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Lessons from Before *Roe:* Will Past be Prologue?

With an administration deeply opposed to abortion, a Congress poised to pass legislation aimed at weakening the principles underlying Roe v. Wade and a Supreme Court whose composition is considered likely to change in the near future, it is instructive to look back at the choices available—and not available—to women before abortion was made legal nationwide. The toll the nation's abortion laws took on women's lives and health in the years before Roe was substantial. Although the world may not be the same as it was three decades ago, Roe's reversal would likely herald the return to a two-tier system in which safe abortion was available to some Americans but out of reach of many in need.

The Supreme Court did not "invent" legal abortion, much less abortion itself, when it handed down its historic *Roe v. Wade* decision in 1973. Abortion, both legal and illegal, had long been part of life in America. Indeed, the legal status of abortion has passed through several distinct phases in American history. Generally permitted at the nation's founding and for several decades thereafter, the procedure was made illegal under most circumstances in most states beginning in the mid-1800s. In the 1960s, states began reforming their strict antiabortion laws, so that when the Supreme Court made abortion legal nationwide, legal abortions were already available in 17 states under a range of circumstances beyond those necessary to save a woman's life (see box).

But regardless of the legal status of abortion, its fundamental underlying cause—unintended pregnancy—has been a continuing reality for American women. In the 1960s, researchers from Princeton University estimated that almost one in three Americans (32%) who wanted no more children were likely to have at least one unintended pregnancy before the end of their childbearing years; more than six in 10 Americans (62%) wanting children at some point in the future were likely to have experienced at least one unintended pregnancy.

While the problem of unintended pregnancy spanned all strata of society, the choices available to women varied before *Roe.* At best, these choices could be demeaning and humiliating, and at worst, they could lead to injury and death. Women with financial means had some, albeit very limited, recourse to a legal abortion; less affluent women, who disproportionately were young and members of minority groups, had few options aside from a dangerous illegal procedure.

Illegal Abortions Were Common

Estimates of the number of illegal abortions in the 1950s and 1960s ranged from 200,000 to 1.2 million per year. One analysis, extrapolating from data from North Carolina, concluded that an estimated 829,000 illegal or self-induced abortions occurred in 1967.

One stark indication of the prevalence of illegal abortion was the death toll. In 1930, abortion was listed as the official cause of death for almost 2,700 women—nearly one-fifth (18%) of maternal deaths recorded in that year. The death toll had declined to just under 1,700 by 1940, and to just over 300 by 1950 (most likely because of the introduction of antibiotics in the 1940s, which permitted more effective treatment of the infections that frequently developed after illegal abortion). By 1965, the number of deaths due to illegal abortion had fallen to just under 200, but illegal abortion still accounted for 17% of all deaths attributed to pregnancy and childbirth that year. And these are just the number that were officially reported; the actual number was likely much higher.

Poor women and their families were disproportionately impacted. A study of low-income women in New York City in the 1960s found that almost one in 10 (8%) had ever attempted to terminate a pregnancy by illegal abortion; almost four in 10 (38%) said that a friend, relative or acquaintance had attempted to obtain an abortion. Of the low-income women in that study who said they had had an abortion, eight in 10 (77%) said that they had attempted a self-induced procedure, with only 2% saying that a physician had been involved in any way.

These women paid a steep price for illegal procedures. In 1962 alone, nearly 1,600 women were admitted to Harlem Hospital Center in New York City for incomplete abortions, which was one abortion-

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Legal Status of Abortion

Legal abortion has been part of American life for much of the nation's history. Under English common law, the cornerstone of American jurisprudence, abortions performed prior to "quickening" (the first perceptible fetal movement, which usually occurs after the fourth month of pregnancy) were not criminal offenses. With no state enacting specific legislation during nearly the first third of the nation's history, this traditional principle prevailed. The medical literature of the day, both popular and professional, included frequent references to methods of abortion.

In the mid-1800s, Massachusetts enacted the first state law making abortion or attempted abortion at any point in pregnancy a criminal offense. By the turn of the century, almost all states had followed suit. In the early 1960s, only Pennsylvania prohibited all abortions, but 44 other states only allowed abortion when the woman's life would be endangered if she carried the pregnancy to term. Alabama, Colorado, New Mexico, Massachusetts and the District of Columbia permitted abortion if the life or physical health of the woman was in jeopardy; Mississippi allowed abortions in case of life endangerment or rape.

