Women, Abortion and Civil Disobedience

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In his first presidential debate in 1988, Vice President George Bush indicated that he would support the criminalization of abortion. "Once that illegality is established, then we can come to grips with the penalty side, and of course there's got to be some penalties to enforce the law, whatever they may be." The next day, Mr. Bush's campaign manager explained that the candidate concluded after further reflection that "women who have abortions should not suffer any criminal penalties, but doctors who perform them should." The woman in his view is only an "additional victim." Since Mr. Bush's election, the United States Supreme Court has announced that it will hear the case of Webster v. Reproductive Health Services, a case the Bush administration hopes will overturn Roe v. Wade and open the door for criminalization.

This debate, and recent cases in which pregnant women are threatened with criminal penalties, raises the question whether women who obtain abortions are criminals or victims. Perhaps these are not the only two choices. Women who choose to have abortions may also be viewed as engaging in their own form of civil disobedience. Since abortion became a crime in America in the 1800's, women have defiantly...

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3. Two days after the presidential election, the Reagan administration asked the United States Supreme Court to overturn Roe — "a stance George Bush seems sure to continue." And Now, A Feminist Full Court Press, U.S. News & World Rep., Nov. 28, 1988, at 12; Brief of the United States as Amicus Curiae Supporting Appellants, Webster v. Reproductive Health Serv., (No. 88-605), prob. juris. noted, 109 S. Ct. 780 (1989).
statutory prohibitions on abortion, violated public norms, and disobeyed clear religious proscriptions by ending unwanted pregnancies.

The vast majority of these women did not see themselves as engaging in civil disobedience. Rather, they viewed their circumstances as unique and the abortion as not a deliberate political act for which they were willing to go to jail. Yet, their collective action had many of the characteristics of planned and self-conscious civil disobedience.

It was estimated that during the 1960s, between 200,000 and 1,200,000 illegally induced abortions were performed each year in the United States. What the numbers reflect is the possibility that over one million women each year engaged in purposeful illegal behavior. Eighteen states provided an express penalty for women who sought or consented to an abortion. There were strong judicial statements in other states that the woman would be liable as aider and abettor.

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7. Some women, however, did consciously try to challenge restrictive abortion laws. Patricia Maginis, a founder of the nation's first abortion rights organization, actively sought arrest to challenge California laws restricting information about abortion. In 1966, she was arrested following a mimeographed list of referrals for abortion in violation of § 188 of the San Francisco Municipal Code, which prohibited distributing information on abortion, contraception or venereal disease. The law was overturned. See Lader, Abortion II: Making the Revolution of 28 (1973) discussing the 1972 case for HUMANE ABORTION NEWSPR. (Jan.-Feb. 1967). The same year, Maginis, along with Rosina Guner and Lorna Clarke, organized a lecture tour which hoped would result in a arrest for breaking a state law writing about or publishing any method for inducing abortion. Lader at 32:3. In 1973, they succeeded in having the law overturned. N. Bachr. With a Vengeance: Pioneers of the Abortion Rights Movement, 1966-1969 (unpublished Master's thesis). See also CLARK & MAGINIS, THE ABORTION HANDBOOK FOR RESPONSIBLE WOMEN (1969).


9. State governments imposed four types of criminal penalties on women who had abortions. Some states punished women as abiders, abettors or accomplices. For v. People, 54 Bar. 308, 309 (N.Y. App. Div. 1943)(the woman having the abortion was guilty of a criminal offense of the same grade as that charged up to the defendant [doctor], and was as liable, upon conviction, to the same punishment. State v. McCoy, 52 Ohio St. 157, 160, 39 N.E. 316 (1894)(holding that despite the fact that the Ohio abortion statute only penalized the doctor's acts, a woman could be indicted as an aider or abettor). See also Waite v. State, 4 Ohio App. 451 (1898).


In other jurisdictions, state penalized women for conspiring to have an abortion, even though the state's criminalization statute only applied to a doctor's performance of the abortion. See Solander v. People, 2 Colo. 48, 62 (1873); U.S. v. Holtz, 236 U.S. 140, 145 (1914). See also State v. Matson, 53 N.D. 486, 206 N.W. 778 (1925); State v. Crofthead, 132 Iowa 478, 110 N.W. 921 (1907); Fields v. State, 107 Neb. 91, 181 N.W. 400 (1921).

