Memorandum

Date: March 15, 2022

To: Joseph Pojman, Ph.D.
Executive Director
Texas Alliance for Life

From: Paul Benjamin Linton, Esq.

Re: Prosecution of Women for Self-Abortion

Executive Summary

This memorandum discusses whether women should be subject to prosecution for self-abortion. Based upon the uniform practice in Texas and throughout the country before the Supreme Court legalized abortion in *Roe v. Wade*, 410 U.S. 113 (1973), the answer is an unequivocal no. A comprehensive review of the law reports of all fifty States fails to disclose a reported case anywhere in the United States, prior to *Roe*, in which a woman was prosecuted, convicted and sentenced either for self-abortion (or attempting to abort herself), or for consenting to an abortion performed (or attempted to be performed) upon her by another. Nor is there any case in which a woman has been charged with the homicide of her unborn child. And the rare efforts to prosecute women for self-abortion (or homicide) of her unborn child after *Roe* have been rejected by the courts. As explained below, there were (and are) compelling reasons of both principle and practicality why pregnant women were not (and should not be) prosecuted for abortion.

The Historical Record

Prior to the Supreme Court's decision in *Roe v. Wade* (1973), thirty States, including Texas, prohibited abortion except when the procedure was necessary to save the life of the mother. Another thirteen States had enacted abortion statutes based on the Model Penal Code. These statutes typically allowed abortions to save the life of the mother, to preserve her physical or mental health, in cases where the pregnancy resulted from an act of rape or incest and to prevent the birth of a child that would be born with a grave physical or mental defect. Two States, by statute or court decision, allowed abortions for reasons of the woman's life or health; one State allowed abortions to save the life of the mother or to end a pregnancy resulting from rape; and four States allowed abortion on demand.[1]

There is no reported case from *any* State, prior to *Roe*, in which a woman was prosecuted, convicted and sentenced for aborting (or attempting to abort) herself, or for consenting to an abortion performed (or attempted to be performed) upon her by a third party. Indeed, out of the

[1] A description of the abortion statutes that were on the books at the time *Roe* was decided may be found in the author's article, *The Legal Status of Abortion in the States if Roe v. Wade is Overruled*, 27 ISSUES IN LAW & MEDICINE 181 (No. 3, Spring 2012).

hundreds of reported prosecutions and appeals, there appear to be only two cases in which a woman who self-aborted or upon whom an abortion was performed by another was charged with abortion. In one, very old Pennsylvania case, a woman upon whom an abortion was performed was found guilty by a jury of abortion, but the trial judge refused to enter judgment on the verdict, explaining that the abortion statute, by its structure and wording, was not intended to apply to the pregnant woman herself. The trial court's order was affirmed by the Pennsylvania Superior Court.[2] In another case decided in 1922, involving the prosecution of an abortionist, the Texas Court of Criminal Appeals noted that the woman upon whom the abortion had been performed had also been indicted for abortion.[3] There is no record, however, that she was ever tried, much less convicted and sentenced for the offense.[4] Moreover, other decisions of the Texas Court of Criminal Appeals clearly held that the woman herself was *not* an accomplice in her own abortion,[5] which implies that she could not be prosecuted as a principal, either, and that a woman does not commit a crime by performing an abortion on herself.[6]

The nearly uniform rule followed in the United States prior to *Roe v. Wade* was that, in the absence of a statute making self-abortion or consenting to an abortion a distinct criminal offense, a woman who self-aborted or consented to an abortion performed upon her by another committed no crime.[7] And even in those States that enacted statutes *expressly* criminalizing the woman's conduct in aborting (or attempting to abort) herself or consenting to an abortion performed (or attempted to be performed upon her) by another,[8] there was not a single reported prosecution

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[2] *Commonwealth v. Weible*, 45 Pa. Super. Ct. 207 (1911). The Pennsylvania Superior Court is a court that reviews judgments in criminal cases.

[3] *Grissman v. State*, 245 S.W. 438 (Tex. Crim. App.1922).

