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Misappropriating Women's History in the Law and Politics of Abortion

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ARTICLES

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*Tracy A. Thomas**

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I. INTRODUCTION

Over the past twenty years, prolife advocates have sought to control the political narrative of abortion by misappropriating women's history. Conservatives, led by the group Feminists for Life (FFL), have used historical feminist icons to support their antiabortion advocacy. Federal antiabortion legislation has been named after feminist heroines.¹ Amicus briefs to the U.S. Supreme Court quote women's rights leaders in support of abortion regulation.² And political forums for college students popularize the notion that feminists historically opposed abortion.³ Prolife groups claim that "[w]ithout known exception, the early American feminists condemned abortion in the strongest possible terms."⁴ This political narrative, however, misconstrues the historical evidence. It invents rather than describes history, blatantly ignoring the text, context, and spirit of the work of the women it appropriates. Such misuse of history diminishes, rather than enhances, the credibility of this antiabortion advocacy.

The appeal to historical figures in the abortion debate is powerful because it utilizes the gravitas of feminist heroines to challenge the existing legal and political assumption that abortion is a cornerstone of sex equality. The use of feminist leaders suggests that women themselves,

1. Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act of 2011, H.R. 3541, 112th Cong. (2011); Elizabeth Cady Stanton Pregnant and Parenting Students Services Act of 2005, S. 1966, H.R. 4265, 109th Cong. (2005).

2. Brief for Feminists for Life as Amici Curiae Supporting Petitioners, *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263 (1993) [hereinafter FFL *Bray* Brief]; Brief of Feminists for Life as Amici Curiae Supporting Respondents, *Planned Parenthood v. Casey*, 505 U.S. 833 (1992) [hereinafter FFL *Casey* Brief]; Brief for the American Academy of Medical Ethics as Amicus Curiae Supporting Respondents, *Casey*, 505 U.S. 833 (supporting the constitutionality of informed consent laws and arguing rhetorically—"why were nineteenth-century feminists, even the most militant, adamantly opposed to the legality of abortion?"); Brief for Feminists for Life as Amici Curiae Supporting Appellants, *Webster v. Reprod. Health Servs.*, 492 U.S. 490 (1989) [hereinafter FFL *Webster* Brief]; Brief of Feminists for Life as Amici Curiae Supporting Petitioner, *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416 (1983) [hereinafter FFL *Akron* Brief].

3. See Mary Meehan, *Feminists for Life on Campus*, 34 HUM. LIFE REV. 64, 68 (2008); Laury Oaks, *What Are Pro-Life Feminists Doing on Campus?*, 21 NAT'L WOMEN STUD. ASS'N J. 178, 183 (2009); Serrin M. Foster, Op-Ed., *Pregnant Student Services Act*, WASH. TIMES, Nov. 20, 2005.

4. Serrin M. Foster, *The Feminist Case Against Abortion*, AM. FEM. Fall 2002, at 19, available at <http://www.feministsforlife.org/taf/2002/Fall2002/Fall2002.pdf>, reprinting Serrin M. Foster, *The Feminist Case Against Abortion*, COMMONWEALTH, Sept. 13, 1999, and reprinted in THE COST OF "CHOICE": WOMEN EVALUATE THE IMPACT OF ABORTION 33 (Erika Bachiochi ed., 2004), and in GREAT SPEECHES IN HISTORY: WOMEN'S RIGHTS (Jennifer A. Hurley ed., 2001); see also JOSEPH W. DELLAPENNA, DISPELLING THE MYTHS OF ABORTION HISTORY 392 (2006) (claiming that "the leading feminists of the nineteenth century were virtually unanimous in supporting the prohibition of abortion as a crime because of a professed concern to protect prenatal human life").

even radical feminist women like Elizabeth Cady Stanton and Susan B. Anthony,⁵ have traditionally opposed abortion.⁶ If these feminist leaders indeed opposed abortion, the historical story would seem to bolster the claim that abortion is not in the best interests of women.⁷

The need to create a history of antiabortion feminists seems important today because abortion has come to be equated with women's rights. Since the second wave of the women's liberation movement in the late 1960s, feminists have identified abortion as a foundational right for women upon which all other economic and educational rights rest.⁸ The appeal to feminist history by prolife advocates offers a counter-narrative in which women dedicated to improving the economic and educational rights of women reject abortion as a gender-based right. This story of women leaders opposing abortion is thus aimed at undermining the prevailing feminist and legal view that a woman's right to bodily autonomy and reproductive choice is a privacy right of constitutional dimension going to the heart of gender equality.

The lack of popular knowledge about the lives and work of women's rights leaders facilitates the co-opting of the historical feminist narrative by antiabortion activists. Most people, politicians, and policymakers lack a familiarity with these women's lives or their work, much less the details of their philosophies and speeches. It is therefore easy to make the claim that a feminist leader had a particular belief because few are

5. These relatively well-known women, along with Lucretia Mott, are memorialized in an unfinished statue (once relegated to the basement) in the Rotunda of the Capitol, and dubbed "Three Women in a Tub" for the bathtub-like blob of uncut stone at its base. *Portrait Monument: Suffrage Pioneers*, ARCHITECT OF THE CAPITOL, <http://www.aoc.gov/cc/art/rotunda/suffrage.cfm> (last visited Mar. 29, 2012). Antiabortion advocates also cite to Mary Wollstonecraft, Victoria Woodhull, and Alice Paul. See DELLAPENNA, *supra* note 4, at 375, 381; PROLIFE FEMINISM: YESTERDAY AND TODAY (Mary Krane Derr et al. eds., 2d ed. 2005).

6. The term "feminist" was first coined around 1898 in France, but it did not enter common parlance in the United States until 1913. This Article uses the term retroactively, though others debate the ahistorical use of the term. See Karen Offen, *Defining Feminism: A Comparative Historical Approach*, 14 SIGNS: J. WOMEN CULTURE & SOC'Y 119–57 (1988); see also Nancy F. Cott, *Comment on Karen Offen's "Defining Feminism: A Comparative Historical Approach,"* 15 SIGNS: J. WOMEN CULTURE & SOC'Y 1, 203 (1989).

7. See Linda C. McClain, *Equality, Oppression, and Abortion: Women Who Oppose Abortion Rights in the Name of Feminism*, in FEMINIST NIGHTMARES: WOMEN AT ODDS: FEMINISM AND THE PROBLEM OF SISTERHOOD 159, 165 (Susan Ostrov Weisser & Jennifer Fleischner eds., 1994).

8. See Betty Friedan, *Abortion: A Woman's Civil Right* (Feb. 1969), reprinted in BEFORE ROE V. WADE: VOICES THAT SHAPED THE ABORTION DEBATE BEFORE THE SUPREME COURT'S RULING 38–40 (Linda Greenhouse & Reva Siegel eds., 2010); see also *Planned Parenthood v. Casey*, 505 U.S. 833, 856 (1992) ("The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives."); Sylvia Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955, 1028 (1994).

able to challenge it.⁹ Despite the ease and utility of creating a feminist history against abortion, the narrative is simply not true. Sound bites that have been excised from history are taken out of context to convey a meaning not originally intended.¹⁰

To examine the veracity of the political and legal claims of a feminist history against abortion, this Article focuses on one of the leading icons used in antiabortion advocacy—Elizabeth Cady Stanton.¹¹ Stanton has, quite literally, been the poster child for FFL’s historical campaign against abortion, appearing on posters, flyers, and commemorative coffee mugs.¹² Advocates claim that Stanton is a particularly fitting spokesperson because she was a “feisty gal who had seven children and was outspokenly pro-life.”¹³ They claim that she “condemned abortion in the strongest possible terms”¹⁴ and was “a revolutionary who consistently advocated for the rights of women, for women’s education, for the celebration and acceptance of motherhood—and for the protection of children, born and unborn.”¹⁵ FFL represented to the Supreme Court that “Elizabeth Cady Stanton clearly argued that the liberation of women was

9. Scholars tried to set the historical record straight on Susan B. Anthony as she became a figurehead of antiabortion activists, but they have been ignored. Ann Gordon & Lynn Sherr, *Sarah Palin is No Susan B. Anthony*, WASH. POST (May 21, 2010), http://onfaith.washingtonpost.com/onfaith/guestvoices/2010/05/sarah_palin_is_no_susan_b_anthony.html; Stacy Schiff, *Desperately Seeking Susan*, Op-Ed., N.Y. TIMES (Oct. 13, 2006), <http://www.nytimes.com/2006/10/13/opinion/13schiff.html?pagewanted=all>; Christine Stansell, *Meet the Anti-Abortion Group Pushing Presidential Politics to the Extreme Right*, NEW REPUBLIC (July 11, 2011), <http://www.tnr.com/article/politics/91669/abortion-pledge-susan-b-anthony-republicans-romney>. For more on the Anthony controversy, see discussion *infra* text accompanying notes 84–96.

10. See Schiff, *supra* note 9 (exposing antiabortion activists’ misappropriation of Susan B. Anthony, decrying “the treacherous province of cutting and pasting, of history plucked from both text and time,” and describing how with “Photoshopping,” and “slicing and dicing, an argument can be made for anything”).

11. Suzanne Schnittman, *Elizabeth Cady Stanton: Feminist, Wife and Mother of Seven*, AM. FEM. Fall 2003–Winter 2004, at 24, available at <http://www.feministsforlife.org/taf/2003/winter/RewardingMotherhood.pdf>.

12. Stanton is shown in maternal fashion, in a bonnet, smiling down at her sixth child, two-year old Harriot, who is cuddled in her lap. The mug reads, “Another humorless old biddy for life,” and includes a quote supposedly from Stanton about the “degrading disposal of children as property,” which FFL later admitted could not be verified or attributed to Stanton. For further discussion of the questionable existence and meaning of this quote, see *infra* Part.IV.C.

13. Meehan, *supra* note 3; Foster, *supra* note 4; Marisa McQuilken, *Not Your Mom’s Feminists*, LEGAL TIMES, June 19, 2006. Stanton’s maternal image counters the negative image of a “feminist” as antifamily and antichildren, and distinguishes her from other single feminists like Anthony, Alice Paul, and, in modern times, Gloria Steinem.

14. Foster, *supra* note 4.

15. Foster, *supra* note 3; see also *Why is This Bill Named After Elizabeth Cady Stanton?*, FEMINISTS FOR LIFE, <http://www.feministsforlife.org/ECS/FINAL-ECS150dpi.pdf> (last visited Aug. 20, 2012) (“The mother of the women’s movement celebrated her maternity and challenged the culture to accept and support mothering.”).

needed to stop the killing of children before and after birth” and that she expressed “an uncompromising view that abortion is ‘child-murder.’”¹⁶

Stanton is an important figure in feminist history who was the “most prominent and brilliant theorist” of the nineteenth-century women’s rights movement.¹⁷ She is credited with initiating the radical demand for women’s suffrage at the First Woman’s Rights Convention in 1848 at Seneca Falls, New York.¹⁸ Beyond the vote, Stanton demanded equality for women within the family, advocating for equal marital partnerships, no-fault divorce (especially for victims of domestic violence), marital rights to property, and maternal custody of children.¹⁹ She appeals to the prolife movement as a heroine because she was the married mother of seven children who trumpeted her caregiving skills and maternal power.

What is less known, and likely less appealing to the right-to-life movement, is that Stanton also attacked the church and accepted religious doctrines of women’s subordination. She retranslated the Bible from Greek with a feminist lens in an attempt to destroy the entrenched gender norms grounded in religion.²⁰ “While her fellow radical Susan B. Anthony ultimately focused on women’s suffrage as the way to equality, Stanton was concerned with changing cultural infrastructures such as religion; family and child-rearing; and American customs, ethics, and

16. See FFL *Bray* Brief, *supra* note 2; FFL *Webster* Brief, *supra* note 2.

17. Jill Elaine Hasday, *Contest and Consent: A Legal History of Marital Rape*, 88 CAL. L. REV. 1373, 1417 (2000). See generally SUE DAVIS, *THE POLITICAL THOUGHT OF ELIZABETH CADY STANTON: WOMEN’S RIGHTS AND THE AMERICAN POLITICAL TRADITIONS* (2010); ELLEN CAROL DUBOIS, *FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN’S MOVEMENT IN AMERICA, 1848–1869* (1999); ELIZABETH CADY STANTON, *FEMINIST AS THINKER: A READER IN DOCUMENTS AND ESSAYS* (Ellen Carol DuBois & Richard Cándida Smith eds., 2007); LORI D. GINZBERG, *ELIZABETH CADY STANTON: AN AMERICAN LIFE* (2009); ELISABETH GRIFFITH, *IN HER OWN RIGHT: THE LIFE OF ELIZABETH CADY STANTON* (1985).

18. The *Declaration of Sentiments* detailed a list of “repeated injuries and usurpations on the part of man to women,” including the denial of the elective franchise, coverture, denial of marital property, the husband’s prerogative of domestic chastisement, the denial of custody of children upon separation, taxation without representation, monopolization of all the profitable employments (specifically theology, medicine, and law), lack of equal opportunity to college education, and denying authority and teaching in the Church, and the establishment of separate spheres. THE FIRST CONVENTION EVER CALLED TO DISCUSS THE CIVIL AND POLITICAL RIGHTS OF WOMEN 2–4 (1848). Stanton concluded, “He has endeavored, in every way that he could, to destroy her confidence in her own powers, to lessen her self-respect, and to make her willing to lead a dependent and abject life.” *Id.* at 4.

19. See TRACY A. THOMAS, *ELIZABETH CADY STANTON AND THE FEMINIST FOUNDATIONS OF FAMILY LAW* (forthcoming N.Y.U. Press); Tracy A. Thomas, *Elizabeth Cady Stanton on the Federal Marriage Amendment: A Letter to the President*, 22 CONST. COMMENT. 137, 138, 140 (2005).

20. See generally KATHI KERN, *MRS. STANTON’S BIBLE* (2001). Stanton’s *The Woman’s Bible* (1898) is considered the first feminist translation of the Bible. *Id.* at 6. She led a committee of women trained in Greek to offer alternative interpretations and commentary on key stories, like the curse of Eve and the Pauline doctrines that had been used to subordinate women. *Id.*

social norms.”²¹ Stanton articulated liberal feminist ideas seeking equal treatment and opportunity for women, while also radically demanding an end to patriarchy and women’s lack of power in society.²²

To refute the “feminist case against abortion” as attributed to Stanton, this Article proceeds in five parts. Like other works of legal history, this Article is fundamentally concerned with recovering all of the legally relevant facts and placing those facts in appropriate historical and legal context. Part II first details the parameters of the political narrative of antiabortion feminists, focusing on the group Feminists for Life, which orchestrated this historical strategy. Part III then situates Stanton’s remarks and views within the appropriate historical context by tracing the development of the nineteenth-century campaign to criminalize abortion. The male propaganda of a physicians’ campaign bolstered by sensationalist journalism attacked the common law acceptability of abortion before quickening and employed antifeminist rhetoric about the proper place of women in society.²³ While a few female voices joined the debate to defend women against moral attacks and place the blame for unwanted pregnancies instead on men, the larger women’s rights movement focused on issues of equality and increasingly on the singular issue of suffrage.²⁴

The Article then offers a detailed account of Stanton’s views related to abortion discerned from original historical research into the archives of Stanton’s papers.²⁵ Stanton did not talk about abortion per se. She did not respond to the media deluge about the immorality of abortion or the demand for its criminalization. Instead, Stanton engaged on the periphery of the debate, trumpeting “voluntary motherhood” and women’s right to control procreation, and defending women convicted of infanticide for

21. Denise M. Marshall, *Introduction* to ELIZABETH CADY STANTON, EIGHTY YEARS AND MORE: REMINISCENCES, 1815–1897, vii (Humanity Books 2002) (1898).

22. THOMAS, *supra* note 19.

23. *See infra* Part III.A.

24. *See infra* Part III.B. *See generally* LINDA GORDON, THE MORAL PROPERTY OF WOMEN: A HISTORY OF BIRTH CONTROL POLITICS IN AMERICA (2007); Linda Gordon, *Voluntary Motherhood: The Beginnings of Feminist Birth Control Ideas in the United States*, in MOTHERS & MOTHERHOOD: READINGS IN AMERICAN HISTORY 423 (Rima D. Apple & Janet Golden eds., 1997) [hereinafter Gordon, *Voluntary Motherhood*]; Linda Gordon, *Why Nineteenth-Century Feminists Did Not Support “Birth Control” and Twentieth-Century Feminists Do: Feminism, Reproduction, and the Family*, in RETHINKING THE FAMILY: SOME FEMINIST QUESTIONS 40–41 (Barrie Thorne & Marilyn Yalom eds., 1982) [hereinafter Gordon, *Nineteenth-Century Feminists*]; Reva B. Siegel, *Reasoning from the Body: An Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 STAN. L. REV. 261, 282 (1992).

25. *See* THE PAPERS OF ELIZABETH CADY STANTON AND SUSAN B. ANTHONY (Patricia G. Holland & Ann D. Gordon eds., Microfilm ed. 1991).

the murder of their infants after birth.²⁶ Part IV explores Stanton's endorsement of the voluntary motherhood ideology and her argument that a woman should be the "sovereign of her own person" with the right to unilateral choice and control of childbearing. She expanded this idea into the notion of "enlightened motherhood," convincing women of their obligation to have intentional and healthy pregnancies to avoid physical and mental impairments in their children. This enlightened motherhood theory directly challenged the propaganda of the nineteenth-century abortion campaign telling women (white, Protestant women) that it was their duty to bear multiple children to preserve the human race.

Part V then details how Stanton reframed the discourse around abortion to turn the public's attention to her priority of exposing women's subordination in law and society.²⁷ She defended women pushed to the extreme crime of infanticide, taking up the public defense of one young immigrant girl, Hester Vaughn, sentenced to die for the murder of her infant. Stanton used the topic of infanticide to expose the gender bias of the jury and legal system that excluded women's participation. She demanded a woman's right to a "jury of her peers" that could appreciate the mitigating circumstances of infanticide rather than condemn a woman to death. Part VI then challenges the remaining historical evidence from Stanton's women's rights newspaper, the *Revolution*, used by pro-life advocates to allege Stanton's antiabortion position.²⁸ It argues that these anonymous writings are likely attributed to someone other than Stanton and that, in any case, they advocated for solutions other than the criminalization of abortion.

The Article concludes by examining the claim that Stanton and modern pro-life advocates share common ground on abortion. While such claims of common ground are prevalent in contemporary political dialogue, they obscure the reality that Stanton never embraced the solution that pro-life advocates seek—the regulation of abortion. To the contrary, Stanton demanded a woman's right as "sovereign of her own person" and the right to control and determine motherhood for herself. She sought to obtain a woman's individual right to procreation, uncontrolled by men or an oppressive legal system.²⁹ Given Stanton's philosophies,

26. See *infra* Parts IV, V.

27. See *infra* Part V.

28. See *infra* Part VI.

29. GORDON, *supra* note 24, at 65 (noting that Stanton "sympathized with women who had abortions and used the abortion problem as an example of women being victimized by the laws made without their consent").

she seems to be an inappropriate figurehead for a modern antiabortion movement committed to opposite ends.

II. FEMINISTS FOR LIFE: OXYMORON OR HISTORICAL TRUTH?

The prolife movement has woven a convincing story about the alleged historical opposition of women's rights leaders to abortion. This strategy of creating a narrative of feminist history against abortion seems to have originated in the early 1990s with the antiabortion lobbying group, Feminists for Life (FFL). And the conservative political movement quickly embraced it.³⁰ For example, Sarah Palin, former Republican vice-presidential candidate, claimed that "[t]he founders of the American women's movement did not think abortion was good for women. Quite the contrary, they saw the rights of the unborn as fundamentally linked to the rights of women."³¹

Legislators also used the narrative to bolster political and popular support for antiabortion legislation. While speaking in support of the federal Partial Birth Abortion Act banning late-term abortions, Representative Mike Pence (R-Ind.) said that "[l]ike Susan B. Anthony, her friend, who also appears on that extraordinary monument in the Rotunda, Elizabeth Cady Stanton was pro-life, and unapologetically so."³² Representative Trent Franks sponsored the "Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act" in 2011 purporting to prohibit abortions as a remedy for sex and race discrimination.³³ Scholars too re-

30. See PRO-LIFE FEMINISM: DIFFERENT VOICES (Gail Grenier-Sweet ed., 1985); MAN'S INHUMANITY TO WOMAN MAKES COUNTLESS INFANTS DIE: THE EARLY FEMINIST CASE AGAINST ABORTION (Mary Krane Derr ed., 1991) [hereinafter MAN'S INHUMANITY].

31. SARAH PALIN, AMERICA BY HEART: REFLECTIONS ON FAMILY, FAITH, AND FLAG 171 (2010); see Gordon & Sherr, *supra* note 9 (discussing Palin's address to the Susan B. Anthony List, in which she claimed that her opposition to abortion was rooted in our "feminist foremothers"); *On the Record with Greta Van Susteren* (Fox News television broadcast Nov. 10, 2008) (interviewing Palin, who stated that she "subscribed to Feminists for Life" and that the organization represented her beliefs).

32. 32 CONG. REC. H9802 (daily ed. Oct. 21, 2003).

33. H.R. 3541, 112th Cong. (1st Sess. 2011). Opponents of the bill were outraged at the bill's exploitation of civil rights to "advance an anti-choice agenda." Nancy Keenan, NARAL President, *Susan B. Anthony and Frederick Douglass Prenatal Nondiscrimination Act of 2011 (H.R.3541)*, *An Attack on the Reproductive Rights of Women of Color (2011)*, NARAL PRO-CHOICE AM. (Dec. 6, 2011), <http://www.prochoiceamerica.org/assets/download-files/hr3541-testimony.pdf>. The proposed legislation asserted that many abortions in the United States are engaged in for "sex-selective purposes" because parents do not desire female children, and that the law thus prohibits "gender violence." H.R. 3541, *supra*, § 2(A)(1), B(1). It also claimed that many other abortions are race-based because abortion is prevalent in the black community, and thus claimed to end race discrimination through restrictions on abortion, increasing members of the minority community. *Id.* The Anthony-Douglass legislation was intended to "protect African-American women from themselves—by making it harder for them to have abortions." *Id.* The bill created civil remedies available to the father or

peated the stories of antiabortion feminist leaders, often without critical examination.³⁴

This popular political narrative often centers on Elizabeth Cady Stanton. In 2005, Senator Elizabeth Dole introduced federal legislation to provide federal funds to enable young women to continue pregnancies and named it “The Elizabeth Cady Stanton Pregnant and Parenting Student Services Act.”³⁵ The Stanton Act became law as part of the 2010 health-care reform bill and provides federal funds for schools to offer pregnancy support services like housing, health care, baby formula, and counseling.³⁶ The law incorporates a narrative now familiar to popular and political audiences in which heroines of the women’s rights movement are “outspokenly” against abortion.³⁷

A. The Antiabortion Feminists

Feminists for Life invented the historical women strategy to advance its political lobbying efforts against abortion. The group’s slogans of “Question Abortion,” and “Refuse to Choose. Women Deserve Better than Abortion,” highlight its mission of opposing abortion and providing alternatives for women to continue unplanned pregnancies.³⁸ FFL believes that abortion is a reflection that society has failed to meet the needs of women and that eliminating legal abortion is the solution to forcing society to address the discriminatory economic and educational

maternal grandparent against the woman who engages in the abortion. 18 U.S.C. § 250. The Governor of Arizona signed a state law to the same effect in April 2011. ARIZ. REV. STAT. §§ 13-3603.02, 36-2156 (2011). Franks, who is white, drew on the name of Frederick Douglass, arguing that the high abortion rate of black women was “the one glaring exception” in the march toward equality beginning with the Civil War. Dana Milbank, *Republicans Color the Abortion Debate*, WASH. POST, (Dec. 6, 2011), http://www.washingtonpost.com/opinions/republicans-color-the-abortion-debate/2011/12/06/gIQAAbNvpaO_story.html. Black Congressman John Conyers (D-Mich.) responded: “I’ve studied Frederick Douglass more than you. I’ve never heard or read him say anything about prenatal nondiscrimination.” *Id.* The bill failed to pass the House. Jennifer Steinhauer, *House Rejects Bill to Ban Sex-Selective Abortions*, N.Y. TIMES, June 1, 2012, at A20.