Many statutes created separate penalties for both the woman and the doctor. Eighteen states, Puerto Rico and the Canal Zone all subjected a woman to criminal penalties for her part in an abortion. MINN. STAT. ANN. 406A, CH. 617 (1945). See also P.R. LAW ANN. tit. 33, § 4010-12 (1983); INDIAN CODE ANN. § 2436 (Burns 1926); N.D. CeDENT CODE 12.25-04 (1960); CONN. GEN. STAT. ANN. § 53-30 (West 1956); DEL. CODE ANN. tit. 11, § 662 (1979); C.Z. CODE tit. 4, § 172 (1979); ARIZ. REV. STAT. ANN § 15-3664 (1978); NEV. REV. STAT. § 200.220 (1961); MONT. CODE ANN. § 94-402 (1969); WASH. COMP. STAT. ANN. tit. 14, §§ 2397, 2449 (1922); ORLA. STAT. ANN. tit. 21, § 862 (West 1963); N.Y. PENAL CODE § 295 (1810); N.Y. PENAL LAW §§ 125.50, 125.55 (McKinney 1987); S.C. CODE ANN. § 1113 (1932); WYO. STAT. § 6-78 (1975); CAL. PENAL CODE § 275 (West 1988); UTAH REV. STAT. § 103-2-2 (1932); WIS. STAT. ANN. § 940.04 (West 1988). See also J. GADES & J. WOLCOTT, ABORTION IN THE U.S. § 34 (1958).

10. For example, after Pat Maginies had an illegal abortion, she "developed an infection and high fever and put herself into a San Francisco hospital. 'That's when you learn how they make terror part of the system,' she said. 'The hospital staff was more interested in getting me to talk to the police than curing me. The police love to brand women in abortion cases. They kept pounding me with questions — who did it? Where? What did it cost? When I insisted I did it myself, they said I was lying.'"

"LADER, supra note 7, at 27.

11. Women in fact arrested and prosecuted for having illegal abortions. See CROSMAN v. STATE, 93 Tex. Crim. 15, 245 S.W. 438 (1922); M.D. HELD IN JAIL for abortion on Hunter Coed, 19, N.Y. Post, May 8, 1963, vol. 5 (woman was also arrested and jailed for having an abortion); Wheeler v. State, 263 So. 2d 322 Filz (1972) (woman convicted of manslaughter and sentenced to two years' probation after having an abortion; conviction later overturned following declaration that Florida's abortion statute is unconstitutional; see also She's Fighting Conviction for Aborting Her Child, N.Y. Times, Dec. 4, 1971, at 37; LADER, supra note 7, at 188-89.

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Like individuals who consciously chose to engage in civil disobedi-
ence, these women also chose to violate a law and did so in a non-
viole nt manner. They believed, as civil disobedients do, in the political
and legal system, 18 but viewed anti-abortion laws as wrong generally or
at least unjust when applied to them. In conformity with the prin-
ciples of civil disobedience, their actions in obtaining illegal abortions were
taken after serious moral analysis, including consideration of the mean-
ting and potential value of life and the legal, medical, and moral conse-
quences of their decisions.

These factors, especially the conscientious decision-making, are
consistent with essential aspects of Gandhi's version of civil disobedi-
ence called "satyagraha," meaning, literally, to hold on to the truth. 14
Despite criminalization, public disapproval, and misinformation about
abortion, women have held on to the truth that abortion is a personal
choice ethically mandated by obligation to self and others. Letters from
women who have had abortions reveal that they chose to do so because
they take their responsibilities to existing family members seriously,
but because they believe they can escape from poverty, because they believe
that an education is important and want to complete their own, because they
believe that someday they will find the right person with whom to
raise a family, and because they have hopes and dreams of better lives for
themselves and those they love. 15

Although the women who chose to have illegal abortions did so not
as a form of protest intended to educate or communicate, their actions
nevertheless had that effect. As political scientist Rosalind Petchesky
argues, the most important factor in leading some states and eventually
the Supreme Court to recognize a fundamental right to choose abortion
was the public health crisis created by the number of women having
illegal abortions. 16

12. Paltrow, Amicus Brief: Richard Thornburgh v. American College of Obst-
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Brief of National Abortion Rights League In Support of Appellants at 3, Thornburgh v.
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13. See e.g., Bedau, On Civil Disobedience, 58 J. Phil. 673, 695 (1961);
15. Paltrow, supra note 12, at 3; Torres & Forrest, U.S. Women Who Obtain
16. Petchesky, Abortion as Violence Against Women: A Feminist Critique, 18
RADICAL AMERICA 64 (1984). See also R. Petchesky, ABORTION AND WOMEN'S
17. Cline & Tysor, Abortion in the U.S.: Past, Present and Future, PPFA MED-
ICAL DISCUSS: ISSUES IN REPRODUCTIVE HEALTH 3 (Spring 1982).
18. Author Larry Lader suggests that Dr. Vainch openly violated the District
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Lader, supra note 7, at 5-7 (discussing Dr. Henrici's activism in this area). See also id.
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People v. Beilou, 71 Cal.2d 954, 80 Cal. Rptr. 354, 458 P.2d 194 (1969), cert. denied
397 U.S. 915 (1970), a case involving a constitutional challenge to California's abor-
tion law); Lader, supra note 7, at 82 (discussing how Dr. Lenny Myers entered the
American Medical Association's 1969 convention "dressed in a white lab coat, her
hands tied with red tape as a symbol of medical restrictions under present [abortion]
laws."). Id.
19. REV. H. MOODY & A. CARMEN, ABORTION COUNSELING AND SOCIAL
CHANGE (1973); Lader, supra note 7, at 42-45, 152, and 154.
28, 1971, at A1, col. 1 ("General concern over population growth has become so intense
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91% opposed liberalization abortion policy; 1959 - 85%; 1969 - 79%; 1971 -
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Times, Aug. 25, 1972, at A1, col. 3 (noting same statistics and adding to them a poll
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15. Paltrow, supra note 12, at 3; Torres & Forrest, U.S. Women Who Obtain
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More recently women have been faced with the decision whether to follow the dictates of their consciences or to obey court orders. Since the first of the year, there have been eleven reported cases of estranged boyfriends or husbands using the courts to stop their girl friends or wives from having abortions. In these cases, the men went to trial-level states and sought temporary restraining orders. Some local judges, disregarding federal constitutional law, granted the orders and issued injunctions that prohibited the women from obtaining abortions.