[4] The woman upon whom the abortion was performed was one Eunice Nicol. There is no record in the Texas law reports of anyone by that name ever having been convicted of abortion.

[5] *Easter v. State*, 536 S.W.2d 233, 229 n. 7 (Tex. Crim. App. 1976).

[6] *Fondren v. State*, 169 S.W. 411, 414 (Tex. Crim. App. 1914).

[7] *See*, *e.g.*, *Heath v. State*, 459 S.W.2d 420, 422 (Ark. 1970); *State v. Carey*, 56 A. 632, 636 (Conn. 1904) ("[a]t common law an operation on the body of a woman quick with child, with intent thereby to cause her misarrange, 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*") (emphasis added); *In re Vickers' Petition*, 123 N.W.2d 253, 254 (Mich. 1963) (under abortion statute, a woman "cannot held for commission of the crime of abortion upon herself"); *State v. Barnett*, 427 P.2d 821, 822 (Or. 1968) ("[a] reading of the [abortion] statute indicates that the acts prohibited are those which are performed upon the mother rather than any action taken by her"); *Weible*. *supra*.

[8] The statutes are cited in the author's article, *Planned Parenthood v. Casey: The Flight from Reason in the Supreme Court*, XIII ST. LOUIS UNIVERSITY PUBLIC LAW REVIEW 15, 115

under any of those statutes.[9] Significantly, Texas never enacted a statute specifically criminalizing the pregnant woman's conduct. Although there have been rare efforts in other States to prosecute women for self-abortion (or homicide of her unborn child) after *Roe* was decided, those efforts have been uniformly rejected by the courts and have resulted in no convictions of women, at least in those cases where the woman did not plead guilty.[10]

Reasons for Non-Prosecution

There were both principled and practical reasons why women were not prosecuted for abortion. With respect to the former reason, abortion was traditionally viewed as an assault upon the woman because, in the words of the Oregon Supreme Court, she "was not deemed able to assent to an unlawful act against herself . . . ."[11] The woman was regarded as a second victim of the abortion,[12] along with her unborn child, at least in part because of the relative dangerousness of the operation, especially in the decades long before *Roe* was decided. With respect to the latter reason, it must be noted that the overwhelming majority (90%) of illegal abortions performed before *Roe* were performed by physicians; self-abortions accounted for only a small percentage (perhaps 8%) of all illegal abortions (the remainder being performed by persons with some medical training).[13] In order to prosecute the abortionist successfully, the testimony of the

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(Appendix A), n. 61 (No. 1, 1993) (listing statutes).

[9] *Id*. at 115.

[10] *See State v. Ashley*, 701 So.2d 338 (Fla. 1997) (holding that common law immunity of pregnant woman for causing death or injury to her unborn child was not affected by the enactment of felony murder, manslaughter and abortion statutes) (pregnant woman shot herself in the abdomen with a handgun during the third trimester of pregnancy); *Hillman v. State*, 503 S.E.2d 610 (Ga. Ct. App. 1998) (criminal abortion statute does not criminalize a pregnant woman's actions in securing an abortion, regardless of the means used) (pregnant woman shot herself in the abdomen with a handgun when she was approximately eight months pregnant). More recently, an effort to prosecute a woman in Idaho, who had illegally obtained and taken an abortifacient, causing her to abort, was ultimately dropped by the State.

[11] *State v. Farnum*, 161 P. 417, 419 (Or. 1916).

[12] *See*, *e.g.*, *State v. Carey*, 56 A. 632, 636 (Conn. 1904); *State v. Murphy*, 27 N.J.L. 112, 114-15 (1858); *Dunn v. People*, 29 N.Y. 523, 527 (1864); *Thompson v. United States*, 30 App. D.C. 352 (1908).

