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You're So Vain, I'll Bet You Think This Song  
Is about You

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# You're So Vain, I'll Bet You Think This Song Is about You

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## Abstract

*Dispelling the Myths of Abortion History* covers over 1,000 years of abortion history in England and America, with special emphasis on the nineteenth and twentieth centuries. It presents an accurate and thoroughly fresh look at that history, reaching several unorthodox conclusions without taking sides on the merits of the abortion debate. The true history of abortion in England and America is important because Justice Harry Blackmun, drawing on the work of law professor Cyril Means, structured the argument of the majority in *Roe v. Wade* around the history of abortion laws. Means' argument was later buttressed by the work of historian James Mohr. Means and Mohr created a new orthodox history of abortion designed to sustain the constitutional right to abort. This new orthodoxy proclaimed four theses as summarizing the "true" history of abortion in England and America:

(1) Abortion was not a crime "at common law" (before enactment of abortion statutes in the nineteenth century). (2) Abortion was common and relatively safe before the statutes were enacted. (3) Abortion statutes were enacted to protect the life of the mother rather than the life of the embryo or fetus. (4) The moving force behind the nineteenth-century statutes was male physicians' efforts to suppress competition from (largely female) practitioners of alternative forms medicine.

Each of these theses is incorrect. Only by placing strictly legal materials in social, political, and technological contexts can one properly understand what happened in the past and how the law specific to abortion changed through time. Anglo-American law always treated abortion as a serious crime, generally including procedures performed early in pregnancy. Prosecutions and even executions go back 800 years in England, establishing law that carried over to colonial America - law that focused consistently on protecting the life of the unborn child.

Dispelling the Myths of Abortion History sets forth the evolution of abortion laws from the earliest days of the common law in twelfth-century England to the opening of the twenty-first century in England and America, framing that story in extended analyses of the social practices that surrounded abortion and abortion laws down through the centuries, with particular emphasis on how abortions were done and on how people have otherwise prevented or disposed of unwanted pregnancies. Changing medical technologies in the last three centuries made abortion less dangerous for the mother and more difficult to detect, yet well into the twentieth century nearly everyone - led by feminists, physicians, and religious leaders - condemned abortion as “child murder” and dealt with the resulting moral challenge through statutes to repress or prohibit abortion. Only in the later twentieth century, faced with the perfection of techniques for doing abortions as well as other social changes, did many societies begin to manage abortion as a medical problem rather than a legal problem, repealing or modifying the laws prohibiting or restricting abortion.

This chapter discusses the role of nineteenth-century feminists in the enactment of the abortion statutes of that century and the obfuscation of that role by contemporary supporters of abortion rights. The nineteenth-century feminists, including Susan B. Anthony, Tennessee Claflin, Elizabeth Cady Stanton, Victoria Woodhull and just about every other feminist who has left a record from that era regarding abortion were all staunchly opposed to abortion - which they uniformly referred to as “child-murder.” These women were hardly afraid to speak their mind, having included the author of a new “women’s Bible” (Stanton), led the “free-love” movement (Claflin & Woodhull), became millionaires as stockbrokers (Claflin and Woodhull), and ran for President (Woodhull, with Frederick Douglas as her running mate). Nor were these women unsophisticated about abortion, carefully distinguishing between abortion and contraception, and supporting the latter but not the former. This pattern, more than anything else, refutes the now generally accepted notion that the abortion statutes were a male conspiracy to suppress women. In fact, they saw abortion as something that men forced on women, leading them to support “voluntary motherhood,” meaning voluntary sex and contraception rather than abortion. As Christabel Pankhurst, an English counterpart to the American feminists summarized the point, the goal was “Votes for women, and chastity for men.”

Chapter 8

You're So Vain, I'll Bet You Think This Song Is about You<sup>1</sup>

*[E]ach generation gets the past it deserves.*

—Grant Gilmore<sup>2</sup>

The new orthodoxy of abortion history has it that the nineteenth-century legislatures debated the frequent statutory enactments in various states throughout the century that steadily closed gaps and fissures in the laws prohibiting abortions<sup>3</sup> primarily as a form of medical regulation.<sup>4</sup> The new orthodoxy also raises anti-foreign feeling, verging (among other prejudices) on anti-Semitism, as a major motive for the anti-abortion crusade of the late-nineteenth century.<sup>5</sup> Those who expound the new orthodoxy dismiss any professed concern of the leaders of the anti-

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<sup>1</sup> Carly Simon, *You're So Vain* (1972).

<sup>2</sup> GRANT GILMORE, *THE AGES OF AMERICAN LAW* 102 (1977).

<sup>3</sup> See Chapter 7, at notes 3-28.

<sup>4</sup> See, e.g., JAMES MOHR, *ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800-1900*, at 119, 202 (1978). See generally Chapters 6 & 7.

<sup>5</sup> ELLEN CHESLER, *WOMEN OF VALOR: MARGARET SANGER AND THE BIRTH CONTROL MOVEMENT* 60 (1992); DAVID GARROW, *LIBERTY AND SEXUALITY: THE RIGHT OF PRIVACY AND THE MAKING OF ROE V. WADE* 17, 96, 107-08, 129 (2<sup>nd</sup> ed. 1998); FAYE GINSBURG, *CONTESTED LIVES: THE ABORTION DEBATE IN AN AMERICAN COMMUNITY* 32 (1989); LINDA GORDON, *WOMAN'S BODY, WOMAN'S RIGHT: A SOCIAL HISTORY OF BIRTH CONTROL IN AMERICA* 140-42, 236-45 (1976); MARK GRABER, *RETHINKING ABORTION: EQUAL CHOICE, THE CONSTITUTION, AND REPRODUCTIVE POLITICS* 24 (1996); MICHAEL GROSSBERG, *GOVERNING THE HEARTH: LAW AND THE FAMILY IN NINETEENTH-CENTURY AMERICA* 170-71 (1985); DONALD JUDGES, *HARD CHOICES, LOST VOICES* 104 (1993); KRISTIN LUKER, *ABORTION AND THE POLITICS OF MOTHERHOOD* 27-28 (1984); MOHR, *supra* note 4, at 91-93, 180, 207-09; ROSALIND POLLACK PETCHESKY, *ABORTION AND WOMEN'S CHOICE: THE STATE, SEXUALITY, AND REPRODUCTIVE FREEDOM* 77-79, 82-89, 93-94, 116-25, 129-30 (rev. ed. 1990); CARROLL SMITH-ROSENBERG, *DISORDERLY CONDUCT: VISIONS OF GENDER IN VICTORIAN AMERICA* 224-28, 238 (1985); Jeannie Rosoff, "The Politics of Birth Control," 20 *FAM. PLANNING PERSPECTIVES* 312, 313 (1988); Reva Siegel, *Reasoning from the Body: A Historical Perspective on Abortion Regulation and Questions of Equal Protection*, 44 *STAN. L. REV.* 261, 297-300 (1992).

abortion campaign for other values—such as the protection of fetal life,<sup>6</sup> the protection of the life or health of mothers,<sup>7</sup> or the protection of public morality<sup>8</sup>—as at best a mere “moral prejudice”<sup>9</sup> and at worst a subterfuge necessary to enlist others in the physicians’ anticompetitive campaign.<sup>10</sup> Only an occasional pro-abortion historian are more candid, admitting that virtually all the discussion of abortion in medical and other literature in the nineteenth century stressed the protection of fetal life (often even labeling the crime as “foeticide”), with other reasons being mentioned, if at all, merely in passing.<sup>11</sup>

The new orthodoxy holds that the public in general, and women in particular, were either duped or disregarded in the efforts of the allopathic physicians to gain economic control over the birthing process. The allopaths supposedly used abortion as a weapon to drive out the competition, particularly midwives. The historians of the new orthodoxy offer no direct evidence of such an allopathic conspiracy, substituting conjecture about the motives of individuals and groups. These conjectures do not hold up when one examines the evidence offered to support them.<sup>12</sup> Completely absent from the new orthodoxy is any sense of change in the methods or techniques by which abortions were performed,<sup>13</sup> yet these changes were central to professional responses to

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<sup>6</sup> See, e.g., MOHR, *supra* note 4, at 87, 104, 110-11, 140, 143, 152-53, 156-59, 164-66, 207, 214, 216-17.

<sup>7</sup> *Id.* at 120-22, 125-29, 207, 254-55.

<sup>8</sup> *Id.* at 88-89, 131, 141-42, 163-66, 207-08, 214, 216-17, 238.

<sup>9</sup> *Id.* at 140, 143-44, 147-54, 164-70, 196-99, 219-21, 238, 261-63, 307 n.69.

<sup>10</sup> *Id.* at 134-35, 159-64, 220-21, 224-26, 228-29, 237-39, 244-45, 255-60. See also SMITH-ROSENBERG, *supra* note 5, at 236-44.

<sup>11</sup> See, e.g., CARL DEGLER, *AT ODDS: WOMEN AND THE FAMILY IN AMERICA FROM THE REVOLUTION TO THE PRESENT* 241 (1980).

<sup>12</sup> See Chapter 6, at notes 213-331, and Chapter 7, at notes 205-470.

<sup>13</sup> See Chapter 6, at notes 332-413, and Chapter 7, at notes 114-60.

abortion throughout the nineteenth century. Nor does the new orthodoxy adequately address the role of women relative to abortion in the nineteenth century.

Historians of the new orthodoxy, particularly those who describe themselves as feminists, tend to project their notions of what women feel and think today onto women of the past, particularly American women of the nineteenth century. Such projections, often enough questionable regarding women the late twentieth century, are wholly insupportable for women in the late nineteenth century. Even James Mohr, intent as he was to demonstrate that the criminalization of abortion was an imposition by a medical conspiracy against society, cited a great deal of evidence of a broad social consensus in favor of the criminalization of abortion—including the near unanimous strong condemnation of abortion by nineteenth-century feminists. Mohr was reduced to describing the feminist attitudes towards abortion as “an anomaly.”<sup>14</sup>

The historical record is clear. Only by impugning the integrity of innumerable social and professional leaders can one argue that protection of unborn children from the rising numbers of abortions was not a significant concern. Even charges of insincerity hardly explain the attitude of the nineteenth century feminists. Their attitude also belies the claims in the two so-called *Historians' Briefs*<sup>15</sup> that nineteenth-century abortion statutes were adopted by men in order to oppress women—in struggles between doctors and midwives for markets, or between husbands and

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<sup>14</sup> MOHR, *supra* note 4, at 113.

