

Preface to the 2022 Edition

The legality of abortion has always been precarious, and it is quite possible that abortion will become, again, a crime in the United States. When I first wrote this book, *Roe v. Wade* (1973) was the law of the land, but under attack. The legal status of abortion has changed since then, but battles continue over whether abortion should be legal at all, what conditions it should be accessible under, and whether reproductive control is, in fact, a woman's right. Pregnant people and people involved in providing abortions will be targeted as criminals if *Roe* is overturned or preserved on narrow grounds. Punishment in a new era of criminal abortion will echo the policing and prosecution of the past but is likely to be even worse, because of the many post-*Roe* state laws that name the fetus a "person" and make pregnancy loss and abortion into crimes of manslaughter or murder. Arrests and incarceration on a massive scale can be expected.¹ Other suffering too, as well as resistance. The history of abortion that I tell here is more relevant than ever for understanding the present and for considering the future.

This book asks, What happened when abortion was made a crime? Abortion was a common practice used by seventeenth-, eighteenth-, and nineteenth-century American women to manage their reproduction. What did it mean to criminalize what had been legal under common law, a home remedy? What did it mean for women?² For abortion providers, doctors, midwives, and others? And how were these new laws enforced? *When Abortion Was a Crime* was the first book to investigate these questions and track both abortion practices and law enforcement for the entire century that abortion was illegal, from the

1860s to 1973. It reveals women's reproductive experiences, decisions, and power beginning in the colonial era, in the 1700s, and through the century when abortion was a crime, the *Roe v. Wade* decision, and its immediate aftermath. *When Abortion Was a Crime* demonstrates how nineteenth-century organized medicine pushed to make abortion a crime and to give doctors the power to monitor women's bodies, behavior, and adherence to gender and sexual norms. Physicians became part of law enforcement and testified in court cases brought against abortion providers. Yet, as this book also reveals, doctors felt competing pressures and loyalties as the organized medical profession insisted that abortion was immoral and unprofessional at the same time that patients expected abortions. Medical professionals were always deeply involved in the practice of abortion. Many provided illegal abortions, while others worked to punish both women who sought abortions and their providers.

The criminalization of abortion in the nineteenth century was rooted in the anxieties of upper-class white men who resented women's political engagement and who feared losing political, economic, and cultural power to two specific groups: people of color (namely, Native Americans, Chinese migrants, and newly freed Black people) and European Catholic migrants.³ To maintain their supremacy, white elites encouraged pro-natalist policies and outlawed abortion in order to expand the community of people like themselves (upper-class white Anglo-Saxon Protestants). Compelling middle-class white women to have more babies in the service of maintaining white elite political power was the goal. But the new laws did not stop abortion, neither among the most well-to-do nor among the working classes and poor. Women of every class, racial identity, nationality, religion, and marital status used abortion.

Once the states made abortion illegal, stopping abortion became the job of law enforcement. This book uncovers the myriad ways that state officials—prosecutors, police, coroners, and state agencies—investigated illegal abortion, worked to suppress it, and punished the people involved. For more than a century, from the 1860s through 1973, abortion was a crime. All state criminal abortion laws penalized both abortion providers and individuals who assisted or offered information about abortion; many sanctioned women who had abortions as well. While the laws differed little, the methods and intensity of law enforcement changed over time. Elections and newspaper exposés could inspire vigorous law enforcement, sending police to question women on their deathbeds or to raid abortion practices in the middle of an operation and make arrests. At other times, particularly during the Great Depression in the

1930s, state authorities curtailed their policing and largely overlooked the practice. Law enforcement shifted with changes in the economy, the organization of medicine, and the political climate.

By the 1950s, a two-tiered system of illegal abortion existed, defined by race and class. Wealthy women—virtually all white—could sometimes obtain legal, therapeutic abortions performed by their own private doctors in hospitals or referrals to safe illegal abortion providers, often M.D.s. In contrast, poor and nonwhite women almost never received safe, legal abortions in hospitals. Instead, they entered the illegal underworld to find abortionists, many of whom were skillful and safe. Some evidence suggests that Black women in segregated neighborhoods may have found abortionists more easily than white women in general because the Black community was “very open” about it. Black women in Pennsylvania and South Carolina, for instance, had their own networks of Black providers, most of whom offered abortion and other health services at home.⁴

Still, inept and dangerous practitioners also performed abortions underground, and women without means frequently resorted to self-induced abortions. The divergent abortion-related mortality rates between Black and white women exposed the inequities. “Abortion mortality from nonhospital abortions in Georgia,” public health analysts observed in 1971, “is becoming increasingly a black health problem.” Racism and poverty produced a horrific statistic in the state: “Pregnant black teenagers are 11 times more likely to die from nonhospital abortions than pregnant white teenagers.”⁵ In New York City, deaths due to abortion were nearly four times higher among Black and Puerto Rican women than among white women. The devastating health effects resulting from the criminalization of abortion cannot be counted in maternal deaths alone, though. Hundreds of thousands more women suffered profuse bleeding for days and weeks on end; punctures in the uterus, stomach, or intestines; infections; and septic shock.

