



AZPHA SPECIAL REPORT:
**WOMEN'S REPRODUCTIVE RIGHTS
IN ARIZONA: 1864 - 2022**



AZPHA
Arizona Public Health Association

Arizona Public Health Association: September 24, 2022

Introduction

Ever since the Territorial days, Arizona has had a history of severely restricting women's reproductive freedom. From territorial era laws passed in 1864 to the laws restricting both abortion and contraception passed in 1901 (called the Comstock Laws), Arizona lawmakers have actively sought to restrict women's reproductive rights.

When the U.S. Supreme Court announced their decisions in the 1960s and 1970s (*Griswald v Connecticut & Roe v Wade*) Arizona finally began to allow more reproductive freedom (including the right to have an abortion), but only because the courts had forced their hand.

The recent U.S. Supreme Court ruling in [Dobbs v. Jackson Women's Health Organization](#) has potentially set back women's reproductive rights to the pre- Roe v. Wade era in Arizona.

In this report, we review historical documents to piece together the history of women's reproductive health rights from the beginning of Arizona's territorial era in 1864 to the present day.

Buckle your seat belt. You're in for a bumpy ride.

Reproductive Rights in Arizona: The Civil War to 1901

Attorney General Brnovich announced on June 29, 2022, that a territorial-era law (from 1864) prohibiting the provision of abortion services except when the abortion is necessary to save the woman's life is now in effect. Brnovich is doubling down on a law that dates to the 1st territorial legislature which met toward the end of the Civil War in Prescott.

The story begins before the Arizona Territory even existed. During the Mexican American War the United States government established the "provisional government of New Mexico" in what is now New Mexico & Arizona. The initial territorial boundaries were ambiguous for a few years because the Mexican Republic hadn't ceded the region to the U.S. After the Mexican Republic ceded the region in 1848, the US federal government set up the provisional wartime/military government of New Mexico which operated until 1850.

The New Mexico Territory was established in September of 1850 and included what is now Arizona and New Mexico. It stayed that way until February 24, 1863, when Congress passed the *Arizona Organic Act*. This split the New Mexico Territory in half with the western half becoming the Arizona Territory.

The 1st Arizona Territorial Legislative Assembly met on September 26, 1864, in Prescott to get the new territory off the ground. Of course, this was a men-only affair. The legislative session ran for forty-three days. There were many decisions made at the assembly among

which were enacting the Arizona Territory legal code. Under the [Arizona Organic Act](#) the Arizona Territory was slated to inherit the existing laws from the New Mexico Territory.

In the meantime, the US Attorney General (Edward Bates) had appointed [William T. Howell](#) as the Chief Justice for the new Arizona Territory (1863). Both Howell and Governor John Goodwin agreed that the New Mexico Territory laws were:

"... so ill adapted to our condition that a complete organization of the Territorial government could be had until a code of laws was substituted for those now in force".

Howell immediately began writing what would shortly become all of Arizona's first territorial laws, (including the Penal Code – which would also outlaw abortion services).

During that 1st legislative session, the delegation passed a motion "*Empowering the Governor of the Territory to change certain Bills*". Basically, it allowed the Territorial Governor to change the "chapters of the Code in his hands" so that they would be in effect (and be enforced) by April 20, 1865. Here's an excerpt (from page 135):

"Resolved by the Council, the House of Representatives concurring, That the Governor of this Territory be and is hereby authorized and empowered to change the following chapters of the Code in his hands, passed at the present session of the Legislature, so that they shall take effect and be in force from and after the 20th day of April next. Said bills are entitled as follows: Of Crimes and Punishments..."

"... nothing contained in this section shall be construed to repeal any laws heretofore in existence in this Territory, until the laws 136 inconsistent therewith, passed at the present session of the Legislature, shall take effect and be in force, excepting, however, that all the provisions of this bill, and every part thereof, shall take effect and be in force from and after the twentieth day of April, 1865."

The legislature then passed an Act "*Authorizing the Appointment of a Commissioner to report a Code of Laws*", authorizing Governor Goodwin to "*appoint a commissioner to prepare and report a code of laws for the use and consideration of the Legislature*".

Governor Goodwin hired Chief Justice Howell to rewrite the territory's laws. Howell had already completed the work of what would become all of Arizona's laws before he was appointed commissioner.

Because he had already been working on the new laws, Howell turned in the draft laws two days after his appointment as commissioner (including what is now ARS 13-3603 – the anti-abortion law).

That set of laws became known as the "Howell Code". The entire Howell Code was passed by the legislature as Council Bill Number 1 on October 1, 1864- after only one day of debate. Howell was paid \$2,500 for his work (the equivalent of \$58,000 in today's dollars).

William Howell wrote all the territorial laws (including what is now ARS 13-3603). From what I can tell, this is what that Howell Code language from 1864 said about abortion (it wasn't called ARS 13-3603 yet):

13-3603. Definition; punishment

A person who provides, supplies or administers to a pregnant woman, or procures such woman to take any medicine, drugs or substance, or uses or employs any instrument or other means whatever, with intent thereby to procure the miscarriage of such woman, unless it is necessary to save her life, shall be punished by imprisonment in the state prison for not less than two years nor more than five years.

It appears that law stood unchanged for the next 15 years. I couldn't find anything about the number of physicians who were prosecuted for violating that law.

Reproductive Rights in the Territorial Era: The 1900s

In 1901 the [Arizona's territorial legislature](#) passed a new code of laws. These revised statutes were adopted by the territorial legislature. The Howell Code set of anti-abortion laws were apparently unchanged, but the legislature added new additional language that further restricted abortion.