34. See Teresa Stanton Collett, *Teresa Stanton Collet (dissenting)*, in WHAT ROE V. WADE SHOULD HAVE SAID: THE NATION’S TOP LEGAL EXPERTS REWRITE AMERICA’S MOST CONTROVERSIAL DECISION 187 (Jack M. Balkin ed., 2007); see also DELLAPENNA, *supra* note 4, at 375; JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY 111 (1978); JOHN THOMAS NOONAN, A PRIVATE CHOICE: ABORTION IN AMERICA IN THE SEVENTIES 48 (1979); John Keown, *Back to the Future of Abortion Law: Roe’s Rejection of America’s History and Traditions*, 22 ISSUES L. & MED. 3, 184–85 (2007).

35. S. 1966, 109th Cong. (2005); H.R. 4265, 109th Cong. (2005).

36. Patient Protection and Affordable Health Care Act, Pub. L. No. 111–148, §§ 10211–10214, 124 Stat. 119 (2010).

37. See sources cited *supra* note 13.

38. See Oaks, *supra* note 3, at 178; Serrin M. Foster, *Women Deserve Better than Abortion*, FEMINISTS FOR LIFE (2003), <http://www.feministsforlife.org/news/WDBSMF150.pdf>.

constraints that force women into abortion.³⁹ Criminalizing abortion is the “lever for forcing society to eliminate all the constraints on pregnant women.”⁴⁰ FFL believes that abortion is never in a woman’s best interest and thus opposes abortion even in cases of rape, incest, birth defects, or risk to the life or health of the mother.⁴¹

FFL identifies itself as “feminist” because of its concern with women’s needs.⁴² Members employ feminist methodology of “listening to women’s voices and taking their experiences seriously.”⁴³ The group’s sense of an authentic feminism stems from and reflects traditional gender roles in which women’s political, social, and economic productivity is based on the bonds with their children and the traits that make them good mothers.⁴⁴ They adopt a cultural feminist ideology that women’s different nature and strength in motherhood have been devalued instead of celebrated and embraced.⁴⁵ The group thus promotes women’s nurturing role. “Its members reject a feminism which is materialistic and narcissistic and embrace a loving, nurturing posture of non-violence in relating to all members of the human family—including the unborn.”⁴⁶

39. FFL argues that “legal abortion is a cop-out, a ‘quick fix,’ and acquiescence to a sexist society.” McClain, *supra* note 7, at 168.

40. *Id.* at 174.

41. Oaks, *supra* note 3, at 182.

42. Mary Ziegler, *Women’s Rights on the Right: The History and Stakes of Modern Pro-Life Feminism*, 27 BERKELEY J. GENDER L. & JUST. *6 (forthcoming 2012) (on file with author). “Pro-life feminism helps to paint abortion opponents as pro-woman and as amenable to the needs of the women who pursue higher education or professional careers.” *Id.*

43. Foster, *supra* note 3. Not all agree that FFL’s interest is “feminist.” See McClain, *supra* note 7, at 170, 176. While there is significant disagreement as to what “feminism” is or should be, it is generally defined as “a concern for women combined with an opposition to their subordinate status in society.” Tracy A. Thomas & Tracey Jean Boisseau, *Law, History, and Feminism*, in FEMINIST LEGAL HISTORY 18 (Tracy A. Thomas & Tracey Jean Boisseau eds., 2011). Feminists understand sex discrimination and inequality as issues of power and seek to rectify denials of power, equality, and autonomy in law and society. *Id.*

44. Ziegler, *supra* note 42, at *5.

45. McClain, *supra* note 7, at 161, 170. Cultural feminism “elevates the identifiable gender differences of relation and maternity to a level of celebration” and focuses on how “women’s different voice—with its concern for human relationships and for the positive values of caring, nurturing, empathy, and connection—could find greater expression in the law.” Thomas & Boisseau, *supra* note 43, at 20; MARTHA CHAMALLAS, INTRODUCTION TO FEMINIST LEGAL THEORY 27 (2d ed. 2003). It bases its belief of women’s relational nature on Carol Gilligan’s *In a Different Voice* (1982), which described the results of her psychological research showing that girls’ relational approach to resolving moral dilemmas through an ethic of care was undervalued. Thomas & Boisseau, *supra* note 43, at 20.

46. FFL *Akron* Brief, *supra* note 2. FFL argues not only that “legal abortion is against the best interests of women and a reflection of women’s inequality, but also that it is a violent and unacceptable killing of vulnerable, helpless human life, a violence incompatible with feminist principles.” McClain, *supra* note 7, at 160.

FFL was founded in 1972 in Ohio by Catherine Callaghan, a long-time professor of linguistics at Ohio State University, and Pat Goltz, a homemaker to seven children.⁴⁷ The women met in a judo club and found that they shared the belief that support for abortion was not inherent in basic principles of feminism.⁴⁸ Both were active in the Columbus, Ohio, chapter of the National Organization of Women (NOW), but Goltz was expelled by the local chapter because of her outspoken opposition to abortion.⁴⁹ At that time, NOW was the leading women's rights political organization nationally and focused its efforts on abortion and the identification of a woman's right to bodily autonomy as the primary women's issue.⁵⁰ Disagreeing with this focus on abortion rights, other women's organizations, including FFL, spun off from NOW.⁵¹

In its early years, FFL was active in the campaign supporting the Equal Rights Amendment (ERA). It worked hard to negate the claim that the ERA was pro-abortion.⁵² Testifying before Congress in 1974, Goltz argued the ERA would not expand access to abortion because abortion did not promote sex equality in any way.⁵³ She argued that abortion was inconsistent with feminist ideology. Abortion, she said, was a concession that women did not demand "the right to be treated as equals and to be mothers at the same time."⁵⁴

FFL remained a small discussion group, marginalized by the national right-to-life movement led by the religious, antifeminist moral majority, until the group's revival as a political advocacy group in the early

47. Cindy Osborne, *Pat Goltz, Catherine Callaghan, and the Founding of Feminists for Life*, in *PROLIFE FEMINISM: YESTERDAY AND TODAY*, *supra* note 5, at 219–27.

48. *Id.*; U.S. WOMEN'S INTEREST GROUPS: INSTITUTIONAL PROFILES, 196 (Sarah Slavin ed., 1995).

49. Osborne, *supra* note 47, at 220–21; Meehan, *supra* note 3, at 65–68.

50. See Friedan, *supra* note 8, at 38–40.

51. For example, the Women's Equity Action League (WEAL) was founded in 1969 because of opposition to abortion and prioritization of education as a key women's issue. The Women's Law Fund spun off from WEAL in 1972 as a litigation organization dedicated to pursuing issues of women's educational and employment equality in the courts, and its first big case, *LaFleur v. Cleveland Board of Education*, successfully overturned mandatory maternity leave for school teachers. Tracy A. Thomas, *The Struggle for Gender Equality in the Northern District of Ohio*, in *JUSTICE AND LEGAL CHANGE ON THE SHORES OF LAKE ERIE: A HISTORY OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO 165* (Paul Finkelman & Roberta Alexander eds., 2012).

52. Pat Goltz, *Equal Rights* (1973), reprinted in *PROLIFE FEMINISM: YESTERDAY AND TODAY*, *supra* note 5, at 224.

53. *Abortion III: Testimony on S. 119 and S. 130 Before the S. Judiciary Subcomm. on Constitutional Amendments*, 93d Cong. 108 (1974) (statement of Pat Goltz).

54. *Id.*

1990s.⁵⁵ This was a time of revival for the prolife movement with the election of a prochoice President, Bill Clinton, and a majority prochoice Congress.⁵⁶ By then, FFL had relocated to Washington, D.C., updated its image, and become more politically active.⁵⁷ To expand the group's base, the organization "began publicizing a different set of claims, those involving the history of pro-life feminism."⁵⁸ Rachel MacNair, then-FFL president, explained, "The early feminists made clear that they regarded abortion as one of the greatest wrongs against women."⁵⁹

Today, the main agenda of FFL is to "refocus the nation on the reasons women feel pressured into abortion and to promote women-centered solutions."⁶⁰ These reasons include a lack of financial resources, a lack of emotional support, coercion by male partners, and inadequate child support enforcement.⁶¹ The group advocates for pregnancy resource centers, "right to know" legislation requiring full disclosure of abortion procedures and complications, regulation of abortion clinics, and other programs that give women "the rest of the choices."⁶²

The organization gained heightened visibility from a glossy website and an aggressive advertising campaign to proactively support antiabortion causes and candidates. In 2005, the group drew attention and controversy during the confirmation hearings for Supreme Court Chief Justice John Roberts because his wife, Jane Sullivan, served as pro bono counsel to FFL and sat on its board for many years.⁶³ Hollywood, too, has given notoriety to the FFL. The group's national spokesperson and honorary chair is Patricia Heaton, two-time Emmy award-winning ac-

55. Ziegler, *supra* note 42, at *9; Mary Ziegler, *The Possibility of Compromise: Antiabortion Moderates after Roe v. Wade, 1973–80*, 87 CHI.-KENT. L. REV. 571 (2012).

56. Ziegler, *supra* note 42, at *5, *9 (stating that in 1989 FFL had only 2,000 members and a budget of \$10,000); *see also* Pamela Reynolds, *A Different Voice in the Abortion Debate*, BOSTON GLOBE, Aug. 11, 1989, at 4.

57. The group supported passage of the Violence Against Women Act, the Family Medical Leave Act, and child support enforcement laws. Osborne, *supra* note 47, at 222; Rosemary Oelrich Bottcher, *The Conception and Life of FFL*, AM. FEM., 2002, at 3.

58. Mary Kane Derr, the president of the Chicago chapter of the FFL, "edited a controversial anthology of writings by first-wave feminists" on the subject of abortion. Ziegler, *supra* note 42; *see* MAN'S INHUMANITY, *supra* note 30.

59. *See* Ziegler, *supra* note 42.

60. Foster, *supra* note 38.

61. Foster, *supra* note 4.

62. *Id.*; McClain, *supra* note 7, at 167; *see* FFL Bray Brief, *supra* note 2; FFL Casey Brief, *supra* note 2; FFL Webster Brief, *supra* note 2; FFL Akron Brief, *supra* note 2. For more on the informed consent litigation in the Akron case, *see* Tracy A. Thomas, *Back to the Future of Abortion Regulation in the First Term*, 16 IOWA J. GENDER, RACE & JUST. (forthcoming 2012).

63. Meehan, *supra* note 3; Lynette Clemetson & Robin Toner, *Antiabortion Advocacy of Wife of Court Nominee Draws Interest*, N.Y. TIMES, July 23, 2005, at A1.

tress from *Everybody Loves Raymond* and *The Middle* fame.⁶⁴ As the group gained popularity, it refined its political message, honing in on the claim of a feminist history against abortion.

B. "The Feminist Case Against Abortion"

FFL says that it continues the tradition of early feminists who, for two hundred years, opposed abortion.⁶⁵ The group published a book, *ProLife Feminism*, and a quarterly magazine, *The American Feminist* (formerly *Sisterlife*), which excerpted phrases from historical women leaders and compiled them to show a comprehensive view against abortion.⁶⁶ FFL's intent was to bring the weight of "herstory" (the history of "her," or women) to bear on the issue of abortion.⁶⁷ The group claimed that "[d]espite the usual ardor for recovering lost herstory, many contemporary prochoice feminists have denied, minimized, or neglected feminism's enduring prolife strain."⁶⁸

Its use of historical evidence is encapsulated in a foundational article and speech by FFL president Serrin Foster, *The Feminist Case Against Abortion*.⁶⁹ Foster argued that certain factions of the women's movement in the 1960s "made a drastic about-face" from the original intent of the feminist movement to help women.⁷⁰ She claimed that "the now revered feminists of the nineteenth century were also strongly opposed to abortion because of their belief in the worth of all humans."⁷¹ Foster asserted that the criminal laws against abortion passed in the late nineteenth century were the "result of advocacy efforts by feminists who worked in an uneasy alliance with the male-dominated medical profession and the mainstream media."⁷² The early feminists understood, she claimed, "that, much like today, women resorted to abortion because they were abandoned or pressured by boyfriends, husbands and parents and lacked financial resources to have a baby on their own."⁷³ Foster said that she heard "the diverse voices of our feminist foremothers telling us

64. Patricia Heaton, *Rewarding Motherhood*, AM. FEM., Fall 2003–Winter 2004, at 3.

65. Foster, *supra* note 38.

66. See also MAN'S INHUMANITY, *supra* note 30.

67. PROLIFE FEMINISM: YESTERDAY AND TODAY, *supra* note 5, at 17.

68. *Id.*

69. Foster, *supra* note 4.

70. *Id.*; see also DELLAPENNA, *supra* note 4, at 387 ("In short, until quite recently, most feminists were strong opponents of abortion, and the farther back one goes in time the more nearly unanimous feminists become in their hostility to abortion.").

71. Foster, *supra* note 4.

72. *Id.*

73. *Id.*

that abortion is a violent and unacceptable alternative to the problem of crisis pregnancy.”⁷⁴

This historical advocacy extends beyond political lobbying into representations made to the U.S. Supreme Court in amicus briefs filed in support of legal regulation of abortion.⁷⁵ In *Bray v. Alexandria Women’s Health Clinic*, FFL supported antiabortion protesters violently blockading an abortion clinic.⁷⁶ The organization argued there was a longstanding feminist position against abortion: “The testimony of these women—including Elizabeth Cady Stanton, Victoria Woodhull, and Matilda Gage—reveal . . . an uncompromising view that abortion is ‘ante-natal murder,’ ‘child-murder,’ or ‘ante-natal infanticide.’”⁷⁷ “Elizabeth Cady Stanton,” they claimed, “clearly argued that the liberation of women was needed to stop the killing of children before and after birth.”⁷⁸

Feminists for Life acknowledged that its historical approach had not gone unchallenged: “To our sadness and frustration, the assumption that we deceptively, manipulatively wrench early feminists’ words out of context to impose an ‘ultra rightwing’ agenda still thwarts dialogue and cooperative action.”⁷⁹ This was a response to a 1990 accusation by a former vice-president of the FFL who expressed concern about the organization’s misuse of history.⁸⁰ The former officer stated, “I really wish my former colleagues would stop twisting the words of dead people to make them mean something they don’t.”⁸¹ She said the quotes attributed to early leaders of the women’s movement are “often used by FFLA and the rest of the anti-choice movement in a way which does not explain their background. The early leaders of the women’s movement were not against women controlling their bodies.”⁸²

As FFL gained more popularity and media attention, it admitted that its “pro-life feminist legacy has met with increasing suspicion and skepticism.”⁸³ The issue reemerged when the group was accused of “hijacking America’s leading suffragist, Susan B. Anthony.”⁸⁴ Media attention in 2010 questioned the use of Anthony’s name for the political lob-

74. PROLIFE FEMINISM: YESTERDAY AND TODAY, *supra* note 5, at 183.

75. See FFL *Bray* Brief, *supra* note 2; FFL *Webster* Brief, *supra* note 2.

76. FFL *Bray* Brief, *supra* note 2.

77. *Id.*

78. *Id.*

79. *Id.*

80. Annette L. Ravinsky, Letter to Editors, DAUGHTERS OF SARAH 28–29, Nov.–Dec. 1990.

81. *Id.*

82. *Id.*

83. Cat Clark, *The Truth About Susan B. Anthony: Did One of America’s First Feminists Oppose Abortion?*, AM. FEM., 2007, at 1.

84. *Id.*

bying organization, the “Susan B. Anthony List.”⁸⁵ The Susan B. Anthony List is a political, fundraising group founded in 1992 that supports prolife candidates, providing a counter to Emily’s List, a political action committee that funds feminist, prochoice candidates.⁸⁶ The group says it is named after Anthony because she was “a trailblazer during her time for the rights of women and the unborn.”⁸⁷

Scholars of Anthony’s life and work have strongly refuted the claim that there is any evidence proving Anthony supported abortion.⁸⁸ As they sarcastically noted, “naming this lobby for Susan B. Anthony doesn’t change her views any more than clicking your heels three times gets you back to Kansas.”⁸⁹ These historians concluded that “Anthony spent no time on the politics of abortion. It was of no interest to her despite living in a society (and a family) where women aborted unwanted pregnancies.”⁹⁰ They explained that one key quote commonly relied upon by FFL and written by the anonymous author “A,” was not actually the work of Anthony, who instead signed her contributions to the newspaper “SBA,” and that in any case, the writer vigorously *opposes* criminalization of abortion.⁹¹ The scholars also point out that a second quote relied

85. Marjorie Dannenfelser, President of the Susan B. Anthony List, *Susan B. Anthony: Pro-Life Feminist*, WASH. POST (May 29, 2010), http://newsweek.washingtonpost.com/onfaith/guestvoices/2010/05/susan_b_anthony_pro-life_feminist.html.

86. *Our History*, SUSAN B. ANTHONY LIST, <http://www.sba-list.org/about-sba-list/our-history> (last visited Sept. 6, 2012). The Susan B. Anthony List boasts 330,000 members and says it has helped elect over 90 members of Congress. *Campaign for Life 2012 Gala*, SUSAN B. ANTHONY LIST, <http://www.sba-list.org/suzy-b-blog/campaign-life-2012-gala> (last visited Sept. 6, 2012).

87. *Meet Past Young Leader Awardees*, SUSAN B. ANTHONY LIST, <http://www.sba-list.org/node/2604> (last visited Aug. 21, 2012).

88. Gordon & Sherr, *supra* note 9; Schiff, *supra* note 9; Stansell, *supra* note 9; Letter from Ann D. Gordon, Research Professor, Rutgers University to author (Oct. 12, 2007) (on file with author). Ann Gordon is the archivist and editor of the forty-five microfilm reels and five volumes of *The Papers of Elizabeth Cady Stanton and Susan B. Anthony*, *supra* note 25. Lynn Sherr is author of *Failure is Impossible: Susan B. Anthony in Her Own Words* (1996). Both historians are featured in Ken Burns’s PBS documentary of the women’s suffrage movement, *Not for Ourselves Alone: The Story of Elizabeth Cady Stanton and Susan B. Anthony* (1999).

89. Gordon & Sherr, *supra* note 9.

90. Only one Anthony source hints at abortion. See Diary of Susan B. Anthony (Mar. 4, 7, 1876), in *THE PAPERS OF ELIZABETH CADY STANTON AND SUSAN B. ANTHONY*, *supra* note 25. “After a visit with her brother, Anthony remarks in her diary that her sister-in-law aborted a pregnancy, things did not go well, and the woman was bedridden. Anthony concludes, ‘She will rue the day she forces nature.’” Gordon & Sherr, *supra* note 9.

91. Gordon & Sherr, *supra* note 9; see A., *Marriage and Maternity*, REVOLUTION, July 8, 1869. The writer “A” responds to an article from the *New York Medical Gazette* blaming women’s love of luxury and shirking of moral duty of motherhood as cause of the crime of abortion and demanding legal reform. A., *supra*. “A” argues against this demand for legal regulation of women, calling for prevention rather than punishment of abortion through voluntary motherhood and restraint of men. “All articles on this subject that I have read have been from men. They denounce women alone as guilty, and never include men in any plans proposed for the remedy of the evil.” *Id.*

on by FFL, when read in context, clearly does not concern abortion, but rather addresses the inequity in the law of estates and guardianship that permitted fathers to transfer legal guardianship of children to a third party at death against the wishes of the mother.⁹²

In response to this scholarly critique, FFL qualified its previous reverential support for Anthony's position in an article, *The Truth About Susan B. Anthony: Did One of America's First Feminists Oppose Abortion?*, published in the organization's magazine and on its website.⁹³ They accepted some of the scholarly conclusions in light of historical evidence and admitted, "abortion was not an issue to which Anthony devoted much time."⁹⁴ The article included a disclaimer intended to downplay the importance of history to the organization: "While we would be pro-life feminists whether or not Susan B. Anthony and the other early American feminists opposed abortion, we are proud to continue their legacy. By giving birth to new solutions, Feminists for Life builds on the foundation they created."⁹⁵ The organization still sells coffee mugs with Anthony's image and the misappropriated quote emblazoned on the side. It bought and now runs the Susan B. Anthony Birthplace Museum.⁹⁶ And it continues to use a created feminist history as a lynchpin in its antiabortion advocacy as a time-tested approach that has a popular appeal to both legal and political audiences.

C. *The Elizabeth Cady Stanton Pregnant and Parenting Student Services Act*

In 2005, FFL proposed language for federal antiabortion legislation to provide resources and support for pregnant college women. The rationale behind this legislation was "to help women who are pregnant get the assistance they need so they do not feel that abortion is the only answer."⁹⁷ The bill was entitled the "Elizabeth Cady Stanton Pregnant and

92. Gordon & Sherr, *supra* note 9; Letter from Ann Gordon to author, *supra* note 88; See Letter from Susan B. Anthony to Frances Willard, 1869 ("Sweeter even than to have had the joy of caring for children of my own has it been to me to help bring about a better state of things for mothers generally, so their unborn little ones could not be willed away from them.").

93. See Clark, *supra* note 83.

94. See *id.*

95. Cat Clark, *Did Elizabeth Cady Stanton Say That?* (2011) (quoting Serrin Foster, FFL president), available at <http://www.feministsforlife.org/history/ecs.htm>.

96. Serrin M. Foster, *Susan B. Anthony Was Born Here*, AM. FEM., 2010, at 19, available at http://www.feministsforlife.org/taf/2011/FFL_TAF_MarchForth.pdf.

97. E. Ashley Wright, *House of Representatives Passes Hart Amendment with 22-Vote Margin*, CAL. AGGIE, Apr. 7, 2006 (quoting FFL president Serrin Foster). Foster said in another interview that "[i]t is not a debate about abortion—it is about the rest of the choices when having children."