After *Roe*: The New Antiabortion Movement

For more than sixty years, since the earliest medico-legal discussions about reforming abortion law in the late 1950s, an organized backlash has fought to restrict and restigmatize abortion. Individual Catholics and the Catholic Church initially led and nurtured the opposition.

State investigations and threats to the licensure of some of the most prominent specialists in gynecology and obstetrics in the 1960s vividly brought the developing antiabortion movement to public attention.⁶ Violent rhetoric equating abortion with murder and Nazism developed early, a language now commonplace in the antiabortion movement and in American culture.

The rise of the New Right and the accompanying shift in the identity of the Republican Party are critical pieces of the legal history of abortion since *Roe*. In the 1970s, the Republicans, starting with Richard Nixon's 1972 reelection campaign, forged a new identity as the party that emphasized "family values," meaning dedication to heterosexuality, marriage, and the stay-at-home mom and opposition to abortion, homosexuality, sex education, and divorce. This agenda united conservative activists with a new coalition of white Christian evangelicals, Catholics, and Mormons—religious groups that had historically distrusted one another became allies in the struggle against social and cultural changes they perceived as threatening. The New Right coalition's attacks on abortion, feminism, and all forms of sexual freedom swept Ronald Reagan into the presidency in 1980.⁷

The New Right did not focus on sex alone, though. It was built on white resentment and white supremacy, bridges from the Old Right to the New. Resistance to racial integration of public schools was key. Indeed, white activists who fought against "busing" became anti-abortion leaders in Detroit and Boston; outrage at threats to the tax-exempt status of (white) Catholic and Christian schools for failing to integrate mobilized both Northern and Southern whites. Meanwhile, white women like Anita Bryant of Florida and Alice Moore of West Virginia represented themselves as Christian mothers who opposed gay rights, sex education, and abortion in order to "protect" "our" children. Linking busing and "law and order" (Nixon-era code for blaming Black people for crime) to abortion brought political dividends to the Republican Party. As its organizers hoped, many Southern whites and Northern white Catholics who had formerly voted Democratic switched parties and voted for Reagan.⁸

Although the Republican Party increasingly supported a vigorous antiabortion agenda, both major political parties have participated in restricting abortion. The 1976 passage of the Hyde Amendment, which prohibited federal funding of abortion, with narrow exceptions for reasons of rape, incest, or health, epitomized the bipartisan consensus. The Hyde Amendment meant that neither poor women who relied on

Medicaid for their health care nor women in the military nor other federal employees had insurance coverage for abortion. Upheld by the Supreme Court, it enshrined a two-tier, class- and race-based abortion system that allowed women who could afford it to “choose” abortion and made it difficult for low-income women to do the same.⁹

As the Republican Party with the New Right identified *Roe* with changes in gender, sexuality, and race, the right-to-life and pro-life movements gave abortion and the fetus new meanings. Abortion became “murder” and the fetus an “innocent” “child.”¹⁰ The most significant ideological work of the antiabortion movement was the separation in American cultural and legal thought of both the pregnant woman from her own pregnancy and the developing fetus from the pregnant body. This made the embryo/fetus into an individual “person” with its own interests, rights, and life completely separate from a woman’s pregnant body. Fetal images proliferated in American culture. The pro-life movement blew up photographs of bloody, dismembered body parts, purportedly fetuses, for protest signs and billboards, and made them their ubiquitous icons. The antiabortion movement invested the fetus, generally imagined as male, with political, legal, and moral meanings. The fetus by himself, in the pro-life formulation, had legal rights as a citizen and human being, felt pain, and had moral status as an “innocent,” a Christian concept that values innocence of sin and (sexual) knowledge. The fetus even had a mind and voice of his own, which he most often used to direct and correct his “mother”—ordering meals, policing her drug use, and insisting that she not “murder” him by having an abortion. The fetus sold cars and, in one popular pro-life cartoon, even pulled out a gun.¹¹

The mythical independent, thinking and speaking fetus provided a puppet with which others—religious leaders, conservative men, advertisers—could cajole and command as if they were themselves innocents. Speaking through the fetus masked (or attempted to) the true speakers and their dedication to white, male, and Christian supremacy and their fundamental opposition to women’s freedom. Indeed, speaking *as* a fetus made sense within the pro-life world, which cultivated identification with the fetus. The fetus was deeply knit into personal life through fetal dolls, funerals, and stories. When speaking of the peril of abortion to the fetus, pro-life proponents see *themselves* as threatened, as well as white Christianity.¹²

The pro-life movement spawned new techniques of harassment and violence toward abortion patients and providers. Activists picketed