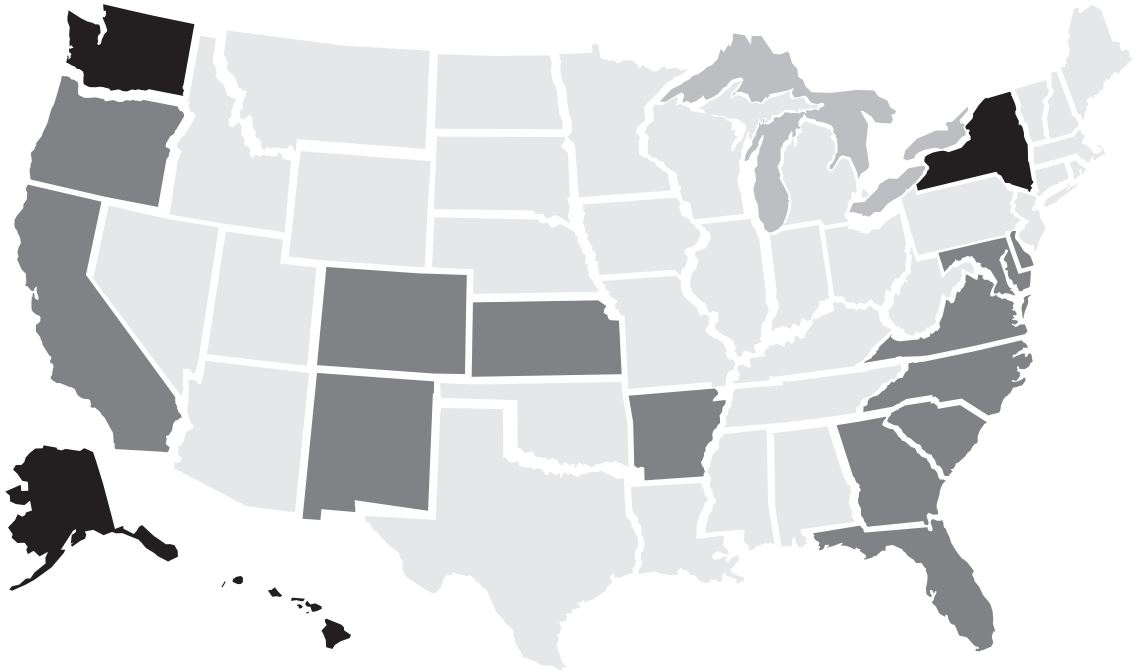
Violating these laws could have serious legal consequences, not only for the provider but potentially for others as well. In nine states, the laws considered it a criminal offense to aid, assist, abet or counsel a woman in obtaining an illegal abortion. Fourteen states explicitly made obtaining an abortion, as well as performing one, a crime. Women were rarely convicted for having an abortion; instead, the threat of prosecution often was used to encourage them to testify against the provider.

One of the first national calls for a change in abortion law came in 1962 from the American Law Institute (ALI)—a prestigious panel of lawyers, scholars and jurists that develops model statutes on a range of topics—with the publication of its "Model Penal Code on Abortion," which called for abortion to be legal when the pregnant woman's life or health would be at risk if the pregnancy were carried to term, when the pregnancy resulted from rape or incest, or when the fetus had a severe defect.

In 1967, Colorado became the first state to reform its abortion law based on the ALI recommendation. The new Colorado statute permitted abortions if the pregnant woman's life or physical or mental health were endangered, if the fetus would be born with a severe physical or mental defect, or if the pregnancy had resulted from rape or incest. Other states began to follow suit, and by 1972, 13 states had so-called ALI statutes. Meanwhile, four states repealed their antiabortion laws completely, substituting statutes permitting abortions that were judged to be necessary by a woman and her physician (see map). By 1973, when the Supreme Court handed down its decision in *Roe,* abortion reform legislation had been introduced in all but five states.

chart a

State Abortion Laws Before *Roe*



STATES THAT HAD REPEALED THEIR ANTIABORTION LAWS (4)

