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America Civil Liberties Union of Maine

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Unequal Access is Unequal Justice: Maine's Two-Tiered System of Reproductive Health Care

Samaa Abdurraqib



Unequal Access is Unequal Justice:

Maine’s Two-Tiered System of Reproductive Health Care

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Introduction

Abortion is a safe and legal medical procedure. It remains one of the most common medical procedures performed today: one out of three women will have an abortion in her lifetime.^{1,2}

Since the Supreme Court recognized a woman's constitutional right to have an abortion in 1973, abortion opponents have slowly chipped away at a woman's right to make decisions about her own body by passing restrictive laws that limit access to abortion for some women.

The Maine legislature has a long history of protecting the right to have an abortion. Yet, deep inequities exist in Maine's reproductive health care system. In particular, while private insurance covers the cost of abortion care, MaineCare – Maine's public insurance program for low-income individuals – does not. This creates a two-tiered system of abortion access in Maine, making it harder for poor women to obtain abortion care than women with private insurance.

Restoring MaineCare coverage of abortion care would correct this disparity and ensure that all women have access to the care they need.

Background: How Did We Get Here?

Women seek abortions for a variety of reasons. Some women, in consultation with their doctors, determine that terminating a pregnancy is the best decision for their health. Some women and couples



Nancy Foss, longtime project manager, Abortion Access Project:

"It's time to stop erecting barriers to abortion care because becoming a parent is an immense responsibility and should be undertaken after careful consideration, not simply because of contraception failure or the unavailability of abortion. It's also a matter of justice: people opposed to abortion should not be privileged to create the rules for those who are not opposed."

¹ Rachel K. Jones, Lawrence B. Finer, and Susheela Singh, "Characteristics of U.S. Abortion Patients, 2008," *Guttmacher Institute*, May 2010, accessed August 2014, <http://www.guttmacher.org/pubs/US-Abortion-Patients.pdf>.

² "Reproductive Health Module," *Columbia University Mailman School of Public Health*, accessed September 26, 2014, <http://www.columbia.edu/itc/hs/pubhealth/modules/reproductiveHealth/abortion.html>.

decide an abortion is best for them because they aren't ready or able to parent a child. Some women are survivors of sexual violence and do not wish to continue pregnancies that are the product of such trauma.

The monumental Supreme Court decision *Roe v. Wade* affirms and protects each woman's right to make these reproductive health decisions.

Since *Roe v. Wade* was decided in 1973, anti-abortion activists have attempted to undermine these constitutionally guaranteed rights by using the courts and the legislature to intervene in women's private health care decisions. These attacks on reproductive rights have increased exponentially in recent years.

Between 2011 and 2013, states enacted 205 pieces of anti-abortion legislation – more than the total number of anti-abortion bills passed in the entire preceding decade. In 2013 alone, 70 abortion restrictions were enacted in 22 different states.³ This trend does not show signs of slowing: in 2014, more than 250 bills to restrict abortion access were introduced in 40 states.⁴

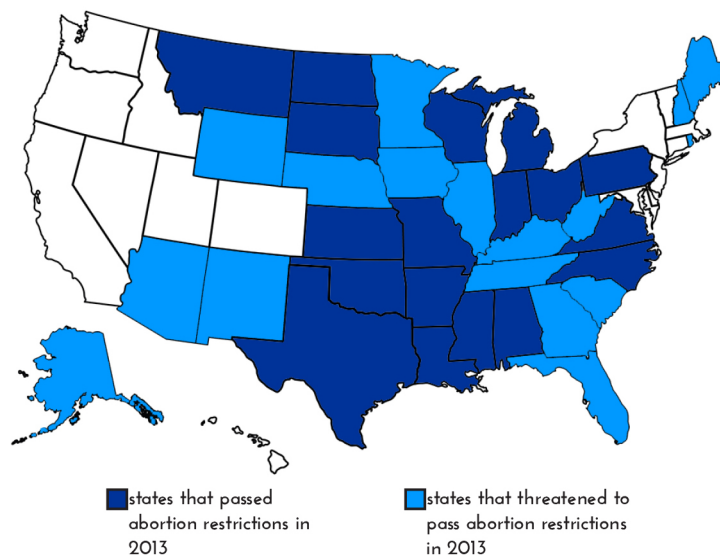


Image: state abortion restrictions in 2013

³ Elizabeth Nash, Rachel Benson Gold, Andrea Rowan, Gwendolyn Rathbun and Yana Vierboom, "Laws Affecting Reproductive Health and Rights: 2013 State Policy Review," *Guttmacher Institute*, January 2014, accessed August 2014, <http://www.guttmacher.org/statecenter/updates/2013/statetrends42013.html>.