<sup>15</sup> *Amicus Brief of 250 American Historians in support of Appellants in Planned Parenthood of Southeastern Pennsylvania v. Casey*, [505 U.S. 833 (1992)], at 11-21 (“*Casey Historians' Brief*”); *Amicus Brief of 281 American Historians supporting Appellees in Webster v. Reproductive Health Services* [492 U.S. 490 (1989)] (“*Webster Historians' Brief*”), reprinted at 11 WOMEN’S RTS. L. RPTR. 163, 173-77 (1989), and in 8 DOCUMENTARY HISTORY OF THE LEGAL ASPECTS OF ABORTION IN THE UNITED STATES: WEBSTER v. REPRODUCTIVE HEALTH SERVICES 107 (Roy Merksy & Gary Hartman eds. 1990) (“DOCUMENTARY HISTORY”) (hereafter pagination will be given only to the version in the *Women's Rts. L. Rptr.*).

wives for dominance in the home, or of men to use women to prevent “race suicide.”<sup>16</sup> It is particularly important to discover what stand the emerging women’s movement (the “first wave of feminism”) took on these matters.

THE NINETEENTH CENTURY FEMINISTS

*Our similarities are different.*

—Dale Berra<sup>17</sup>

The later nineteenth century was an era in which sexual roles were heavily contested. Growing numbers of women sought to enter what many considered to be “male” occupations, including medicine and law. Often men in those lines of work succeeded in organizing themselves to exclude women. This effort was largely successful in excluding women from the law; a few women fought stubbornly and eventually successfully to enter the profession against claims that women were inherently unsuited for such work.<sup>18</sup> Women were also largely excluded from the dominant (allopathic) medical profession at this time.<sup>19</sup> The women who fought these battles were among the feminist leaders and organizers of the later nineteenth century, the so-called “first wave” of feminism.<sup>20</sup> Most of these women generally were neither lawyers nor physicians

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<sup>16</sup> See the text *infra* at notes 164-69; and Chapter 9, at 36-43; Chapter 11, at notes 5-24.

<sup>17</sup> DAVID NATHAN, *BASEBALL QUOTATIONS* 153 (1993).

<sup>18</sup> See Chapter 9, at notes 233-329.

<sup>19</sup> See Chapter 6, at notes 213-67, Chapter 7, at notes 394-439, and *infra*, at notes 253-308.

<sup>20</sup> On the use of this expression, see CASSANDRA LANGER, *A FEMINIST CRITIQUE: HOW FEMINISM HAS CHANGED AMERICAN SOCIETY, CULTURE, AND HOW WE LIVE FROM THE 1940S TO THE PRESENT* 6 (1996). See generally BARBARA BERG, *THE REMEMBERED GATE: ORIGINS OF AMERICAN FEMINISM* (1978); CARRIE CHAPMAN CATT & NETTIE ROGERS SHULER, *WOMAN SUFFRAGE AND POLITICS* (1969); WILLIAM HENRY CHAFE, *THE AMERICAN WOMAN: HER CHANGING SOCIAL, ECONOMIC, AND POLITICAL ROLES, 1920-1970* (1972); CATHERINE CLINTON, *THE OTHER CIVIL WAR: AMERICAN WOMEN IN THE NINETEENTH CENTURY* (1984); DEGLER, *supra* note 11, at 328-61; ELLEN CAROL DUBOIS, *FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN’S MOVEMENT IN AMERICA, 1848-1869* (1978); ELLEN CAROL DUBOIS, *HARRIOT STANTON BLATCH AND THE WINNING OF WOMAN SUFFRAGE* (1997); ELEANOR FLEXNER, *A CENTURY OF STRUGGLE: THE WOMAN’S RIGHTS MOVEMENT IN THE UNITED STATES* (rev. ed. 1975); DOLORES HAYDEN, *THE GRAND DOMESTIC REVOLUTION: A HISTORY OF FEMINIST DESIGNS FOR AMERICAN*

and they were not representative of the hypothetical “average” woman of the time. The feminist leaders represent thoughtful and articulate women of the time. This section examines their attitudes, later sections of this chapter examining the specific experiences and attitudes of women physicians. The next chapter examines the specific experiences and attitudes of women lawyers.

Today it is fashionable for pro-abortion historians and lawyers to assert that the late nineteenth century feminists supported abortion rights and were simply unable to overcome the sexist oppression of the time to secure these rights for their sisters.<sup>21</sup> Several hundred historians signed a brief for the Supreme Court making just such an assertion,<sup>22</sup> while in an earlier brief these same historians asserted that the nineteenth century abortion statutes resulted from a male conspiracy to oppress women.<sup>23</sup> Nothing could be further from the truth. Historian Estelle Freedman, who co-authored one of the leading histories of sexual practices in America,<sup>24</sup> candidly ac-

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HOMES, NEIGHBORHOODS AND CITIES (1981); AILEEN KRADITOR, THE IDEAS OF THE WOMAN SUFFRAGE MOVEMENT: 1890-1920 (1971); SUZANNE MARILLEY, WOMEN SUFFRAGE AND THE ORIGINS OF LIBERAL FEMINISM IN THE UNITED STATES, 1820-1920 (1996); LOUISE MICHELE NEWMANN, MEN'S IDEAS/WOMEN'S REALITIES (1985); WILLIAM O'NEILL, EVERYONE WAS BRAVE: A HISTORY OF FEMINISM IN AMERICA (1969); DEBORAH RHODE, JUSTICE AND GENDER 12-50 (1989); ANNE & ANDREW SCOTT, ONE HALF THE PEOPLE: THE FIGHT FOR WOMEN SUFFRAGE (1975); ANDREW SINCLAIR, THE BETTER HALF: THE EMANCIPATION OF THE AMERICAN WOMAN (1966); THE SELECTED PAPERS OF ELIZABETH CADY STANTON AND SUSAN B. ANTHONY VOLUME ONE: THE SCHOOL OF ANTI-SLAVERY (Ann Gordon ed. 1997); REAY TANNAHILL, SEX IN HISTORY 388-402 (1980); NANCY WOLOCH, WOMEN AND THE AMERICAN EXPERIENCE (1984).

<sup>21</sup> See JANET FARRELL BRODIE, CONTRACEPTION AND ABORTION IN NINETEENTH-CENTURY AMERICA xii 41-44, 253-72, 275-80 (1994); BARBARA BROOKES, ABORTION IN ENGLAND 1900-1967, at 2-7, 14, 40, 57, 63-67, 70-71, 79-88, 105-06, 113-17 (1988); GORDON, *supra* note 5, at 97-111; GROSSBERG, *supra* note 5, at 155-95; BEVERLY WILDUNG HARRISON, OUR RIGHT TO CHOOSE: TOWARD A NEW ETHIC OF ABORTION 161-72 (1983); PETCHESKY, *supra* note 5, at 45-46, 54-56, 67-73, 82-84, 89-90, 188-92; LESLIE REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867-1973, at 11-12 (1997); JAMES REED, FROM PRIVATE VICE TO PUBLIC VIRTUE: THE BIRTH CONTROL MOVEMENT AND AMERICAN SOCIETY SINCE 1830, at 34-35 (1978); RHODE, *supra* note 20, at 202; SMITH-ROSENBERG, *supra* note 5, at 220-525; Rachael Pine & Sylvia Law, *Envisioning a Future for Reproductive Liberty: Strategies for Making the Rights Real*, 27 HARV. C.R.-C.L. L. REV. 407, 455 n.219 (1992); Siegel, *supra* note 5, at 294-95, 302-14.

<sup>22</sup> *Casey Historians' Brief*, *supra* note 15, at 18-20, & App. at 6.

<sup>23</sup> *Webster Historians' Brief*, *supra* note 15, at 173-77.

<sup>24</sup> See JOHN D'EMILIO & ESTELLE FREEDMAN, INTIMATE MATTERS: A HISTORY OF SEXUALITY IN AMERICA 67 (1988).

knowledge that she signed the first brief even though it contradicts the history of women as she has found it.<sup>25</sup> Other historians signed those briefs without even reading them.<sup>26</sup> The briefs are more of a political manifesto than a serious attempt to develop the history of abortion in the United States.

Feminism was a major political and social force from the middle of the nineteenth century onward in the United States, its influence declining only in the middle years of the twentieth century.<sup>27</sup> Yet the feminists did not stand apart from the emerging scientific knowledge of their time. Indeed, perhaps the most impressive demonstration of the new consensus on the nature of human gestation<sup>28</sup> was its emphatic embrace by all leading feminists during the period when the abortion statutes were being enacted. Feminist leaders, as a result, were explicit and uncompromising, and virtually unanimous, in condemning abortion as “ante-natal murder,” “child-murder,” or “ante-natal infanticide.”<sup>29</sup>

Explaining the underlying motives of the early feminists in opposing abortion is no easier than it is for others who opposed abortion during that time. While the leading feminists of the

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<sup>25</sup> Estelle Freedman, *Historical Interpretation and Legal Advocacy: Rethinking the Webster Amicus Brief*, 12 PUB. HISTORIAN 27, 28-30. See Chapter 17, at notes 48-51. See also Chapter 17, at notes 52-66.

<sup>26</sup> See *Remarks of Professor Joan Hollinger, AALS 1990 Conference Audio Tape No. 163* (available from Recorded Resources Corporation of Millersville, Md.) (proudly reciting how she personally recruited 38 members of the History Department at the University of Michigan to sign the *Webster Historians' Brief*—all signing without having read the brief they were subscribing to, let alone a brief on the other side).

<sup>27</sup> See the authorities collected *supra* at note 20.

<sup>28</sup> See Chapter 5, at notes 209-46.

<sup>29</sup> See, e.g., EMMA DRAKE, WHAT A YOUNG WIFE OUGHT TO KNOW 130 (1901); ELIZA BISBEE DUFFEY, THE RELATIONS OF THE SEXES 274-75 (1876); ALICE BUNKER STOCKHAM, TOKOLOGY 246-50 (1887); Susan B. Anthony, *Marriage and Maternity*, THE REVOLUTION, July 8, 1869, at 4; Ann Densmore, *Lectures*, THE REVOLUTION, Mar. 19, 1868, at 170; Matilda Gage, *Is Woman Her Own?*, THE REVOLUTION, April 9, 1868, at 215-16; Elizabeth Cady Stanton, *Child Murder*, THE REVOLUTION, March 12, 1868, at 146-47. See generally D'EMILIO & FREEDMAN, *supra* note 24, at 64; MARY KRANE DERR, MAN'S INHUMANITY TO WOMAN MAKES COUNTLESS INFANTS DIE (1991);

nineteenth century were rebelling in so many ways against the social conventions of the time, they were by no means free of those conventions. Some of the leading feminists of the time were notoriously racist, arguing that women should have the vote as a bulwark against the “brutish and ignorant Negro.”<sup>30</sup> Such feminists might have opposed abortion out of fears of race suicide,<sup>31</sup> although no one has come forward with direct evidence of this motive among feminists. There might have been other unsavory motives for feminist opposition to abortion. But at least in part feminist opposition to abortion arose from a desire to protect women against the depredations of men. And regardless of what the motivations were, if the feminists and ordinary women all strongly opposed abortion, along with most men in society, the nineteenth century laws represented a clear social consensus regardless of the underlying motivations, and not simply a male conspiracy against women.

