# Women's History

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**Abortion Anthology**

Abortion was practiced in ancient Greece and in the Roman Era. Greek and Roman law afforded little protection to the unborn. In America, abortion prior to quickening was considered perfectly legal and acceptable prior to 1800. It was viewed with less disfavor when the U.S. Constitution was written in 1787 than currently. By the 1840s, abortion had become a common commercialized practice in most states. The use of abortion and contraception remained widespread throughout most of the nineteenth century. Newspapers advertised pills, midwives' services to women, and the availability of "novel inventions" to assist women who did not want children for health or financial reasons. A woman enjoyed a substantially broad right to terminate a pregnancy. Most jurisdictions followed English common law rule that abortion with a woman's consent was not a crime prior to quickening. Between 1840 and 1860 a number of antiabortion laws were enacted, but these generally "preserved" the woman's right to end her pregnancy prior to quickening. Law in all but a few States until the mid-19th century was lenient with abortion before quickening.

In the early nineteenth century, the birth rate among whites began to fall. A rise in abortion, particularly among "respectable" married women, played an important role in this demographic. A doctors' crusade initiated in the 1850s led to the enactment of "restrictive" abortion legislation in the next several decades. The campaign organized by male doctors, focused on moral and safety concerns, as well as on white, native-born Protestants' fear of being out bread by Catholic immigrants. The WASP elite of the Northeast became increasingly aware of their small-family pattern as opposed to the large-family pattern of immigrants and the rural poor. Eugenicists advocated selective use of contraception and sterilization to ensure the survival of the superior stock.

Widespread sterilization became possible in America at the end of the nineteenth century with the perfection of safe and simple operations for both sexes. Compulsory sterilization laws had a markedly gender bias. The sterilization of criminals was directed at men. There is evidence that courts were reluctant to order men sterilized. Sterilization of women, however, was deemed crucial to ending feeblemindedness; of those sterilized for that reason, two-thirds were women. In *Buck v Bell* (1927) the Supreme Court upheld the compulsory sterilization of the feebleminded. The famous decision of Justice Oliver Wendell Holmes declared, "Three generations of imbeciles are enough."

But in "Carrie Buck's Daughter," biologist Stephen Jay Gould illustrates a subtle gender bias in sterilization abuse when he writes of how there was no evidence that Carrie Buck, her mother, or her daughter were deficient mentally, but that Carrie Buck, one of several

illegitimate children, was institutionalized to hide the pregnancy that had resulted from her rape by one of her foster relatives. Not only was Carrie Buck blamed for her pregnancy, but as Gould's article suggests, her improper sexual behavior was considered a key indicator of feeblemindedness.

In the middle and late 19th century the quickening distinction disappeared from the law. Abortion before quickening was made a crime in Connecticut in 1860. After the Civil War, antiabortionists persuaded states to toughen their laws and by 1910 every state, except Kentucky had made abortion a felony.

Constitutional protection for procreation dates from the 1942 Supreme Court *Skinner v Oklahoma* decision regarding compulsory sterilization of certain felons on equal protection grounds. The decision in *Skinner* invalidated a state statute authorizing sterilization of persons convicted two or more times of felonies "involving moral turpitude." *Skinner* used heightened scrutiny invalidating that the statute, which only authorized sterilization of embezzlers and certain other criminals [mostly men], violated the Equal Protection Clause on the ground that it "forever deprived of a basic liberty." In Skinner Justice William Douglas explained: "We are dealing here with legislation which involves one of the basic civil rights of "man." Marriage and procreation are fundamental to the very existence and survival of the race. The power to sterilize, if exercised, may have subtle, far-reaching and devastating effects. In evil or reckless hands, it can cause races of types which are inimical to the dominate group to wither and disappear. There is no redemption for the individual whom the law touches. Any experiment which the State conducts is to *his* irreparable injury. *He* is forever deprived of a basic liberty." The protection it accorded procreation as "fundamental to the very existence and survival of the race" reflect a rather sharp break with the view held of sterilization and reproductive rights earlier in our history.

By the 1950's a large majority of the jurisdictions banned abortion however and whenever performed, unless to save or preserve the life of the mother. It has been argued (1) that these laws were the product of a Victorian social concern to discourage illicit sexual conduct (2) concern with abortion as a medical procedure - when most criminal abortion laws were first enacted, the procedure was a hazardous one for the woman - thus, to "protect" the pregnant woman, that is to restrain her from submitting to a procedure that placed her life in serious jeopardy. Modern medical techniques have altered this. Consequently, any interest of the State in protecting the woman has largely disappeared. The State has a legitimate interest in seeing to it that abortion, like any other medical procedure, is performed under circumstances that insure maximum safety for the patient (3) some say in terms of the duty of the state in protecting prenatal life.

By the 1960s, fourteen states had liberalized abortion laws. *Roe v Wade* (1973) elevated the issue to the national political agenda. The legal reforms leading to Roe v Wade were little more than a return to the legal status of abortions a century earlier.

**Sources**

*Constitutional Law and Politics*, David M. O'Brien.
*The Law of Sex Discrimination*, Ralph J. Lindgren& Nadine Taub.