⁴ Bridgit Burns, Amanda Dennis, Ella Douglas-Durham, "Evaluating Priorities: Measuring Women's and Children's Health and Well-Being against Abortion Restrictions in the States," *Ibis Reproductive Health*, September 2014, accessed October 2014, http://reproductiverights.org/sites/crr.civicactions.net/files/documents/Priorities_Project_FINAL_9.14pdf.pdf.

Because the right to safe and legal abortion is guaranteed by the Constitution, state legislatures are unable to ban abortions outright. Instead, anti-abortion advocates and legislators seek to circumvent the Constitution by introducing bills that erode abortion rights. These bills empty *Roe v. Wade* of any real meaning by making abortions inaccessible, while still technically legal.

Anti-abortion advocates and lawmakers advocate for these laws and regulations under the guise of “protections” for women; however, these laws have nothing to do with safety or women’s health. These laws have three primary focuses:

- **Making abortion inaccessible:** Laws that increase waiting periods, introduce complicated consent requirements, or create other unnecessary procedural roadblocks make it harder for women to obtain abortions.
- **Placing unnecessary burdens on reproductive health care practitioners and clinics:** Burdensome requirements for providers, such as obtaining admitting privileges at a local hospital, along with unnecessary regulations on facilities, such as statutes dictating the required width of hallways, force some clinics to close.
- **Making abortion unaffordable:** Restrictions on insurance coverage of abortion force some women to pay out of pocket or delay getting the care they need.



**Lynne Schmidt,
founder,
AbortionChat:**

“Having an abortion was the right choice for me, because the alternative I was considering at the time was ending my own life. Had it not been for a good friend who asked me to choose my life, no matter what the cost, I would have completed my plan. I am grateful every day that that woman encouraged me to seek the life I needed to live.”

The Hyde Amendment: Targeting Poor Women

“The Hyde Amendment is designed to deprive poor and minority women of the constitutional right to choose abortion.” –Justice Thurgood Marshall⁵

In 1973, when *Roe v. Wade* affirmed the right to legal abortion in the United States, there were no restrictions on the use of federal funds to pay for the procedure. That changed in 1976, with the passage of the Hyde Amendment.

The amendment, authored by Rep. Henry Hyde (R-Ill), prohibits the use of federal funds to pay for abortions, except in very limited cases.⁶ In practice, this means that people who are insured by Medicaid, the joint state and federal medical insurance program, cannot use their insurance to pay for their abortion care, even though it is a safe and legal medical procedure. Today, the Hyde Amendment plays a major role in keeping abortion unaffordable and inaccessible for some women.

In essence, the Hyde Amendment enshrines discrimination in law by excluding abortion from otherwise comprehensive health care services provided to low-income people.

Congress has reauthorized the Hyde Amendment every year since its introduction in 1976.⁷ The original version of the Hyde Amendment banned Medicaid coverage of abortion completely. Since then, the parameters have fluctuated; the current version, as of 1997, allows for Medicaid coverage only in cases of rape, incest, or when the life of the mother is in danger.

While the Hyde Amendment bans the use of federal funds to pay for abortions, 17 states cover abortions for low-income women using state dollars. Four states (Hawaii, Maryland, New York, and Washington) enacted this change voluntarily; 13 states (Alaska, Arizona, California, Connecticut, Illinois, Massachusetts, Minnesota,

⁵ *Harris v. McRae*, 448 U.S. 297 (1980).

⁶ “Public Funding for Abortion: Medicaid and the Hyde Amendment,” *National Abortion Federation*, 2006, accessed August 2014, https://www.prochoice.org/pubs_research/publications/downloads/about_abortion/public_funding.pdf.

⁷ Jessica Arons, “The Changing Status Quo on Federal Abortion Funding,” *Kaiser Health News*, March 19 2010, accessed August 2014, <http://www.kaiserhealthnews.org/Columns/2010/March/031910Arons.aspx>.

Montana, New Jersey, New Mexico, Oregon, Vermont, and West Virginia) are currently funding abortions as a result of a court order.⁸

Abortion Access in Maine: A Two-Tiered System

Maine has a long history of protecting access to the full spectrum of reproductive health care, and Maine statute supports the notion that a woman's constitutional right to an abortion must be protected.⁹ As a result, abortion access in Maine is considerably less restricted than in some other states. For example:

- Women in Maine are able to access the care they need the same day they receive counseling from a physician.
- Doctors are not forced to read from a coercive script before performing an abortion.
- Maine's parental consent law recognizes that a minor in need of an abortion might not always have the option to speak with a parent about her reproductive health decisions, and allows a minor to get consent from a trusted adult instead.¹⁰
- Physicians perform abortions in the abortion facility itself, without having to involve local hospitals.