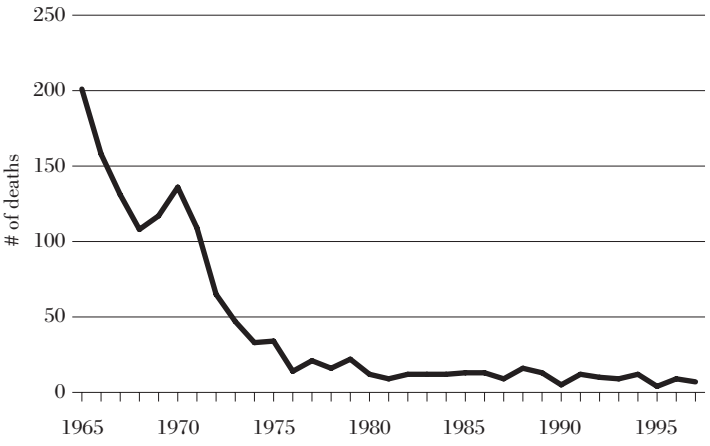
STATES THAT HAD REFORMED THEIR ANTIABORITON LAWS (13)

Note: Status of state laws in 1972. *Source:* Rachel Benson Gold, *Abortion and Women's Health: A Turning Point for America?*, The Alan Guttmacher Institute, New York, 1990.

chart b

Abortion Mortality

The number of deaths from abortion has declined dramatically since Roe v. Wade.



Source: The Alan Guttmacher Institute, *Trends in Abortion in the United States, 1973–2000,* January 2003.

related hospital admission for every 42 deliveries at that hospital that year. In 1968, the University of Southern California Los Angeles County Medical Center, another large public facility serving primarily indigent patients, admitted 701 women with septic abortions, one admission for every 14 deliveries.

A clear racial disparity is evident in the data of mortality because of illegal abortion: In New York City in the early 1960s, one in four childbirth-related deaths among white women was due to abortion; in comparison, abortion accounted for one in two childbirth-related deaths among nonwhite and Puerto Rican women.

Even in the early 1970s, when abortion was legal in some states, a legal abortion was simply out of reach for many. Minority women suffered the most: The Centers for Disease Control and Prevention estimates that in 1972 alone, 130,000 women obtained illegal or self-induced procedures, 39 of whom died. Furthermore, from 1972 to 1974, the mortality rate due to illegal abortion for nonwhite women was 12 times that for white women.

Navigating the System

Although legal abortions were largely unavailable until the years just before *Roe*, some women were always able to obtain the necessary approval for an abortion under the requirements of their state law. In most states, until just before 1973, this meant demonstrating that a woman's life would be endangered if she carried her pregnancy to term. In some states, especially between 1967 and 1973, a woman also could receive approval for an abortion if it were deemed necessary to protect her physical or mental health, or if the pregnancy had resulted from rape or incest.

Even so, the process to obtain approval for a legal abortion could be arduous. In many states, it involved securing the approval of a standing hospital committee established specifically to review abortion requests. Either as a matter of state law or hospital policy, these committees frequently required that additional physicians examine the woman to corroborate her own physician's finding that an abortion was necessary to protect her life or physical health. Likewise, a licensed psychiatrist might be required to second the judgment of a woman's doctor that an abortion was necessary on mental health grounds, or a law enforcement officer might be required to certify that the woman had reported being sexually assaulted.

Contemporaneous accounts noted that a woman's ability to navigate this process successfully generally required having a long-standing relationship with a physician. In practice, this meant that the option was only available to those who were able to pay for the review process, in addition to the procedure itself. One study of the 2,775 so-called therapeutic abortions at private, not-for-profit hospitals in New York City between 1951 and 1962 found that 88% were to patients of private physicians, rather than ward patients served by the hospital staff. The abortion to live-birth ratio for white women was five times that of nonwhite women, and 26 times that of Puerto Rican women.

Long-Distance Travel

In the late 1960s, an alternative to obtaining committee approval emerged for women seeking a legal abortion, but once again, only for those with considerable financial resources. In 1967, England liberalized its abortion law to permit any woman to have an abortion with the written consent of two physicians. More than 600 American women made the trip to the United Kingdom during the last three months of 1969 alone; by 1970, package deals (including round-trip airfare, passports, vaccination, transportation to and from the airport and lodging and meals for four days, in addition to the procedure itself) were advertised in the popular media.