The authors of the *Casey Historians' Brief* would have us see early feminist opposition to abortion as based on Victorian hostility to sexuality or to “male license.”<sup>32</sup> They mischaracterize the nineteenth-century feminist position on abortion as one of reluctance rather than opposition and attempted to conflate historical opposition to abortion with historical opposition to contraception.<sup>33</sup> The authors even claimed in that brief that the spousal notice requirement held uncon-

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GORDON, *supra* note 5, at 129; MARY LYNDON SHANLEY, *FEMINISM, MARRIAGE, AND THE LAW IN VICTORIAN ENGLAND, 1850-1895*, at 87-93 (1989).

<sup>30</sup> See, e.g., Ida Husted Harper, *Would Woman Suffrage Benefit the State, and Woman Herself?*, 178 N. AM. REV. 362, 373 (1904). See generally BELL HOOKS, *TALKING BACK: THINKING FEMINIST, THINKING BLACK* 130-31, 161-65 (1989); TANNAHILL, *supra* note 78, at 400; Deborah Rhode, *The “No-Problem” Problem: Feminist Challenges and Cultural Change*, 100 YALE L.J. 1731, 1741-42 (1991).

<sup>31</sup> On the prominence of fears of race suicide among some opponents of abortion, see the text *infra* at notes 164-69; and Chapter 9, at 36-43; Chapter 11, at notes 5-24.

<sup>32</sup> *Casey Historians' Brief*, *supra* note 15, at 18-19.

<sup>33</sup> *Id.* at 18-20.

stitutional in the *Casey* decision<sup>34</sup> was designed to carry forward the common-law tradition of subordination of a woman to her husband's control.<sup>35</sup> No one disputes that such traditions existed, and few would support those traditions as legal mandates today. Whether those traditions are relevant to the abortion controversy is another question. The answer is suggested by the fact that the same authors omitted any mention of nineteenth-century feminists in their earlier *Webster Historians' Brief* because it was simply too embarrassing for their argument.<sup>36</sup>

Susan B. Anthony and Elizabeth Cady Stanton both spoke in terms of child murder.<sup>37</sup> To argue, as the authors of the *Casey Historians' Brief* do,<sup>38</sup> that such the nineteenth-century feminists' were merely seeking to protect women from exploitation by men and were not morally opposed to abortion is, at best, to focus narrowly on their stated goals to the exclusion of both how they explained their positions and what they themselves understood to be the practical effects of their efforts. Such women as Anthony and Stanton were hardly afraid of confronting male opinions on questions of basic morality. Numerous early feminists were actively engaged in working for the abolition of slavery, the imposition of temperance, and reforming of prisons as well as for development of women's rights.<sup>39</sup> Both Anthony and Stanton publicly abandoned the religions in

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<sup>34</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. at 911-22 (Stevens, J., partially concurring), 922-43 (Blackmun, J., partially concurring).

<sup>35</sup> *Casey Historians' Brief*, *supra* note 15, at 17.

<sup>36</sup> Sylvia Law, *Conversations between Historians and the Constitution*, 12 THE PUB. HISTORIAN 11, 15 (1990) (Sylvia Law was the principal author of the *Historians' Briefs*).

<sup>37</sup> See Anthony, *supra* note 29; Stanton, *supra* note 29. See also DERR, *supra* note 29, at 24; ELIZABETH GRIFFITH, *IN HER OWN RIGHT: THE LIFE OF ELIZABETH CADY STANTON* 133 (1984).

<sup>38</sup> *Casey Historians' Brief*, *supra* note 15, at 19.

<sup>39</sup> Such wide-ranging activism had deep roots going back to Quaker women before the American Revolution. See REBECCA LARSON, *DAUGHTERS OF LIGHT: QUAKER WOMEN PREACHING AND PROPHECYING IN THE COLONIES AND ABROAD, 1700-1775*, at 94, 182, 185, 292-95, 302-03 (1999). See also JULIE ROY JEFFREY, *THE GREAT SILENT ARMY OF ABOLITIONISM: ORDINARY WOMEN IN THE ANTISLAVERY MOVEMENT* (1998); KATHRYN KISH SKLAR,

which they were raised, and Stanton published her own feminist version of the Bible.<sup>40</sup> Stanton did so at a time when women, still excluded from formal political power, were a growing influence in mainstream Protestantism.<sup>41</sup> Stanton, like Anthony, was a figure of international stature who strongly influence English suffragists as well as American, and had connections with suffragists in other European and Europeanized countries.<sup>42</sup> These were hardly women who backed off from an argument that they considered essential to women's lives because of fear of men's opinions.

Contemporary historians go further, conflating attitudes towards abortion and contraception in the nineteenth century.<sup>43</sup> This goes beyond merely draining the color out of our pictures of the past; it smacks of deliberate obfuscation. Some anti-feminists of the time did link abortion and

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WOMEN'S RIGHTS EMERGE WITHIN THE ANTISLAVERY MOVEMENT, 1830-1870 (2000). On the radicalism and influence of feminists in Europe on feminists in the United States, see BONNIE ANDERSON, *JOYOUS GREETINGS: THE FIRST INTERNATIONAL WOMEN'S MOVEMENT, 1830-1860* (2000).

<sup>40</sup> ELIZABETH CADY STANTON, *THE WOMAN'S BIBLE* (1895).

<sup>41</sup> See ANN DOUGLAS, *THE FEMINIZATION OF AMERICAN RELIGION* (1977); SMITH-ROSENBERG, *supra* note 5, at 129-64.

<sup>42</sup> See ELIZABETH CADY STANTON, *EIGHTY YEARS AND MORE: REMINISCENCES, 1815-1897* (1898); Elizabeth Cady Stanton, *Declaration of Sentiments*, reprinted in MARI JO & PAUL BUHLE, *THE CONCISE HISTORY OF WOMAN SUFFRAGE: SELECTIONS FROM THE CLASSIC WORK OF STANTON, ANTHONY, GAGE, AND HARPER* 94-95 (1978). See also GRIFFITH, *supra* note 37; ELIZABETH CADY STANTON AS REVEALED IN HER LETTERS, DIARY AND REMINISCENCES (Theodore Stanton & Harriet Stanton Black eds. 1922); Sandra Stanley Holton, *From Anti-Slavery to Suffrage Militancy: The Bright Circle, Elizabeth Cady Stanton and the British Women's Movement*, in *SUFFRAGE AND BEYOND: INTERNATIONAL FEMINIST PERSPECTIVES* 213 (Caroline Daley & Melanie Nolan eds. 1994).

<sup>43</sup> See, e.g., DEGLER, *supra* note 11, at 202-06, 215; HARRISON, *supra* note 21, at 161-72; RHODE, *supra* note 20, at 202; SMITH-ROSENBERG, *supra* note 5, at 220; PETCHESKY, *supra* note 5, at 25-35; Linda Gordon, *Voluntary Motherhood: The Beginnings of Feminist Birth Control Ideas in the United States*, 1 *FEM. STUD.* 5 (1973) ("Gordon, *Voluntary Motherhood*") (this became ch. 5 in GORDON, *supra* note 5); Linda Gordon, *Why Nineteenth Century Feminists Did Not Support "Birth Control" and Twentieth Century Feminists Do*, in *RETHINKING THE FAMILY* 40 (Barrie Thorne & Marilyn Yalom eds. 1982) ("Gordon, *Nineteenth Century Feminists*"). This conflation pervades Gordon's major work. GORDON, *supra* note 5.

contraception and blamed both on feminism.<sup>44</sup> One need look no further than the very nineteenth-century feminists that the authors of the *Casey Historians' Brief* discuss in claiming that such feminists opposed the abortion statutes<sup>45</sup> to discover that nineteenth-century feminists themselves distinguished sharply between the two practices, frequently and adamantly condemning abortion while supporting contraception.<sup>46</sup> Nineteenth century courts and legislatures also distinguished between abortion (a crime everywhere) and the use of contraceptives (a crime only in Connecticut).<sup>47</sup> Many male physicians of the time drew the same distinction.<sup>48</sup> Some anti-feminist moralists did condemn abortion and contraception in similar terms in the nineteenth century.<sup>49</sup> As Michael Grossberg noted, however, “they reserved their harshest condemnations and most zealous efforts for the antiabortion crusade.”<sup>50</sup> Perhaps some men who supported the feminists also condemned contraception equally with abortion, but the principal example of

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<sup>44</sup> See, e.g., H.S. POMEROY, THE ETHICS OF MARRIAGE 95-96 (1888); Montrose Pallen, *Foeticide*, 3 MED. ARCHIVES (St. L. n.s.) 195, 205-06 (1869). MOHR, *supra* note 4, at 107-08; MARY ROTH WALSH, DOCTORS WANTED: NO WOMEN NEED APPLY 145-46 (1977).

<sup>45</sup> *Casey Historians' Brief*, *supra* note 15, at 18-20.

<sup>46</sup> See, e.g., ANNIE BESANT, THE LAW OF POPULATION: ITS CONSEQUENCES, AND ITS BEARING UPON HUMAN CONDUCT AND MORALS (1878). See generally D'EMILIO & FREEDMAN, *supra* note 24, at 50-63, 64-65; GROSSBERG, *supra* note 5, at 169-70.

<sup>47</sup> *Commonwealth v. Leigh*, 15 PHILA. R. 376 (1881).

<sup>48</sup> BRODIE, *supra* note 21, at 275-78.

<sup>49</sup> See, e.g., AUGUSTUS GARDNER, CONJUGAL SINS AGAINST THE LAWS OF LIFE AND HEALTH AND THEIR EFFECTS UPON THE FATHER, MOTHER, AND THE CHILD 31, 35, 101 (1876); DIO LEWIS, CHASTITY, OR OUR SECRET SINS 89-109, 183 (1874); WILLIAM WALLINGS, SEXOLOGY 74 (1876); JOHN TODD, SERPENT IN A DOVE'S NEST 23-24 (1867); William Goodell, *Clinical Lecture on Conjugal Onanism and Kindred Sin*, PHILA. MED. TIMES, Feb. 1, 1872, at 161, 162; Pallen, *supra* note 44, at 205.

