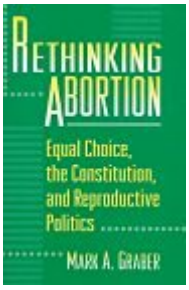
H-Net Reviews
in the Humanities & Social Sciences

Mark A. Graber. *Rethinking Abortion: Equal Choice, the Constitution and Reproductive Politics.* Princeton: Princeton University Press, 1996. x + 244 pp. $29.95 (cloth), ISBN 978-0-691-01142-4.



Reviewed by James C. Mohr (University of Oregon)
Published on H-Pol (October, 1997)

The History of Abortion and the Issue of Equal Access

Mark Graber is a political scientist at the University of Maryland, College Park, and among his degrees is a JD from Columbia Law School. His law school training shows through clearly in this very lawyer-like book. In essence, *Rethinking Abortion* is an extended brief in favor of taking an equity approach to the national debate over abortion policy. Underlying equity arguments is a longstanding American commitment to the proposition that no governmental authorities should be allowed to impose policies which cannot be fairly and impartially implemented, regardless of how desirable or undesirable those policies might seem to be in theory. Equity arguments play upon "the traditional American antipathy toward special privileges in any area of law" (p. ix) and assume that the Fourteenth Amendment riveted that antipathy into the Constitution. Consequently, despite the fact that substantial portions of this book are devoted to tactical exhortation and political speculation, *Rethinking Abortion* is of interest to H-net readers because Graber's position, like all equity jurisprudence, ultimately rests upon analyses of the impact of policies in actual practice–upon history–rather than upon fundamental constitutional principles (such as the right to privacy) or upon moral absolutes (such as the right to life).

At the heart of Graber's argument is his version of the concept of a "gray market." Graber describes a gray market as a quasi-legal arrangement whereby governmental authorities acquiesce (and sometimes even aid) in the distribution of goods or services that are, at least on paper, supposed to be uniformly forbidden to all citizens alike. Gray markets are unacceptable both because the state treats favored citizens one way (by allowing them access) and less well situated citizens another (by denying them access), and because the state invokes the law against the latter in capricious and often prejudiced ways. Graber acknowledges that black markets and open markets might produce similar results–a maldistribution of goods and services in favor of the rich and powerful–but the state would not be so actively and unacceptably complicit as it is in a gray market. Moreover, he argues that the realities of an open market tend to expand access to goods and services.

Graber applies these ideas to the history of anti-abortion law in practice prior to the United States Supreme Court's 1973 decision in *Roe v. Wade*. He sees that history as a paradigmatic example of a gray market in action. Wealthy and well-connected women enjoyed access to relatively safe medical abortions, primarily because local authorities routinely permitted medical professionals to perform hundreds of thousands of abortions without really challenging their "therapeutic" necessity. Poor and unsophisticated women, by contrast, especially women of color, had only limited access to far more dangerous procedures. That long-standing *de facto* double standard had become patently obvious by the 1960s, the decade from which Graber draws his most convincing data. "From 1960 to 1962," for example, "Women's Hospital of New York City performed one abortion for every 900 live births on the ward service, but the same doctors performed one abortion for every 20 live births on the private service. At Strong Memorial Hospital in Rochester, New York, the respective rates were 1:4,324

for the charity cases and 1:218 for the paying customers" (p. 53). Similarly, "from 1933 to 1966, the national abortion mortality rate for black women increased from two to six times that of white women" (p. 59). He also makes a powerful case for caprice and prejudice in the enforcement (and conscious lack of enforcement) of the nation's anti-abortion laws from jurisdiction to jurisdiction.

By striking down those unfairly enforced laws, the Supreme Court ended the nation's historic gray market in abortions. *Roe* did not significantly increase the numbers of abortions (as right-to-life forces feared); those rates rose only slightly. What the decision did do was allow poor women and women of color equal access to safe medical procedures, and that access probably accounted for the small increase in rates. Legalization also broadened awareness of reproductive rights for all women and lowered what had been an artificially high price for abortions (the gray market had made abortion the third most lucrative illegal enterprise in the United States by the 1960s, where only gambling and narcotics accounted for more money).

According to Graber, the actual history of abortion in the United States thus precludes the possibility of recriminalization. On the basis of what took place through 1973, and on the basis of subsequent American social behavior, Graber concludes flatly, "Future bans on abortion would reintroduce massive discrimination against poor women and women of color" (p. 40). Consequently, his "equal choice" approach to the subject becomes a practical method of maintaining relatively open abortion services in the United States, on the grounds that no laws against the procedure ever have been or ever realistically could be enforced in acceptable ways.

This is not a timid book. Graber takes on the principal theorists of the contemporary abortion debate one by one, from Robert Bork to Catharine MacKinnon, naming names and offering rebuttals. None of them, in his view, knows much history (or if they do, they do not appreciate its implications). But he is not naive about the power of rhetoric, the weight of majorities, or the possibility of courts packed with one-issue judges. The very elites who benefitted from the old gray market must now, in his view, make certain that abortion remains an essentially depoliticized and legalistic issue (since the elites that dominate the courts are most likely to sustain relatively open access to abortion) lest the gray market reemerge. In that last context, Graber admits, "To some extent, this book is a flagrant attempt to shame affluent Americans into supporting legal abortion" (p. 147).

Though Graber's history is sound, not everyone will subscribe to the arguments he builds upon it. Certainly the so-called right-to-life forces will not: they will argue that the gray market should have been ended by arresting officials who did not enforce the law (as federal authorities tried to do in the South during Reconstruction) rather than by striking the laws. Many who favor reproductive rights will be unhappy as well with Graber's willingness to settle for the practical part loaf of open market access. He is not, for example, particularly troubled by the hemming-in actions of recent years (parental consent, waiting periods, and so forth), since they have not made much statistical difference in the actual rates of abortion and they have not introduced measurable discriminations by class or race. And Graber regards efforts to get the government to guarantee and fund abortions as irresponsibly dangerous.

Finally, there is a difference between sound history used in defense of a particular legal argument (which Graber does well) and fully contextualized history. One of the ironies that Graber does not discuss, for example, is the fact that the Supreme Court did not decide *Roe* on absolute moral or constitutional principles. It decided *Roe* in a longstanding context of medical policy: since the nineteenth century, abortion regulations in the United States had revolved around the practical and professional question of who should be allowed to do what to whom in the name of health. And some of the most capricious enforcement of antiabortion law during the era of the gray market had less to do with denying reproductive rights to women (of any class or color) than it did with efforts to curtail midwives and unlicensed doctors. It was no accident that Mr. Justice Blackmun, who wrote the *Roe*decision, had risen to prominence as counsel to the Mayo Clinic. In short, a number of different "histories" have figured into the formation of American abortion policy in the last quarter of the twentieth century, and they will all have to be taken into consideration as the debate continues. Still, Graber has crafted a first-rate case for the implications of one of those histories and he has offered it to the court of public opinion. As historians, we should be pleased that he has taken history seriously, and *Rethinking Abortion* deserves serious consideration.

Citation: James C. Mohr. Review of Graber, Mark A., *Rethinking Abortion: Equal Choice, the Constitution and Reproductive Politics*. H-Pol, H-Net Reviews. October, 1997.

URL: http://www.h-net.org/reviews/showrev.php?id=1387