But, despite these victories, reproductive freedom in Maine is not without its challenges. In Maine, as in other states, anti-abortion legislation is regularly introduced. Several anti-abortion



**Rev. Anne Fowler,
Episcopal priest:**

"To talk theologically about women's right to choose is to talk about justice, equality, health and wholeness, and respect for the full humanity and autonomy of every woman. I believe as well that God calls us all to particular vocations, and our decisions about whether and when to bear children are part of that larger pattern of our lives' sacred meanings."

⁸ "State Funding of Abortion Under Medicaid," *Guttmacher Institute*, September 2014, accessed September 25, 2014, http://www.guttmacher.org/statecenter/spibs/spib_SFAM.pdf.

⁹ Me. Rev. Stat. Ann. tit. 22, § 1598 (2012).

¹⁰ *Id.* § 1597-A.

measures have been introduced in the Maine legislature in recent years. In 2013, the legislature considered and rejected three anti-abortion measures.¹¹ The bills in question included a bill to require abortion providers to read a legislatively mandated, coercive script to women seeking abortions; a bill to replace our successful adult involvement law with a more restrictive one; and a “personhood” bill designed to confer individual rights onto a fetus.

Beyond anti-abortion legislation, other limitations exist that, when compounded, create a two-tiered system in which women have unequal access to abortion care based on their income and where they live. The primary limitations to abortion in Maine are related to facility accessibility and cost.

Accessibility

Maine has only three clinics that provide abortions. The clinics are located in Portland (Cumberland County), Augusta (Kennebec County), and Bangor (Penobscot County). Over half of Maine women live in counties that have no abortion provider. Some women live more than 200 miles from the nearest clinic and would have to travel more than four hours each way in order to obtain an abortion.

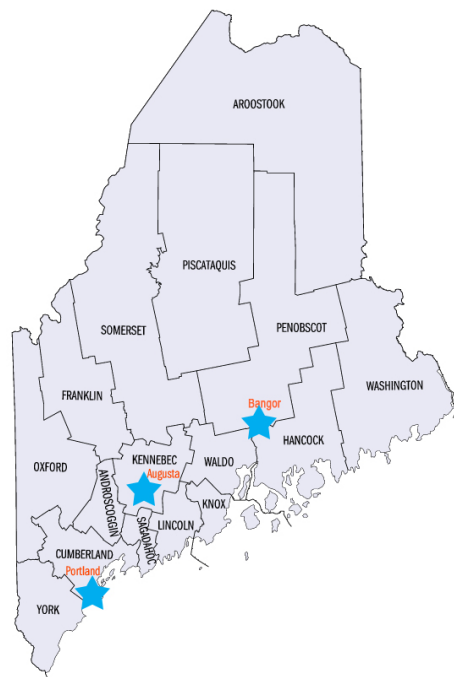


Image: location of Maine abortion providers

¹¹ “Maine Senate Rejects Three Anti-Choice Bills,” *ACLU of Maine*, June 13, 2013, accessed August 2014, <http://www.aclumaine.org/maine-senate-rejects-three-anti-choice-bills>.

Cost

According to the U.S. Census Bureau, Maine has the second highest poverty rate in New England; 14 percent of Mainers were living below the poverty rate in 2013.¹² The highest poverty rates are in the rural “rim” counties: Washington, Somerset, and Franklin. Unfortunately, the counties with the highest rates of poverty are the same counties with the least access to abortion facilities.

The average cost of an abortion procedure ranges from \$400 to \$500. That figure doesn’t account for the cost of transportation, lodging, childcare and lost wages. For a woman who lives far from an abortion provider, the total cost of obtaining an abortion can be well over \$700 – an amount that is prohibitive for women who are struggling to make ends meet.¹³

Because MaineCare does not cover the cost of abortion care, women who use MaineCare for their health insurance are forced to pay for the procedure out-of-pocket, often relying on outside financial assistance or delaying other financial obligations such as paying bills in order to afford an abortion.¹⁴

The costs associated with abortion also lead some women to delay their abortions. Nationwide, over half of women seeking abortions are forced to delay their procedures so that they can both raise funds and make transportation arrangements.^{15,16} In turn, delaying an abortion leads to higher cost, as the costs associated with the procedure increase as the pregnancy progresses.^{17,18}

¹² Alemayehu Bishaw and Kayla Fontenot, “Poverty: 2012 and 2013 American Community Survey Briefs,” *U.S. Census Bureau*, September 2014, <http://www.census.gov/content/dam/Census/library/publications/2014/acs/acsbr13-01.pdf>.

¹³ Rachel K. Jones, Ushma D. Upadhyay, and Tracy Weitz, “At What Cost? Payment for Abortion Care by U.S. Women,” *Women’s Health Issues* 23-3 (2013): 173-178, doi: 10.1016/j.whi.2013.03.001.