<sup>50</sup> GROSSBERG, *supra* note 5, at 193. See generally GROSSBERG, *supra*, at 175-78, 193-95; JOHN & ROBIN HALLER, THE PHYSICIAN AND SEXUALITY IN VICTORIAN AMERICA 114-15, 122-24 (1974).

this—Ezra Heywood—later defended the use of a contraceptive syringe.<sup>51</sup> Other pro-feminist men openly advocated contraception while condemning abortion, a stance most feminists similarly embraced.<sup>52</sup>

Abortion rights advocates similarly attempt to obfuscate the distinction today.<sup>53</sup> Abortion has, and always has had, a different moral and legal quality compared to contraception or other forms of reproductive and sexual privacy, for abortion involves the killing of an embryo or a fetus regardless of how one morally evaluates the status of that being. The drawing of this distinction continues down to today,<sup>54</sup> and continued throughout the time that both abortion and contraception were becoming technologically feasible. For example, a survey of British physicians in 1922 found three-fourths of them supportive of birth control while very few supported the ready availability of abortion.<sup>55</sup> Even the Supreme Court in *Roe v. Wade* recognized that the evolving traditions regarding other forms of intimate privacy simply do not correspond to the abortion

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<sup>51</sup> EZRA HEYWOOD, CUPID'S YOKE; OR, THE BINDING FORCES OF CONJUGAL LIFE 20 (1887). See GORDON, *supra* note 5, at 107-09).

<sup>52</sup> See D.M. BENNETT, ANTHONY COMSTOCK AND HIS CAREER OF CRIME AND CRUELTY 1068 (1878); EDWARD BOND FOOTE, THE RADICAL REMEDY IN SOCIAL SCIENCE 89 (1886); FREDERICK HOLLICK, THE MARRIAGE GUIDE OR NATURAL HISTORY OF GENERATION 334 (1850). See generally BRODIE, *supra* note 21, at 193-94; C. THOMAS DINES, LAW, POLITICS AND BIRTH CONTROL 63 (1972); DEGLER, *supra* note 11, at 201-02; D'EMILIO & FREEDMAN, *supra* note 24, at 50-63, 64-65; GORDON, *supra* note 5, at 97-100; GROSSBERG, *supra* note 5, at 169-70, 187-95.

<sup>53</sup> See, e.g., RONALD DWORKIN, LIFE'S DOMINION: AN ARGUMENT ABOUT ABORTION, EUTHANASIA, AND INDIVIDUAL FREEDOM 32-34 (1993); CHERYL MEYER, THE WANDERING UTERUS: POLITICS AND THE REPRODUCTIVE RIGHTS OF WOMEN 133-35 (1997); Susan Estrich & Kathleen Sullivan, *Abortion Politics: Writing for an Audience of One*, 138 U. PA. L. REV. 119, 128-30 (1989); Berta Hernández, *To Bear or Not to Bear: Reproductive Freedom as an International Human Right*, 17 BROOKLYN J. INT'L L. 309, 323-24 (1991). See generally James Bopp, jr., & Richard Coleson, *What Does Webster Mean?*, 138 U. PA. L. REV. 157, 166-68 (1989).

<sup>54</sup> See NANETTE DAVIS, FROM CRIME TO CHOICE xiii, 3-4 (1985); DWORKIN, *supra* note 53, at 10-24, 29-35, 50, 56-60, 67-101; HARRISON, *supra* note 21, at 219-21, 225-26, 250-51.

<sup>55</sup> PETER FRYER, THE BIRTH CONTROLLERS 248 (1966).

situation.<sup>56</sup> The joint plurality opinion of Justices Kennedy, O'Connor, and Souter made the same point in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,<sup>57</sup> as did the two dissenting opinions representing four other justices.<sup>58</sup> Furthermore, the historical record itself demonstrates that the traditional condemnation of abortion in England and America was independent of the sometimes widespread opposition to contraception. As Dr. Alice Bunker Stockham put it in 1887, "[t]he remedy is in the prevention of pregnancy, not in producing abortion."<sup>59</sup> Yet at least one feminist historian, who noted this support for contraception, was so intent on conflating abortion and contraception that she never seemed to notice the differing professional response to the two procedures.<sup>60</sup>

Nor, when one fairly reads the record of what was said or written about abortion, can one fairly equate opposition to abortion in the nineteenth century to support for paternal dominance in the home. In fact, one of the stronger strands in the traditional condemnation of abortion has been the protection of the woman, even, if need be, against her husband.<sup>61</sup> The two *Historians' Briefs* admit as much, at least regarding the statutes adopted in the nineteenth century.<sup>62</sup> This tra-

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<sup>56</sup> *Roe v. Wade*, 410 U.S. 113, 159 (1973).

<sup>57</sup> 505 U.S. 833, 851 (1992) (Kennedy, O'Connor, & Souter, JJ., joint plurality op.).

<sup>58</sup> *Id.* at 951-52 (Rehnquist, C.J., dissenting, joined by Scalia, Thomas, & White, JJ.), 982 (Scalia, J., dissenting, joined by Rehnquist, C.J., & Thomas & White, JJ.).

<sup>59</sup> STOCKHAM, *supra* note 29, at 250. *See also* Anthony, *supra* note 29 (calling for an investigation into causes).

<sup>60</sup> BROOKES, *supra* note 21, at 65, 70-71.

<sup>61</sup> *See, e.g.,* Rex v. Scharp, THE LONDON EYRE OF 1276, at 23 (no. 76) (London Rec. Soc'y 1976) (a husband cannot compel his wife to have an abortion; therefore the husband's consent did not immunize the crime from prosecution) (quoted in Chapter 3, at note 92).

<sup>62</sup> *Casey Historians' Brief*, *supra* note 15, at 11-13; *Webster Historians' Brief*, *supra* note 15, at 173.

dition views the woman undergoing an abortion as victim rather than culprit.<sup>63</sup> The tradition can be traced back to the very beginnings of the common law, when abortion, along with the rape of her virginity and the murder of her husband in her arms, were the only three personal invasions for which a woman could bring an appeal of felony without the consent of and representation by her husband or another appropriate male relative.<sup>64</sup> Also evidencing the policy of protecting the woman was the rule, which even law professor Cyril Means, jr., termed “an act or restoration gallantry,” that an abortion causing the death of the mother is murder regardless of whether the killing of the fetus would be a punishable offense.<sup>65</sup> The nineteenth century feminists’ opinion of abortion and abortion laws fell squarely within this tradition.

The notion that men were behind abortion has an ancient pedigree. Anthropologist Georges Devereux found that in pre-industrial societies around the world female attitudes towards pregnancy and abortion were largely determined by the attitudes of their men towards becoming a father.<sup>66</sup> Even when a woman chose to seek abortion on her own, including when she would abort out of spite against the man, her actions were largely a reaction to his attitudes rather than

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<sup>63</sup> See *Peoples v. Commonwealth*, 9 S.W. 509, 510 (Ky. 1898); *State v. Murphy*, 27 N.J.L. 112, 114-15 (1858); *Dunn v. People*, 29 N.Y. 523, 527 (1864); *Watson v. State*, 9 Tex. Crim. App. 237, 244-45 (1880); *State v. Howard*, 32 Vt. 380, 403 (1859); WM. L. CLARK, JR., *HAND-BOOK OF CRIMINAL LAW* 182 (1894); JOHN WIGMORE, *A TREATISE ON THE LAW OF EVIDENCE* 2755-56 (1905). See also *In re Vince*, 67 A.2d 141 (N.J. 1949); MARY BOYLE, *RETHINKING ABORTION, PSYCHOLOGY, GENDER, POWER AND LAW* 44 (1997); Ellen Willis, *Putting Women Back into the Abortion Debate*, in *FROM ABORTION TO REPRODUCTIVE FREEDOM: TRANSFORMING A MOVEMENT* 131, 135 (Marlene Gerber Fried ed. 1990). See generally Chapter 6, at notes 292-319.

<sup>64</sup> See Chapter 3, at notes 30-46. At the time, the appeal of felony was the prevalent form of private prosecution of a felony. A woman’s right to appeal a felony was limited because the normal mode of trial was by battle.

<sup>65</sup> *Rex v. Anonymous* (1670), 1 MATTHEW HALE, *HISTORY OF PLEAS OF THE CROWN* 429-30 (1736), quoted in Chapter 4, at note 164. See also the cases collected in Chapter 4, at note 157. On “restoration gallantry,” see Cyril Means, jr., *The Phoenix of Abortional Freedom: Is a Penumbra Right or Ninth-Amendment Right About to Arise from the Nineteenth-Century Legislative Ashes of a Fourteenth-Century Common-Law Liberty?*, 17 N.Y.L.F. 335, 362 (1971) (“Means II”).

<sup>66</sup>GEORGES DEVEREUX, *A STUDY OF ABORTION IN PRIMITIVE SOCIETIES* 135-36 (1955).

determined simply by her own desires.<sup>67</sup> And, of course, down through the ages more than a few women were literally coerced into attempting abortion—especially when abortion was tantamount to suicide.<sup>68</sup> The idea that abortion is solely a woman's concern, or solely of concern to the mother and to the fetus, is a distinctly modern view.<sup>69</sup>

Even today the father's attitude is likely to be extremely important to a woman who is seeking an abortion. A woman is far more likely to seek to abort if the father does not want the child, particularly if it is evident that she will receive no support or help from him.<sup>70</sup> Furthermore, even the Alan Guttmacher Institute—the research arm of the National Abortion Rights Action League as it was then known—found that in large measure a woman sought an abortion because of their man's attitude. In a 1987 survey of 1,900 women who had had abortion, the Institute found that 68 percent did so because they could not afford a baby at the time, 51 percent said they sought an abortion because they either had problems in their relationship with the father or had no relation-

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<sup>67</sup> *Id.* at 136.

<sup>68</sup> See Chapter 1.

<sup>69</sup> See generally George Harris, *Fathers and Fetuses*, 96 ETHICS 594 (1986).