Parenting Student Services Act.”⁹⁸ Its supporters explained that the bill is named after Elizabeth Cady Stanton because “[t]he early feminists were pro-life Because like the philosophy of FFL, they felt if women were turning to abortion, there was a larger need that needed to be addressed.”⁹⁹

The Stanton Act was sponsored and first introduced by Senator Elizabeth Dole (R-N.C.) in the Senate¹⁰⁰ and Representative Melissa Hart (R-Pa.) in the House.¹⁰¹ The congressional briefing on the bills by Feminist for Life was orchestrated for February 15, 2006, Susan B. Anthony’s birthday.¹⁰² The Stanton bills were reintroduced in 2007 as “common ground legislation” with bipartisan support, though the most strident anti-abortion advocates were among the sponsors.¹⁰³ The House bill stated that “[i]t is the sense of Congress that pregnant college students should not have to make a choice between keeping their baby and staying in school.”¹⁰⁴ The Act proposed to give federal grants to colleges to establish student-service offices for students who were pregnant, parenting, or adopting.¹⁰⁵ The funds were intended to allow colleges to make program assessments and to meet the needs of students for maternity health-care coverage, family housing, childcare, flexible academic schedules, parenting education, material needs of children, and postpartum counseling and support.¹⁰⁶ Critics cast the Stanton Act as one that encourages the “disas-

Lauren Moyer, *House Bill Would Aid Students With Children*, DAILY COLONIAL (Feb. 2, 2006), <http://dailycolonial.com/go.php?p=3&s=2065>.

98. S. 1966, 109th Cong. (2005); H.R. 4265, 109th Cong. (2005).

99. McQuilken, *supra* note 13.

100. S. 1966.

101. H.R. 4265. The bill was referred to the House Committee on Education and the Workforce, and subsequently referred to the Subcommittee on Twenty-First Century Competitiveness on March 24, 2006. The bill had fourteen cosponsors, ten Republicans and four Democrats, and passed by a twenty-two-vote margin.

102. Foster, *supra* note 4.

103. S. 915, 110th Cong. (2007) (cosponsored by Robert Casey (R-Pa.), Ben Nelson (D-Neb.)); H.R. 1088, 110th Cong. (2007) (sponsored by Marcy Kaptur (D-Ohio) and twelve cosponsors—nine Republicans and three Democrats, including Dan Burton (R-Ind.), Jo Ann Davis (R-Va.), Sue Myrick (R-N.C.), Tim Ryan (D-Ohio), and Albert Wynn (D-Md.)). In 2006, Dole added cosponsors Rick Santorum (R-Pa.) and Mike DeWine (R-Ohio). 152 CONG. REC. S4696-02 (daily ed. May 17, 2006); 152 CONG. REC. S124-02 (daily ed. Jan. 25, 2006).

104. S. 915, § 2(1). See Elizabeth F. Farrell, *A Pregnant Cause: Student Mothers Say Some Small Colleges Make it Difficult for Them to Stay in School*, CHRON. HIGHER EDUC., May 26, 2006.

105. S. 1966; H.R. 4265; 151 CONG. REC. S12,447-02 (daily ed. Nov. 7 2005).

106. H.R. 4265, § 7(1), (2)(A–G); see *U.S. Briefing on ECS Pregnant and Parenting Students Support Act*, FEMINISTS FOR LIFE (Feb. 15, 2006), <http://www.womendeservebetter.com/ECS/ECS%20briefing%20transcript%20021506.htm>; see also Pregnant and Parenting Student Services Act, MICH. COMP. LAWS § 390.1591 (2012) (originally enacted as Act of Dec. 29, 2004, Mich. Legis. Serv. P.A. 500 (S.B. 72)) (sponsored by FFL).

ter” of teenage pregnancy by “offering financial rewards to pregnant teens.”¹⁰⁷

The core tenets of the Stanton Act became law as part of the health-care reform legislation. The grants for pregnant students were proposed again as a “common ground provision” that made its way into the final Patient Protection and Affordable Health Care Act.¹⁰⁸ Championed by the stridently antiabortion senator from Pennsylvania, Robert Casey, and supported by Democrats for Life, the provision was intended “as an effort to reduce the demand for abortion.”¹⁰⁹

In July 2010, the Obama Administration quietly announced the availability of the Pregnancy Assistance Funds for Pregnant and Parenting Students.¹¹⁰ These are competitive state project grants from the Department of Health and Human Services, Office of Public Health and Office of Adolescent Health.¹¹¹ The grants provide \$25 million per year from 2010 until 2019 to help states develop and implement “activities to assist pregnant teens and women who have made the decision to carry their pregnancies to term.”¹¹² Funds can be used to perform needs as-

107. John Tomasic, *U.S. Abortion Politics: Senate Bill Would Pay Teens to Have Babies*, COLO. INDEP. (Dec. 21, 2009), <https://coloradoindependent.com/44610/u-s-abortion-politics-senate-bill-would-pay-teens-to-have-babies> (“In sociological terms, teen pregnancy is a disaster. It drives income and education and skill levels down. It sustains an underclass. The U.S. already has the highest teen pregnancy rate in the industrialized world. . . . Now the plan is to incentivizing [sic] the nation’s teens to have kids.”); see also Susan Frelich Appleton, *Unraveling the Seamless Garment: Loose Threads in Pro-Life Progressivism*, 2 ST. THOMAS L. REV. 294, 295 (2005) (“That is why, in past publications, I have challenged both public funding schemes that subsidize prenatal care and childbirth for indigent pregnant women while withholding such financial assistance for their abortions.”); Susan Frelich Appleton, *Beyond the Limits of Reproductive Choice: The Contributions of the Abortion-Funding Cases to Fundamental-Rights Analysis and to the Welfare-Rights Thesis*, 81 COLUM. L. REV. 721 (1981).

108. Patient Protection and Affordable Care Act, Pub. L. No. 111–148, §§ 102011–10214, 124 Stat. 119 (2010).

109. Robert Pear, *Negotiating to 60 Votes, Compromise by Compromise*, N.Y. TIMES, Dec. 19, 2009, at A37.

110. See U.S. DEPT. OF HEALTH & HUMAN SERVS., <http://www.hhs.gov> (last visited July 8, 2012); see also FEMINISTS FOR LIFE, <http://www.feministsforlife.org/> (last visited July 8, 2012). Seventeen states were awarded these grants on September 28, 2010. Dan Gilgoff, *White House Ties Pregnancy Aid Grants to “Common Ground” Abortion Plan*, CNN BELIEF BLOG (Sept. 29, 2010), <http://religion.blogs.cnn.com/2010/09/29/white-house-ties-pregnancy-aid-grants-to-common-ground-abortion-plan/>.

111. Office of Adolescent Health, *What is the Pregnancy Assistance Fund?*, U.S. DEPT. OF HEALTH & HUMAN SERVS., <http://www.hhs.gov/ash/oah/oah-initiatives/paf/home.html> (last visited Aug. 19, 2012).

112. Office of Adolescent Health, *Support for Pregnant and Parenting Teens and Women*, U.S. DEPT. OF HEALTH & HUMAN SERVS., <http://www.hhs.gov/ash/oah/grants/pregnance-assistance-foa.html> (last visited Dec. 11, 2011). States can use the funds for campaigns to make the public aware of pregnancy services, or make the funds available to colleges (which must match with twenty-five percent cash or in-kind services) or directly to high schools for pregnant teens.

assessments on campuses, which are then encouraged to link with existing public and private “culturally competent” service providers.¹¹³ Supportive services envisioned under the grants include health care, housing, childcare, telecommuting programs, and practical assistance like maternity and baby clothing, food (including formula), and furniture.¹¹⁴ The schools will also be required to “provide referrals for prenatal care and delivery, infant or foster care, or adoption, to a student who requests such information.”¹¹⁵

FFL was optimistic that these practical solutions signaled a new approach to the abortion debate:

For almost thirty-three years, one side in the polarized abortion debate has asked “What about the woman?” The other has asked “What about the baby?” The Elizabeth Cady Stanton Pregnant and Parenting Students Act of 2005 holds the answer to both questions: working together to address the unmet needs of women. A peaceful revolution on campuses has begun.¹¹⁶

Stanton emerged from historical obscurity to lead the way for the modern prolife movement. This re-creation of history, however, misrepresents the meaning of Stanton’s words and ignores the relevant historical context.

III. ABORTION IN THE NINETEENTH CENTURY

To understand Stanton’s words used today by antiabortion advocates, it is important first to appreciate the historical context in which they were made. Abortion was not a part of Stanton’s agenda or a focus of the nineteenth-century “woman’s rights” platform. During the early stages of the women’s rights movement initiated in 1848, abortion in the first half of pregnancy was permissible.¹¹⁷ During the second half of the century, legislators, spurred by lobbying from the medical establishment, began to take action to criminalize abortion.¹¹⁸ Male physicians, determined to secure their profession against female midwives and to control

113. As the creator of the program, FFL offers assistance to state offices and universities in seeking and implementing funds. FFL claims that providers like Planned Parenthood are prohibited from involvement with the grants, which can be referred only to service providers “that serve parents.” See *Major Victory for Pregnant and Parenting Students*, FEMINISTS FOR LIFE, <http://feministsforlife.org/news/major-victory.htm> (last visited Aug. 21, 2012).

114. See Foster, *supra* note 3.

115. Patient Protection and Affordable Care Act, Pub. L. No. 111-148, §§ 10211–10214, 124 Stat. 119, 933 (2010).

116. Foster, *supra* note 3.

117. *Roe v. Wade*, 410 U.S. 113, 138 (1973).

118. See discussion *infra* Part III.A.

what they increasingly believed was the wrongful practice of abortion by women, developed a public campaign against abortion and worked carefully with legislatures to criminalize abortion in every state by the end of the nineteenth century.¹¹⁹ Leading newspapers facilitated political opposition to abortion through sensational accounts of women who died from abortions and the prosecution of the doctors who caused their deaths.¹²⁰ The campaign evolved into an attack on women, who were accused of selfishly seeking economic and social luxuries while shirking their maternal duty.¹²¹ These increasingly misogynistic appeals drew in a few feminist voices that diverted the blame to men for their sexual aggressions, betraying allegiances, and exclusion of women from the public spheres of power.¹²²

A. *The Male Campaign Against Abortion*

At common law, abortion was legal until the time of quickening—the time when a woman first felt fetal movements, usually late in the fourth month of pregnancy.¹²³ Quickening served as the legal dividing line between acceptable behavior and criminality, as abortions after quickening were punished as a crime.¹²⁴ Popular home manuals gave explicit details of procedures that might release “obstructed menses” or cure an “unnatural blockage” and listed specified herbs, medicines, and activities to avoid during pregnancy.¹²⁵ Women and their physicians thus felt justified in restoring the “natural” return of menses.¹²⁶ This quickening “distinction was virtually universal in America during the early decades of the nineteenth century and accepted in good faith,” and abortion “was neither morally nor legally wrong in the eyes of the vast majority of Americans.”¹²⁷ Abortion was a socially accepted, if underground, practice.

119. See *infra* text accompanying notes 135–43.

120. See *infra* text accompanying notes 155–60, 171.

121. See *infra* text accompanying notes 149–54.

122. See discussion *infra* Part III.B.

123. *Roe v. Wade*, 410 U.S. 113, 130 (1973); MOHR, *supra* note 34, at 3, 6.

124. *Roe*, 410 U.S. at 130; see MOHR, *supra* note 34, at 3, 6.

125. CARL N. DEGLER, *AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT* 229, 230 (1980); GORDON, *supra* note 24, at 30–35; MOHR, *supra* note 34, at 107.

126. CARROLL SMITH-ROSENBERG, *DISORDERLY CONDUCT: VISIONS OF GENDER IN VICTORIAN AMERICA* 217 (1986). The term “abortion” carried the same connotation that “miscarriage” does today in that it referred to a natural event, whereas the term “criminal abortion” was used to connote an artificial or improper interference with a pregnancy post-quickening. *Id.*

127. MOHR, *supra* note 34, at 5, 16.

The first wave of abortion regulation intended to change this status quo began in a handful of states in the 1820s as part of the general codification movement. The earliest laws in Connecticut, Missouri, and Illinois were poison-control measures concerned with preventing the deaths of pregnant women due to abortion herbs and drugs.¹²⁸ By 1841, ten of twenty-six states had passed an abortion statute.¹²⁹ This early legislation continued to focus on medical malpractice and protection of the life and health of the mother from the consequences of abortion.¹³⁰ Most of these statutes codified the common law rule criminalizing later term abortions while permitting abortions prior to quickening, though five states prohibited abortion before quickening for the first time.¹³¹ Yet, even these laws that appeared to prohibit early abortions effectively allowed for continued abortions before quickening because enforcement of these laws required the prosecution to “prove pregnancy or prove intent, neither of which could be determined without doubt without quickening.”¹³² James Mohr, the historian who has best documented the history of abortion during this period, suggests that this result may have been intentional as the common law quickening distinction was assumed, and “probably reflected the continued perception of abortion in the United States as a fundamentally marginal practice usually resorted to by women who deserved pity and protection rather than criminal liability.”¹³³

“The years 1850 to 1880 saw abortion emerge as a mass political issue in America for the first time. During these years the legality of abortion became the focus of a nationwide lobbying effort, of legislative debate, and of a spate of new legislation.”¹³⁴ The lobbying effort to criminalize abortion was spearheaded by the medical profession. In 1859, the American Medical Association (AMA) issued a resolution condemning

128. *Id.*

129. *Id.*

130. SMITH-ROSENBERG, *supra* note 126, at 220 (quoting a New Jersey court decision from 1858); *see also* MOHR, *supra* note 34, at 20–45.

131. MOHR, *supra* note 34, at 20–25 (discussing laws of New York (1828), Ohio (1834), Maine (1840), and Massachusetts (1846)). This was, in part, a delayed response to a change in Anglo-American common law from England’s passage of Lord Ellenborough’s Act in 1803, which criminalized prequickening abortions. *See* *Roe v. Wade*, 410 U.S. 113, 136 (1973) (discussing the history of England’s legislation that made postquickening abortion a capital offense, but punished prequickening abortions less severely and noting that the death penalty and the quickening distinction were both removed by subsequent legislation in 1837).

132. MOHR, *supra* note 34, at 23, 26–27, 43.

133. *Id.* at 44.

134. SMITH-ROSENBERG, *supra* note 126, at 218. The Susan B. Anthony List incorrectly claims that Stanton and Anthony made their alleged antiabortion comments “on-record at a time when abortion wasn’t even a hot political issue of the day.” Dannenfels, *supra* note 85.

abortion as an “unwarrantable destruction of human life.”¹³⁵ The doctors denounced the concept of quickening as medically insignificant and endorsed a pseudoscientific understanding of human development beginning at conception.¹³⁶ Their propaganda was aimed at discrediting women’s experiences of pregnancy and quickening, claiming pregnancy as an area solely for medical expertise.¹³⁷ Because quickening was based on women’s own bodily sensations, not on medical diagnosis, physicians were dependent on female judgment.¹³⁸ Quickening, the physicians argued, could not be relied upon as an indicator of fetal life because it did not occur at a standard moment.¹³⁹ “Many women never quicken at all,” one writer joked, “though their children are born living.”¹⁴⁰

The physicians’ campaign also had practical motivations. The campaign began when the doctors were attempting to establish their practice as a profession and medical school graduates (“regulars”) were trying to drive out competing popular practitioners (“irregulars”), including midwives and homeopathic medical reformers.¹⁴¹ In particular, the male obstetricians and gynecologists who led the mid-century campaign against abortion “were seeking to appropriate management of the birthing process from midwives, and to prevent women from entering the medical profession.”¹⁴² The physicians’ antiabortion tracts depicted abortion as a “female crime” perpetrated by female midwives, female patients, and their female friends, in which the new (male) medical professionals would play no part.¹⁴³

The public campaign against abortion intensified as the number of abortions increased.¹⁴⁴ The increase in abortion came primarily from white, middle-class, Protestant women who chose abortion as a birth-

135. MOHR, *supra* note 34, at 157.

136. MOHR, *supra* note 34, at 44; DEGLER, *supra* note 125, at 240–41.

137. LESLIE REAGAN, *WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867–1973* (1998). For the leading AMA tracts, see HORATIO ROBINSON STORER, *CRIMINAL ABORTION: ITS NATURE, ITS EVIDENCE, AND ITS LAW* (1868), and HORATIO ROBINSON STORER, *WHY NOT? A BOOK FOR EVERY WOMAN* (1868).

138. REAGAN, *supra* note 137, at 8; Siegel, *supra* note 24.

139. REAGAN, *supra* note 137, at 8.

140. MOHR, *supra* note 34, at 44; REAGAN, *supra* note 137, at 12; Siegel, *supra* note 24, at 282.

141. MOHR, *supra* note 34, at 30–39; SMITH-ROSENBERG, *supra* note 126, at 230–31.

142. Siegel, *supra* note 24, at 300; *see also* MOHR, *supra* note 34, at 30–39.

143. Siegel, *supra* note 24, at 300.

144. GORDON, *supra* note 24, at 25. Some estimates indicated that tens of thousands of abortions were done in the 1870s in New York City, while other numbers (perhaps exaggerated) showed that abortions increased to more than 100,000 per year in New York City in the 1890s. *Id.*

control method, often with the support of their spouses.¹⁴⁵ This was a significant change in the social character of abortion, which was typically thought of as an option only for poor, unmarried women who were forced by shame and desperate circumstances into action.¹⁴⁶ “Now, however, the exceeding prevalence of the evil is found to be among an entirely different class, and the fruit of legitimate wedlock in every grade of society, high and low, but especially the former, is the prey of this destroying Moloch.”¹⁴⁷ The use of abortion by women who had other socially acceptable choices outraged the physicians. Their rhetoric was infused with nativist implications in appeals to white Protestant women to bear children to counter the rising numbers of immigrants and nonwhite children.¹⁴⁸

The “antiabortion campaign was antifeminist at its core.”¹⁴⁹ The AMA campaign developed the caricature of the married woman who willfully aborted pregnancy and rejected the domestic and maternal role men had constructed for her.¹⁵⁰ The woman who sought an abortion was selfish, frivolous, dangerous, and destructive for rejecting her social duty to bear children.¹⁵¹ The American Medical Association’s 1871 *Report on Criminal Abortion* denounced the married woman who aborted a pregnancy: “She becomes unmindful of the course marked out for her by Providence, she overlooks the duties imposed on her by the marriage contract. She yields to the pleasures—but shrinks from the pains and responsibilities of maternity”¹⁵² Horatio Storer, one of the first male gynecologists and the leading antiabortion crusader of the AMA wrote that “[t]he true wife” does not seek “undue power in public life, . . . undue control in domestic affairs, . . . or privileges not her own.”¹⁵³ The AMA campaign succeeded in convincing the public and the

145. MOHR, *supra* note 34, at 46–47, 94; *see also Restellism*, REVOLUTION, Mar. 4, 1869 (stating that abortion was “fashionable in the American dress circle”).

146. MOHR, *supra* note 34, at 16; Siegel, *supra* note 24, at 285.

147. DEGLER, *supra* note 125 (citing Morse Steward, *Criminal Abortion*, DETROIT REV. MED. & PHARM. 2, 7–8 (1867)).

148. MOHR, *supra* note 34, at 16; Siegel, *supra* note 24, at 297–98; *see, e.g., Restellism: The Crime of this Age*, REVOLUTION, May 7, 1868 (“That is why, shortly, the children of the Emerald Isle will be walking through the graveyards of the Puritans.”).

149. REAGAN, *supra* note 137, at 11.

150. SMITH-ROSENBERG, *supra* note 126, at 225, 235–36.

151. *See id.*; Siegel, *supra* note 24, at 293–96, 300–04.

152. *See* Siegel, *supra* note 24, at 295–96 (citing D.A. O’Donnell & W.L. Atlee, *Report on Criminal Abortion*, 22 TRANSACTIONS AM. MED. ASS’N 239, 241 (1871)); *see also* DEGLER, *supra* note 125, at 232–33 (collecting physician statements of alleged “anti-maternal” motivations of women in seeking abortion).

153. REAGAN, *supra* note 137, at 11.

politicians that abortion, and women, were a threat to the social order and male authority.¹⁵⁴

The physicians' antiabortion campaign was fueled by the sensationalist journalism of leading newspapers. These stories recounted the horrific details of women dying from abortions in squalid conditions or focused on the notorious millionaire abortionist, Madame Restell.¹⁵⁵ The *New York Times* began its campaign for more stringent laws against abortion in 1863, recounting the tragic death of Mrs. Elizabeth Huntington at the hands of Dr. McGonegal and the empanelling of a jury in the dying woman's home to get her deathbed declaration.¹⁵⁶ The paper reported sensational cases of the deaths of ten more women who died from abortions between 1865 and 1869.¹⁵⁷ In 1871, the *New York Times* ran an exposé on abortion entitled *The Evil of the Age* followed by a sequel, *Trunk Mystery*.¹⁵⁸ The *Times* assigned a reporter, Augustus St. Clair, to go undercover for the purpose of visiting well-known abortionists to gather materials for an article on the abortionists' qualifications, practices, and fees. He wrote of the enormous amount of abortion "that exists and flourishes, almost unchecked in the City of New York."¹⁵⁹ "Thousands of human beings are thus murdered before they have seen the light of this world, and thousands upon thousands more of adults are irremediably robbed in constitution, health, and happiness."¹⁶⁰

These practices were fostered by loosely veiled advertisements for abortionists and abortifacients that were prevalent in mainstream and religious newspapers from 1840 to the mid-1870s.¹⁶¹ A key source of revenue for these papers, doctors (and quack doctors like Madame

154. SMITH-ROSENBERG, *supra* note 126; DEGLER, *supra* note 125, at 242.

155. Madame Restell openly advertised and provided abortion services from 1836 to 1878. She lived in a palatial mansion on Fifth Avenue in New York City and operated her practice out of her home. By the mid-1840s, she had offices in Boston and Philadelphia and traveling agents who sold her "Female Monthly Pills." Her name gave rise to the epithet for abortion, "Restellism." See *Restellism: The Crime of this Age*, *supra* note 148. She was arrested many times and finally prosecuted and convicted in 1878 following a sting operation run by Anthony Comstock, the anti-obscenity crusader. She committed suicide in prison after she lost her appeals. See MOHR, *supra* note 34; REAGAN, *supra* note 137, at 10; *Mrs. Lohman's History*, N.Y. TIMES, Apr. 2, 1878; see also *People v. Ann Lohman*, 2 Barb. 216, 450 (N.Y. Gen. Term 1848), *aff'd*, 1 N.Y. 379 (1848). See generally CLIFFORD BROWDER, *THE WICKEDEST WOMAN IN NEW YORK: MADAME RESTELL, THE ABORTIONIST* (1988); ALLAN KELLER, *SCANDALOUS LADY: THE LIFE AND TIMES OF MADAME RESTELL, NEW YORK'S MOST NOTORIOUS ABORTIONIST* (1981).

156. *The Evil of the Age*, N.Y. TIMES, Jan. 12, 1863, at 5.

157. See, e.g., *Another Malpractice Case*, N.Y. TIMES, March 26, 1867; *The Noble Malpractice Case*, N.Y. TIMES, April 1, 1867.

