suffering a miscarriage and going to the hospital for medical attention; although she did not know she was pregnant at the time, hospital staff still reported her to the authorities.²⁸ In 2007, a teenager was sentenced to 30 years in prison after seeking medical care for a stillbirth, after medical staff reported her to the authorities on the unsubstantiated suspicion she had attempted to induce an abortion;²⁹ she was recently pardoned as a result of a sustained campaign brought by Agrupación Ciudadana and other nongovernmental organizations.²⁷

Although abortion is legal in the United States, cases of women who experience miscarriages getting caught up in the legal system are occurring here. Seemingly, this is the result of the

the patient strongly disputes.³⁰ The patient was arrested and only released after it became clear that the hospital had miscalculated her pregnancy and that she was not far enough along to be charged under Iowa's fetal homicide law.³¹ In 2010, an Indiana woman in her third trimester attempted suicide and subsequently lost her pregnancy after undergoing an emergency cesarean section. She was charged with feticide and held in jail without bail for over a year. She ultimately agreed to plead guilty to criminal recklessness and was sentenced to time served.³²

In another highly publicized case in Indiana, a woman was reported to authorities by a physician in the emergency department after she told hospital staff that she had miscarried. She was eventually charged with feticide and neglect of a dependent, and the prosecution argued that she had delivered a live baby after attempting to induce an abortion using drugs purchased on the Internet. Although the prosecution failed to present conclusive evidence that the woman had actually obtained or ingested mifepristone or

misoprostol,³³ she was convicted in 2015 of both crimes and sentenced to 20 years in prison. She is currently appealing the sentence.³⁴

The growing climate of suspicion surrounding pregnant women's choices and actions has also had an impact on those struggling with substance abuse. For instance, the Tennessee legislature enacted a law in 2014 that explicitly criminalizes pregnant women's substance use, and National Advocates for Pregnant Women has documented dozens of cases in which pregnant women who have tested positive for drugs or alcohol have been imprisoned or denied parental rights throughout the United States.³⁵ Such laws and prosecutions run counter to what medical professionals recommend for pregnant women with addictions; indeed, the American College of Obstetricians and Gynecologists has warned that these laws prevent women from seeking addiction treatment and prenatal care,³⁶ thereby negatively affecting women's health and that of their fetus.

Care, Not Incarceration

Because an unintended pregnancy precedes almost all abortions, criminalizing and cutting off access to abortion alone cannot end the need for it. Notably, the abortion rates where the procedure is illegal in all or most circumstances are not necessarily lower than in places without restrictions. For instance, the estimated abortion rate in Latin America—a region that contains countries with some of the world's most restrictive abortion laws—was 32 per 1,000 women aged 15–44 in 2008; that same year, Western Europe—where abortion is generally unrestricted and subsidized by national health systems—had the world's lowest abortion rate, 12 per 1,000.³⁷

As with many other health disparities, unintended pregnancy and abortion are more concentrated among disadvantaged women. The unintended pregnancy rate among poor U.S. women (those with incomes below the federal poverty level) in 2008 was more than five times that among higher income women (those at or above 200% of poverty).³⁸ Therefore, the impact of restrictions on abortion services falls hardest upon low-income women. The declining availability of affordable and accessible abortion services is leaving some

women who want to terminate their pregnancies—but who live in hostile geographic areas, and have limited resources and little support—with no practical options other than to self-induce, which in turn may put them at risk of prosecution.

The evidence from other countries where abortion is criminalized and from the United States before abortion was legalized nationwide shows unequivocally that outlawing abortion does not make it stop and, in fact, just makes it unsafe.³⁹ Moreover, outlawing abortion has the potential to drive miscarrying women away from seeking care to avoid the risk of encountering health care providers who might report them to authorities.

The criminalization of pregnant and miscarrying women and women who self-induce abortion does not advance women's health or address the underlying societal and public health issues affecting many of these women in the first place. Instead, these laws are used to harass women who seek needed medical care, and they drive women to rely on less safe methods of abortion without access to medical guidance. Low-income women are particularly exposed to the many legal barriers to safe abortion care, as well as to other medical and social supports for pregnancy, miscarriage and substance abuse treatment, so they are most vulnerable to being targets of prosecution and imprisonment.

A few years ago, antiabortion leader Marjorie Dannenfelser insisted that “compassion for women...will drive the law” and that “the focus of such laws [regulating abortion] is on protection, not punishment”;⁴⁰ a host of other antiabortion leaders have made similar claims.⁴¹ Whether or not they still want to believe this to be true, today's reality is that prosecutors and those who bring the cases to them are demonstrating the opposite of compassion. The best and most acceptable way to reduce the incidence of abortion always has been and still is to reduce the need for it by lowering the rate of unintended pregnancy. Better access to contraceptive services is the most effective way to accomplish this goal. Making access to safe abortion care easier, not harder, is what protects women's health. And supportive addiction treatment, mental health services and strong social support

systems that provide assistance to low-income women of reproductive age are essential to protect their health. This is what compassion, not punishment, looks like. ■

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