<sup>70</sup> See, e.g., Akinrinola Bankole *et al.*, *Reasons Why Women Have Induce Abortions: Evidence from 27 Countries*, 24 INT'L FAM. PLAN. PERSP. 117 (1998); Susan Davies, *Partners and the Abortion Decision*, in ABORTION, MEDICINE, AND THE LAW 223 (J. Douglas Butler & David Walbert eds., 3<sup>rd</sup> ed. 1986); Susan Fischman, *Delivery of Abortion to Inner-City Adolescents*, 47 AM. J. ORTHOPSYCHIATRY 127 (1977); Malcolm Helper *et al.*, *Life Events and Acceptance of Pregnancy*, 12 J. PSYCH. RESEARCH 183 (1968); Kristina Holmgren, *Time of Decision to Undergo a Legal Abortion*, 26 GYNECOLOGICAL & OBSTET. INVESTIGATIONS 289 (1988); A. Kero *et al.*, *The Male Partner Involved in Legal Abortion*, 14 HUMAN REPRODUCTION 2669 (1999); T. Kitamura *et al.*, *Psychological and Social Correlates of the Onset of Affective Disorders among Pregnant Women*, 23 PSYCH. MED. 967 (1993); R. Kumar & Kay Mordecai Robson, *A Prospective Study of Emotional Disorders in Childbearing Women*, 144 BRIT. J. PSYCH. 35 (1984); F. Lieh-Mak, *Husbands of Abortion Applicants: A Comparison with Husbands of Women Who Complete Their Pregnancies*, 14 SOC. PSYCH. 59 (1979); C.M. Lyon & G.J. Bennett, *Abortion—Whose Decision?*, 9 FAM. L. 35 (1979); M. Tornbom *et al.*, *Evaluation of Stated Motives for Legal Abortion*, 15 J. PSYCHOSOMATIC OBSTET. & GYNECOLOGY 27 (1994).

ship at all with the father, and 23 percent sought an abortion because the father insisted on it.<sup>71</sup> Some 29 percent of the women reported that they had sought an abortion because their partner would not, or could not, marry her, while another 32 percent indicated that they expected the relationship to break up soon.<sup>72</sup> No wonder so many women report that they felt isolated and alone when they underwent an abortion.<sup>73</sup> These feelings, and the attitude of the man generally, is even more important when abortion is illegal.<sup>74</sup>

The nineteenth century feminists often insisted that the criminal was either the abortionist (regardless of gender) or the man responsible for the pregnancy (who, they realized, often pressured an unwilling woman into an abortion), not the woman.<sup>75</sup> Some feminists reasoned from this view of the matter that only the man (or perhaps the abortionist regardless of gender) involved should be guilty of a crime, and not the mother. Dr. Stockham noted that “[a]n unmarried

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<sup>71</sup> Aida Torres & Jacqueline Darroch Forrest, *Why Do Women Have Abortions?*, 20 FAM. PLAN. PERSP. 169, 170 (1988).

<sup>72</sup> *Id.* See also Stanley Henshaw & K Kathryn Kost, *Abortion Patients in 1994-1995: Characteristics and Contraceptive Use*, 28 FAM. PLAN. PERSP. 140, 143 (1996) (finding that women who were never married or who were living with someone without being married to that person accounted for the great majority of abortions).

<sup>73</sup> EVE KUSHNER, EXPERIENCING ABORTION xx (1997). See also CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT 74 (1982).

<sup>74</sup> O.A. Abiodun *et al.*, *Psychiatric Morbidity in a Pregnant Population in Nigeria*, 15 GEN. HOSP. PSYCH. 125 (1993); Augustine Ankomah, *Unsafe Abortions: Methods Used and Characteristics of Patients Attending Hospitals in Nairobi, Lima, and Manila*, 18 HEALTH CARE FOR WOMEN INT'L 43 (1997); P.E. Bailey *et al.*, *A Hospital Study of Illegal Abortion in Bolivia*, 27 PAHO BULL. 27 (1988); Carole Browner, *Abortion Decision Making: Some Findings from Columbia*, 10 STUD. IN FAM. PLAN. 96 (1979); Helena Lutescia Coelho *et al.*, *Misoprostol: The Experience of Women in Fortaleza, Brazil*, 49 CONTRACEPTION 101 (1994); Sarah Costa & Martin Vessey, *Misoprostol and Illegal Abortion in Rio de Janeiro, Brazil*, 341 LANCET 1261 (1993); Susan Pick de Weiss & Henry David, *Illegal Abortions in Mexico: Client Perceptions*, 80 AM. J. PUB. HEALTH 715 (1990); V.M. Lema *et al.*, *Induced Abortion in Kenya: Its Determinants and Associated Factors*, 73 E. AFR. MED. J. 164 (1966).

<sup>75</sup> See, e.g., Anonymous, *Why Not? A Book for Every Woman: A Woman's View*, 75 BOS. MED. & SURGICAL J. no. 14, at 273 (Nov. 1, 1866). See also DERR, *supra* note 29, at 19; PERCY KAMMERER, *THE UNMARRIED MOTHER* (1918); MOHR, *supra* note 4, at 111-14; MARVIN OLASKY, *ABORTION RIGHTS: A SOCIAL HISTORY OF ABORTION IN AMERICA* 175-76, 187-88 (1992); REAGAN, *supra* note 21, at 38, 58-59. There are a few lawsuits in which a woman sued her lover claiming he had pressured her into an abortion. *Sayadoff v. Warda*, 271 P.2d 140 (Cal. Ct. App. 1954); *Goldnamer v. O'Brien*, 98 Ky. 569 (1896).

woman, seduced under false representations by a man who feels no responsibility for his own offspring, suffers alone all the shame and contumely of the act, and is tempted to cause miscarriage to shield her good name.”<sup>76</sup> Matilda Gage expressed a stronger version of this view right after the Civil War:

I hesitate not to assert that most of this crime of “child murder,” “abortion,” “infanticide,” lies at the door of the male sex.... Many a woman has laughed a silent, derisive laugh at the decisions of eminent medical and legal authorities, in cases of crimes committed against her as a woman. Never, until she sits as a juror at such trials, will or can just decisions be rendered.<sup>77</sup>

Gage concluded that “[t]he crime of abortion is not one in which the guilt lies solely or chiefly with the woman” because the crime resulted from the denial of a woman’s “right to herself,” not as an exercise of that right.<sup>78</sup> She pointedly lay full responsibility for abortion on the machinations of men. Like most nineteenth century feminists,<sup>79</sup> Gage addressed the causes of abortion, including marital rape and exploitive relations between the sexes that left women vulnerable and, all too often, desperate. She, like other nineteenth century feminists who supported the criminal laws against abortion, did not suppose that the criminal statutes alone were sufficient, but also sought measures to eliminate the causes of abortion as well as the practice.

This feminist view neatly captured the long-standing tradition that the women who underwent abortions were victims of the crime rather than culprits. Such sentiments were not limited to women. For example, Dr. John Cowan wrote that “the licentiousness of the man and bondage

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<sup>76</sup> STOCKHAM, *supra* note 29, at 247.

<sup>77</sup> Gage, *supra* note 29, at 215-16. James Mohr quoted only the first sentence of this passage. MOHR, *supra* note 4, at 112.

<sup>78</sup> *Id.*

<sup>79</sup> See, e.g., STOCKHAM, *supra* note 29, at 250; Anthony, *supra* note 29; Abigail Dunaway, *Liberty for the Married Woman*, NEW NORTHWEST, Aug. 15, 1873, at 2. See generally D’EMILIO & FREEDMAN, *supra* note 24, at 64; GORDON, *supra* note 5, at 108; MOHR, *supra* note 4, at 111-14.

of the woman ... [produce] the monstrous crime ... the murder of the unborn.”<sup>80</sup> Even Horatio Robinson Storer, a leading campaigner against abortion among physicians whom modern abortion rights advocates assure us was utterly misogynistic,<sup>81</sup> recognized the guilt of husbands and lovers in encouraging or compelling abortions, although he did not excuse the mother for her share of responsibility.<sup>82</sup> Storer, the first true professor of gynecology, also denounced marital rape<sup>83</sup> and decried those who would treat a woman’s body as a “mere plaything.”<sup>84</sup>

The view that men were responsible for abortion was fully realized in the prosecution patterns as the nineteenth century turned to the twentieth century. Men involved with unmarried women who died from abortions were one of the more frequent targets of arrest, prosecution, and incarceration.<sup>85</sup> Only occasionally, however, did a more fortunate woman apparently exploit this feature of the abortion laws to make the responsible man “suffer for it.”<sup>86</sup>

The “free love wing” of nineteenth-century feminists shared the same view of abortion of the more mainstream leaders.<sup>87</sup> The label “free love,” when used by members of the “free love”

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<sup>80</sup> JOHN COWAN, *THE SCIENCE OF A NEW LIFE* 275 (1871).

<sup>81</sup> See Chapter 7, at notes 394-439.

<sup>82</sup> HORATIO ROBINSON STORER, *ON CRIMINAL ABORTION IN AMERICA* 13 (1860); HORATIO ROBINSON STORER, *WHY NOT? A BOOK FOR EVERYWOMAN* 79 (1866) (“STORER, WHY NOT?”).

<sup>83</sup> STORER, *WHY NOT?*, *supra* note 82, at 11-13, 94-95.

<sup>84</sup> *Id.* at 80-83. See also HORATIO ROBINSON STORER, *THE CAUSATION, COURSE AND TREATMENT OF REFLEX INSANITY IN WOMEN* 97 (1871) (“STORER, REFLEX INSANITY”); HORATIO ROBINSON STORER & FRANKLIN FISKE HEARD, *CRIMINAL ABORTION: ITS NATURE, ITS EVIDENCE AND ITS LAW* 127 (1868).

<sup>85</sup> REAGAN, *supra* note 21, at 115, 122, 125, 128-30.

<sup>86</sup> See, e.g., *People v. Patrick*, 115 N.E. 390 (Ill. 1917); *Dunn v. People*, 50 N.E. 137 (Ill. 1898); *Scott v. People*, 30 N.E. 329 (Ill. 1892).

<sup>87</sup> MOHR, *supra* note 4, at 112-13.

movement in that century, did not have the salacious meaning ascribed to it by its enemies.<sup>88</sup> Those in the movement argued not that people should indulge in sexual relations without restraint, but that sexual relations should be based solely upon feelings of love—feelings that were not always present in marriage and sometimes were present outside of marriage.<sup>89</sup> As historian Carl Degler noted, the “free love” movement of the nineteenth century was more devoted to giving women the right to say no within marriage than the right to say yes outside of marriage.<sup>90</sup>

Victoria Woodhull and Tennessee Claflin were sisters who led the “free love” wing of nineteenth-century feminism.<sup>91</sup> As their espousal of “free love” suggests, they were particularly independent in their thinking and in their actions. The sisters were the first women stockbrokers in New York, becoming millionaires.<sup>92</sup> Woodhull also became the first woman to run for President

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<sup>88</sup> See, e.g., DIARY OF GEORGE TEMPLETON STRONG: THE TURBULENT 50s, at 235 (entry for Oct. 17, 1855) (Allen Nevins & Milton Thomas eds. 1952); WILLIAM DIXON, SPIRITUAL LOVES 399 (1868); BENJAMIN HATCH, SPIRITUALISTS' INIQUITIES UNMASKED 16-24, 50-51 (1859); Pallen, *supra* note 44, at 217-28. See generally OLASKY, *supra* note 75, at 62-80; MAX RHEINSTEIN, MARRIAGE, STABILITY, DIVORCE, AND THE LAW 38-46 (1972).

