

Asking better questions about abortion

## "Should it be legal?" has not been serving us well.

by [Michelle Oberman](#) in the [March 14, 2018](#) issue



Demonstrators in front of the U.S. Supreme Court on June 27, 2016, the day justices released their decision in [Whole Woman's Health v. Hellerstedt](#). [Some rights reserved](#) by [Jordan Uhl](#).

In my freshman year of college, I started volunteering at Planned Parenthood. Every Saturday morning, I crossed picket lines to work with the women in the abortion clinic's recovery room. There were six recliners in a semicircle around the table where I sat, arranging crackers, juice, and pamphlets that described various forms of family planning. My job was to make sure no one left without contraception. We half-joked about never wanting to see them again.

Women choose abortion for a multitude of reasons, but a sense of desperation is almost always present among them. As I listened to their descriptions of the forces that shaped their decisions, making the abortion seem right or even inevitable, I could see the way those same forces shaped my own life. Money, love, safety, shelter, health: one has either enough of them or nowhere near enough to thrive. The women's stories made visible the things that were going right in my life—the things I relied upon in order to make my way. Their tales were cautionary ones too: their stories could be my stories.

After I finished law school, I went to work at Loyola, a Catholic university in Chicago. It was there that I first came to know at more than a superficial level people who spoke openly of their deep moral opposition to abortion. It was the 1990s, and the media were consumed with stories about pregnant women who used illegal drugs. Fear of a generation of crack babies animated the public imagination. The reports mostly evoked images of black women, who were portrayed as slutty and irresponsible, busy chasing their high rather than getting clean for the sake of their unborn child. The solution, some thought, was to prosecute these women for child abuse.

The stories I knew from the abortion clinic revealed the messy reasons why women have sex without contraception, even though they do not want to get pregnant. So my hunch was that the truth about pregnant women who were addicted to drugs was more complicated than the news stories suggested. I began collecting stories from drug rehabilitation centers, from doctors, from experts on the subject of child abuse, and from the women themselves.

It turned out that for these women, sex and drugs went hand in hand. They get pregnant because sex plays a central role in how they get the drugs they need. They have sex for money, they have sex in exchange for drugs, they have sex with their dealers. For many of these women, sex has been part of the way they navigate their risky world since they were children. Women who are addicted to drugs are survivors of immense violence and trauma. Studies estimate that somewhere around 70 percent of them have been victims of childhood sexual abuse.

Most of these women use drugs not because they like to party, but because they want to make themselves numb.

Their responses to pregnancy are complicated. Unlike the callous depiction of them in the media, these women often want to be mothers. Actually, they want to be good mothers. Many see in a baby the prospect of unconditional love, of a new beginning, of a positive identity for themselves as mothers. Many already have lost children to the foster care system. They know the risks of losing yet another child if they continue using drugs, yet still they hold out hope that their unborn child might provide the change they so desperately want.

Perhaps the biggest problem underlying the 1990s crisis of perinatal addiction was that these women didn't have access to drug rehabilitation programs. Their cases were too complex for programs developed for single men, and the overwhelming majority of drug treatment programs didn't accept pregnant women. Once I understood their stories, it seemed obvious to me that prosecuting them wouldn't solve the problem. What we needed was an approach built upon our knowledge of addiction, one that paved a path to recovery.

In this period the war over abortion was also raging. The battles were over parental notification laws, clinic protests, and the stage of fetal viability. The Supreme Court decision in *Planned Parenthood v. Casey* created the "undue burden test." The court said that so long as abortion laws didn't create too much hardship for women seeking to exercise their constitutional right to terminate an unwanted pregnancy, states could use their power to encourage women to carry their pregnancy to term.

As a law professor, I followed the legal debates closely. But the noisy debate over abortion law didn't seem all that connected to my research, because the legal status of abortion didn't seem to make much of a difference in the lives of pregnant women who used drugs.

Abortion law was even less relevant to another set of stories I'd started collecting: about women who killed their children. It might seem logical to infer that a mother who kills her child must have been someone who wanted an abortion but for some reason couldn't get one. But it turns out that's totally wrong. These cases are complicated in ways that have almost nothing to do with abortion.

Consider the case of Eva, a 16-year-old who was pregnant and living with her uncle and his fiancée after her mother told her there wasn't room in her apartment. Starving for love, yet certain she'd have nowhere to live if she had a baby, she spent the months waiting for someone to notice she was pregnant. No one said

anything—not her father or stepmother, nor her mother, nor her friends, to whom she'd confided her predicament. In the end, she had her baby alone, on a toilet. The baby drowned.

I asked Eva why she didn't have an abortion, since it was legal and she did not need her parents' permission for it. It wasn't that she lacked the money, she said. Her ex-boyfriend had even offered to pay for it, before he stopped talking to her. But she didn't want an abortion. She didn't want to kill her best chance at feeling connected and loved.

The same desire to be a mother—to be a good mother—surfaced when I was researching mothers imprisoned for killing their children. I interviewed 40 women in an Ohio prison incarcerated for crimes like beating their children and then failing to take them to the hospital in time, or standing by while their boyfriend beat their child to death. They bristled when asked whether they'd considered having an abortion. They wanted to be mothers. Most of their babies were simply victims of the chaos in their mothers' lives. The mothers didn't wish them dead. Most began our conversations about the child they'd been convicted of killing by saying, "Being a mother is the single most important thing in my life."

The intensity with which Americans fight over abortion's legality, with its rhetoric of "choice" and "life," seemed at odds with the stories I'd spent a lifetime gathering. I was coming to believe that for the most vulnerable and marginalized women, the legality of abortion hardly mattered. Some women live with a chaos so profound the notion of a "planned pregnancy" is almost meaningless. How much,

I wondered, did it matter whether or not abortion was legal?