158. N.Y. TIMES, Aug. 23, 1871, at 6.

159. *Id.*

160. *Id.*

161. MOHR, *supra* note 34, at 51–52, 56–57.

Restell) advertised “female services,” and product advertisements offered “French pills” and “Portuguese medicines.”¹⁶² Abortion advertisements were eventually outlawed by the federal Comstock Law, passed in 1873, which prohibited obscenity in documents sent through the mail and defined “obscenity” to include anything related to contraception or reproduction.¹⁶³ Pressures from public opinion and the physicians’ campaign spurred state legislators into further legislative action. Laws passed between 1860 and 1880 criminalized abortion at every stage of pregnancy and ultimately made abortion a crime in every state by the end of the century.¹⁶⁴

The public shift from acceptance to criminalization of early term abortion played out in Stanton’s home state of New York. Beginning in 1828, the revisers of the New York code expanded the offense of abortion to include abortions prior to quickening and elevated post-quickening abortion from a misdemeanor to a felony with an exception for therapeutic abortions necessary for the health of the mother.¹⁶⁵ One legal scholar concluded, based on the revisers’ notes, that the law was primarily concerned with protecting women from surgical malpractice and death from abortion procedures during a time before the invention of antiseptic.¹⁶⁶ In 1845, the New York legislature enacted a comprehensive law to criminalize abortion through medicines or procedures and to punish the provider of abortions for manslaughter in the second degree.¹⁶⁷ For the first time, this act brought the woman herself under the criminal sanctions of the statute rather than punishing only the doctor, midwife, or

162. *Id.*

163. Comstock Act, ch. 258, 17 Stat. 598 (1873); see GORDON, *supra* note 24; REAGAN, *supra* note 137, at 13.

164. MOHR, *supra* note 34, at 200; see also Eugene Quay, *Justifiable Abortion—Medical and Legal Foundations*, 49 GEO. L.J. 395 (1961) (cataloguing all state abortion regulations and their date of enactment).

165. N.Y. Rev. Stat., pt. 4, ch. 1, Title. 2, Art. 1, § 9, p. 661, and Title. 6, § 21, p. 694 (1829); see also *Roe v. Wade*, 410 U.S. 113, 138 (1973); MOHR, *supra* note 34, at 578.

166. Cyril C. Means, Jr., *The Phoenix of Abortional Freedom: Is a Penumbral or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 N.Y. L. FORUM 335, 391 (1971); Cyril C. Means, Jr., *The Law of New York Concerning Abortion and the Status of the Foetus, 1664–1968: A Case of Cessation of Constitutionality*, 14 N.Y. L. FORUM 411, 451 (1968) [hereinafter Means, *Law of New York*]. Means was part of Governor Rockefeller’s Commission to revise the New York state laws of abortion in 1968 and expressly sought a basis to repeal the criminal bans on abortion.

167. An Act to Punish the Procurement of Abortion, and for Other Purposes, ch. 260, 1845 N.Y. Laws § 2; An Act to Amend the “Act to Punish the Procurement of Abortion and for Other Purposes,” ch. 22, 1846 N.Y. Laws § 1, 2 (amending section 1 of the 1845 act to qualify punishment of providing abortions where the death of the child or woman is caused); see also Means, *Law of New York*, *supra* note 166, at 454.

pharmacist.¹⁶⁸ Practically, however, these laws changed nothing because they applied to a woman “quick with child” or a “pregnant woman,” and thus to enforce the laws it was necessary to prove pregnancy.¹⁶⁹ Additionally, the law required the heightened standard of proof of “intent thereby to procure a miscarriage.”¹⁷⁰

Following a “cacophony of sensational and usually fatal abortion cases, as reported in the daily press,” the New York legislature was again lobbied to protect women from these deaths.¹⁷¹ The Medical Society of the State of New York met in Albany on February 5, 1867, and adopted a resolution against abortion with three key findings.¹⁷² First, it concluded that life begins at the moment of conception; second, that the association abhorred abortion and intended to “arrest this flagrant corruption of morality among women, who ought to be and unquestionably are the conservators of morals and of virtue”; and third, that newspaper publications of “ostensible remedies for female disease that suggest abortion are highly detrimental to public health and morals” and should be forbidden by the legislature.¹⁷³

Action on the abortion resolution in the legislature was delayed, however, because of the debate over black suffrage.¹⁷⁴ In 1868, the New York legislature banned abortion advertisements in its first anti-obscenity statute, which explicitly prohibited the advertising and printing of advertisements for any “article or medicine for the prevention of conception or procuring of abortion.”¹⁷⁵ The legislature returned to the topic of abortion in 1869 and passed a law that made abortion at any time, including prior to quickening, illegal and removed the prosecutor’s burden of proving pregnancy.¹⁷⁶ The increasing fervor of the physician and journalist anti-

168. 1845 N.Y. Laws § 3–5 (prohibiting a woman from “soliciting” medicine or operation and from concealing the death of a “bastard” aborted privately by the woman, and penalizing a woman’s second offence by two to five years imprisonment).

169. *Id.* §§ 1–2.

170. *Id.* §§ 1–3.

171. Means, *Law of New York*, *supra* note 166, at 458.

172. *Id.* The Medico-Legal Society of New York organized in 1867 with physicians joining with the coroner’s office and eventually with lawyers who brought a shared interest in medical jurisprudence. *Id.* at 476.

173. MOHR, *supra* note 34, at 215.

174. DUBOIS, *supra* note 17, at 168; MOHR, *supra* note 34, at 215.

175. An Act for the Suppression of the Trade in and Circulation of Obscene Literature, Illustrations, Advertisements, and Articles of Indecent or Immoral Use, and Obscene Advertisements of Patent Medicines, ch. 430, 1868 N.Y. Sess. Laws § 1; *see* MOHR, *supra* note 34, at 215–16. *See generally* Donna I. Dennis, *Obscenity Law and Its Consequences in Mid-Nineteenth-Century America*, 16 COLUM. J. GENDER & L. 43 (2007).

176. An Act Relating to the Procurement of Abortions and Other Like Offenses, ch. 631, 1869 N.Y. Laws § 1; MOHR, *supra* note 34, at 217.

abortion campaign pressured the legislature to revise the abortion law again in 1872 to strengthen its prohibitions, increase the penalties, and incorporate the ban on abortion advertising.¹⁷⁷ New York was at the forefront of the movement to criminalize abortion, and the rest of the states soon followed by uniformly prohibiting abortion by the century's end.

B. Feminist Voices and Voluntary Motherhood

A few female voices joined in the public fray over abortion, writing into Stanton and Anthony's women's rights newspaper, the *Revolution*.¹⁷⁸ They reacted strongly to the attacks on women and to the blame of women for the public problem of increasing abortions.¹⁷⁹ These female writers crafted a counternarrative of men's equal responsibility. Using the rhetoric of the abortion campaign, they blamed the men: "This crime of 'child murder,' 'abortion,' 'infanticide,' lies at the door of the male sex," wrote Matilda Joslyn Gage.¹⁸⁰ Mattie Brinkerhoff wrote of "the boldness with which many men blame women for the crime of infanticide without assuming themselves, in the case, a shadow of responsibility."¹⁸¹

The women argued for voluntary motherhood and the right of a woman to be "the owner of her own body."¹⁸² The following argument appeared in the *Woman's Advocate* of Dayton, Ohio:

Till men learn to check their sensualism, and leave their wives free to choose their periods of maternity, let us hear no more invectives against women for the destruction of prospective unwelcome children, whose dispositions, made miserable by unhappy ante-natal conditions, would only make their lives a curse to themselves and others.¹⁸³

Other women agreed that men were at fault and expressed empathy for the circumstances of poverty and domestic violence that drove wom-

177. An Act for the Better Prevention of the Procurement of Abortions and Other Like Offenses, ch. 181, 1872 N.Y. Laws §§ 1-4; see MOHR, *supra* note 34, at 217-19.

178. DUBOIS, *supra* note 17, at 104 (calling the *Revolution* perhaps the "most daring feminist paper" that has ever appeared); THE REVOLUTION IN WORDS: RIGHTING WOMEN 1868-1871 7 (Lana R. Rakow & Cheris Kramarae eds., 2001).

179. A., *supra* note 91; Mattie Brinkerhoff, *Women and Motherhood*, REVOLUTION, Sept. 2, 1869; *Child Murder*, REVOLUTION, Apr. 8, 1868; *Child Murder*, REVOLUTION, May 1868; Matilda Joslyn Gage, *Is Woman Her Own?*, REVOLUTION, Apr. 9, 1868, at 215-16.

180. Gage, *supra* note 179. Gage was Stanton and Anthony's co-editor on several volumes of *History of Woman Suffrage*.

181. Brinkerhoff, *supra* note 179.

182. *Id.*

183. E.V.B., *Restellism, and the N.Y. Medical Gazette*, WOMAN'S ADVOC. Apr. 8, 1869, at 16, cited in MOHR, *supra* note 34, at 112, 289.

en to abortion. One writer doubted that the medical profession's "educational" campaign to disabuse women of the scientific truth of quickening would make any difference to the prevalence of abortion:

They do it with the knowledge that it endangers their own lives, but the cry is "Liberty or Death": and could you look upon the wretched homes where heartbroken women work day and night, for the most shameful pittance to provide food for the little ones whom the brutal lusts of a drunken husband have forced upon them, you would not wonder that they do not choose to add to their number.¹⁸⁴

She challenged "statesmen and philanthropists" to "abate this evil" by instead giving "liberty to women, freedom entire, and the education it is sure to bring."¹⁸⁵ The anonymous writer concluded that it was time to conspire against the institution of marriage, which "made one human being the slave of another."¹⁸⁶

Scholars have characterized these writings as part of a nineteenth-century "feminist position on abortion."¹⁸⁷ The feminist position is summarized as calling for a woman's right to control her own body, emphasizing prevention rather than punishment, and placing the blame for abortion on men.¹⁸⁸ "The first woman's rights movement was highly sympathetic to the reasons why women sought abortions. These feminists understood the incidence of abortion to be rooted in women's lack of control over marital intercourse," leading to desperate acts.¹⁸⁹ "They blamed the husbands who refused to restrain their sexual demands, rather than the wives forced to submit to them."¹⁹⁰

Nineteenth-century feminists did not, however, affirmatively endorse abortion as their twentieth-century counterparts did.¹⁹¹ These early feminists "feared that separating intercourse from reproduction would facilitate male infidelity, destabilizing marital relationships on which women were enormously dependent, in an environment in which extra-marital sexuality" was an unattractive option.¹⁹² Supporting abortion

184. *Child Murder*, Apr. 8, 1868, *supra* note 179 (signed "Conspirator" from E. Poland, Maine).

185. *Id.*

186. *Id.*; see also Brinkerhoff, *supra* note 179.

187. MOHR, *supra* note 34; Hasday, *supra* note 17, at 1437.

188. MOHR, *supra* note 34, at 110–11; Hasday, *supra* note 17, at 1437.

189. Hasday, *supra* note 17, at 1437.

190. *Id.* at 1438.

191. See GORDON, *supra* note 24, at 1–2; Gordon, *Nineteenth-Century Feminists*, *supra* note 24; Hasday, *supra* note 17, at 1437–38; SMITH-ROSENBERG, *supra* note 126, at 243.

192. GORDON, *supra* note 24, at 1–2; Gordon, *Nineteenth-Century Feminists*, *supra* note 24. Linda Gordon explains that the early feminists understood that women needed freedom from male

would also have been “very politically costly for the feminist movement, given the medical establishment’s fierce and organized opposition to abortion” and given its increasing illegality.¹⁹³ Feminists were part of a general equal rights movement seeking equal respect for women’s social and legal rights, and “they needed respect for motherhood and women’s work even while women needed freedom from excessive childbearing.”¹⁹⁴

Instead, “feminists found the argument they need to reconcile involuntary pregnancies and equality in the ideal of voluntary motherhood.”¹⁹⁵ “Voluntary motherhood” was the slogan for the theory that wives had the right to unilaterally choose when to engage in sexual relations with their husband, abstaining periodically or abstaining permanently unless procreation was desired.¹⁹⁶ Voluntary motherhood “represented an initial response to feminists’ understanding that involuntary motherhood and child rearing were important parts of women’s oppression.”¹⁹⁷ They understood motherhood as involuntary, analogizing forced maternity to prostitution.¹⁹⁸ The right to control this involuntary oppression through a unilateral right of refusal was at the heart of voluntary motherhood. “A woman’s right to refuse was the fundamental condition of birth control—and of her independence and personal integrity.”¹⁹⁹

Both conservative and radical factions of the women’s rights movement agreed on the topic of voluntary motherhood.²⁰⁰ “On no ques-

sexual tyranny, embodied in domestic violence, temperance issues, and legal exemptions for marital rape, but encouraging licentious behavior by removing the consequences of sexual predation would exacerbate, rather than squelch, these aggressions. In addition, endorsing birth control and abortion depended upon a morality that separated sex from reproduction, but such nonprocreative sex was widely considered immoral, akin to prostitution, which encouraged men to abandon their wives and families.

193. Siegel, *supra* note 24, at 280–323, 305 n.175.

194. GORDON, *supra* note 24.

195. *Id.*; see also SMITH-ROSENBERG, *supra* note 126, at 243. Victorian women did not publicly respond to the male antiabortion discourse, but instead developed their own system of sex and marital advice books that stressed sexual power within the home for controlling unwanted pregnancies, marital rape, or “marital prostitution.” SMITH-ROSENBERG, *supra* at 243.

196. GORDON, *supra* note 24; Gordon, *Voluntary Motherhood*, *supra* note 24, at 423.

197. Gordon, *Voluntary Motherhood*, *supra* note 24, at 423.

198. GORDON, *supra* note 24, at 68 (citing Harriot Stanton Blatch, Stanton’s daughter arguing about the “prostitution of the maternal instinct”).

199. *Id.* at 57, 61.

200. *Id.* The feminists who advocated voluntary motherhood came from three camps: suffragists, moral reformers, and free lovers, small utopian groups that advocated love and sexual relations between equal partnerships freed from the oppressive confines of civil marriage. Gordon, *Voluntary Motherhood*, *supra* note 24, at 423; see, e.g., Hasday, *supra* note 17, at 1418 n.144, 1441 n.233 (citing statements of Rev. Antoinette Brown Blackwell and Isabella Beecher Hooker in support of voluntary motherhood).

tion did the feminists agree so clearly as on birth control. The slogan they used—‘voluntary motherhood’—was an exact expression of their ideology, incorporating both a political critique of the status quo, as *involuntary motherhood*, and a solution.²⁰¹ Voluntary motherhood, as the very name implies, carried no “antimotherhood implications.”²⁰² The argument was that “willing mothers would be better mothers.”²⁰³

By the end of the nineteenth century, “[t]he general conviction of the women’s rights community that women had a right to choose when to be pregnant was . . . strong.”²⁰⁴ Voluntary motherhood established the foundational notion of bodily autonomy and philosophy of a woman’s individual right to have a choice in procreation that served as precursors to the twentieth-century feminist demand for the right to choose an abortion.²⁰⁵ The women’s rights community spoke in terms of a woman’s ownership of her own body and emphasized that motherhood should be a voluntary choice. These ideas would be fundamental to a modern understanding of a constitutional right of privacy that includes a woman’s right to choose an abortion.²⁰⁶ Scholars have thus identified the voluntary motherhood movement as the first step initiating the modern feminist movement for the right to an abortion.²⁰⁷

IV. ENLIGHTENED MOTHERHOOD

Stanton endorsed this feminist ideal of voluntary motherhood and its later corollary, enlightened motherhood, which extolled the virtues of women’s procreative control. As the public debate over abortion demanded that women had a social and moral duty to bear children, Stanton countered that women had a duty *not* to bear children.²⁰⁸ Stanton used her national lecture tour and individual caucuses with women to teach that women had a right to their own person, their own “womanhood.”²⁰⁹ She buttressed this individual rights argument by asserting that the good of society would be served not by having many children, but by having fewer, “quality” children derived from intentional and healthy pregnancies.²¹⁰ She told women that they should not see their own worth

201. GORDON, *supra* note 24, at 55.

202. Gordon, *Nineteenth-Century Feminists*, *supra* note 24, at 42.

203. GORDON, *supra* note 24, at 66; Gordon, *Nineteenth-Century Feminists*, *supra* note 24, at 42.

204. GORDON, *supra* note 24, at 66.

205. *Id.*

206. See *Roe v. Wade*, 410 U.S. 113, 138 (1973).

207. GORDON, *supra* note 24, at 67; Siegel, *supra* note 24, at 305.

208. See *infra* Part IV.A–B.

209. See *infra* text accompanying notes 216–27.

210. See *infra* text accompanying notes 240–41.

in terms of motherhood, but in terms of their “own womanhood.”²¹¹ Stanton offered a strong voice against the deluge of propaganda from the abortion campaign that commanded women to have multiple children as dictated by law and their husbands.

Stanton “understood a woman’s right to control her person as the foundational right upon which political and economic equality needed to rest if they were to have any value.”²¹² Based on her experience as the mother of seven children, Stanton appreciated the reality that the work of raising children fell exclusively on women.²¹³ She thus vividly understood “that women needed to have full control over marital intercourse so that they could determine how many children they would raise and when.”²¹⁴ Stanton’s argument about the right of self-ownership was “an intensely gender-specific argument about a woman’s particular right.”²¹⁵ She knew that bearing and raising children were solely a woman’s obligation and argued that women should therefore solely determine when to undertake that responsibility.

A. The Sovereign of Her Own Person

Stanton’s speeches and lectures worked to convince women of their “right to their own person,” and the “preservation of their own womanhood.”²¹⁶ When asked what she meant by a woman’s right to “owning her own body,” Stanton replied, “Womanhood is the primal fact, wifehood and motherhood its incidents. . . . Must the heyday of her existence be wholly devoted to the one animal function of bearing children? Shall there be no limit to this but woman’s capacity to endure the fearful strain on her life?”²¹⁷ Stanton wrote, “How can she [woman] endure our present marriage relations by which women’s life, health, and happiness are held so cheap that she herself feels that God has given her no charter of rights,

211. See *infra* text accompanying notes 228–32.

212. Hasday, *supra* note 17, at 1419; see Elizabeth B. Clark, *Self-Ownership and the Political Theory of Elizabeth Cady Stanton*, 21 CONN. L. REV. 905, 906, 909 (1989) (noting that “the right to control one’s body was the preeminent personal and political right for Stanton,” and this vision of individual autonomy formed the basis of her contribution to radical feminism).

213. Clark, *supra* note 212, at 909; see also GRIFFITH, *supra* note 17.

214. Hasday, *supra* note 17, at 1419.

215. *Id.*

216. “Stanton spoke about a married woman’s right ‘to her person’ again and again.” Hasday, *supra* note 17, at 1422 & n.7; see, e.g., Elizabeth Cady Stanton, *Marriage and Divorce*, N.Y. TRIBUNE, May 30, 1860 (“It is only in marriage that she must demand her rights to person, children, property, wages, life, liberty, and the pursuit of happiness.”).

217. Gordon, *Voluntary Motherhood*, *supra* note 24, at 430 n.26 (citing Elizabeth Cady Stanton, Manuscript No. 11 (on file with the Library of Congress)).

no individuality of her own?”²¹⁸ She called women to action: “Man in his lust has regulated long enough this whole question—of sexual intercourse. Now let the mothers of mankind whose prerogative it is to set bounds to his indulgence, raise up [and] give this whole matter a thorough, fearless examination.”²¹⁹

For Stanton, the right of a woman to control her own person was the foundational right, the starting point for social equality, “the battleground where our independence must be fought and won.”²²⁰ She wrote:

The rights, to vote, to hold property, to speak in public, are all-important, but there are great social rights, before which all others sink into utter insignificance. The cause of woman is . . . not a question of meats and drinks, of money or lands, but of human rights—the sacred right of a woman to her own person, to all her God-given powers of body and soul. Did it ever enter into the mind of man that woman too had an inalienable right to life, liberty, and the pursuit of her individual happiness? Did he ever take in the idea that to the mother of the race, and to her alone, belonged the right to say when a new being should be brought into the world?²²¹

“Stanton’s understanding of a married woman’s right to her person was shared throughout the woman’s rights movement.”²²² There was a shared appreciation that because of women’s “exclusive responsibility for child rearing,” women “were entitled to control the terms of this work and determine how much of their lives they would have to spend raising children.”²²³

For Stanton, the concept of voluntary motherhood was so central that on her lecture tours “she held separate afternoon meetings for *women only* (an unfamiliar practice at that time) and talked ‘the gospel of fewer children [and] a healthy, happy maternity.’”²²⁴ She wrote: “What

218. Letter from Elizabeth Cady Stanton to Lucy Stone (Nov. 24, 1856) (including Stanton’s letter to the Tenth National Woman’s Rights Convention).

219. Letter from Elizabeth Cady Stanton to Susan B. Anthony (Mar. 1, 1853).

220. Letter from Elizabeth Cady Stanton to Gerrit Smith (Dec. 21, 1855). Stanton’s public letter was a response to a public letter from her cousin, abolitionist Gerrit Smith, who argued that women’s continued inequality was largely the result of their dress, which was a symbol and outgrowth of “the false doctrines and sentiments” which cause women’s helplessness and degradation. Letter from Gerrit Smith to Elizabeth Cady Stanton (Dec. 1, 1855).

221. Letter from Elizabeth Cady Stanton to Gerrit Smith, *supra* note 220.

222. Hasday, *supra* note 17, at 1422 (documenting agreement among feminists Lucy Stone, Matilda Joselyn Gage, Paulina Wright Davis, and Lucinda Chandler that a woman’s right to her own person was the most crucial right).

223. *Id.*

224. GORDON, *supra* note 24, at 66 (citing Letter from Elizabeth Cady Stanton to Martha Wright (June 19, 1871)). Stanton spent eight months of the year for eleven years traveling and

radical thoughts I then and there put into their heads [and] as they feel untrammelled, these thoughts are permanently lodged there! That is all I ask."²²⁵ At a lecture in San Francisco, she relayed her experience in speaking with the polygamist Mormon women in Utah. She reported:

Women are there treated in that matter just as they are treated elsewhere—without regard to their nature and their rights. Girls of 15 to 17, whose girlhood has not yet ripened, are wives and bear children every year. Everywhere it is so, and none the less so in Utah.²²⁶

She offered the same solution for all women. "We must educate our daughters, . . . First—to regard their own lives and bodies and the laws which govern them."²²⁷

In her lectures, Stanton encouraged women not to have children. She argued that "the preservation of their own womanhood was the one prime object of their lives."²²⁸ Instead, she said, "[A]s it is now, we look up to wives and mothers, and down on womanhood. This is wrong."²²⁹ Stanton said she revered single women like "Susan B. Anthony and Harriet Hosmer²³⁰ who have done great things in the world despite not having borne children."²³¹ She continued, "[w]e must educate our girls that they are independent; that in the society of the refined they may be happy; that they may live peaceful, glorious lives, and take high seats in Heaven, without ever seeing a man."²³²

In San Francisco, women in the audience questioned the practical realities of Stanton's suggestion.²³³ As reported in the newspaper *The Chronicle* (allegedly by a male journalist who claimed to slip into the lecture dressed as a woman), one woman asked, "How can we follow

speaking on the national Lyceum Tour, which took her to the Midwest and West to California and Utah. STANTON, *supra* note 21, at 262, 297; GRIFFITH, *supra* note 17, at 160–65.

225. Letter from Elizabeth Cady Stanton to Elizabeth Smith Miller (June 12, 1871).

226. *For Women Only: Mrs. Elizabeth Cady Stanton Discourses on Marriage and Maternity*, S.F. CHRON., July 13, 1871 [hereinafter *For Women Only*]. Stanton believed that daughters should be educated as to their duty as parents and then as citizens, and only last should be taught music "and silly arts and accomplishments," rather than the existing reverse order that was used to prioritize the primary education of girls. *Id.*

227. *For Women Only: Mrs. Elizabeth Cady Stanton Discourses on Marriage and Maternity*, DAILY IOWA STATE REG., July 29, 1871.

228. *For Women Only*, *supra* note 226.