<sup>89</sup> STEPHEN PEARL ANDREWS, LOVE, MARRIAGE, AND DIVORCE, AND THE SOVEREIGNTY OF THE INDIVIDUAL (1889); R.D. CHAPMAN, FREELOVE A LAW OF NATURE (1881); TENNESSEE CLAFLIN, THE ETHICS OF SEXUAL EQUALITY (1873); ANDREW JACKSON DAVIS, THE GREAT HARMONIA (1856); DORA FORSTER, SEX RADICALISM AS SEEN BY AN EMANCIPATED WOMAN OF THE NEW TIME (1905); HEYWOOD, *supra* note 51; C.L. JAMES, THE FUTURE RELATION OF THE SEXES (1877); HARMON KNOX ROOT, LOVE'S MARRIAGE LIGHTHOUSE (1858); VICTORIA CLAFLIN WOODHULL, THE SCARE-CROWS OF SEXUAL SLAVERY (1874). See generally MARTIN BLATT, FREE LOVE AND ANARCHISM: THE BIOGRAPHY OF EZRA HAYWOOD (1989); BRODIE, *supra* note 21, at 125-30, 273-74, 279-80; DEGLER, *supra* note 11, at 198-99, 276-77; D'EMILIO & FREEDMAN, *supra* note 24, at 112-16, 156-57, 161-67; BARBARA GOLDSMITH, OTHER POWERS: THE AGE OF SUFFRAGE, SPIRITUALISM, AND THE SCANDALOUS VICTORIA WOODHULL (1998); GORDON, *supra* note 5, at 95-117; M.M. MARBERRY, VICKY: A BIOGRAPHY OF VICTORIA C. WOODHULL (1967); MARY MARSH, ANARCHIST WOMEN, 1870-1920, at 72-90 (1981); H.D. SEARS, THE SEX RADICALS: FREE LOVE IN HIGH VICTORIAN AMERICA (1977); TAYLOR STOEHHR, FREE LOVE IN AMERICA: A DOCUMENTARY HISTORY (1979).

<sup>90</sup> DEGLER, *supra* note 11, at 277. See also 4 DAVIS, *supra* note 89, at 426-45. See generally STEPHEN KERN, ANATOMY AND DESTINY: A CULTURAL HISTORY OF THE HUMAN BODY 153 (1975).

<sup>91</sup> See generally MARY GABRIEL, NOTORIOUS VICTORIA: THE LIFE OF VICTORIA WOODHULL (1998); GOLDSMITH, *supra* note 89; EMANIE SACHS, THE TERRIBLE SIREN (1928); TANNAHILL, *supra* note 20, at 397.

<sup>92</sup> GOLDSMITH, *supra* note 89, at 162.

(with Frederick Douglas as her vice-presidential candidate),<sup>93</sup> under the guise of the “People’s Party” some 15 years before the large scale Populist movement of the last fifteen years of the nineteenth century emerged. And Woodhull became the first woman ever to testify before a congressional committee—on January 11, 1871, on the vote for women, with Elizabeth Cady Stanton and Susan B. Anthony looking on.<sup>94</sup>

Victoria Woodhull and Tennessee Claflin had unsavory personal reputations, coming as they did from a family with a history of personal scandal.<sup>95</sup> Their political positions were also quite radical for their time. *Woodhull & Claflin’s Weekly* printed the *Communist Manifesto* in English—more than 20 years after its initial appearance, but before any other press in the United States had done so.<sup>96</sup> Woodhull also served as honorary president of the American branch of Marx’s First International.<sup>97</sup> They supported abolition of the death penalty, an international tribunal backed by an international military to settle disputes and to enforce peace, a national educational and welfare system, nationalization of mines, and progressive taxation—and “free love.”<sup>98</sup> The two sisters were even jailed at the instigation of Anthony Comstock on the grounds that the journal they published was obscene, although they were released after one month.<sup>99</sup> No

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<sup>93</sup> *Id.* at 320.

<sup>94</sup> *Id.* at 247-48.

<sup>95</sup> *Id.* at 14-16.

<sup>96</sup> *Id.* at 305.

<sup>97</sup> *Id.* at 273.

<sup>98</sup> GABRIEL, *supra* note 91, at 124-25; GOLDSMITH, *supra* note 89, at 303-06; HENRYK KATZ, *THE EMANCIPATION OF LABOR: A HISTORY OF THE FIRST INTERNATIONAL* 121-22 (1992).

<sup>99</sup> NICOLA BEISEL, *IMPERILED INNOCENTS: ANTHONY COMSTOCK AND FAMILY REPRODUCTION IN VICTORIAN AMERICA* 80 (1997); HEYWOOD BROUN & MARGARET LEECH, *ANTHONY COMSTOCK: ROUNDSMAN OF THE LORD* 18 (1927); ANDREA TONE, *DEVICES AND DESIRES: A HISTORY OF CONTRACEPTIVES IN AMERICA* 12 (2001). *See also* GOLDSMITH, *supra* note 89, at 344-45.

wonder historian Milton Rugoff described Woodhull as “in her life and loves as well as her views she was one of the most emancipated and uninhibited women of that or any other American time.”<sup>100</sup>

The sisters Woodhill and Claflin did not support abortion rights. They published a journal in which they declared that any claim that abortion was not murder was so flimsy that those making such a claim “fully realize the enormity of the crime” and were not making a serious exculpatory argument.<sup>101</sup> The sisters also published in their journal the following statement of Sarah Norton:

Perhaps there will come a time when the man who wantonly kills a woman and her babe [through abortion] will be loathed and scorned as deeply as the woman is now loathed and scorned who becomes his dupe; when the sympathy of society will be with the victim rather than the victimizer; when an unmarried mother will not be despised because of her motherhood; when unchastity in men will be placed on an equality with unchastity in women, and when the right of the unborn to be born will not be denied or interfered with...<sup>102</sup>

Men in the free love movement also condemned abortion.<sup>103</sup>

In contrast with the views of the nineteenth-century feminists, historian James Mohr somehow concluded that most nineteenth-century abortions resulted from mutual agreement between loving couples.<sup>104</sup> Remarkably, Mohr supported his claim by referring only to a diary that disclosed that the woman had undergone an abortion without bothering to tell her husband. Considerable evidence continues to suggest that even today men responsible for unwanted pregnan-

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<sup>100</sup> MILTON RUGOFF, *THE BEECHERS: AN AMERICAN FAMILY IN THE NINETEENTH CENTURY* 486 (1981).

<sup>101</sup> Victoria Woodhull & Tennessee Claflin, *The Slaughter of the Innocents*, *WOODHULL & CLAFLIN'S WEEKLY* (June 20, 1874). See generally MOHR, *supra* note 4, at 112-13; TONE, *supra* note 99, at 16-18, 297 n.46.

<sup>102</sup> Sarah Norton, *Tragedy, Social and Domestic*, *WOODHULL & CLAFLIN'S WEEKLY* (Nov. 19, 1870).

<sup>103</sup> See, e.g., BENNETT, *supra* note 119, at 1068; FOOTE, *supra* note 119, at 89 (1886); HEYWOOD, *supra* note 118, at 20. See generally TONE, *supra* note 99, at 16-17, 297 n.46.

<sup>104</sup> MOHR, *supra* note 4, at 114-17. See also GINSBURG, *supra* note 5, at 30; Daniel Scott Smith, *Family Limitation, Sexual Conduct, and Domestic Feminism in Victorian America*, 1 *FEMINIST STUD.* 40 (1973).

cies often pressure unwilling women into having abortions, pressure that succeeds more easily without legal barriers to abortion.<sup>105</sup> Additional pressures can also come from the mother's parents, particularly if the mother is an adolescent<sup>106</sup>—or from the parents of the father if he also is an adolescent.<sup>107</sup> Even employers sometimes put intense pressure on pregnant women to abort.<sup>108</sup>

Curiously lacking in the writings of both the nineteenth-century feminists and their contemporary critics was any discussion of the role of prostitutes as providing a major market for the expanding abortion industry although there is some persuasive evidence of this in some medical reports of the time.<sup>109</sup> Nineteenth-century feminists almost uniformly condemned prostitution and devoted considerable energy to crusading against it as something that had to be suppressed

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<sup>105</sup> See, e.g., *Collins v. Thakker*, 352 N.E.2d 507 (Ind. Ct. App. 1990), *appeal denied*; GILLIGAN, *supra* note 73, at 80-81, 90-91; MARY ANN GLENDON, *HERMENEUTICS, ABORTION AND DIVORCE: A REVIEW OF ABORTION AND DIVORCE IN WESTERN LAW* 52 (1989); KATHLEEN MCDONNELL, *NOT AN EASY CHOICE: A FEMINIST RE-EXAMINES ABORTION* 59 (1984); Daniel Callahan, *An Ethical Challenge to Prochoice Advocates: Abortion and the Pluralistic Proposition*, COMMONWEAL, Nov. 23, 1990, at 681, 684; Kathleen Franco *et al.*, *Psychological Profile of Dysphoric Women Postabortion*, 44 J. AM. MED. WOMEN'S ASS'N 113 (July/Aug. 1989).

<sup>106</sup> See Nancy Heller Horowitz, *Adolescent Mourning Reactions to Infant and Fetal Loss*, 59 SOCIAL CASEWORK 551, 557 (Nov. 1978) (only half of aborted adolescents approved of their abortion at the time and only one-fourth do so even years later). See also LINDA BIRDE FRANCKE, *THE AMBIVALENCE OF ABORTION* 178-206 (1978); Lucy Olson, *Social and Psychological Correlates of Pregnancy Resolution among Adolescent Women*, 50 AM. J. ORTHOPSYCHIATRY 432, 437-41 (1980).

<sup>107</sup> See Marie McCullough, *Abortion Case Taps Some of Parents' Deepest Fears*, PHILA. INQUIRER, Oct. 27, 1996, at A1; Marie McCullough, *For Young Teen's Mother, a Hollow Victory in Court*, PHILA. INQUIRER, Nov. 3, 1996, at E2; David Stout, *Woman Who Took Girl for Abortion Is Guilty in Custody Case*, N.Y. TIMES, Oct. 31, 1996, at A15. See also Susan Dundon, *The Verdict Is in, but There's No Simple Answer When It Comes to Abortion*, PHILA. INQUIRER, Nov. 3, 1996, at E7.

<sup>108</sup> See Mark Klebanoff *et al.*, *Outcomes of Pregnancy in a National Sample of Resident Physicians*, 323 N. ENG. J. MED. 1040, 1041 (1990) (reporting that female resident physicians have three times as many abortions *per capita* as the general population); David Shulkin & Merlem Bari, *Letter to the Editor*, 323 N. ENG. J. MED. 630 (1991) (relating the intense pressures and even hostilities brought to bear on female residents when they become pregnant).