Except for one case that was settled out of court, all of these women ultimately won on appeal in later proceedings.84 In one case, and her doctor.) See also Public Opinion Polls, Reproductive Rights Analysis, Produced by the Resource Committee on Reproductive Health Care, and the Women's Media Project of the NOW Legal Defense and Education Fund; Law, Reckoning Sex and the Constitution, 145 N.Y.L.J. 953, 977-73 (1984); D. SCHULDER & F. KENNEDY, ABDUCTION RAP (1973); Goodmier, Schonbrad & Stearns, Roe and Roe Where Do We Go From Here?; 1 WOMEN'S RTS L. REV. 20, 23 (1973); Judge Ruth Bader Ginsberg, Some Thoughts on Autonomy and Equality in Relation to Roe v. Wade, 63 N.C. L. REV. 375 (1984).


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healthy infants."

Even though Mr. Bush may not personally wish to see a woman go to jail, women are already going to jail. In 1985, Pamela Rae Stewart spent seven days in a California jail after her baby died allegedly as the result of her failure to follow her doctor’s advice regarding prenatal care.17 The charges were eventually dismissed.18 In Wisconsin, a sixteen-year-old girl was held in secure detention for the duration of her pregnancy because she tended "to be on the run" and to "lack motivation or ability to seek prenatal care."

In New Jersey, a pregnant woman was held in a psychiatric facility, despite release orders, because some officials believed that she would not obtain adequate prenatal care.19 This year, in Washington D.C., a judge sentenced a pregnant woman to jail after a conviction for forgery even though the prosecutor had recommended probation. The judge stated "I’m going to keep her locked up until the baby is born because she’s tested positive for cocaine when she was before me."20

Unlike other acts of civil disobedience, those involving reproductive rights depend on the occurrence of a pregnancy. Few women will deliberately become pregnant in order to challenge a law. Disobedience, therefore, will necessarily be individual and disgruntled. In addition, a woman’s decision regarding her pregnancy will have personal, moral and medical implications that other potentially political acts will not have. But, Mr. Bush’s view that women are merely victims doubly disempowers them, first, by denying women the right to control their reproductive lives, and again, by denying them the status of self-conscious political actors challenging the unjust laws.

Limiting punishment to the people who perform the acts also de-


29. Kelder, Gallagher & Parsons, supra note 23, at 1195.


32. "I decided to abort myself. I cleaned a 14-inch knitting needle with alcohol, lay on the bed, prayed, and slowly inserted it into myself. I knew I could die if I pierced my womb and bleed or become infected. I felt I had to risk it. As I drew out the needle there was blood on it and I was very afraid. I will always remember that red fluid on the end of that shiny blue needle. Paltrow, supra note 12, at 17 n.11; Lodged Materials, supra note 12, at 95 (letter of Jane Roe). See also, People of the State of N. Y. v. Linnette Jenkins, Indictment No. 900-84 (Sup. Ct. N.Y. Westchester County July 5, 1984) (20 year old woman charged with attempted self-abortion in the first degree).

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26. Id. at 47; Rhoden, supra note 23, at 1959-60; Jefferson v. Griffin County
Hosp. Auth., 247 Ga. 86, 274 S.E.2d 457 (1981); In re Baby Jeffries, No. 4804
(Jackson County, Mich. P. Ct. May 24, 1982); Flanagan, Mom Follows Belief, Goes
Back in Hiding, Det. Free Press, June 28, 1982, at 3A.

27. Fitzpatrick, El Cajon Case Stirs Emotion, San Diego Tribune, Oct. 21,


29. Keider, Gallagher & Parsons, supra note 23, at 1195.

Reyes v. Super. Ct. of San Bernadino County, 75 Cal. App. 3d 214, 141 Cal. Rptr. 912

31. Churchville, D. C. Judge Jails Woman as Protection for Fetus, Wash. Post,

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