229. *Id.*

230. Hosmer (1830–1908) was a lesbian sculptor who was part of an expatriate community of writers and artists in Rome that included a circle of prominent "independent women." DOLLY SHERWOOD, HARRIET HOSMER, AMERICAN SCULPTOR: 1830–1908 (1991).

231. *For Women Only*, *supra* note 226.

232. *Id.*

233. *Id.*

your advice and keep from having children?”²³⁴ Stanton answered, “Woman’s perfect independence is the answer to the query. Woman must at all times be the sovereign of her own person.”²³⁵ A second woman asked, “What do we do when men don’t agree with us?”²³⁶ Stanton replied that men can be educated as to voluntary motherhood, that their passions can be controlled, and that women should stop stimulating men’s passions with dress, dance, and fashion with bare arms and bare necks.²³⁷ *The Chronicle* reported that “[o]ne lady asked a question which hinted at prevention by other than legitimate means.”²³⁸ The journalist wrote that “Mrs. Stanton promptly replied that such views of the matter were too degrading and disgusting to touch upon, and must be classified in the category of crime alongside infanticide.”²³⁹ Stanton’s solution was abstinence, which followed the core principles of the voluntary motherhood movement and its emphasis on women’s control of sexual relations.

B. “Lions Not Jackasses”

Stanton extended her advocacy of voluntary motherhood into the idea of “enlightened motherhood.” Enlightened motherhood added a second argument about the eugenic consequences of unwanted pregnancies to the rhetoric of individual rights. It articulated a concern for the greater human race by controlling pregnancy to produce fewer children, but children of “superior quality.”²⁴⁰ Stanton emphasized the impact of unwanted and unhealthy pregnancies on the mental and physical health of the child, arguing that women should aim “to have one good kind of child” rather than many, and should try to produce “lions not jackasses.”²⁴¹

“This concern with eugenics was characteristic of nearly all feminists of the late nineteenth century.”²⁴² Feminists used eugenic arguments to bolster their credibility and “conquer conservative and religious scruples about reproduction.”²⁴³ Women had been told in the abortion campaign that their duty to the human race and the greater good was to pro-

234. *Id.*

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.*

240. DAVIS, *supra* note 17, at 48–50.

241. Elizabeth Cady Stanton, *Marriage and Maternity*, WOODHULL & CLAFLIN’S WEEKLY, Jan. 16, 1875.

242. GORDON, *supra* note 24, at 68.

243. *Id.*

duce multiple children. Feminists now used this rhetoric about the greater good of the human race to find a benefit from women's restriction of procreation. The newly articulated eugenics theory provided a scientific basis for that argument.

The early eugenicists like Stanton focused on individual improvements in environment that could be transmitted to offspring, such as improving the physical and mental conditions of the mother during pregnancy.²⁴⁴ At the time, eugenics was an implication of evolutionary theory, used by many social reformers to buttress their arguments that improvement of the human condition was possible.²⁴⁵ As it developed, eugenics added a fear about the decline of the white race from social, political, and economic threats from an expanding class of immigrants, a nativist and racist theory that featured prominently in the antiabortion literature. Later in the twentieth century, eugenics would take on a more invidious focus, but the thought "originally was primarily directed at the elimination of idiocy, criminality, and drunkenness" on the theory that such undesirable qualities were hereditary.²⁴⁶ "Feminists assumed the inheritability of acquired characteristics and contended that a husband's licentiousness and a wife's unhappiness about her impending maternity would be transmitted to their child before birth, forever diminishing the child's capabilities and prospects."²⁴⁷

Stanton was particularly concerned about unwanted pregnancies from alcoholic fathers. She was influenced here by her early work on and support of the temperance movement that pushed for the prohibition of

244. GORDON, *supra* note 24, at 190. Stanton said, "so long as children are conceived in weariness and disgust, you must not look for high-toned men and women capable of accomplishing any great and noble achievements." Letter from Elizabeth Cady Stanton to Gerrit Smith, *supra* note 220. On another occasion, she argued, "[t]ruly are the sins of the father visited upon the children. God, in his wisdom, has so linked together the whole human family, that any violence done at one end of the chain is felt throughout its length." Letter from Elizabeth Cady Stanton to Paulina Wright Davis (Oct. 20, 1850), in THE PROCEEDINGS OF THE WOMAN'S RIGHTS CONVENTION, HELD AT WORCESTER, OCTOBER 23D & 24TH, 1850, 51, 54 (1851). "Men and brethren, look into your asylums for the blind, the deaf and dumb, the idiot, the imbecile, the deformed, the insane . . . and there behold the terrible retributions of your violence on woman!" Tenth National Woman's Rights Convention (May 11, 1860), in THE SELECTED PAPERS OF ELIZABETH CADY STANTON AND SUSAN B. ANTHONY: IN THE SCHOOL OF ANTI-SLAVERY, 1840 TO 1866, 423 (Ann D. Gordon ed., 1997).

245. Mary Ziegler, *Eugenic Feminism: Mental Hygiene, the Women's Movement, and the Campaign for Eugenic Legal Reform, 1900–1935*, 31 HARV. J.L. & GENDER 211 (2008).

246. Eugenics morphed into a movement for involuntary sterilization of criminals and the mentally ill, and later black mothers and the welfare poor, much of which was initially supported by the legal system. GORDON, *supra* note 24, at 68, 84–85, 190; Gordon, *Nineteenth-Century Feminists*, *supra* note 24, at 143; Ziegler, *supra* note 245; see also *Buck v. Bell*, 274 U.S. 200 (1927) (upholding involuntary sterilization of a mentally disabled woman); cf. *Skinner v. Oklahoma*, 316 U.S. 565 (1942) (invalidating involuntary sterilization of male criminal defendant).

247. Hasday, *supra* note 17, at 1440–41.

alcohol. As a housewife in Seneca Falls, Stanton's neighbors and household employees often confided in her, as a de facto lawyer, about domestic abuse, unwanted pregnancies, and other indignities from drunken husbands.²⁴⁸ Stanton drew on these experiences in her remarks on controlling childbirth. She warned women against having children with an alcoholic husband: "[L]ive with him as a friend, . . . but for woman's sake, for humanity's sake, be not his wife—bring no children to that blighted, dreary, desolate hearth."²⁴⁹ At other times she argued more stridently, sarcastically calling for the legislature to command such a result: "Let them fine a woman fifty dollars for every child she conceive by a Drunkard. Women have no right to saddle the state with idiots to be supported by the public. Only look at the statistics of the idiot asylums, nearly all the offspring of Drunkards."²⁵⁰

C. Sparring with Mrs. Stanton

This time period of enlightened motherhood gave rise to one quote alleged to have come from Stanton and prominently featured by modern prolife advocates. The quote reads, "When we consider that women are treated as property, it is degrading to women that we should treat our children as property to be disposed of as we see fit."²⁵¹ For many years, this quote was the centerpiece of FFL propaganda showcased on posters, brochures, and coffee mugs. FFL members embroidered the quote on a quilt and donated it to the Seneca Falls Historical Society.²⁵² However, the anonymous quote has not been proven to be Stanton's—or even to exist.

At first blush, the content of the FFL quote recalls something Stanton once said early in her career attacking the "disposal of children as property" through the laws of guardianship and indentured servitude. In her 1854 *Address to the Albany Legislature*, Stanton wrote, "[B]y your laws, the child is the absolute property of the father, wholly at his disposal in life or at death."²⁵³ In her multilayered attack on coverture, Stanton criticized the custody laws under which mothers were powerless to

248. Tracy A. Thomas, *Elizabeth Cady Stanton and the Notion of a Legal Class of Gender*, in FEMINIST LEGAL HISTORY, *supra* note 42, at 139–55; *Mrs. Stanton's Address*, LILY, May 1852 (speaking at the second Women's Temperance Convention of the State of New York).

249. *Mrs. Stanton's Address*, *supra* note 248, at 41.

250. Letter from Elizabeth Cady Stanton to Susan B. Anthony (Mar. 1, 1852).

251. See FEMINISTS FOR LIFE, *supra* note 110 (flyers and mug on file with author).

252. Suzanne Schnittman, *Elizabeth Cady Stanton Honored by FFL of Western New York*, AM. FEM., Spring 1996, available at <http://feministsforlife.org/taf/1996/spring/honorecs.htm>.

253. Elizabeth Cady Stanton, *Address to the Legislature of New-York Adopted by the State Woman's Right Convention Held at Albany* (Feb. 14, 1854) [hereinafter Stanton Address].

stop the indentured servitude of their children and to prevent the “binding out” of their children to third-party guardians.²⁵⁴ She decried the “abuse of absolute power” by which a father could bind his daughter to the owner of a brothel, or apprentice his child to a trade or labor “without the mother’s consent—yea, in direct opposition to her most earnest entreaties, her prayers and tears.”²⁵⁵ The FFL quote hints at a similar focus on guardianship, but review of the complete source is required.

However, attempts to locate and verify the source of this alleged Stanton quote have been unavailing. FFL and other scholars cite the source for the quote as a “letter to Julia Ward Howe, October 16, 1873, recorded in Howe’s diary at Harvard University Library.”²⁵⁶ While Howe was a contemporary of Stanton’s and a supporter of suffrage, she was also a leader in the rival conservative women’s rights organization.²⁵⁷ A search of the archives by Harvard librarians, this author, and a second researcher could not locate the source. An inquiry to the Feminists for Life went unanswered.²⁵⁸ Several months after the inquiry, FFL stopped using the Stanton quote and removed all posters and mugs with the quote from its website. The group issued this disclaimer: “Though we have been searching for it and continue to seek it, Feminists for Life has, unfortunately, not been able to locate this letter attributed to Stanton.”²⁵⁹ They offered an explanation: “The letter may never have been written, or it may have been misplaced, relocated, stolen, or destroyed.”²⁶⁰ And the group agreed to stop using the quote. “Until we can verify that Elizabeth Cady Stanton wrote the words, we will no longer attribute them to her.”²⁶¹

254. *Id.*

255. *Id.*

256. See FEMINISTS FOR LIFE, *supra* note 110; see also 149 CONG. REC. H9802 (Oct. 21, 2003) (statement of Rep. Pence); Collett, *supra* note 34, at 187.

257. Howe is best known as the author of “The Battle Hymn of the Republic” and as one founder of Mother’s Day. See generally VALARIE H. ZIEGLER, *DIVA JULIA: THE PUBLIC ROMANCE AND PRIVATE AGONY OF JULIA WARD HOWE* (2003). She shared Stanton’s support of women’s suffrage, but joined the more conservative women’s organization, the American Woman’s Suffrage Association, which was opposed to Stanton and her more radical approach to women’s rights advanced by the National Woman’s Suffrage Association. DUBOIS, *supra* note 17; ZIEGLER, *supra* at 97, 113. The hostilities between the two groups grew out of Stanton’s refusal to support black suffrage in the absence of universal suffrage for both blacks and women; Stanton’s refusal to allow men to lead the organization; Stanton’s inclusion of radical ideas of divorce; and Stanton’s approach of federal, rather than state-by-state action. DUBOIS, *supra* note 17.

258. Email from author to Feminists for Life (Mar. 2011).

259. Clark, *supra* note 95.

260. *Id.* (stating that “earlier generations of pro-life feminists informed us that these words were written by Elizabeth Cady Stanton, in a letter tucked into Julie Ward Howe’s diary on October 16, 1873”).

261. *Id.*

What Howe's diary does reveal, however, is that she and the radical Stanton disagreed on the topic of infanticide. Howe rejected Stanton's views, which she interpreted as implicitly tolerating the crime of infanticide. Howe wrote that she

[s]parred with Mrs. Stanton, who excused infanticide on the grounds that women did not want to bring moral monsters into the world, and said that these acts were regulated by natural law. I differed from her strongly, asserting that the moral law of man's being was paramount to the mechanical tendencies, quoted as natural laws, and that infanticide was usually a crime of gross selfishness, though under some circumstances, the struggle against it must be agonizing. Nature has a dark horror of the act, I think.²⁶²

That day, October 16, 1873, Howe and Stanton had attended a conference of Howe's newly formed First Woman's Congress of the Association for the Advancement of Women in New York City.²⁶³ Twelve days later, Howe wrote in her diary, "Someone has sent me a Golden Age with a dashing notice of the Woman's Congress, by Mrs. Stanton. As might be expected, she slurs me with faint praise, but somewhat sustained my objections to proceedings already characterized in these pages."²⁶⁴

Stanton attended the Woman's Congress to speak on the topic of the co-education of the sexes, but on the third day of the meeting, the topic turned to enlightened motherhood and the notion that women should engage in more deliberate and healthful pregnancies.²⁶⁵ The speeches opened with strong condemnation of infant mortality rates, pleaded for women to improve their knowledge and physical condition during pregnancy, and demanded that men practice sexual self-control so that healthier babies were born.²⁶⁶ One speaker, Elizabeth Lovering, made what the newspapers called "a tricky case":

No child should be brought into the world which was not the product of a perfect love, the damage to the race from the birth of children, the product of an overburdened and unwilling motherhood, or

262. Diary of Julia Ward Howe (Oct. 16, 1873) (on file with Harvard Houghton Library).

263. *The Woman's Congress*, N.Y. TIMES, Oct. 16, 1873; *The Woman's Congress*, N.Y. TRIBUNE, Oct. 16, 1873.

264. Diary of Julia Ward Howe, *supra* note 262.

265. PAPERS AND LETTERS PRESENTED AT THE FIRST WOMAN'S CONGRESS OF THE ASSOCIATION FOR THE ADVANCEMENT OF WOMEN, OCT. 1873 [hereinafter FIRST WOMAN'S CONGRESS], available at Harvard University Library, <http://pds.lib.harvard.edu/pds/view/2582380?n=1&s=4&printThumbnails=no>.

266. *Id.*

of an exhausted vitality on the part of either of the parents, was incalculable.²⁶⁷

Stanton responded to this argument during the discussion. She asserted that the character of the child was formed before birth, and she made eugenics-type arguments against bringing deformed children into the world. Stanton said,

[She] [h]ad often thought, when she inspected the different charitable asylums, what should we say of an artist who should spend all day in filling a gallery full of distorted statues and everything crooked about them. Yet we have been filling the world with men and women with crooked legs and crooked brains and everything crooked about them altogether. I want to have women, she said, think on these things. They must not take the teaching of men, that have taught women their whole duty was to multiply and replenish the earth. This was a mistake; we have too many children already. It is in vain that Bishop Cox Hopkins talks from the pulpit against the crime of infanticide; there are laws deeper down than anything we know. Every woman knows we are bringing into the world moral monstrosities. When physical monstrosities are born the physician thinks it is perfectly just to put them out of the world. Mothers know that they are bringing into the world moral monstrosities. It is not the right and duty of every man and woman to be fathers and mothers, for it is the ante-natal conditions that determine the character of the race.²⁶⁸

Howe quickly attempted to distance herself and the convention from the implications of Stanton's remarks. Howe said that she "was deeply mortified if any sanction of infanticide should go forth from that meeting" and that she "was fearful that the impression might go abroad that the Woman's Congress favored infanticide based upon Stanton's remarks."²⁶⁹ Stanton sarcastically replied that "she had not the least idea that the majority of the audience thought that she favored infanticide. She had merely stated what was an acknowledged fact in the world and always would be until women had the full and entire control of their own person."²⁷⁰ Stanton continued to say that if a woman was grand enough to bring into the world a dozen children, by all means let her do so (she

267. Mrs. Elizabeth C. Lovering, *Enlightened Motherhood*, in FIRST WOMAN'S CONGRESS, *supra* note 265, at 31.

268. FIRST WOMAN'S CONGRESS, *supra* note 265.

269. *The Woman's Congress*, N.Y. TIMES, Oct. 16, 1873; *The Woman's Congress*, N.Y. TRIBUNE, Oct. 16, 1873.

270. See sources cited *supra* note 269.

thought she fell within this category, which justified her deliberate efforts to have seven children).²⁷¹ But Stanton continued, “[I]f a woman with weak, sickly constitution is married to a drunken and profligate husband the fewer the children she brings into the world the better.”²⁷²

V. STANTON REFRAMES THE DEBATE AS WOMEN’S OPPRESSION

Stanton articulated clear views about women’s right to control their own person and their singular right to control procreation. As the campaign against abortion swirled around her, Stanton joined in at the periphery, drawn in by the attack on women. She did not engage with the moral question of abortion but instead utilized the public dialogue to reframe the question into one of women’s rights. The male-dominated abortion debate gave her the toehold she needed to get an audience for her radical issues of women’s rights reform. Stanton routinely adopted this approach in other contexts as well, taking a topic from the front-page headlines and redirecting the public and political discourse to implications for women’s rights.²⁷³ She knew how to capitalize on the media to keep her agenda of the “woman question” front and center.

Stanton focused her attention on the crime of infanticide to expose the gender bias of the legal system. Infanticide, the murder of an infant after birth, had never been permissible, and was universally condemned. Yet Stanton used infanticide, rather than the more morally ambiguous issue of abortion (given the common law acceptance of early-term abortion) to illustrate her points about women’s oppression. Contrary to conservative claims today, Stanton did not speak expressly about or against abortion. Instead, she directed her comments to infanticide, formulating a defense of women accused of this crime—mainly in the notable case of

271. See STANTON, *supra* note 21, at 108.

272. N.Y. TIMES, Oct. 16, 1873; N.Y. TRIBUNE, Oct. 17, 1873; N.Y. TRIBUNE, Oct. 16, 1873; N.Y. WORLD, Oct. 17, 1873; WOODHULL & CLAFLIN’S WEEKLY, Nov. 1, 1873; see also Lucinda Chandler, *Enlightened Motherhood*, N.Y. WORLD, Oct. 17, 1873 (speaking of the “evils of an undesigned and undesired maternity”). Stanton, writing on October 19 about the Congress for the *Golden Age* (Oct. 25, 1873), comments that Chandler’s paper on *Enlightened Motherhood* was the best presented on that question. According to *Woodhull & Claflin’s Weekly*, Nov. 1, 1873, the *New York Herald* regarded Mrs. Chandler’s lecture as too obscene to publish.

273. For example, during the media frenzy surrounding the scandalous Beecher–Tilden trial regarding a husband’s suit against his wife’s paramour for adultery and breach of affection, Stanton redirected the debate to focus on a woman’s lack of rights in marriage and her inability to divorce. THOMAS, *supra* note 19. When a murder trial in the Richardson–McFarland case acquitted an estranged husband who murdered his wife’s lover in cold blood, Stanton decried the verdict of innocent by insanity, calling it the “Dred Scott decision” for women in which women were always the property of their husbands. *Id.* When divorce reform advocates sought a federal constitutional amendment to prohibit divorce, Stanton reframed the issue as women’s right to freedom from tyrannical husbands through domestic violence and coverture. Thomas, *supra* note 19.

Hester Vaughn. Stanton's defense focused on women's exclusion from participation in making the law and their absence in legislatures and juries. She argued that women were entitled to a "jury of their peers" and the right to equal access to serve on juries in these and other cases.

Stanton used the platform of her paper, the *Revolution*, as a vehicle to disseminate her views about infanticide. Editorials in the paper, by Stanton and others, also form the basis of proof that antiabortion advocates use today to claim that Stanton was "outspokenly" against abortion. But the evidence speaks for itself.

A. Stanton's "Infanticide and Prostitution"

In February 1868, Stanton began the weekly edition of the *Revolution* with a piece entitled "Infanticide and Prostitution."²⁷⁴ It began by reprinting two blurbs, one from the *Sun* lamenting the "social evil statistics" of prostitution and one from the *Tribune* regarding "child murder."²⁷⁵ The *Tribune* excerpt attacked the "notorious boarding-house," where "mothers, married or unmarried, can be delivered of their offspring in the strictest confidence, and relieved of all the burdens of maternity."²⁷⁶ The reprint stated that "the murder of children, either before or after birth, has become so frightfully prevalent that physicians, who have given careful and intelligent study to the subject, have declared that were it not for immigration the white population of the United States would actually fall off!"²⁷⁷ The reprint concluded that "the murder of infants is a common thing among American women."²⁷⁸

Stanton responded to the newspapers' moral attacks on women by focusing on potential remedies to the alleged problems. She asserted, "We believe that cause of all these abuses lies in the degradation of woman."²⁷⁹ The only remedy, she said, is "the education and enfranchisement of woman."²⁸⁰ Stanton explained she was not surprised that women "do everything to avoid maternity" because maternity is presented religiously as a curse, and women "through ignorance of the science of life and health find it so."²⁸¹ Stanton placed the blame for unwanted pregnancies on men. "Strike the chains from your women; for as long as they are slaves to man's lust, man will be the slave of his own pas-

274. Elizabeth Cady Stanton, *Infanticide and Prostitution*, *REVOLUTION*, Feb. 5, 1868, at 65.

275. *Id.*

276. *Id.*

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*

sions.”²⁸² She refused to engage in the moral outrage against women. “Let us no longer weep, whine and pray over all these abominations.”²⁸³ Instead, she called for an “enlightened conscientiousness” and for “every thinking man” to change things in his own household by facilitating intentional and healthful pregnancies.²⁸⁴

Stanton used the heightened awareness of the public media campaign against abortion to advance her own agenda of exposing the nature of women’s oppression and demand for equal rights. She capitalized on the existing public rhetoric and media frenzy to reframe the narrative into one of women’s rights, focusing on the social causes and public endorsement of women’s oppression. She did not engage in the debate on the same moral and sexist terms dictated by the male medical profession and press, but instead recast the issue from a feminist perspective to focus on the issue of women’s subordination under the law.

B. Defending Hester Vaughn

For Stanton, the issue of infanticide was not about morality. Rather, it was an example of the gendered bias of an unjust legal system. She used infanticide as a principal example of how man unjustly made and executed laws against woman, explaining that “the one in power fails to apply the immutable principles of right to any grade but his own.”²⁸⁵ Stanton brought the public’s attention to her views on infanticide through the pages of the *Revolution* and a series of features on the trial of Hester Vaughn, capitalizing on the media attention on infanticide and abortion in 1868.²⁸⁶

Hester Vaughn was a poor, young English immigrant convicted of infanticide by a Philadelphia court and sentenced to be “hanged by the neck until she is dead.”²⁸⁷ Vaughn worked as a domestic servant, became pregnant either by force or seduction, and was forced out on the streets.²⁸⁸ She rented a room in a tenement house run by a German-speaking family.²⁸⁹ There, in the dead of winter, with no heat or water, she gave birth alone; three days later she was found in her room next to

282. *Id.*

283. *Id.*

284. *Id.*

285. Stanton Address, *supra* note 253.

286. *Infanticide*, *REVOLUTION*, Aug. 6, 1868, at 74; *see also The Case of Hester Vaughan*, *REVOLUTION*, Dec. 10, 1868. Hester’s last name was spelled “Vaughn” in most papers, though the *Revolution* spelled it “Vaughan.”

287. *The Case of Hester Vaughan*, *supra* note 286.