<sup>109</sup> See *Hays v. State*, 40 Md. 645 (1874); WILLIAM ACTON, *PROSTITUTION* 206 (1857); COWAN, *supra* note 80, at 275; JOHN MCDOWELL, *FIRST ANNUAL REPORT OF THE NEW YORK MAGDALEN SOCIETY* 23 (1831); C.E. ROGERS, *SECRET SINS OF SOCIETY* 76, 144 (1881); WILLIAM SANGER, *THE HISTORY OF PROSTITUTION* 482, 586 (1859); JOHN WARREN, JR., *THIRTY YEARS BATTLE WITH CRIME, OR THE CRYING SHAME OF NEW YORK AS SEEN UNDER THE BROAD GLARE OF AN OLD DETECTIVE'S LANTERN* 37-38, 53 (1874); J.J. Mulheron, *Foeticide*, 10 PENINSULAR J. MED. 387, 387 (1874). See also RUTH ROSEN, *THE LOST SISTERHOOD: PROSTITUTION IN AMERICA, 1900-1918*, at 99

in order to achieve control over male sexuality.<sup>110</sup> Those early feminists coupled their condemnation of prostitution coupled with sympathy for the prostitute.<sup>111</sup> Ironically, modern feminist historians tend to see a link between the increasingly harsh criminal penalties applied to prostitution and the increasing legal activity directed against abortion, seeing both as attempts to control female sexuality—without bothering to explain why such control should have come to the fore in the nineteenth century and without noting that nineteenth century feminists strongly favored both sets of penalties.<sup>112</sup> The role of the early feminists in opposing both prostitution and abortion suggests some interesting speculations about how such a link might have affected their attitudes toward abortion.

Nineteenth century feminists did not simply talk about abortion as another form of male domination of women. Many feminists undertook to organize practical aid for pregnant, unmarried women and girls. Marvin Olasky has documented the efforts of women (sometimes with the help of sympathetic men) across the United States to provide shelter and medical care for those who had been seduced and abandoned, or at least who found themselves pregnant, homeless, and

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(1982) (estimating 20,000 prostitution-related abortions in New York City annually during the period she studied). See generally D'EMILIO & FREEDMAN, *supra* note 24, at 137; OLASKY, *supra* note 75, at 43-59.

<sup>110</sup> See, e.g., Ellen Battelle Dietrick, *Rescuing Fallen Women*, WOMEN'S J., May 27, 1893, at 162. See generally BERG, *supra* note 20, at 181-84, 211; RUTH BORDIN, WOMEN AND TEMPERANCE: THE QUEST FOR POWER AND LIBERTY, 1873-1900, at 110-11 (1981); D'EMILIO & FREEDMAN, *supra* note 24, at 140-45, 148-56, 202-15; BARBARA EPSTEIN, THE POLITICS OF DOMESTICITY: WOMEN, EVANGELISM, AND TEMPERANCE IN NINETEENTH-CENTURY AMERICA 125-28 (1981); GORDON, *supra* note 5, at 116-35; GROSSBERG, *supra* note 5, at 47-48; DAVID PIVAR, PURITY CRUSADE: SEXUAL MORALITY AND SOCIAL CONTROL, 1868-1900 (1973); ROSEN, *supra* note 109, at 112-36; SHANLEY, *supra* note 29, at 79-86, 92-93; SMITH-ROSENBERG, *supra* note 5, at 109-28; Elizabeth Pleck, *Feminist Responses to "Crimes against Women," 1800-1896*, 8 SIGNS 459 (1983).

<sup>111</sup> See D'EMILIO & FREEDMAN, *supra* note 24, at 149-56; GORDON, *supra* note 5, at 116-20.

<sup>112</sup> See, e.g., D'EMILIO & FREEDMAN, *supra* note 24, at 64; Mary Odem, *Fallen Women and Thieving Ladies: Historical Approaches to Women and Crime in the United States*, 17 LAW & SOC. INQUIRY 351, 352 (1992).

without financial resources.<sup>113</sup> By 1895, Chicago alone had at least a dozen shelters for the unmarried pregnant, with the most active of these shelters caring for 1,291 adults and 1,361 children in 1893.<sup>114</sup> These homes offered to place the children for adoption, offered education and job placement for the mothers, and provided personal counseling that it was hoped would enable the women and girls to avoid such problems in the future.<sup>115</sup> More than a few of the persons involved in these efforts were explicit that a major goal was to provide an alternative to abortion.<sup>116</sup>

As the foregoing demonstrates, feminist support for abortion laws that severely punished the men whom the feminists considered truly responsible for an abortion but did not punish the mother were based on a reality they well understood. Nineteenth century feminists saw abortion as something that was done to women, rather than as something done by women. This vision underlies the laws enacted in most states during the nineteenth century—under which the woman committed no crime.<sup>117</sup> Nonetheless, these laws did greatly restrict women's access to abortion.<sup>118</sup> The feminist concern to protect women from being pushed into an abortion by the men in

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<sup>113</sup> OLASKY, *supra* note 75, at 197-217, 242-45. *See also* WALTER BARRETT, *THE CARE OF THE UNMARRIED MOTHER* (1929); TIMOTHY HACSI, *SECOND HOME: ORPHAN ASYLUMS AND POOR FAMILIES IN AMERICA* (1998); REGINA KUNZEL, *FALLEN WOMEN, PROBLEM GIRLS: UNMARRIED MOTHERS AND THE PROFESSIONALIZATION OF SOCIAL WORK, 1890-1945* (1993); REAGAN, *supra* note 21, at 28-29.

<sup>114</sup> OLASKY, *supra* note 75, at 199.

<sup>115</sup> *See* Joan Jacobs Brumberg, "Ruined" Girls: Changing Community Responses to Illegitimacy in Upstate New York, 1890-1920, 18 J. SOC. HIST. 247 (1984); Regina Kunzel, *The Professionalization of Benevolence*, 22 J. SOC. HIST. 21 (1988).

<sup>116</sup> *See, e.g.*, Charles Reed, *Therapeutic and Criminal Abortion*, 7 ILL. MED. J. 26, 29 (1904).

<sup>117</sup> *See* Chapter 6, at notes 292-319.

<sup>118</sup> MOHR, *supra* note 4, at 239-44.

their lives also serves to place the issue of abortion into the broader debate between the feminists and their critics over the institution of marriage.

The feminists of that time were critical (to varying degrees) of marriage as a form of bondage.<sup>119</sup> The first step taken to break the cruder forms of bondage in marriage was the *Married Women's Acts*, giving married women the right to own property and to manage their own incomes.<sup>120</sup> Before these laws, married women in common law countries were considered legally merged with their husband—who was vested with authority of the married women's property and incomes. While some modern feminist historians choose to see these acts as motivated by a desire to provide greater rights to creditors,<sup>121</sup> historian Jean Donnison is closer to the mark in concluding that nineteenth century feminism was born in the struggle for these statutes.<sup>122</sup>

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<sup>119</sup> See, e.g., 2 HISTORY OF WOMAN SUFFRAGE 642-44 (Elizabeth Cady Stanton, Susan B. Anthony, & Matilda Joselyn Gage eds. 1881); VICTORIA WOODHULL, THE ELIXIR OF LIFE, OR WHY DO WE DIE? 8-9 (1873); Susan Anthony, *Editorial*, THE REVOLUTION, Oct. 27, 1870, at 264; M. Brinkerhoff, *Women and Motherhood*, THE REVOLUTION, Sept. 2, 1869, at 138. See generally Chapter 2, at notes, 157-71; DEGLER, *supra* note 11, at 144-77; D'EMILIO & FREEDMAN, *supra* note 24, at 153-54; JOAN HOFF, LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN 135-41 (1991); WILLIAM LEACH, TRUE LOVE AND PERFECT UNION: THE FEMINIST REFORM OF SEX AND SOCIETY (1980); SHANLEY, *supra* note 29; WALSH, *supra* note 44, at 17-20; Ellen Carol DuBois, *Outgrowing the Compact of the Fathers: Equal Rights, Woman Suffrage, and the United States Constitution, 1820-1878*, 74 J. AM. HIST. 836 (1987).

<sup>120</sup> See generally MARY RITTER BEARD, WOMAN AS A FORCE IN HISTORY: A STUDY IN TRADITIONS AND REALITIES 122-44, 158-66 (1946); JEAN DONNISON, MIDWIVES AND MEDICAL MEN: A HISTORY OF THE STRUGGLE FOR THE CONTROL OF CHILDBIRTH 74 (2<sup>nd</sup> ed. 1988); HOFF, *supra* note 119, at 121-35, 187-91; MARYLYNN SALMON, WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA (1986); ELIZABETH BOWLES WARBASSE, THE CHANGING LEGAL RIGHTS OF MARRIED WOMEN 1800-1861 (1987); Richard Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359 (1983). For the parallel development of the law in England, see SHANLEY, *supra* note 29, at 49-78, 103-30. See also Chapter 2, at notes 164-69.

<sup>121</sup> See NORMA BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH CENTURY NEW YORK (1982); BEARD, *supra* note 120, at 160-65; HOFF, *supra* note 119, at 120, 134-35, 187-91; RHODE, *supra* note 20, at 24-26 (1989); CAROLE SHAMMAS, MARYLYNN SALMON, & MICHEL DAHLIN, INHERITANCE IN AMERICA FROM COLONIAL TIMES TO THE PRESENT 88-101 (1987); SHANLEY, *supra* note 29, at 104-09; Richard Chused, *Late Nineteenth-Century Married Women's Property Law: Reception of the Early Married Women's Acts by Courts and Legislatures*, 29 AM. J. LEGAL HIS. 24 (1985); Lawrence Friedman, *Rights of Passage: Divorce Law in Historical Perspective*, 63 OR. L. REV. 649, 655-56 (1984); John Johnston, *Sex and Property: The Common Law Tradition, the Law School Curriculum and Developments toward Equality*, 47 NYU L. REV. 1033 (1972); Suzanne Lebsock, *Radical Reconstruction and the Property Rights of Southern Women*, 43 J. SOC. HIST. 195 (1977); Isabel Marcus, *Locked In and Locked Out: Reflections on the History of Divorce Law in New York*, 37 BUFF. L. REV. 375, 399 (1988); Linda Speth, *The Married Women's Property Acts, 1839-1865: Reform, Reaction, or Revolution?*, in 2 WOMEN AND

Feminist leaders of virtually every branch of the movement took a radical stance against the mistreatment of women in or out of marriage and most embraced a frank understanding and acceptance of female sexuality at a time when Victorian morality insisted that women were chaste beings who must subordinate their sexuality to nurturing and reproduction.<sup>123</sup> Dr. William Acton expressed the then prevalent view, against which the feminists were contending, in these words: “The majority of women (happily for them) are not very troubled with sexual feelings of any kind. What men are habitually, women are only exceptionally.”<sup>124</sup> Despite Acton’s double standard, the social strictures imposed on men during this same era were hardly less debilitating.<sup>125</sup>

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THE LAW: A SOCIAL HISTORICAL PERSPECTIVE 269 (D. Kelly Weisberg ed. 1982); Amy Dru Stanley, *Conjugal Bonds and Wage Labor: Rights of Contract in the Age of Emancipation*, 75 AM. J. LEGAL HIST. 471 (1988); Joan Williams, *Married Women and Property*, 1 VA. J. SOC. POL’Y & L. 383 (1994). See also Reva Siegel, *The Modernization of Marital Status Law: Adjudicating Wives’ Rights to Earnings, 1860-1930*, 82 GEO. L.J. 2127 (1994) (arguing that the statutes weren’t so much intended to benefit creditors as ineffectual at protecting women’s interests); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1116-19 (1997) (same).