The fight over the legality of abortion distracts us from the plight of women.

In 2008, I went to Chile to try to answer this question from another direction. At the time, Chile had the world's strictest law against abortion: it was a crime in all cases, without exception. I wanted to learn whether banning abortion shaped the circumstances or frequency of cases involving mothers accused of murdering their child. I imagined that in a country that outlawed abortion, I would find cases of women driven to their crimes because they couldn't get a legal abortion. Knowing the studies of what happened in the United States before abortion was legalized, I also expected to find hospital wards overflowing with women who had septic shock or had perforated their uteruses as a result of trying to induce an abortion by their

own methods.

Once I started exploring Chile, though, nothing looked as I'd expected. There were no hospitals filled with women injured from illegal abortions, no epidemic of cases involving women who abandoned their newborns to die. Law professor Lidia Casas, a prominent Chilean lawyer, helped me make sense of the situation. She first led me to Dr. Ramiro Molina, director of the country's only adolescent health clinic, located within a public hospital that serves Santiago's poorest residents. When I asked him to tell me about unplanned pregnancy and abortions in Chile, he said, "Abortion is a non-issue in Chile. You can buy abortion drugs on the street anytime you like."

The abortion drug most widely available in Chile is misoprostol. It's only part of the formulation of the more effective abortion drug used in the United States. Even so, taken alone and within the first 12 weeks of a pregnancy, misoprostol will bring on a miscarriage in 90 percent of cases. Unless the bleeding is severe, there's no need to see a doctor.

I asked Molina where women found the drug. He opened his computer and plugged "misoprostol" into a search engine. Thousands of vendors appeared at the click of a mouse.

In spite of being legally prohibited, abortion in Chile is commonplace. Because abortion is illegal, estimates of how many abortions take place every year in Chile vary widely, but all estimates agree that tens of thousands of women have abortions there every year.

Furthermore, the high rates of illegal abortions don't appear to have led to high rates of maternal mortality. In fact, experts agree that fewer women die from illegal abortions now than they did 50 years ago, before the ban.

If abortion remained commonplace in spite of being illegal, I wondered how the abortion law was enforced. Who gets prosecuted for the crime of illegal abortion? Casas knew the answer. She'd studied prosecution patterns and found that prosecution rates had declined, rather than increased, in the years since the abortion ban took effect. Furthermore, when the state did prosecute women or doctors for illegal abortion, Casas found, conviction rates were low and punishment was light.

Casas introduced me to a former client named Marina. Casas had defended Marina in 2007 when she was prosecuted for the crime of abortion. Marina had been caught when a news channel ran a sting operation, filming women as they entered and exited the office of a doctor known to perform abortions. She was one of only a handful of women prosecuted that year.

The press lifted up her story, Marina said, because of her age. “I was almost 40, and I had a teenage daughter. I’d been living overseas for 20 years, and had only recently returned to Chile.” Most women in her situation who wanted an abortion would have flown to Miami for it, but that was not an option for her. Marina was convicted, but like other women convicted of abortion in recent years in Chile, Marina did not go to prison. (The crime officially carries a five-year prison term.) The court gave her a suspended sentence and let her go.

Chile shows us that legality is not the only question that underlies decisions about abortion, and it is often not the primary one. Other issues play a significant role, some having to do with personal circumstances, such as access to adequate resources to raise a child.

I once asked a pro-life Oklahoma state senator what would happen if *Roe v. Wade* were reversed. He sighed and said, “It will be a bloodbath on the right.” He was thinking of how pro-life groups would be forced to reckon with the disparate views of their constituents, the vast majority of whom want to keep abortion legal in cases of rape, incest, and fetal anomaly. The dismantling of *Roe* would therefore spark a furious battle in some states over how to frame the crime of abortion. But not all states would be fighting. Some would choose not to criminalize abortion at all. Most experts agree that, even without *Roe*, abortion would remain legal in as many as half the states.

Judging from how Americans fight over abortion law, you might think that if *Roe* were overturned, it would be impossible to get a safe, legal abortion in the United States. The truth is that even if *Roe* were to be overturned or significantly altered, those with enough time and money would probably find it easy to obtain a legal abortion. If abortion were to remain legal in even one state, it would be available to any woman who could get to that state. In a world without *Roe*, the most significant barrier to abortion would be wealth. In effect, there would be two laws: one for those who can afford to travel, and one for those who cannot. Thus, for many women, the legality of abortion would not be the decisive question in shaping their response to

an unplanned pregnancy.

Further, many of the factors underlying the lack of abortion law enforcement in Chile would apply in the United States as well. There would likely be no broad-scale prosecution of women for abortion—or at least not against privileged nonminority women. Pro-life advocates historically and today oppose prosecuting women for having abortions, preferring to target doctors. But for the overwhelming number of abortions that take place within the first 12 weeks of pregnancy, abortion drugs make doctors largely irrelevant.

For decades, Americans have been locked in debate over the question of whether abortion should be legal. But that question is not serving us well. It's distracting us from the better question of how we think things will change if abortion is illegal. And it's distracting us from the plight of those most affected by our abortion laws: the most marginalized women in the country. Another child will thrust them deeper into poverty, but an abortion does little to lift them out of it. The war over abortion law draws our gaze away from these women and children, relieving us of the obligation to notice, if not to reset the odds against them.

What would it look like to design a policy around the idea that no one should have to choose abortion because she is too poor to have a child? It would cost billions of dollars. Yet we routinely spend such sums on the war over abortion's legality. Might it be worth it to try something different?

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