288. *Id.*

289. *Id.*

the dead infant.²⁹⁰ She was denied the right to testify at her own trial and was convicted by an all-male jury.²⁹¹ The judge later explained that Vaughn had “an excellent face,” but that it was important to establish a principle, “because you have no idea how rapidly the crime of infanticide is increasing. Some woman must be made an example of.”²⁹²

The unsigned editorial that initiated the *Revolution's* defense of Vaughn described her as a “poor, ignorant, friendless and forlorn girl who had killed her newborn child because she knew not what else to do with it.”²⁹³ It blamed society, the law, and the church, claiming that if the sentence was executed, “it will be deliberate, downright murder.”²⁹⁴ For “her death will be a far more horrible *infanticide* than was the killing of her child.”²⁹⁵

In her first signed editorial on the case, Stanton portrayed the Vaughn case as one of seduction.²⁹⁶ She emphasized Vaughn as an innocent girl of “good repute” whose “protector proved her betrayer” and turned her into the street “at the very time she needed shelter, love and care.”²⁹⁷ This characterization adopted the language of the criminal seduction laws, first passed in 1843, which punished those who “seduced women and engaged in sexual intercourse with an unmarried woman of previously chaste character under a promise of marriage.”²⁹⁸ Seduction was a popular defense for infanticide that many elites in the nineteenth century shared, as seen in both public and literary contexts.²⁹⁹ Some, like

290. *Id.*

291. *Id.*

292. *Id.* In response, feminist journalist Eleanor Kirk suggested that he “inaugurate the good work by hanging a few men.” *Id.*

293. *Infanticide*, *supra* note 286, at 74.

294. *Id.*

295. *Id.*

296. Elizabeth Cady Stanton, *Hester Vaughan*, *REVOLUTION*, Nov. 19, 1868, at 312.

297. *Id.*

298. *Id.* The criminal statutes created a new claim beyond the common law tort of seduction, which merely gave fathers a right to sue those who seduced their daughters for damages for the loss of services or labor of that daughter. Melissa Murray, *Marriage as Punishment*, 100 *COLUM. L. REV.* (forthcoming 2012). The common law tort failed to address the outrage of moral reformers who were concerned about sexual mores, the rise in prostitution, and the social and economic desolation of the unmarried woman. *Id.* The seduction statutes, however, were not implicated in Vaughn's story because there was no claim of a promise to marry, as Vaughn refused to identify the perpetrator or make any beliefs or claims of marital promises that would have implicated her partner. Stanton nevertheless applied the analogy, continually talking about Vaughn's “reputation of good repute” in reference to the language of many of the seduction statutes. See Act of Apr. 19, 1843, No. 165, § 1, 1843 Pa. Laws 348 (“The seduction of any female of good repute, under twenty-one years of age, with illicit connexion under promise of marriage, is hereby declared to be an indictable offence.”).

299. See Ruth Ellen Homrighaus, *Wolves in Women's Clothing: Baby-Farming and the British Medical Journal, 1860-1872*, 26 *J. FAM. HIST.* 350, 354 (2001); *Infanticide in England*, *N.Y. TIMES*, Aug. 25, 1865. Stanton's depiction of Vaughn is reminiscent of the character Hetty Sorrel, the

the Female Moral Reform Society, called for regulation of seduction, not abortion, as the solution to the public outcry over women's deaths from abortion sensationally portrayed in the media.³⁰⁰ Stanton, echoing the feminist voices in the *Revolution*, decried the double standard of sexual morality and the penal code that severely penalized infanticide for women, but exonerated the man involved in the initial seduction.³⁰¹ "What a holocaust of women and children we offer annually to the barbarous customs of our present type of civilization, to the unjust laws that make crimes for women that are not crimes for men!"³⁰²

Stanton then moved beyond the seduction defense to call women to action in defense of Vaughn.³⁰³ She compelled women, as a class, to embrace one of their own and to appreciate that her predicament and death sentence could happen to any one of their daughters. "In the name of womanhood, we implore the mothers . . . to rescue that defenceless girl from her impending fate. Oh! make her case your own."³⁰⁴ She told a story of another case of infanticide among the upper class, in which a woman threw her baby into the sea.³⁰⁵ She continued, "[I]n the Court of Heaven that act was not registered to her account, but to a priest who had fled to foreign lands."³⁰⁶ Stanton argued that the demands of justice should take the life of the seducer rather than the woman. "Men," she claimed, "have made the laws cunningly, for their own protection; ignorantly, for they can never weigh the sorrows and sufferings of their victims."³⁰⁷

The Working Woman's Association (WWA) responded to the call to take up the cause of Hester Vaughn.³⁰⁸ The WWA investigative com-

infanticidal mother in the fictional novel, *Adam Bede* (1859) by George Eliot, whom Stanton greatly admired. In the book, the poor orphaned Hetty succumbs to the sexual advances of a local aristocrat with his promises of wealth, love, and flattery. When Hetty discovers she is pregnant, she leaves her household in shame, wanders destitute, hides her pregnancy, gives birth, and buries her child alive in a state of delirium.

300. MOHR, *supra* note 34, at 122; SMITH-ROSENBERG, *supra* note 126, at 229.

301. Stanton, *supra* note 296. Stanton analogized to the 1850 novel, *The Scarlett Letter*, and its story of the punishment of shame and ostracism for a Puritan woman, also named Hester, for adultery, sentenced by the judge who was her seducer. "That picture of Hawthorne's of a grand woman . . . is in marked contrast with the cowardly selfishness of the man who betrayed and judged her." *Id.*

302. *Id.*

303. *Id.* at 312.

304. *Id.*

305. *Id.*

306. *Id.*

307. *Id.*

308. Elizabeth Cady Stanton, *The Working Women's Association*, *REVOLUTION*, Nov. 5, 1868. The WWA was a women's labor union formed in September 1868 by Susan B. Anthony and was initially comprised of skilled female typesetters demanding equal pay and the elimination of abuses

mittee sent a delegation to Philadelphia “to have an interview with the doomed woman, and gain from her own lips the sad particulars.”³⁰⁹ They reported that “truth beamed from every feature of her expressive face.”³¹⁰ The delegation recast Vaughn as a girl “well reared by respectable parents” in England who was deserted by her husband once they arrived in America.³¹¹ They reported how she managed as a servant, then a dairy-maid, until “overcome, not in a moment of weakness and passion, but by superior strength—*brute force*—Hester Vaughan fell a victim to lust and the gallows.”³¹²

In December, WWA supporters met, raised donations for Vaughn, and passed resolutions challenging her conviction and condemning the death penalty in general.³¹³ Horace Greeley, editor of the *New York Tribune*, and one of the supporters in attendance, cautioned the women against overstepping their argument by claiming that the death penalty itself was wrong.³¹⁴ He urged them to stick with the argument that there was a lack of evidence against Vaughn in this case to support the imposition of such a penalty.³¹⁵ The association ignored his advice and instead passed resolutions condemning both the death penalty in Vaughn's case

such as the “oppression of workingwomen by unjust and avaricious employers” that perpetuated poverty, misery and death. DUBOIS, *supra* note 17, at 126–51; *A Struggle for Life*, N.Y. TIMES, Nov. 6, 1868. The WWA grew quickly to include mostly professional women, including journalists, physicians, and teachers, who focused more broadly on women's economic autonomy and independence. These middle-class women eventually controlled and comprised the entirety of the organization, which led to its downfall in less than a year because it replicated the work of other suffrage and club women's groups and thus had no purpose or reason to continue. DUBOIS, *supra* note 17, at 126–51. During the height of the WWA's activism in November 1868, the group searched for an issue around which to rally, leery of a singular focus on suffrage because they prioritized economic concerns and were fearful of the negative connotations of suffragists as “strong-minded women” with short hair and bloomers. *Id.* The association searched for practical ways of elevating female workers and established committees to investigate and publicize the living and working conditions of working women. *Working Women's Association*, REVOLUTION, Dec. 24, 1868. Eleanor Kirk, an aspiring journalist active in the association, wrote a series of articles for the *Revolution* to explain the dire necessities of New York working women. See Eleanor Kirk, *Heart Aching Facts*, REVOLUTION, Nov. 12, 1868 [hereinafter Kirk, *Heart Aching Facts*]; see also Eleanor Kirk, *Another Dose of Facts*, REVOLUTION, Oct. 29, 1868. Kirk recommended that “the very first public step taken by this new Society should be to petition Governor Geary for the pardon and release of Hester Vaughn.” Kirk, *Heart Aching Facts*, *supra*.

309. *The Case of Hester Vaughan*, *supra* note 286. The group, led by Kirk and escorted by Mr. Seward, visited Vaughn in prison on Thanksgiving Day. *Id.* The group included “Mrs. Dr. Clemence Lozier,” a female obstetrician “on account of her scientific knowledge.” *Id.*

310. *Id.*

311. *Id.*

312. *Id.*

313. *The Workingwomen of New-York in Behalf of Hester Vaughn, Under Sentence of Death in Philadelphia*, N.Y. TIMES, Nov. 24, 1868.

314. *Hester Vaughn*, N.Y. TIMES, Dec. 2, 1868.

315. *Id.*

and capital punishment across the board, arguing to banish from the land the “horrible relic of barbarism” that is “opposed to the genius of our institutions and the civilization of the age.”³¹⁶

Three days later, Stanton and her cousin, Elizabeth Smith Miller, presented the resolutions to the governor of Pennsylvania, Governor Geary.³¹⁷ Geary was concerned that the women from New York were interfering with the jurisdiction of a neighboring state.³¹⁸ He emphasized that the women of Pennsylvania, namely a Dr. Susan Smith, had already quietly been petitioning for Vaughn’s release.³¹⁹ Geary reassured Stanton that he would not sign Vaughn’s death warrant and that she “was safe in his hands.”³²⁰ Stanton urged that “safety within the walls of a prison might not be the most desirable to an innocent woman,” and renewed her request for Vaughn’s release.³²¹ The conversation veered toward the reform of prison conditions, which Geary, and later Geary’s wife, reported was a top priority of the governor.³²²

Stanton and Miller continued on to Philadelphia to visit Vaughn in Moyamensing Prison.³²³ Stanton remarked that “on seeing the poor girl, our interest in her greatly intensified, and we felt more than ever convinced of her innocence.”³²⁴ Stanton described Vaughn as a “short, stout girl,” with a “benevolent face,” “soft blue eyes,” and a quiet, gentle, self-possessed manner.³²⁵ She commented on Vaughn’s ability to read and write, and remarked that she “is very intelligent for one of her class.”³²⁶ Stanton recounted Vaughn’s story of desertion, betrayal, and disgrace, and how she was dragged by men in the depth of winter from her “bed of sickness” to the prison house.³²⁷ When Stanton complained to the guards of the mice and cockroaches that had bitten Vaughn, the guard curtly

316. *The Case of Hester Vaughan*, *supra* note 286.

317. Elizabeth Cady Stanton, *Editorial Correspondence*, *REVOLUTION*, Dec. 10, 1868, at 353. They traveled by train to Harrisburg, and Stanton recorded their meeting in a letter to the *Revolution* in great detail. She described the elegant setting, the prevalence of spittoons, and the handsomeness of the “hero of Lookout Mountain,” Governor Geary. *Id.*

318. *See id.*

319. Dr. Susan Smith, a prominent female physician in Philadelphia, and the neighbor of Judge Lowell who had convicted Vaughn, began visiting Hester in prison immediately after her sentence. Convinced of her innocence, Smith petitioned Governor Geary for her release beginning in August and continued to visit her several times a week. *Id.*

320. *Id.*

321. *Id.*

322. Stanton, *supra* note 317; *Working Women’s Association*, *SUN*, Dec. 8, 1868.

323. Stanton, *supra* note 317, at 354.

324. *Id.*

325. *Id.*

326. *Id.*

327. *Id.*

replied that “a prison is not a hotel.”³²⁸ Stanton ended her essay with a call to individual responsibility toward helpless people suffering in jails and prisons. She pled for empathy: “If we could only make the sorrows of others our own we should have less patience with wrong and oppression.”³²⁹

Stanton and the WWA committee developed two legal critiques of the Vaughn case based on (1) the insufficiency of the evidence and (2) the ineffective assistance of counsel.³³⁰ Arguing like a criminal defense lawyer, Stanton claimed that “every lawyer accustomed to examine evidence must see the strong points for doubt as to her guilt.”³³¹ She referenced *Archbold's Criminal Practice and Pleading* and its comments on infanticide, which concluded that “new-born infants are easily killed by cold and starvation”—two strong points in Vaughn's case because she was alone in a cold room in the depth of winter for several days after the birth, “long enough, without any violence, for a child to die, with either cold or starvation.”³³² Feminist supporter and physician, Dr. Clemence Lozier, offered another explanation for the baby's death: puerperal mania and blindness caused by the birth made Vaughn unaware of her actions, and in her delirium, she may have lain on the baby after its birth.³³³ Dr. Lozier also emphasized that there was no evidence that the baby had in fact been born alive.³³⁴ She pointed out that no routine inquest had been made examining the infant's lungs to determine if it had lived.³³⁵ The baby had been born prematurely at eight months, and Dr. Lozier said that “most babies born at this time did not live.”³³⁶

Stanton argued that “there was so much room for doubt in the case that if she had been properly defended, the jury would either have acquitted her, or disagreed,” either way resulting in her release.³³⁷ The ineffective assistance of counsel claim attacked the inadequacy of Vaughn's lawyer, Mr. Goforth. He had failed to visit her in prison or consult with her regarding a defense, and he spoke with her only in open court.³³⁸ He

328. *Id.*

329. *Id.*

330. *Hester Vaughn*, *supra* note 314; *The Case of Hester Vaughan*, *supra* note 286; Elizabeth Cady Stanton, *Hester Vaughan*, *REVOLUTION*, Dec. 10, 1868; *see also A Western Judge on Hester Vaughan*, *REVOLUTION*, Dec. 11, 1868.

331. *Hester Vaughan*, *REV.*, Dec. 10, 1868, at 360.

332. *Id.*

333. *Id.*

334. *The Case of Hester Vaughan*, *supra* note 286, at 358.

335. *Id.*

336. *Id.*

337. *Id.*

338. *Id.*

failed to raise any defense about the stillbirth of the child, the lack of witnesses, or the potential temporary insanity brought on by the birth.³³⁹ Vaughn had paid him her last thirty dollars. Stanton and the working women criticized what they called “the \$30 defence” with references to the betrayal of Jesus by Judas Iscariot for thirty pieces of silver.³⁴⁰

The *Revolution*'s public defense of Vaughn triggered a backlash by some of the prominent papers in New York.³⁴¹ Stanton's coeditor, Parker Pillsbury, noted that “some of the city newspapers (not many, nor the best of them) complained that it was out of the province of the Association to take cognizance of such an affair.”³⁴² The complaints were that the labor organization should not be involved in issues of infanticide, women's rights, or capital punishment. Eleanor Kirk defended against the attack repeating the equities of the case.³⁴³ Pillsbury defended the association on broader moral and political grounds of aiding a woman “in the deepest depths of sorrow,” helping one of their own working women, and seeing the implication of the issue for women's rights.³⁴⁴ He reminded the reform community that the “abolitionists were long accustomed to that type of humanity and philanthropy” as they had helped individual slaves obtain freedom in Canada.³⁴⁵

In the spring of 1869, the Governor quietly pardoned Vaughn on the condition that she return immediately to England.³⁴⁶ When the New York supporters learned of her release, they expected to meet her at the train station with donation money in hand. Vaughn never appeared. In August 1869, Dr. Susan Smith sent a letter to the *New York World* affirming that Vaughn had returned safely to England and excerpted a letter that she had received from Vaughn asking for the money her supporters had collected.³⁴⁷ Hester Vaughn was never heard of again.

339. *Id.*

340. *Id.* They contrasted Vaughn's pathetic legal representation to that procured by a \$50,000 payment by a California Senator to acquit his brother, General Cole, of murdering his wife's lover in cold blood. N.M., *Hester Vaughan and Gen. Cole Again*, *REVOLUTION*, Feb. 1869.

341. Sarah Barringer Gordon, *Law and Everyday Death: Infanticide and the Backlash Against Woman's Rights After the Civil War*, in *LIVES IN THE LAW* 55 (Austin Sarat et al. eds., 2002).

342. Parker Pillsbury, *The Hester Vaughan Meeting at Cooper Institute*, *REVOLUTION*, Dec. 10, 1868, at 361.

343. *The Case of Hester Vaughan*, *supra* note 286; Eleanor Kirk, *Is Hester Vaughan Guilty?*, *REVOLUTION*, Jan. 14, 1869.

344. Pillsbury, *supra* note 342.

345. *Id.*

346. *The Workingwoman's Association*, N.Y. *DAILY TRIB.*, May 28, 1869; Gordon, *supra* note 341.

347. Parker Pillsbury, *Hester Vaughan Once More*, *REVOLUTION*, Aug. 1869 (reprinting Smith's letter to *N.Y. World* of August 5).

C. A Jury of Her Own

For Stanton, the Vaughn case and the subject of infanticide represented more than an individual injustice; it demonstrated the unacceptability of the all-male legal system. The case gave Stanton the opportunity to renew her twenty-year-old demand that women be given the right to a “trial by a jury of our own peers,” which she called the “most sacred of all rights.”³⁴⁸

[T]rial by a jury of her peers has never yet been vouchsafed to woman. Here is a right so ancient that it is difficult to trace its origin in history, a right so sacred that the humblest criminal may choose his juror. But alas for the daughters of the people, their judges, advocates, jurors, must be men, and for them there is no appeal.³⁴⁹

In the Vaughn case, Stanton developed two main arguments in support of the demand for women jurors: the male bias of the existing system and the different perspective of women jurors.³⁵⁰ Women, she argued, would understand the social norms and double standards, the limited economic and social options for women, and the betrayal by a would-be suitor in a way that would excuse rather than condemn.³⁵¹

Under English common law adopted in the United States, women were excluded from juries because of “the defect of sex.”³⁵² Little changed under the evolving American law. Although Wyoming briefly allowed female jurors in 1870, and Utah first allowed women in 1898, half of the states continued to exclude women from juries in the mid-twentieth century.³⁵³ Women’s continued exclusion from juries was justi-

348. Stanton Address, *supra* note 253; see Elizabeth Cady Stanton, Appeal to the Women of New York (1860) (appealing to women to sign petitions demanding the right to the ballot, jury, and marital earnings); *Hester Vaughn*, *supra* note 314; see also National Woman Suffrage Association, Declaration of Rights of the Women of the United States (July 4, 1876), in *THE SELECTED PAPERS OF ELIZABETH CADY STANTON AND SUSAN B. ANTHONY: IN THE SCHOOL OF ANTI-SLAVERY, 1840 TO 1866*, *supra* note 244, at 235 (claiming the Constitution guaranteed the right to trial by a jury of one’s peers, yet “[y]oung girls have been arraigned in our courts for the crime of infanticide: tried, convicted, hung—victims, perchance of judge, jurors, advocates—while no woman’s voice could be heard in their defence”).

349. Elizabeth Cady Stanton, *Self-Government the Best Means of Self-Development*, in 4 *HISTORY OF WOMAN SUFFRAGE* 171 (Susan B. Anthony & Ida Husted Harpers eds., 1902).

350. See *infra* text accompanying notes 356–61.

351. See *infra* text accompanying notes 362–65.

352. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 132 (1994) (citing 2 W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 362 n.4 (1765–1769)).

353. Joanna L. Grossman, Note, *Women’s Jury Service: Right of Citizenship or Privilege of Difference?*, 46 *STAN. L. REV.* 1115, 1134–36 (1994). Women’s participation in Wyoming was initially desired because of the chaos and violence of the western territory when people called for moral and clear-headed jurors to contain the criminal activity, but a new chief justice reversed that thinking after just one year. *Id.*; see Elizabeth Cady Stanton, *The Other Side of the Woman Question*,

fied on grounds of protecting fragile, vulnerable women from the depravity of trial, the incompetence of women to make reasoned judgments, and the greater need for women “as the center of home and family life” to remain at home.³⁵⁴ A brief exception to this common law rule of exclusion was permitted during colonial times for a “jury of matrons” convened to determine issues of paternity, abortion, infanticide, and other cases involving verification of pregnancy, which is where Stanton’s critique found grounding.³⁵⁵

Stanton’s challenge to the all-male jury system began first with a deconstruction of the existing male bias. Stanton exposed the double standards of the social norms underlying the law and the inclination for men to protect one of their own:

Where is he who by false vows thus blasted this trusting woman?
Ah, he is freely abroad in the dignity of manhood, in the pulpit, on the bench, in the professor’s chair. The imprisonment of his victim and the death of his child, detract not a tittle from his standing and complacency. His peers made the law, and shall law-makers set nets for those of their own rank?³⁵⁶

Stanton bolstered this social critique with legalistic arguments as to the use of peremptory challenges to exclude biased jurors.³⁵⁷ And she

129 N. AM. REV. 432 (1879) (“On petit juries the women held the men up to a higher tone of morality and stricter sense of honesty than they would have exercised if left to themselves.” (quoting Wyoming Supreme Court Justice John Kingman)).

354. *J.E.B.*, 511 U.S. at 132; *Hoyt v. Florida*, 368 U.S. 57, 62 (1961); LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP 136, 144 (1998); Grossman, *supra* note 353, at 1131, 1149, 1152; see Carol Weisbrod, *Images of the Woman Juror*, 9 HARV. WOMEN’S L.J. 59 (1986) (discussing stereotypes of the woman juror).

355. *J.E.B.*, 511 U.S. at 133 n.4.; KERBER, *supra* note 354, at 130; MARY BETH NORTON, *FOUNDING MOTHERS & FATHERS: GENDERED POWER AND THE FORMING OF AMERICAN SOCIETY* 225 (1996). The jury of matrons was used in the United States during the Colonial period, when midwives headed up panels of six or more women who investigated “matters involving women’s bodies and reproduction.” *J.E.B.*, 511 U.S. at 133 n.4.; NORTON, *supra*, at 225. This included collateral issues, for example, in the case where a woman was subject to capital punishment, the jury of matrons determined whether the defendant was pregnant and, if so, stayed execution until after the birth. Grossman, *supra* note 353, at 1133 n.102.

356. Grossman, *supra* note 353, at 1133 n.102.

357. *The Case of Hester Vaughan*, *supra* note 286. Under English law, *propter honoris respectum* allows exception or challenge to a juror based on nobility because a defendant, like a commoner, is entitled to be tried by a jury of his peers according to class. JOHN COLBY, *A PRACTICAL TREATISE UPON THE CRIMINAL LAW AND PRACTICE OF THE STATE OF NEW YORK* 344–45 (1868). Stanton argued that “[t]he nobleman cannot make just laws for the peasant; the slaveholder for the slave; neither can man make and execute just laws for woman, because in each case, the one in power fails to apply the immutable principles of right to any grade but his own.” *The Case of Hester Vaughan*, *supra* note 286. She continued, “in our country, the nobility are ‘white males’ who make laws for their own protection, in whose rights and privileges disfranchised classes have no

exposed the widely varying results between sentences of death for women like Vaughn and the exoneration of men who had killed their wives' lovers by male jurors who accepted jealousy as mitigating justification. In fact, these men "are not only acquitted but feasted and toasted by the press and the people!"³⁵⁸ She focused on this legal inequality, decrying a system that makes "crimes for women that are not crimes for men."³⁵⁹

While they punish us for the violation of law, drag us into their courts to be tried not by our peers, but by judges, juror, lawyers, all men, they close their law schools against us. Nero was thought the chief of tyrants because he made laws and hung them up so high that the people could not read them, but all of our codes and constitutions are sealed instruments to the women of this nation, with crimes for women that are not crimes for men, . . . [while] the erring girl of eighteen may be tried and hung for the crime of infanticide, he who betrayed her trust may sit in the jury-box or on the bench, with no true women to pity or protect.³⁶⁰

Stanton's argument here for a jury of her peers was cast as a demand—an entitlement of women to equal political and property rights.