The new 1901 laws still outlawed abortion (using the 1864 law) but went further, prohibiting "advertising, causing, or performing abortions or contraceptives anywhere in Arizona". See the [1901 Arizona Comstock Law](#) for details.

Originally called ARS 13-211, 13-212, and 13-213, those 1901 anti-abortion laws were later renumbered 13-3603, 13-3604, and 13-3605. Statute 13-211 made it illegal for anyone to provide an [abortion](#). Statute 13-212 made it illegal for any pregnant woman to solicit or receive any procedure that caused an [abortion](#). Statute 13-213 made it illegal to advertise [contraception](#) or [abortion](#) services.

The 1901 territorial law regarding reproductive rights were tailored to be in sync with the Federal [Comstock Act of 1873](#), which made the distribution of material on contraceptives and abortions through the US Postal Services illegal by calling them "obscene".

The 1960s & 1970s: Griswold v Connecticut & Roe v Wade

Contraception remained illegal in Arizona (because of the 1901 Comstock law) until [Griswold v. Connecticut](#) legalized [contraception](#) for married couples in 1965 (including in Arizona). Of course, abortion also remained illegal unless 'it is necessary to save her life'. Contraceptives for unmarried people remained illegal.

In 1972, the US Supreme Court decided the *Eisenstadt v. Baird* case, which legalized access to [contraception](#) for unmarried individuals (in all states including AZ). Abortion remained illegal in Arizona until 1973 when [Roe v. Wade](#) voided the 1864 and 1901 Arizona Comstock laws related to abortion.

Planned Parenthood had sued to be able to provide abortion services in 1972 in *Nelson v. Planned Parenthood Ctr. of Tucson, Inc.* 505 P.2d 580 (Ariz. Ct. App. 1973). Planned Parenthood won the case in Superior Court and the Arizona Superior Court wrote a declaratory judgment stating that the Arizona's 1901 [abortion](#) statutes were unconstitutional and issued an injunction preventing the state from enforcing the [abortion](#) statutes.

Nelson appealed to the Arizona Court of Appeals and on 3 January 1973, the Court of Appeals ruled that the 1901 Arizona [abortion](#) laws were constitutional, and abortion became illegal again. However, two weeks later (January 22, 1973) the US Supreme Court announced its decision in [Roe v. Wade](#).

Following the US Supreme Court decision, the Arizona Court of Appeals amended its decision in *Nelson v. Planned Parenthood Center of Tucson* and ruled that the Arizona [abortion](#) statutes were unconstitutional. An injunction was issued to stop implementation of the 1901 Comstock laws, and abortion finally became legal in Arizona.

2022: Back to the Future

Now that the U.S. Supreme Court removed constitutional protections for abortion rights the question becomes... what's the law of the land in Arizona?

The answer to that question hinged on whether [SB1164](#) (restricting abortions to the first 15 weeks gestation) is the law of the land or whether the territorial-era law [[ARS 13-3603](#)] takes precedence as well as whether ARS 13-3603 is found to be unconstitutional on grounds other than those covered in the *Dobbs* decision.

During the summer of 2022 Attorney General Brnovich moved to begin implementation of the abortion ban in ARS 13-3603 by filing a motion in Pima County Superior Court to remove the injunction from the [Nelson v. Planned Parenthood Center of Tucson](#) case.

On September 22, 2022 [Pima County Superior Court Judge Kellie Johnson ordered](#) the lifting of the injunction in the *Nelson v. PP* case. In her decision she dismissed the relevance of the new law limiting abortions to those at less than 15 weeks of gestation because the state legislature included in the session law that the 15-week gestation age limitation does not "... *repeal by implication or otherwise Section 13-3603 or any other applicable state law regulating or restricting abortion.*"

By lifting the injunction, Judge Johnson turned the clock back to January 1973 when abortions were illegal to perform "... *unless it is necessary to save her (the patient's) life.*"

Beginning on the afternoon of September 23, 2022, any clinician in Arizona who performs an abortion (whether medication or surgical) that is not necessary to save the life of the patient can be charged with and convicted of a violation of ARS 13-3603 and if found guilty, punished with between 2 and 5 years in the state penitentiary.

Planned Parenthood of Arizona is likely to appeal the lifting of the injunction on the 1973 ruling to the Arizona Supreme Court, where it stands little chance of being overturned. The Arizona Supreme Court was recently increased in size from 5 to 7 justices, giving Governor Douglas A. Ducey an opportunity to fill the court with his preferred appointees. Governor Ducey is a well-established foe of abortion services and presumably ensured that his appointees share his values in that regard.

Unless the election in November 2022 drastically changes the makeup of the Arizona State Legislature **and** the Democratic candidate for Governor (Katie Hobbs) is elected, abortion services will remain illegal to perform in Arizona through at least 2024 with no exceptions unless the clinician establishes that the procedure is necessary to save the life of the patient.

A voter initiative changing the Arizona Constitution to guarantee the right to abortion services will likely be initiated in 2024. If the effort can collect the more than 300,000 valid signatures needed to qualify for the ballot, and if the initiative survives the inevitable legal challenges to keep it off the ballot, Arizona voters will have an opportunity to again make abortion services legal beginning in late 2024.

In the meantime, look for the Arizona Department of Health Services to restrict abortion clinic licenses to only those abortions necessary to save the life of the patient. Most if not all licensed abortion clinics will likely completely close within the next few months.

At a practical level, Arizona women will be forced to seek abortion services in neighboring states like California, Nevada, New Mexico, or Colorado, all of which allow abortion services. Several resources exist to help women that are living in states with restrictive abortion laws such as [I need an abortion](#). However, many women who can't afford to or are unable to travel will be forced into motherhood in a state with little commitment to safety net services.



AZPHA
Arizona Public Health Association