[13] Mary Steichen Calderone, *Illegal Abortion as a Public Health Problem*, 50 AMERICAN JOURNAL OF PUBLIC HEALTH 948, 949 (1960) (referring to estimates that in 1957, 90% of illegal abortions were performed by physicians, and attributing their relative safety to this fact and improvements in medicine generally). At the time her article was published, Dr. Calderone was

pregnant woman upon whom the abortion was performed (or attempted) was usually necessary. Yet, if she were regarded as an accomplice, her testimony could not be compelled (because it would tend to incriminate her in a crime) and, if she testified voluntarily, her testimony would be viewed with suspicion and would have to be corroborated by independent evidence, which often was not available. Thus, for a very practical reason, she was not treated as an accomplice.[14]

Summary and Conclusion

Prior to *Roe*, pregnant women who aborted (or attempted to abort) themselves or who consented to an abortion performed (or attempted) upon them were not prosecuted, convicted and sentenced for either abortion or homicide of their unborn child, even under statutes expressly making their conduct criminal (Texas never enacted such a statute). Indeed, a comprehensive review of the case law reveals that, prior to *Roe*, only two women have ever been *charged* with abortion. In one case (*Weible*), the jury's verdict of guilty was vacated by a trial court and that order was affirmed by the state superior court; in the other case (*Grissman*), there is no record that the pregnant woman (Nicol), who had been indicted along with the abortionist, was ever tried.

In interpreting their general abortion statutes (as opposed to statutes specifically directed at pregnant women), American courts uniformly held, based upon the structure of the statute and the definition of the offense, that they applied *only* to persons who performed (or attempted to perform) abortions upon pregnant women, not to the woman herself.[15] And even in the nineteen States that, at one time or another, expressly criminalized a woman's conduct in aborting (or attempting to abort) herself or consenting to an abortion performed (or attempted) upon her by another, there were no reported prosecutions.

For both principled and practical reasons, pregnant women were not prosecuted and were not treated as accomplices in their own abortions. They were regarded as second victims of the

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the Medical Director of Planned Parenthood Federation of America and a vigorous advocate of legalized abortion.

[14] The dozens of cases so holding are collected in an annotation in the American Law Reports, Jonathan M. Purver, *Woman Upon Whom Abortion Is Committed Or Attempted As Accomplice For Purposes of Rule Requiring Corroboration of Accomplice Testimony*, 34 ALR 3d 858 (1970). The annotation notes that most of the courts to have considered the matter held that the woman upon whom an abortion was performed (or attempted) "is not an accomplice to the crime, and, accordingly, that her testimony requires no corroboration." *Id*. at 860. Indeed, the rule that the woman herself is not an accomplice "has been applied even where the woman performed the operation on herself at the instigation of another." *Id*. at 861, citing *Wilson v. State*, 252 P. 1106 (Okla. Crim. App. 1927).

[15] It must be noted that, in their structure and definition of the offense of abortion, those statutes are indistinguishable from Texas' pre-*Roe* statutes.

offense, along with their unborn child, in part because of the dangerousness of the abortion procedures that were used long before *Roe* was decided. And, without their testimony, the person who performed or attempted to perform the abortion could not be successfully prosecuted.

Both of those reasons apply to self-abortion. Self-abortion is extremely dangerous to the pregnant woman. Given the relatively rare circumstances in which a woman will attempt to abort herself and the very high risk to her life or physical health in attempting to do so, it is unlikely that a prohibition of self-abortion would have much of a deterrent effect (any more than a law against attempted suicide would deter attempted suicides). And where the pregnant woman survives an attempt to abort herself, she should not be deterred from seeking prompt medical care (for herself or her unborn child) because of the possibility that she might be charged with a crime.

Moreover, at least in some instances, a woman who aborts (or attempts to abort) herself *has* been assisted in some fashion by a third person who may have advised her to abort herself, provided the means of aborting herself or actually participated in the self-abortion. That is the person who should face prosecution as an aider or abettor of an illegal abortion, not the woman herself. But, if self-abortion is a crime, then the testimony of the pregnant woman herself could not be compelled (in the absence of a grant of immunity) and, if volunteered, would have to be corroborated by other, independent evidence which, as noted above, might not be available.

In view of the foregoing analysis, a pregnant woman's conduct in aborting herself or attempting to abort herself should not be treated as a criminal offense.