Stanton's second emphasis regarding juries was that men lacked the empathy to understand the mitigating circumstances that would lead a woman to commit infanticide. In 1854, she appealed to the New York legislature:

part, hence the unequal laws women and negroes suffer to-day." *Id.* Stanton also analogized to the challenge of *propter affectum*, which means "on account of bias," in support of women challenging male jurors for appearance of bias or partiality because man was interested only in his own protection and was antagonistic to woman. *Id.* She cited a third peremptory challenge, *propter delictum*, which translates to "on account of crime," to attack men as jurors for female defendants because of men's crime of conspiring as a class against women under the law of their own making. *Id.* Finally, Stanton challenged the use of the peremptory challenge, *propter defectum*, which kept women off juries "for lack of proper qualification" and facetiously noted women's "flattering" inclusion with other disqualified groups such as minors, aliens, slaves, and convicts. *Id.*

358. Elizabeth Cady Stanton, *Supposed Infanticide*, REVOLUTION, Jan. 1869; Elizabeth Cady Stanton, Address to Anniversary of American Equal Rights Association at New York City (May 12, 1868); see also E. M. C., *General Cole and Hester Vaughan*, REVOLUTION, Dec. 31, 1868 (emphasizing the irony between infanticide death sentences and paramour acquittals, and arguing that women jurors could better sympathize with women).

359. Stanton, *supra* note 296.

360. Elizabeth Cady Stanton, *The Strong-Minded Women of the Bible*, REVOLUTION, Feb. 26, 1868. To rectify this male-only legal system, Stanton called on women of "wealth, education and leisure" to "study the laws under which they live, that they may defend the unfortunate of their sex in our courts" and for Columbia Law School to open its doors to girls "who have brains to understand the science of jurisprudence and hearts big enough to demand justice for the humblest of God's children." Elizabeth Cady Stanton, *Hester Vaughan*, REVOLUTION, Dec. 10, 1868.

Shall an erring woman be dragged before a bar of grim-visaged judges, lawyers and jurors, there to be grossly questioned in public on subjects which women scarce breathe in secret to one another? Shall the most sacred relations of life be called up and rudely scanned by men who, by their own admission, are so coarse that women could not meet them even at the pools without contamination? Shall the frenzied mother, who, to save herself and child from exposure and disgrace, ended the life that had but just begun, be dragged before such a tribunal to answer for her crime? How can man enter into the feelings of that mother? How can he judge of the mighty agonies of soul that impelled her to such an outrage of maternal instincts?³⁶¹

Stanton emphasized women's differences as a basis for obtaining women's access to the political rights of jury service. The difference Stanton notes is based upon women's experiences as mothers, both in pregnancy and in family relationships.³⁶² She argued that men should not sit in judgment of "the mothers of the race," who were superior to men in the "diviner elements of human nature, in love, spiritual perception and moral power."³⁶³ She played the parent card, arguing that a father of a daughter who might be summoned for such a crime might prefer a jury of women:

Would it not, in that hour, be some consolation to see that she was surrounded by the wise and virtuous of her own sex; by those who had known the depth of a mother's love and the misery of a lover's falsehood; to know that to these she could make her confession, and from them receive her sentence?³⁶⁴

In highlighting women's differences, Stanton perhaps played into the dominant ideology of the time of women as moral superiors who had a duty to educate children and control the moral compass of the family.³⁶⁵ That argument would have resonated with her audience at that time.

Stanton foreshadowed the idea of women's differences as jurors that was later popularized by journalist and Pulitzer Prize-winning au-

361. Stanton, *The Strong-Minded Women of the Bible*, *supra* note 360.

362. See Wendy Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN'S RTS. L. REP. 175, 177 (1982) (arguing that women bring a unique perspective to a jury because "women's life experiences still differ sufficiently from men's that a diverse group of women would bring a somewhat different set of perceptions and insights to certain issues than would a similarly diverse group of men").

363. *Id.*

364. Stanton, *supra* note 253.

365. For a discussion of "true woman" ideology, see Thomas & Boisseau, *supra* note 43, at 6. The moral superiority argument later expanded to serve as a basis for women's right to vote in order to have moral actors making the laws for all of society. See *id.*

thor, Susan Glaspell.³⁶⁶ As a young journalist, Glaspell covered the trial and conviction of a wife for the murder of her husband.³⁶⁷ She subsequently wrote a story, “A Jury of Her Peers,” and a play, “Trifles,” dramatizing the absence of women on the jury.³⁶⁸ The story, like the case upon which it is based, develops the clues of what would now be called a battered women’s defense for the murder based on years of control and cruel treatment by the husband. The neighboring farm women who are called to the scene of the crime are the only ones to piece together the clues of a motive (murder of a beloved pet canary), and they destroy the evidence making conviction of the wife impossible.³⁶⁹ The men on the scene, the Sheriff and the prosecutor, are oblivious to the “trifles” of what the women see as obvious evidence and exoneration of the crime. Glaspell’s story demonstrates “that the different insights and understandings women bring to the interpretation of facts may lead to more accurate factfinding,” thus capturing the essence of the legal argument about the necessity of including the different perspectives of women on juries.³⁷⁰

This focus on women’s different perspective became the central argument in legal cases seeking women’s inclusion on juries “because excluding qualified women was tolerated by the courts.”³⁷¹ The U.S. Supreme Court had struck down laws excluding African-American men from participation on juries in 1880 as a violation of the constitutional right of citizenship, but the Court refused to recognize jury service as one of women’s citizenship rights.³⁷² Instead, the Court upheld exemption

366. Marina Angel, *Criminal Law and Women: Giving the Abused Woman Who Kills “A Jury of Her Peers” Who Appreciate “Trifles,”* 33 AM. CRIM. L. REV. 229, 241 (1996).

367. *State v. Hossack*, 89 N.W. 1077 (Iowa 1902). The real case involved a lengthy history of domestic abuse against both the wife and children, though this evidence at the time would only enhance rather than mitigate the motive for the killing. The wife’s conviction for murder was overturned on the basis of improperly admitted evidence, and the retrial resulted in a hung jury. Angel, *supra* note 366, at 244.

368. Susan Glaspell, *A Jury of Her Peers*, EVERYWEEK, Mar. 5, 1917, at 42, reprinted in LIFTED MASKS AND OTHER WORKS 279 (Eric S. Rabkin ed., 1993); SUSAN GLASPELL, TRIFLES (1927), reprinted in LIFTED MASKS AND OTHER WORKS, *supra* at 263. See generally Patricia Bryan, *Stories in Fiction and in Fact: Susan Glaspell’s A Jury of Her Peers and the 1901 Murder Trial of Margaret Hossack*, 49 STAN. L. REV. 1293 (1997).

369. Angel, *supra* note 366.

370. Grossman, *supra* note 353, at 1145–46.

371. *Id.* at 1115–16. Liberal feminists in the 1920s moved toward an emphasis on women’s difference from men to seek “protective legislation like minimum wages, maximum hours, and funding for prenatal care generally focused on women’s distinctive responsibilities as mothers.” KERBER, *supra* note 354, at 183; see, e.g., *Muller v. Oregon*, 208 U.S. 412 (1908) (upholding women’s maximum hour law on grounds of women’s inherent difference and physical weakness).

372. *Strauder v. West Virginia*, 100 U.S. 303, 310 (1879); Grossman, *supra* note 353, at 1116 (arguing that the Court implicitly recognized jury service as a right of citizenship for women finally in the 1994 case *J.E.B.*).

and rules designed to keep women off juries.³⁷³ When the Court did finally strike down the practice of all-male juries, it did so because of the defendant's rights under the Sixth Amendment to a jury representative of a fair cross-section of the community, not because of the rights of the excluded women themselves.³⁷⁴ The Court held that an all-male jury was not truly representative, and a jury needed to include women's different voices.³⁷⁵ The holding was reminiscent of the Court's decision thirty years earlier in which it declared women eligible for federal jury service because of their differences.³⁷⁶ "The truth is that the two sexes are not fungible; . . . a flavor, a distinct quality is lost if either sex is excluded."³⁷⁷ However, in 1994, in *J.E.B. v. Alabama ex rel. T.B.*, the Court struck down a reliance on women's difference as jurors in a case where the government's peremptory challenges were used to dismiss men and empanel an all-female jury in a paternity case.³⁷⁸ The Court thus rejected any reliance on gender, and guaranteed women's equal right to participation on the jury.³⁷⁹

Justice O'Connor, however, was concerned that the *J.E.B.* Court was discarding an important aspect of gender in jury deliberation. She argued, "We know that like race, gender matters. . . . One need not be a sexist to share the intuition that in certain cases a person's gender and resulting life experience will be relevant to his or her view of the case."³⁸⁰ O'Connor cited studies showing female jurors were more likely to convict in rape cases, and she opined that gender likely made a difference in cases like sexual harassment, child custody, or spousal abuse.³⁸¹ She was concerned that in "the name of fighting gender discrimination," the Court's ruling on peremptory challenges might preclude a defendant like a battered wife "from using her peremptory challenges to ensure that the jury of her peers contains as many women members as possible."³⁸²

373. See *Hoyt v. Florida*, 368 U.S. 57, 69 (1961) (upholding an all-male jury's conviction of a woman for killing her husband, and finding that it is not constitutionally impermissible to grant women an absolute exemption from jury service because women are responsible for home and family life, and thus differentiation between men and women is reasonable and not discriminatory on the basis of sex); *Fay v. New York*, 332 U.S. 261, 289 (1947) (upholding jury selection process of automatic exemption for women unless they affirmatively register).

374. Grossman, *supra* note 353, at 1129; see *Taylor v. Louisiana*, 419 U.S. 522 (1975) (reversing conviction of man charged with aggravated kidnapping and rape of a young mother of three).

375. *Taylor*, 419 U.S. at 532-33.

376. *Ballard v. United States*, 329 U.S. 187, 193-94 (1946).

377. *Id.*

378. *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 132 (1994).

379. *Id.*

380. *Id.* at 148-49.

381. *Id.*

382. *Id.*

She hoped not, thus illustrating a shared appreciation for Stanton's insight that sometimes women's differences are relevant.

VI. STANTON'S *REVOLUTION*

Stanton's advocacy touched on issues of abortion by redirecting the debate to issues of women's subordination. She illustrated the gendered nature of the abortion discourse from its moral blame of women, its origination and enforcement in a gendered legal system, and its foundation in social norms that denied women the right to control voluntary procreation. This focus was only a small part of Stanton's larger lifelong advocacy of women's rights, but it remained consistent with her other work focused on deconstructing the implicit gender bias of the law and seeking equal treatment for women.

Nevertheless, the "feminist case against abortion" continues to rely on a handful of historical evidence, which FFL claims demonstrates Stanton's outspoken commitment to prolife positions.³⁸³ In addition to Howe's quote and Stanton's *Infanticide and Prostitution* article³⁸⁴ previously discussed—and distinguished—prolife advocates rely on two anonymous articles, *Infanticide*³⁸⁵ and *Child Murder*³⁸⁶ printed in the *Revolution*, and on the absence of abortion advertisements in the newspaper. FFL and other prolife groups simply assumed that these unsigned articles and the advertisement policy are those of Stanton's because they appear in her newspaper. This evidence, however, cannot be fairly attributed to Stanton. It is more likely that they are the sentiments of Parker Pillsbury, Stanton's male co-editor. Given Pillsbury's daily editorial control of the paper, evidence of his beliefs against abortion from other articles in the paper, and his moralistic religious philosophy, it is possible, if not likely, that these sources can be attributed to him. Moreover, these articles, regardless of who wrote them, do *not* support the call for criminalization of abortion, but instead argue for alternative solutions, including founding homes for infants and the "empowerment and elevation of woman."

383. See FEMINISTS FOR LIFE, *supra* note 110; PROLIFE FEMINISM: YESTERDAY AND TODAY, *supra* note 5, at 15–21; Dannenfelser, *supra* note 85.

384. Stanton, *supra* note 274.

385. *Infanticide*, *REVOLUTION*, Jan. 29, 1868.

386. *Child Murder*, *REVOLUTION*, Mar. 12, 1868.

A. Writing Women's Rights

The *Revolution* was a national women's rights newspaper founded by Stanton and Susan B. Anthony in January 1868.³⁸⁷ This weekly paper, published in New York City, ran for three years until financial problems forced the paper to close.³⁸⁸ The paper's motto was "[p]rinciple, not policy: justice, not favors—Men, their rights and nothing more: women, their rights and nothing less."³⁸⁹ When reform colleagues questioned Stanton's choice of name for the paper, she replied with her usual acerbic wit that some might call the paper "The Rosebud," but for her, "there is no name like the Revolution," because "the establishing of woman on her rightful throne is the greatest revolution the world has ever known or will know. To bring it about is no child's play."³⁹⁰ Not only did the paper "insert women's voices into public debates on many subjects, it also insisted that women's rights be the major topic of the day."³⁹¹

The *Revolution* was managed by a team of three: Anthony as "proprietor," business and financial manager, and Stanton and Parker Pillsbury as content editors. Stanton spent much of the year traveling and speaking on the national lyceum tour, writing in her letters and contributions to the paper; Pillsbury handled the daily editing and production of

387. Although the paper was not the first American newspaper dedicated to improving women's status, it was perhaps the most famous one. THE REVOLUTION IN WORDS: RIGHTING WOMEN 1868–1871, *supra* note 178, at 7 (citing the first woman's rights paper as the *Una* edited by Paulina Wright Davis in 1853). "Stanton herself had been associated with the *Lily*, a temperance, women's rights and dress reform journal of the 1850s. However, the *Revolution* was certainly the least trampled and most daring feminist paper that had yet—and perhaps has ever—appeared." DUBOIS, *supra* note 17, at 104.

388. The paper was initially funded by the controversial George Train, a feminist supporter but avowed racist who vitriolically opposed black suffrage. Stanton defended her affiliation with Train, saying she would "take the money where I can find it" and "would take aid from the devil himself." Train supported the paper for only a short time, after his generous funds dried up when he was imprisoned in England and his assets seized for his involvement in the bombings in Northern Ireland in support of the Irish rebels. Stanton and Anthony were left with the entire financial burden of the paper. DUBOIS, *supra* note 17, at 103; GINZBERG, *supra* note 17, at 131. Subscriptions to the paper were few. In the first year, there was an overwhelming response and many subscriptions to the paper, including one famously sent to the White House, but most were free, and few subscriptions were renewed. The reform community refused to support the newspaper because of its association with the racist George Train, the paper's support of "easy divorce," and opposition to the Fifteenth Amendment because of exclusion of female suffrage. The rivals in the women's suffrage community established their own newspaper, edited by Lucy Stone, head of the American Woman's Suffrage Association, called the *Woman's Journal*. After the *Revolution* shut down, Anthony assumed the debt for the paper, and Stanton's failure to share in this debt or work toward repayment was a point of contention between the two friends.

389. See, e.g., Masthead, REVOLUTION, Mar. 26, 1868.

390. Letter from Elizabeth Cady Stanton to Susan B. Anthony (Dec. 28, 1869).

391. THE REVOLUTION IN WORDS: RIGHTING WOMEN 1868–1871, *supra* note 178, at 5.

the newspaper in New York City.³⁹² Pillsbury worked for the *Revolution* for two of its three years of operation, leaving in early 1870 when the paper could no longer afford to pay him.³⁹³

The six-page newspaper covered issues of women's rights in the first four pages, and then current political affairs, like President Johnson's impeachment, in the back pages written by Pillsbury. It discussed and reprinted a variety of issues in order to "convey a complex sense of women's oppression and a rich vision of their emancipation."³⁹⁴ These issues included suffrage but extended beyond to address divorce, female farmers, infanticide, housekeeping, and the polygamy of the Utah Mormons.³⁹⁵ In 1868, when the paper started, abortion was front-page news as the medical profession accelerated its antiabortion campaign and the New York legislature considered antiabortion reforms. Seeking to be relevant in the main political discourse, the *Revolution* occasionally reprinted excerpts of articles from other papers like the *New York Times*, *Sun*, *Herald*, and *World*, followed by a short commentary.

Modern antiabortion activists cite two anonymous articles from the *Revolution* during this time as evidence of Stanton's position against abortion.³⁹⁶ These citations, indicating Stanton's authorship, give no hint that the articles are actually unsigned. The first is a blurb entitled *Infanticide*, which was published on January 29, 1868.³⁹⁷ *Infanticide* reprints a blurb from the *New York Times* about the mortality of infants who are boarded out and the increase in the practice for illegitimate children.³⁹⁸ The second, *Child Murder*, published in March 1868, reports on a medical convention of the "regular" physicians drawing public attention to the "frightful increase" in infanticide and the alleged four hundred "murders

392. GRIFFITH, *supra* note 17, at 144, 160–61; *see also* GINZBERG, *supra* note 17. Stanton traveled the circuit for eleven years, returning home to New Jersey for her children's summer and winter breaks. Stanton said she toured for the income that she needed to provide for her family and pay for her children's college educations (though her sister paid for Stanton's two daughters to attend Vassar College).

393. In May 1870, Laura Curtis Bullard, a wealthy writer, bought the *Revolution* for one dollar and changed it into a literary and society journal, which lasted only until early 1872. GRIFFITH, *supra* note 7, at 133.

394. THE REVOLUTION IN WORDS: RIGHTING WOMEN 1868–1871, *supra* note 178.

395. *Id.*

396. *See* DELLAPENNA, *supra* note 4; PROLIFE FEMINISM: YESTERDAY AND TODAY, *supra* note 5, at 48–50; Clark, *supra* note 95; *Feminist History: Voices of Our Feminist Foremothers*, FEMINISTS FOR LIFE, <http://www.feministsforlife.org/history/foremoth.htm#ecstanton> (last visited Aug. 24, 2012).

397. *Infanticide*, *supra* note 385. This was one week before Stanton's signed piece, *Infanticide and Prostitution*, appeared.

398. *Id.*

annually produced by abortion” in one Maine county.³⁹⁹ From this second article, modern antiabortion activists emphasize the reaction to these reports that “[t]here must be a remedy even for such a crying evil as this. But where shall it be found, at least where begin, if not in the complete enfranchisement and elevation of woman.”⁴⁰⁰ This quote, they say, shows that Stanton condemned abortion as “evil.”

These unsigned articles are attributed to Stanton by abortion opponents because they “infer her authorship from their appearance in her newspaper and their similarities to known Stanton texts.”⁴⁰¹ However, Ann Gordon, the main scholar and archivist of Stanton’s papers, does not think that Stanton wrote either of these unsigned articles.⁴⁰² Stanton generally signed all of her editorials when she was in town as “E.C.S.,” and she signed her letters from out of town with her full name.⁴⁰³ Notably, Stanton did sign the article immediately preceding the *Infanticide* article, thus suggesting that the subsequent anonymous editorial is not hers.⁴⁰⁴

It is more likely that the anonymous editorial is the work of Stanton’s male co-editor, Parker Pillsbury.⁴⁰⁵ Pillsbury had opportunity to print these views, as he was responsible for the daily content and publication of the paper. He would have been managing the content of the paper by reviewing submissions from readers and contributors and perusing the headlines of the other newspapers. Pillsbury also demonstrated a propensity to air his own views as a newspaper editor, even when contrary to the views of the editorial board, as he had done at his prior position as editor of the abolitionist newspaper, the *National Anti-Slavery Standard*, where his outspokenness cost him his job.⁴⁰⁶ And Pillsbury demon-

399. *Child Murder*, *supra* note 386.

400. DELLAPENNA, *supra* note 4; Clark, *supra* note 95; *Feminist History: Voices of Our Feminist Foremothers*, *supra* note 396.

401. PROLIFE FEMINISM: YESTERDAY AND TODAY, *supra* note 5, at 413 n.9.

402. Letter from Ann Gordon to author, *supra* note 88.

403. *Id.*

404. *Id.*

405. One reader attributed the *Infanticide* article to Parker Pillsbury. *Restellism: The Crime of this Age*, *supra* note 148 (“THE REVOLUTION is doing God’s work. . . . THE REVOLUTION sounds the alarm. P.P. on Quack Medicines, P.P. on Infanticide, in No. 12 are independent thoughts, such writing, such bold grasp of realities is very rare in newspaperdom.”). The reader argued against abortion and for solutions in temperance, dress reform, founding hospitals, occupations for women, and women’s suffrage. *Id.*

406. STACEY M. ROBERTSON, PARKER PILLSBURY: RADICAL ABOLITIONIST, MALE FEMINIST (2000). In 1865, Pillsbury became editor of the *Standard*, the leading voice of the American Anti-Slavery Society, when its founder and leader William Lloyd Garrison and several other leaders left the society after a failed attempt to disband the society once slavery had been abolished. *Id.* at 132. Pillsbury also briefly served as editor of a radical abolitionist paper, the *Herald of Freedom*, in 1840, while the editor, Nathaniel Rogers, attended the World Anti-Slavery Convention in London. *Id.* at 21.

strated the motive to print articles against abortion as evidenced by other signed editorials he wrote on the subject for the paper.

Pillsbury expressed his own view against abortion in multiple articles in the *Revolution*.⁴⁰⁷ He discussed the “frightful” increase in abortion, expressed abhorrence of the “evil” crime “foeticide” and the “killing the unborn,” and expressed outrage at the advertising of such immoral conduct.⁴⁰⁸ Others acknowledged Pillsbury’s strong sentiments against abortion.⁴⁰⁹ This view against abortion was consistent with Parker’s religious philosophy of perfectionism.⁴¹⁰ He believed in a perfectionist theology that, as its name suggests, promoted absolute commitment to uncompromising moral standards, and refused to tolerate any degree of moral ambivalence in others.⁴¹¹ Pillsbury was a defrocked Congregationalist minister who had gained some notoriety as a zealous anti-slavery speaker.⁴¹² His license to preach had been revoked for his fanatical attacks on the clergy and congregations for what he described as their hypocrisy in claiming to be Christians.⁴¹³

407. Parker Pillsbury, *The Hester Vaughan Meeting at Cooper Institute*, *REVOLUTION*, Dec. 10, 1868; Parker Pillsbury, *Foundling Hospitals Again*, *REVOLUTION*, Apr. 30, 1868; Parker Pillsbury, *Foundling Hospitals*, *REVOLUTION*, Mar. 26, 1868; Parker Pillsbury, *Quack Medicines*, *REVOLUTION*, Mar. 26, 1868; see also Parker Pillsbury, *Decision Diabolical*, *REVOLUTION*, July 29, 1869 (objecting to acquittal in rape of eleven year old on grounds of consent, and decrying the perversion of nature including the “millions of homes” in which the woman does not want children and “so she kills them, kills them unborn!”).

408. Pillsbury, *Foundling Hospitals*, *supra* note 407; Pillsbury, *Foundling Hospitals Again*, *supra* note 407; Pillsbury, *Quack Medicines*, *supra* note 407.

409. See *Women as Jurors*, *REVOLUTION*, Dec. 1868 (reprinting excerpt from *NY Express* saying “Parker Pillsbury when he said the ‘wives, with husbands consenting, were continually guilty of the crime’ of infanticide, was not much in the wrong”); see also *Restellism: The Crime of this Age*, *supra* note 148 (unsigned letter from reader thanking Parker Pillsbury for showing “such independent thought” and sounding the alarm of the “foul murder of restellism” in articles on foundling hospitals, quack medicines, and infanticide); *N.Y. WORLD*, Dec. 2, 1868, at 1 (describing Pillsbury’s speech in defense of Vaughn and against abortion and advertisement by “professional murderers” of “professional infanticide” in its “disgusting form”).