¹⁴ “Many Women Find It Difficult To Pay For An Abortion Procedure, Are Unable To Use Insurance,” *Guttmacher Institute*, May 8, 2013, accessed September 25, 2014, <http://www.guttmacher.org/media/nr/2013/05/08/index.html>.

¹⁵ Stanley K. Henshaw, Theodore J. Joyce, Amanda Dennis, Lawrence B. Finer, and Kelly Blanchard, “Restrictions on Medicaid Funding for Abortions: A Literature Review,” *Guttmacher Institute*, June 2009, accessed July 2014, <http://www.guttmacher.org/pubs/MedicaidLitReview.pdf>.

¹⁶ Jessica Arons and Madina Agénor, “Separate and Unequal: The Hyde Amendment and Women of Color,” *Center for American Progress*, December 2010, accessed September 25, 2014, http://cdn.americanprogress.org/wp-content/uploads/issues/2010/12/pdf/hyde_amendment.pdf.

¹⁷ Arons, “The Changing Status Quo” (see fn 7).

¹⁸ Amy Allina, Jessica Arons, and M. Elizabeth Brajas-Román, “Pre-existing Conditions: How Restrictions on Abortion Coverage and Marginalization of Care Paved the Way for

Recommendation: Restore Public Funding

Maine has a two-tiered system of abortion access that grants women with private insurance access to the full spectrum of reproductive health care, while poorer women are denied this same access. Women who qualify for MaineCare must find other means of paying for an abortion, which may involve forgoing other financial obligations, or else they must carry the pregnancy to term.

Maine can eliminate this two-tiered system by restoring MaineCare funding for abortion.

Public funding of abortion care would not be a new endeavor for Maine. After *Roe v. Wade* was decided in 1973 and prior to the passage of the Hyde Amendment in 1976, all women in Maine had the ability to access abortion care. Restoring public funding for abortion would return us to a time when equity in reproductive health care was the law in Maine.

Maine would not be the only state to provide public funding for abortion care. Because the Hyde Amendment only affects federal dollars, states are free to use their own state funds to cover abortion services.¹⁹ There are currently 17 states using state monies to fund abortion.²⁰

Providing insurance coverage for abortion care would mean that poor women would have access to safe and legal abortion care by licensed, qualified health care providers.



Abbie Strout, Mabel Wadsworth Women's Health Center:

"Access to abortion care is a human right and should not be denied to a woman simply because she is poor. It's time to restore public funding for abortion."

Discriminatory Treatment of Abortion in Health Reform and Beyond," *Center for Women Policy Studies*, August 2012, accessed August 2014, http://www.centerwomenpolicy.org/programs/health/statepolicy/documents/REPRO_PreExistingConditions_Allina-Arons-Barajas-RomanFINAL.pdf.

¹⁹ "Public Funding for Abortion: Medicaid and the Hyde Amendment," *National Abortion Federation*, 2006, accessed September 2014, https://www.prochoice.org/pubs_research/publications/downloads/about_abortion/public_funding.pdf.

²⁰ "State Funding of Abortion Under Medicaid," *Guttmacher Institute* (see fn 8).

Conclusion

Restricting public funding for abortion has created a two-tiered system of women's health care. These restrictions create a barrier that keeps some women from accessing safe and legal abortion.

Hindering a woman's access to abortion, an important part of reproductive health care, limits a woman's ability to plan if and when to have children. It restricts her ability to be in control of her own body and her own life.

Poor women in Maine should have coverage for the full range of pregnancy related care, including abortion. Removing public funding restrictions would ensure that all women in Maine have equal access to safe and legal abortions.

It's time to trust Maine women to make the decisions that are best for themselves and for their families. It's time to ensure that all women have access to safe and legal abortion.

Addendum

By Rachel Healy

On November 24, 2015, the ACLU of Maine and the nationwide ACLU filed a lawsuit seeking to restore abortion coverage for women who qualify for MaineCare.

MaineCare withholds coverage for abortion from eligible women, but will cover a full range of pregnancy-related care for women who choose to carry their pregnancies to term. The lawsuit argues that, in doing so, the state interferes with a woman's fundamental right to decide whether or not to continue a pregnancy and discriminates against women who decide to have an abortion.

It contends that the ban on abortion coverage for MaineCare-eligible women violates the "liberty and safety clause" of the Maine Constitution, which provides that all people have an inherent right to pursue and obtain safety and happiness, as well as the "equal protection clause," which holds that no person shall be denied the equal protection of the laws.

The ACLU filed the lawsuit on behalf of Mabel Wadsworth Women's Health Center, Maine Family Planning and Planned Parenthood of Northern New England, three health care providers specializing in comprehensive reproductive and sexual health care, including abortion.

Abortion is a protected right for all women, regardless of what type of insurance they have. This lawsuit aims to right the ship and to bring DHHS policy back in line with the Maine Constitution.

-Zachary Heiden, ACLU of Maine legal director