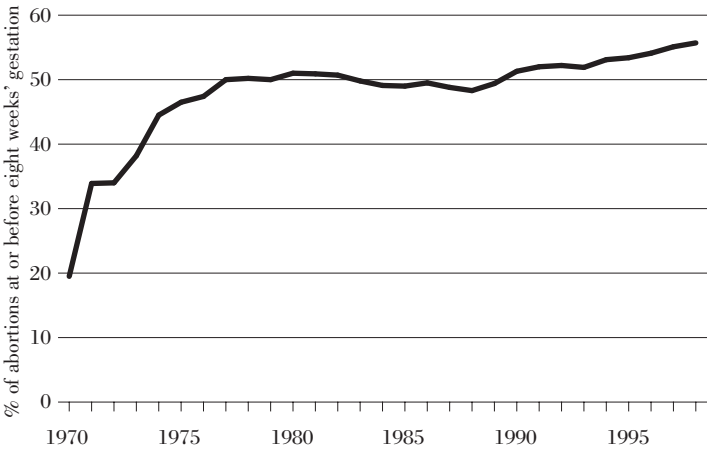
Beginning in 1970, four states—Alaska, Hawaii, New York and Washington—also repealed their antiabortion statutes, and generally allowed licensed physicians to perform abortions on request before fetal viability. Alaska, Hawaii and Washington required a woman seeking an abortion to be a resident of the state for at least 30 days prior to the procedure; New York did not include a residency requirement, which put it on the map as an option for the affluent.

The year before the Supreme Court's decision in *Roe v. Wade*, just over 100,000 women left their own state to obtain a legal abortion in New York City. According to an analysis by The Alan Guttmacher Institute, an estimated 50,000 women traveled more than 500 miles to obtain a legal abortion in New York City; nearly 7,000 women traveled more than 1,000 miles, and some 250 traveled more than 2,000 miles, from places as far as Arizona, Idaho and Nevada.

Data from the New York City Department of Health con-

chart c
Early Abortions

Since Roe v. Wade, *a greater proportion of women who have an abortion have done so early in pregnancy.*



Source: Trends in Abortion in the United States, 1973–2000 and *Abortion and Women's Health.*

firm that this option, as difficult as it was, was really only available to the small proportion of women who were able to pay for the procedure plus the expense of travel and lodging. (Nonresidents were not eligible for either Medicaid-covered care in New York or care from the state's public hospitals.) While eight in 10 nonresidents obtaining abortions in the city between July 1971 and July 1972 were white, seven in 10 city residents who underwent the procedure during that time were nonwhite.

A serious consequence of having to travel long distances to obtain an abortion was the resulting delay in having the procedure performed, which could raise the risk of complications for the woman. No more than 10% of New York City residents who had an abortion in the city in 1972 did so after the 12th week of pregnancy; in contrast, 23% of women from nonneighboring states who had an abortion in New York City did so after the 12th week.

Moreover, a woman who traveled long distances to obtain an abortion not only had to undergo the rigors of travel shortly after a surgical procedure but also was precluded from continuity in her medical care if she needed follow-up services. By the time a complication occurred, an out-of-state woman might already be home, where she would be unable to receive care from the physician who performed the abortion and, perhaps, from any physician with significant abortion experience.

Learning From History

By making abortion legal nationwide, *Roe v. Wade* has had a dramatic impact on the health and well-being of American women. Deaths from abortion have plummeted, and are now a rarity (see chart b). In addition, women have been able to have abortions earlier in pregnancy when the procedure is safest: The proportion of abortions obtained early in the first trimester has risen from 20% in 1970 to 56% in 1998 (see chart c). These public health accomplishments may now be seriously threatened.

Supporters of legal abortion face the bleakest political landscape in recent history. Congress is poised to pass legislation criminalizing some abortion procedures (termed "partial-birth" abortion) even when they are performed prior to fetal viability and when they are deemed by the physician to be in the best interest of the woman's health; by doing so, the Partial-Birth Abortion Ban Act takes direct aim at the basic principles underlying *Roe.* In the likely event the measure is passed, signed by the president and then challenged, its fate will be decided by a Supreme Court whose balance may have been tipped by the most doggedly antiabortion administration in history. In short, it is more possible than at any time in the past 30 years that the legal status of abortion is about to undergo a major change.

Should the Supreme Court overturn *Roe* and return the fundamental question of abortion's legality to the states, NARAL Pro-Choice America estimates that abortion could be made illegal in 17 states. In that light, the years before *Roe* offer something of a cautionary tale. Granted, it is by no means a given that the precise dimensions of the public health situation that existed before 1973 would reappear. However, it must be considered extremely likely that such an overhaul of U.S. abortion jurisprudence would lead to the reestablishment of a two-tiered system in which options available to a woman confronting an unintended pregnancy would be largely determined by her socioeconomic status. Such a system has proved to be deleterious to the health of women, especially those who are disadvantaged, and is something that many had hoped would have been long consigned to the history books.

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