

Life After Roe

We need to be clear about what is at stake with the nomination of Brett Kavanaugh.

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Supporters of Planned Parenthood outside the Capitol in costumes described in the dystopian novel "The Handmaid's Tale," in which women are forced to conceive and bear children. Credit...Jim Lo Scalzo/European Pressphoto Agency

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By Lynn M. Paltrow

Ms. Paltrow is the executive director of National Advocates for Pregnant Women. In the post-Roe v. Wade world described by opponents of legal abortion — one they imagine Brett Kavanaugh will bring into being if he is confirmed to the Supreme Court — abortions will be outlawed, but women won't be arrested and they won't be treated like criminals. According to this mythology, women were never arrested for having abortions before Roe, and therefore we can count on the same being true after the constitutional protection for abortion is overturned. This is the story they tell, but it is not true.

As the Senate begins confirmation hearings this week on Judge Kavanaugh's nomination, it is especially important to refute the skewed vision presented by those who want to see Roe overturned. Let's begin by looking at a pre-Roe arrest — and then at the way the legal system has dealt with women even with Roe as the law of the land.

In 1971, Shirley Wheeler was pregnant and living in Florida. She was advised by her doctor to have an abortion for medical reasons. Abortion was illegal in most states, including Florida. So Ms. Wheeler did what an estimated one million women did each year at that time: She found a way to end her pregnancy.

She paid someone \$150 to perform an abortion on her and developed complications. When she began hemorrhaging, she went to the hospital. Someone at the hospital reported her to the police.

When she refused to name the person who had performed the abortion, police officers arrested her. Ms. Wheeler was convicted of manslaughter — a crime with a possible 20-year sentence. The court, however, sentenced her to two years of probation and forbade her to stay out overnight, go to a bar or associate with people “of harmful character or bad reputation.” The court also gave her this ultimatum: Marry the man she was living with in Florida or leave the state in no more than a week and return to North Carolina to live with a different man, her brother.

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Ms. Wheeler, whose conviction was later overturned, was not alone in being arrested for having an abortion before Roe, but it is true that such arrests were not common. It’s unlikely, however, that would be the case today because our current legal system — radically expanded through the war on drugs — is profoundly different from the one we lived with when Roe was decided.

In the 1970s, the United States imprisoned approximately 300,000 people, almost all of them men. Today, American prisons and jails hold more than 2.2 million people, and 4.5 million more people are under some form of criminal justice supervision, such as probation and parole.

This is not the result of population growth. Between 1970 and 2000, the American population rose by less than 40 percent, yet the number of inmates rose by more than 500 percent. Today, more than 200,000 women are behind bars, in both jails and prisons, and more than one million women are on probation or parole. Looking just at prisons, there has been more than a 1,700 percent increase in incarceration of women since 1973. The majority of them are black and brown.

But we don’t have to just imagine future arrests. Such arrests are happening already.

Some states still have pre-Roe laws on their books that specifically authorize prosecution of women who have abortions. In 2011, Jennie Linn McCormack, a pregnant mother of three who lived in southeastern Idaho, used medications she obtained online to carry out an abortion at home. She was charged with violating an Idaho law that makes it a felony for a woman to perform her own abortion. Nearly four months after Ms. McCormack was charged, a state court dismissed the criminal complaint, but in a way that left open the possibility that she could be charged again. Ms. McCormack brought suit in federal court challenging Idaho laws that could be used to punish her for having an abortion. [She prevailed.](#) (My organization filed [an amicus brief on her behalf.](#))

Editors’ Picks

Ms. McCormack is not the only woman to face such charges since Roe. Other women who had or attempted to have abortions have also been arrested in [Tennessee](#) and at least 14 other states.

In recognizing a right to choose abortion, Roe rejected the argument that fetuses, at any stage of development, may be treated as if they are separate constitutional persons under the law. It has been [this argument](#), however, that has been used to justify arrests and detentions of more than 1,200 pregnant women — some of whom sought to terminate a pregnancy but most of whom went to term or experienced a pregnancy loss. These cases, documented by my organization, [National Advocates for Pregnant Women](#), include pregnant women who fell down a flight of stairs, delayed having cesarean surgery, had a home birth, used a controlled substance (including ones prescribed to them), experienced miscarriages and stillbirths or who gave birth to a baby who did not survive.

Such arrests have occurred in virtually every state, including [New York](#), which is one of the eight states that has a law specifically making self-abortion a crime. Despite [assurances from anti-abortion groups](#) that their commitment is to protecting pregnant women, not jailing them, those organizations have rarely, if ever, opposed arrests of pregnant women — whether the woman was one of the approximately one million who have an abortion, the one million who experience miscarriages or stillbirths, or one of the four million women who go to term each year in the United States.

The fight about the next Supreme Court appointment is not just about whether abortion remains legal or illegal but also about how many of the six million women who become pregnant each year could be subject to arrest if Roe is overturned.

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