410. ROBERTSON, *supra* note 406, at 64–65. In the 1820s, evangelical Protestantism popularized the doctrine of human perfectibility. It emphasized free will, activity, and benevolence. All individuals were charged with seeking perfection within themselves, and creating and sustaining it in society through good works. Perfectionists “refused to tolerate any degree of moral ambivalence, from a sip of wine to an act of racial discrimination.” *Id.* at 65.

411. Stanton described Pillsbury in the *History of Woman Suffrage* as “a man with a strong, vigorous mind, a quick conception of principles and perfectly fearless in his advocacy of them, holding always his personality so in reserve as sometimes to be overlooked among the many more assuming.” 2 *HISTORY OF WOMAN SUFFRAGE* 434–35 (Elizabeth Cady Stanton et al. eds., 1882).

412. ROBERTSON, *supra* note 406, at 5–6.

413. *Id.* at 5–6, 24. Pillsbury lost his license in 1841 when he told an association of ministers that they “by their continued silence on the wrongs of two and a half million slaves have proved themselves a great brotherhood of thieves; and instead of being supported as the ministers of righteousness, they should be held (on their own principles) in execration and abhorrence by the whole

It cannot be assumed that Pillsbury's own personal and religious views were shared by Stanton. Pillsbury had demonstrated his ability to depart from the preferred views of the editorial board. In fact, he had been forced to resign from his job as editor of the *Standard* when he expressed views contrary to the main view of the abolitionist paper.⁴¹⁴ On another occasion, Stanton wrote in from her national tour chastising Pillsbury for an unflattering article about Mary Todd Lincoln.⁴¹⁵ Moreover, the *Revolution* also allowed its editors free reign, giving Pillsbury the opportunity to present his own views without censorship.⁴¹⁶ In its first issue, the *Revolution* made clear:

[T]his journal is to represent no party, sect, or organization, but individual opinion; editors and correspondents alike, all writing, from their own stand point, and over their own names. . . . With both man and woman in the editorial department, we shall not have masculine and feminine ideas alone, but united thought on all questions of national and individual interest.⁴¹⁷

The paper was designed to promote debate and to provide a forum for its varied readership to discuss issues of the day including, but not limited to, women's rights.⁴¹⁸ Thus, given the independence of the editors, Pillsbury's motive of personal belief against abortion, and his opportunity to control the daily content of the paper, it is more likely that the anonymous author of these articles was Pillsbury.

B. "Where Lies the Remedy?"

Beyond authorship, what is significant about these articles is that they do not endorse the medical profession's goal of passing new laws to criminalize abortion, but instead look to alternative social solutions. The

human race." *Id.* at 6. "Pillsbury believed that the clergy, because they controlled 'the mind and will of the people,' were particularly responsible for the lack of antislavery sentiment in the nation." *Id.* at 81.

414. *Id.* at 133. Pillsbury's tenure at the *Standard* was "brief and controversial." *Id.* at 133. His year at the paper was marked by conflicts with the governing executive committee, which disapproved of his editorials, convoluted writing style, and radicalism. *Id.* at 136, 138–39. In particular, Pillsbury disagreed with the official editorial policy of the paper against universal suffrage to include women, and he ignored directives of the committee that he "speak the average sentiment" of the society. *Id.* at 140.

415. THE REVOLUTION IN WORDS: RIGHTING WOMEN 1868–1871, *supra* note 178, at 6.

416. *Id.* at 145.

417. *Salutatory*, REVOLUTION, Jan. 8, 1868. The *New York World* responded to the first issue of the newspaper by describing the *Revolution* as "a sharp and spicy sheet, with a considerable show of Stanton, plenty of Pillsbury paragraphs, and an almost inexhaustible volcano of Train." REVOLUTION, Jan. 22, 1868 (quoting the *New York World*).

418. THE REVOLUTION IN WORDS: RIGHTING WOMEN 1868–1871, *supra* note 178, at 6.

other mainstream papers, excerpted in the *Revolution*, demanded a solution to the problems of abortion, infanticide, and unwanted children, issuing the plea—"Where lies the remedy?"⁴¹⁹ The *Times* answered the question by endorsing the regulation of abortion. The anonymous author of the *Revolution* editorials expressly responds to the question of "where lies the remedy?" with the empowerment of women.

In *Infanticide*, the solution is in "the independence of woman."⁴²⁰ This article responds to a reprinted blurb on the topic of the abandonment of illegitimate children in boarding houses or "lying-in houses."⁴²¹ Women, usually poor women, went to these places during their lying-in period to give birth with the intent to abandon the baby. The author advocates that the "world of work be open to woman" and that women have their "own property and business."⁴²² "Our idea is, that every woman of sound mind and body, with brains and two hands, is more noble, virtuous and happy in supporting herself."⁴²³ "So long as woman is dependent on man, . . . she will despise herself and hate him whose desires she gratifies for the necessaries of life; the children of such unions must needs be unloved and deserted."⁴²⁴ The author blames the "startling facts" in the *Times* extract on men: "the masculine element is everywhere overpowering the feminine, and crushing women and children alike beneath its feet."⁴²⁵ It concludes with a call for women to assert themselves in purity, dignity, and true womanhood to end "the wholesale suffering and murder of helpless children."⁴²⁶

In *Child Murder*, the anonymous writer repeats the argument that the remedy for abortion lies in "the complete enfranchisement and elevation of woman."⁴²⁷ It responds again to the question of "where lies the remedy?" by adopting the sensationalist title used in the *Tribune* and other papers of "child murder." It begins by recognizing the prevalence of the abortion issue in the other papers, and the reported statistics on an apparent increase in both infanticide and abortion. "The public attention has been much drawn to this frightful subject of late. The disclosures made are appalling to the highest degree. . . . Infanticide is on the in-

419. *Infanticide*, *supra* note 385 (excerpting *New York Times*).

420. *Id.*

421. *Id.*; *Startling Disclosures*, N.Y. TIMES, Jan. 25, 1868.

422. *Infanticide*, *supra* note 385.

423. *Id.*

424. *Id.*

425. Pillsbury had expressed this belief that men were to blame for women's seduction and were the "devils" that destroyed "fallen women," and that remedy was in women's empowerment through the ballot. Parker Pillsbury, *Male Magdalen Asylums*, REVOLUTION, May 19, 1870.

426. *Infanticide*, *supra* note 385.

427. *Child Murder*, *supra* note 386.

crease to an extent inconceivable.”⁴²⁸ It describes a report made by a medical convention of “regular physicians” in Maine that there were “four hundred murders annually produced by abortion.”⁴²⁹ The writer agrees that “[t]here must be a remedy for a crying evil as this.”⁴³⁰ The article continues to explain that “[f]orced maternity, not out of legal marriage, but within it, must lie at the bottom of a vast proportion of such revolting outrages against the laws of nature and our common humanity.”⁴³¹

The unsigned *Child Murder* article is similar in rhetorical flourish, word choice, and argumentation to an article written by Parker Pillsbury published two weeks later.⁴³² In *Foundling Hospitals*, Pillsbury commented that “[t]he frightful increase of foeticide, infanticide and child murder in every form, has forced the subject of Foundling Hospitals upon the public attention as never before.”⁴³³ He responds to an article appearing in the *New York Times* a few weeks earlier advocating the creation of a New York Foundling Hospital to address the widespread concern about abandoned infants found nightly on the “streets, alleyways and doorsteps” by city police officers.⁴³⁴ Despite opposition claiming that these hospitals encouraged vice and immorality, the *Times* supported such institutions, which like similar institutions in Europe, avoided issues of infanticide and “the murder of children, either before or after birth,” by those forced to abandon their infant by economic necessity or social shame.⁴³⁵ Pillsbury was strongly in favor of such institutions, writing, “[i]t is difficult to imagine a pleasanter sight, and the aching heart of many a poor mother might be gladdened to behold her own child in such

428. *Id.*

429. *Id.* A response was published from a reader from the same county arguing that such actions were taken by women because they were desperate for emancipation from the slavery of marriage. *Child Murder*, Apr. 8, 1868, *supra* note 179.

430. *Child Murder*, *supra* note 386.

431. *Id.*

432. Parker Pillsbury, *Foundling Hospitals*, *supra* note 407. Both articles mention the “frightful” incident of “child murder” and the rise in “foeticide,” whereas Stanton wrote of “infanticide.” See also *Restellism Rebuked*, REVOLUTION, at 501 (unsigned prescript of “an evil most frightful” introducing a reprint of a *New York Medical Gazette* article blaming women’s love of luxury and abandonment of duty of motherhood for the crime of abortion). Stanton archivist Ann Gordon concludes that the flat style of *Child Murder* does not compare to Stanton’s writing. Letter from Ann Gordon to author, *supra* note 88.

433. Pillsbury, *Foundling Hospitals*, *supra* note 407.

434. *A Foundling Hospital for New York—The Project of the Grand Jury*, N.Y. TIMES, Mar. 6, 1868. Pillsbury’s article also responded to similar articles recently appearing in the *New York Tribune* and the Boston spiritualist newspaper, *Banner of Light*.

435. *Id.*

a paradise.”⁴³⁶ Despite this embellishment, the statistics were grimmer: ninety percent of infants abandoned in such institutions died from lack of nourishment.⁴³⁷ These hospitals, however, offered a public policy solution to the identified problem of infanticide and abortion.

C. The Absence of Abortion Advertisements

Both infanticide and abortion thus personally troubled Pillsbury. He expressed his strong opposition to the inclusion of advertisements for abortion medicines in another piece for the *Revolution* entitled *Quack Medicines*.⁴³⁸ In this article, Pillsbury condemned public and religious newspapers for publishing advertisements for abortifacients.⁴³⁹ Mainstream newspapers between 1840 and 1870 commonly published advertisements for abortion medicines. As Pillsbury noted, “it is known to newspaper publishers that its advertising patronage pays far better than any other.”⁴⁴⁰ The thinly veiled ads for “French lunar pills” and “procedures to assist with bringing on menstruation” fooled no one.⁴⁴¹ Pillsbury argued that quack medicines, foeticides, and infanticides should be classed together and “regarded with shuddering horror by the whole human race.”⁴⁴² Yet he realized, that “in every large city they hold more control over the public health and public morals, than all the regular medical school and the pulpit combined.”⁴⁴³

In another article, Pillsbury repeated his abhorrence of those who encouraged the practice of abortion—“that very evil in all its horrible enormity and extent.”⁴⁴⁴ In a clear reference to Madame Restell, he berated “those who make it a profession and grow enormously rich in the

436. Pillsbury, *Foundling Hospitals*, *supra* note 407. The *Revolution*, perhaps at Pillsbury's editorial direction, also reprinted a blurb from the *New York World* of a speech by female physician Dr. Anna Dinsmore to the clubwomen's group Sorosis arguing for the solution of foundling hospitals and parroting the medical association's dogma about the “the ignorance of quickening.” *Sorosis: Report on Hospitals and Asylums*, *REVOLUTION*, Jan. 1869.

437. Pillsbury, *Foundling Hospitals*, *supra* note 407; Parker Pillsbury, *Foundling Hospitals Again*, *supra* note 407.

438. Pillsbury, *Quack Medicines*, *supra* note 407.

439. *Id.*

440. *Id.*

441. For examples of the ads for “female monthly pills,” see MOHR, *supra* note 34, at 51–52, 56–57.

442. *Id.*

443. *Id.*; see also Hester Vaughn, *supra* note 314 (reporting Pillsbury's speech in which he criticized the “New-York papers full of advertisements of professional murderers, who committed infanticide for pay” and stated that not a single paper in the city, save the *Revolution*, would refuse such an advertisement).

444. Parker Pillsbury, *The Hester Vaughan Meeting at Cooper Institute*, *REVOLUTION*, Dec. 10, 1868.

murderous business; and yet walk unblushingly, and ride most magnificently on Broadway in broad day, and receive both the gratitude and gold of those who employ them.”⁴⁴⁵ He also condemned the advertisements for abortion services, excoriating “the not less inexcusable crime of those newspapers that advertise for greed and gain, the loathsome operators of the abomination!”⁴⁴⁶

The strong aversion to such popular (and lucrative) ads was then, explicitly Pillsbury’s. His attack on the practice in *Quack Medicines* explains the lack of such advertisements in the *Revolution*.⁴⁴⁷ Moreover, New York outlawed such advertisements in 1868, shortly into the paper’s tenure.⁴⁴⁸ The state’s first anti-obscenity statute expressly banned ads related to “an article or medicine for the prevention of conception or procuring of abortion.”⁴⁴⁹ The lack of such ads in the paper for most of its operation simply conforms to this law. Therefore, no inferences about Stanton’s views about abortion can be drawn from the absence of abortion ads in the *Revolution*.

VII. CONCLUSION: THE SEARCH FOR COMMON GROUND

FFL now claims that Stanton agreed with the organization’s position on the social causes that force women to have abortions. It is true that Stanton did share an understanding of women’s economic and educational oppression and abandonment by male partners.⁴⁵⁰ Thus, it is possible to argue that there is common ground between Stanton and FFL, as there is between prochoice and prolife groups more generally on “reducing unwanted pregnancy and making it possible for women to be both mothers and equal citizens participating in economic and social life.”⁴⁵¹ However, a shared appreciation for some of the causes of abortion does not mean an agreement about the solution.

This claim of “common ground” is often expressed by prochoice leaders seeking to reach out to antiabortion groups in some kind of com-

445. *Id.*

446. *Id.*

447. However, one ad repeatedly appearing in the *Revolution* from July 1868 until April 1869 appears to offer abortion services. An advertisement for Mrs. Mary Peckenpaugh, M.D., of St. Louis read, “Besides a general practice, given special attention to all diseases of women, and to the duties of an *Accoucheuse*.” An “accoucheuse” was a midwife who typically delivered babies and assisted women with issues of menstruation and pregnancy, and the use of the French term may have implied a connection to abortion, like other “French pills” sold to induce abortion.

448. 1868 N.Y. Sess. Laws § 430.

449. *Id.* § 1–2.

450. Foster, *supra* note 4; Elizabeth Cady Stanton, *REVOLUTION*, Mar. 12, 1868; see McClain, *supra* note 7.

451. McClain, *supra* note 7, at 180.

promise. For example, then-Senator Hillary Clinton's platform on abortion was that "[n]obody wants to need an abortion," echoing the refrain of Catholic antiabortion groups and Planned Parenthood.⁴⁵² Abortion is "a sad, even tragic choice to many, many women," said Clinton.⁴⁵³ Going further, she argued that "[t]here is no reason why government cannot do more to educate and inform and provide assistance so that the choice guaranteed under our constitution either does not ever have to be exercised or only in very rare circumstances."⁴⁵⁴ In 2009, a newly elected President Barack Obama articulated a similar "common ground agenda" on abortion in a controversial speech at a Notre Dame graduation in an attempt to reach out to antiabortion activists on shared grounds of supporting women who choose to continue a pregnancy.⁴⁵⁵ The Obama Administration pursued this common ground agenda by quietly enacting the Pregnancy Assistance Funds authorized by the Stanton Act.⁴⁵⁶

But agreement on the common ground idea that abortion should ideally be rare does not mean that abortion foes agree on the rest of the equation and the "ultimate question of state regulation of women's reproductive decisions."⁴⁵⁷ Clinton, for example, finds the solution not in restricting choice, but in preventing unwanted pregnancies, supporting "sex education, family planning, and requiring health insurers to cover contraception."⁴⁵⁸ FFL today does not support the right to access birth control, and instead focuses on societal accommodation of pregnant women to permit all pregnancies to continue, even in cases of rape, incest, and threat to the life of the mother.⁴⁵⁹ Other prolife advocates such

452. Patrick D. Healey, *Clinton Seeking Shared Ground Over Abortions*, N.Y. TIMES, Jan. 25, 2005, <http://www.nytimes.com/2005/01/25/nyregion/25clinton.html>; William Slatean, *Safe, Legal, Never: Hillary Clinton's Antiabortion Strategy*, SLATE, Jan. 26, 2005; see also *Hillary in the Middle on Values Issues*, WASH. TIMES, Jan. 26, 2005; Advertisement, *Catholics for a Free Choice*, PLAIN DEALER, Nov. 1, 2006, at A8.

453. Healey, *supra* note 452, at 1.

454. Slatean, *supra* note 452.

455. See *Transcript: President Obama's Notre Dame Speech*, CHI. TRIB., May 19, 2009, available at <http://www.chicagotribune.com/news/politics/obama/chi-barack-obama-notre-dame-speech,0,118,0040,full.story> (last visited Mar. 2, 2012) [hereinafter *President Obama Speech*]; see also Peter Baker & Susan Saulny, *At Notre Dame, Obama Calls for Civil Tone in Abortion Debate*, N.Y. TIMES, May 17, 2009.

456. Gilgoff, *supra* note 110.

457. McClain, *supra* note 7, at 160.

458. Healey, *supra* note 452; Slatean, *supra* note 452. Catholics for Free Choice agree: "Picture a world where safe and reliable birth control is affordable and everybody uses it. Where the decision to become a parent is made responsibly. Where parents have easy access to child care. Where people have health care whether or not they have a job. Where sex is both serious and pleasurable. In this world, abortions aren't illegal. They're prevented. Isn't that the best choice of all?" Advertisement, *supra* note 452.

459. FEMINISTS FOR LIFE, *supra* note 110.

as 2012 presidential contender Rick Santorum explicitly reject contraception.⁴⁶⁰ Thus, a shared appreciation that abortion is not an ideal outcome does not mean that prochoice and prolife advocates agree on restriction of women's rights. To the contrary, as Hillary Clinton said, "let's not forget the importance of the freedom of women to make the choices that are consistent with their faith and their sense of responsibility to their family and themselves."⁴⁶¹

Thus, the overlapping concerns between Stanton and FFL on issues of women's economic and educational deficits that can contribute to abortion decisions does not mean that Stanton agreed with the regulation of abortion and the restriction of women's liberty. Stanton never gave any indication that she supported the criminalization of abortion advocated by the mainstream press. To the contrary, her writings include a demand for the self-ownership of women and the right to be "sovereign of her own person," singularly responsible for deciding issues of procreation. She rejected aspects of the abortion debate that told women their duty and sole purpose was to bear children, and she instead advocated for women to avoid childbirth and to maintain their individual womanhood and control over their own body.

The adoption of Elizabeth Cady Stanton as an historical spokesperson against abortion is, therefore, not justified, and it is misleading to continue to misappropriate her image in this way. Our heroines in history come with a mixed bag of attributes, some of which resonate with modern audiences, while others appall. Stanton is no exception. She brought much radical change to the advocacy and reforms of the women's movement, providing the foundational political and philosophical efforts for many reforms we accept today. Yet she also brought with her nativist and racist rhetoric, employed to oppose the Fifteenth Amendment because it excluded women's suffrage.⁴⁶² She advocated procreation theories of healthy children and healthy pregnancies that mimic today's accepted theories of "what to expect when you're expecting," even while they included darker elements of eugenics.⁴⁶³ Thus, attributing modern

460. Irin Carmon, *Rick Santorum is Coming for Your Birth Control*, SALON, Jan. 4, 2012, available at http://www.salon.com/2012/01/04/rick_santorum_is_coming_for_your_birth_control/ (last visited March 2, 2012).

461. Slatean, *supra* note 452.

462. Thomas, *supra* note 247.

463. The book *What to Expect When You're Expecting* has been the leading popular pregnancy guidebook for the past thirty years, "making it one of the most recognized and ubiquitous accoutrements of American pregnancy." Nicole Laporte, 'What to Expect When You're Expecting': The Movie and the Book's Heidi Murkoff, DAILY BEAST, May 18, 2012, <http://www.thedailybeast.com/>

day sentiments to past history is messy as we seek to find important connections with the past while discarding those beliefs that have been rejected.

Although we can parse through the historical record to find nuggets of truth and evolutionary legal change, we cannot simply ignore or invent a reality. Historians warn of the dangers of presentism—the interpretation of history through a modern lens by trying to fit people, views, and events of the past into contemporary boxes. Politicians and lawyers, however, continually search for historical relevance, seeking to use history to bring meaning to the present. They search for rationales and support for policy decisions, and history provides one source of evidence that can be offered as persuasive argument. It is important, however, to understand history for what it is. We must be clear about what it is, and is not, before seeking to use it as a basis for new social and legal policy.

One conservative scholar accused contemporary feminist scholars of doing just this, twisting the historical record for political purposes and “obfuscating nineteenth century feminist attitudes.”⁴⁶⁴ He observed that a particular political agenda might cause “scholars to miss the fact that although one might not be able to determine the truth in any ultimate sense, one often can recognize lies.”⁴⁶⁵ He chastised political misrepresentation: “The plain fact is that no historian can afford to ignore ‘the stubborn resistance of the raw materials.’”⁴⁶⁶ And he concluded that “we can distinguish between the truth and the untruth of certain facts about the past even while we quarrel about the significance of these truths. History is more than a process of projecting our wishes onto the past.”⁴⁶⁷ This critique seems particularly fitting to those who promote an unfounded history of antiabortion feminist leaders.

It is simply not the case that nineteenth-century feminist leaders expressed explicit and unanimous support for the criminalization of abortion because of the concern of the morality of prenatal life.⁴⁶⁸ Similarly, it is not true that “Stanton and Anthony expressed concern against child murder.”⁴⁶⁹ As this Article has demonstrated, the few feminist voices

articles/2012/05/18/what-to-expect-when-you-re-expecting-the-movie-and-the-book-s-heidi-murkoff.html.

464. DELLAPENNA, *supra* note 4, at 376, 387.

465. *Id.* at 388.

466. *Id.* at 398.

467. *Id.* at xiv.

468. *Id.* at 372, 392.

469. *Id.* at 375. As demonstrated, “child murder” was jargon used by New York newspapers to sensationalize abortion issues. Dellapenna cites two anonymous articles as evidence of this statement, improperly assigning authorship and not indicating the anonymity of the articles. This misrep-

joining the periphery of the abortion debate did not support the regulation of abortion. Instead, these writers defended women against the abortion campaign's attack and shifted the moral blame to men and to society's oppression of women. What feminists did unanimously endorse was voluntary motherhood and the right of women to control procreation through abstinence. Stanton expanded on this idea, arguing for a woman's right to be the "sovereign of her own person," which meant the right to choose when and under what conditions she would become pregnant. Stanton empathized with women who had unwanted pregnancies and argued against a legal system that imposed punishment upon women for infanticide. This advocate of women's individual right to control makes an unlikely leader for today's antiabortion movement.

The hope for common ground has political appeal, particularly between entrenched long-term adversaries such as those existing in the debate over abortion. But co-opting historical feminist beliefs that are silent on the precise issue of abortion does not create a credible basis for shared ground. The hope for mutual understanding, however, continues. As President Obama pleaded, "[w]hen we open up our hearts and our minds to those who may not think precisely like we do or believe precisely what we believe—that's when we discover at least the possibility of common ground."⁴⁷⁰ This is something with which Elizabeth Cady Stanton might have agreed, as she argued for radical change to the law, religious norms, and social practices to accomplish the full liberation of women.

resentation is compounded in textual discussion where he emphasizes that the *Child Murder* article was "written by Elizabeth Cady Stanton." *Id.* at 398.

470. President Obama Speech, *supra* note 455.