<sup>122</sup> DONNISON, *supra* note 120, at 74-75.

<sup>123</sup> CAROLINE DALL, THE COLLEGE, THE MARKET, AND THE COURT 293 (1867); 2 ELIZABETH CADY STANTON REVEALED, *supra* note 44, at 114; STOCKHAM, *supra* note 29, at 247-48; VICTORIA WOODHULL, THE HUMAN BODY THE TEMPLE OF GOD 38 (1890); Stanton, *supra* note 29.

<sup>124</sup> WILLIAM ACTON, THE FUNCTIONS AND DISORDERS OF THE REPRODUCTIVE ORGANS IN YOUTH, IN ADULT AGE, AND IN ADVANCED AGE: CONSIDERED IN THEIR PHYSIOLOGICAL, SOCIAL AND PSYCHOLOGICAL RELATIONS 133 (1865). See also GARDNER, *supra* note 49; SYLVESTER GRAHAM, LECTURE TO YOUNG MEN ON CHASTITY (1834); SAMUEL GREGORY, LICENTIOUSNESS, ITS CAUSES AND EFFECTS (1846); GEORGE NAPHEYS, THE TRANSMISSION OF LIFE: COUNSELS ON THE NATURE AND HYGIENE OF THE MASCULINE FUNCTION 173-74 (1878); MICHAEL RYAN, PHILOSOPHY OF MARRIAGE (4<sup>th</sup> ed. 1843); EDWARD TILT, THE CHANGE OF LIFE IN HEALTH AND DISEASE 79, 93-94 (4<sup>th</sup> ed. 1882); HENRY WRIGHT, THE UNWELCOME CHILD, OR, THE CRIME OF THE UNDESIGNED AND UNDESIREN MATERNITY (1860); Goodell, *supra* note 49, at 162. See generally G.J. BARKER-BENFIELD, THE HORRORS OF THE HALF-KNOWN LIFE: MALE ATTITUDES TOWARD WOMEN AND SEXUALITY IN NINETEENTH CENTURY AMERICA (1976); D’EMILIO & FREEDMAN, *supra* note 24, at 50-63, 64-65, 70-72, 80-81; DEGLER, *supra* note 11, at 249-97; GORDON, *supra* note 5, at 16-25, 101-15, 174-81; GROSSBERG, *supra* note 5, at 45-49; HALLER & HALLER, *supra* note 50; KERN, *supra* note 81, at 1-9, 95-102, 109-13, 153-65; KAREN LYSTRA, SEARCHING THE HEART: WOMEN, MEN, AND ROMANTIC LOVE IN NINETEENTH-CENTURY AMERICA 50-59 (1989); STEVEN MARCUS, THE OTHER VICTORIANS (1964); PETCHESKY, *supra* note 5, at 74-77; MARY POOVEY, UNEVEN DEVELOPMENTS: THE IDEOLOGICAL WORK OF GENDER IN MID-VICTORIAN ENGLAND (1988); SMITH-ROSENBERG, *supra* note 5, at 182-216; LUCIA ZENDER, WOMEN, CRIME, AND CUSTODY IN VICTORIAN ENGLAND (1991); Ruth Bloch, *The Gendered Meanings of Virtue in Revolutionary America*, 13 SIGNS 37 (1987); Peter Cominos, *Late Victorian Sexual Repression and the Social System*, 7 INT’L REV. SOC. HIST. 18 (Pt. I), 216 (Pt. II) (1963); Nancy Cott, *Passionless: An Interpretation of Victorian Sexual Ideology, 1790-1850*, 4 SIGNS 219 (1978); Sondra Herman, *Loving Courtship or the Marriage Market? The Ideal and Its Critics, 1871-1911*, 25 AM. Q. 235 (1973); Jane Larson, “Women Understand So Little, They Call My

Recently, some revisionist historians have argued that Victorians were not repressive about sexuality.<sup>126</sup> These “new histories” do demonstrate that many people of both genders gave considerable attention to their inner life back then—including their own personal sexual needs. (And when wasn’t this true?) Yet these arguments serve more to highlight that the depth that separates us from Victorian times has become so great that some historians can no longer imagine a time so sexually repressive as the histories indicate that they feel impelled to try to persuade us that the Victorians were in fact happily unrepressed sexually.<sup>127</sup>

While the “free love” wing was at an extreme in the criticism of the institution of marriage, even the most mainstream feminists were comfortable comparing marriage with the chattel slavery abolished by the Thirteenth Amendment.<sup>128</sup> Interestingly, this point was first made, in writing at least, by a man.<sup>129</sup> We have already seen the strained readings given these materials by such modern feminists as law professor Reva Siegel.<sup>130</sup> Yet the divorce reform movement of the late nineteenth-century was led by men such as Samuel Dike motivated more by eugenic con-

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*Good Nature ‘Deceit’’: A Feminist Rethinking of Seduction*, 93 COLUM. L. REV. 374, 388-93 (1993); Barbara Welter, *The Cult of True Womanhood*, 18 AM. Q. 151 (1966).

<sup>125</sup> See KERN, *supra* note 90, at 102-11, 117-24, 139-52.

<sup>126</sup> See, e.g., PATRICIA ANDERSON, *WHEN PASSION REIGNED: SEX AND THE VICTORIANS* (1995); PETER GAY, *THE NAKED HEART* (1995); MICHAEL MASON, *THE MAKING OF VICTORIAN SEXUALITY* (1995).

<sup>127</sup> A point made in reviews of these books. Noel Annan, *Under the Victorian Bed*, N.Y. REV. BOOKS, June 22, 1995, at 48; Richard Jenkyn, *Victoria’s Secret*, N.Y. REV. BOOKS, Nov. 30, 1995, at 19.

<sup>128</sup> See ELLEN CAROL DUBOIS, *FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN’S MOVEMENT IN AMERICA, 1848-1869*, at 32 (1978); PAULA GIDDINGS, *WHEN AND WHERE I ENTER: THE IMPACT OF BLACK WOMEN ON RACE AND SEX IN AMERICA* 55 (1984); Peggy Cooper Davis, *Neglected Stories and the Lawfulness of Roe v. Wade*, 28 HARV. C.R.-C.L. L. REV. 299, 330-31 (1993).

<sup>129</sup> WILLIAM THOMPSON, *APPEAL OF ONE-HALF OF THE HUMAN RACE, WOMEN, AGAINST THE PRETENSIONS OF THE OTHER HALF, MEN, TO RETAIN THEM IN POLITICAL, AND THENCE IN CIVIL AND DOMESTIC SLAVERY* (1825).

<sup>130</sup> See Chapter 2, at notes 163-71. For Siegel’s work, see Reva Siegel, *Home as Work: The First Women’s Rights Claims Concerning Wives’ Household Labor, 1850-1880*, 103 YALE L.J. 1073 (1994) (“Siegel, *Home as Work*”); Siegel, *supra* note 5.

cerns—the wrong people were marrying—than by any concern about individual liberation.<sup>131</sup> In contrast, by the end of the nineteenth century, most feminist leaders had joined in an attempt to make divorce more difficult to obtain.<sup>132</sup>

The truth is that most nineteenth century feminists, including even the “free love” wing, wanted to strengthen marriage rather than destroy it.<sup>133</sup> After all, fewer than five percent of white women in the United States worked outside the home after marriage during the nineteenth century<sup>134</sup>—and the feminist leaders of the time were predominantly white and married. No wonder the Women’s Christian Temperance Union and other feminist groups often acted as “marriage enforcers” at this time, pressuring men to marry their pregnant paramours (and sometimes pressuring the women involved as well) unless they considered the marriage hopeless.<sup>135</sup>

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<sup>131</sup> See, e.g., NATIONAL DIVORCE REFORM LEAGUE, ANNUAL REPORT OF 1886, at 6 (1887) (decrying the significance of the foreign born in American cities); NATIONAL DIVORCE REFORM LEAGUE, ANNUAL REPORT OF 1888, at 12 (1889) (same); Samuel Dike, *Uniform Marriage and Divorce Laws*, 2 THE ARENA 399 (1890). See also *In re McLaughlin’s Estate*, 4 Wash. 570, 590-91 (1892) (“All wise and healthful regulations ... prohibiting such marriages as far as practicable would tend to the prevention of pauperism and crime, and the transmission of hereditary diseases and defects...”); George Elliott Howard, *Divorce and the Public Welfare*, 84 MCCLURE’S MAG.232 (1909) (arguing that the functions of families should be transferred to the state); Elizabeth Scott Phelps, *Women’s View of Divorce*, 150 N. AM. REV. 130 (1890) (arguing for an end of paupers begetting paupers). See generally GROSSBERG, *supra* note 5, at 83-95; Matthew Lindsay, *Reproducing a Fit Citizenry: Dependency, Eugenics, and the Law of Marriage in the United States, 1860-1920*, 23 LAW & SOC. INQUIRY 541, 553-54 (1998).

<sup>132</sup> See generally DEGLER, *supra* note 11, at 362-94; PETCHESKY, *supra* note 5, at 41-42; Smith, *supra* note 103; James J. White, *Ex Proprio Vigore*, 89 MICH. L. REV. 2096 (1991).

<sup>133</sup> See SMITH-ROSENBERG, *supra* note 5, at 243-44. See also Chapter 2, at notes 157-62.

<sup>134</sup> PETCHESKY, *supra* note 5, at 75; LYNN WEINER, FROM WORKING GIRL TO WORKING MOTHER 6 (1985). For the similar pattern in England, see WENDY NEFF, VICTORIAN WORKING WOMEN (1966); IVY PINCHBECK, WOMEN WORKERS AND THE INDUSTRIAL REVOLUTION, 1750-1850 (1930).

<sup>135</sup> LINDA GORDON, HEROES OF THEIR OWN LIVES: THE POLITICS AND HISTORY OF FAMILY VIOLENCE, BOSTON, 1880-1960, at 297 (1988); Constance Backhouse, *Involuntary Motherhood: Abortion, Birth Control and the Law in Nineteenth Century Canada*, 3 WINDSOR Y.B. OF ACCESS TO JUSTICE 61, 62 n.1 (1983); Brumberg, *supra* note 115, at 254-57. The WCTU was the largest and most influential women’s organization anywhere in the world at that time. See RUTH BORDIN, WOMEN AND TEMPERANCE: THE QUEST FOR POWER AND LIBERTY, 1873-1900, at 3-4 (1981). See also EPSTEIN, *supra* note 110; DAVID PIVAR, PURITY CRUSADE: SEXUAL MORALITY AND SOCIAL CONTROL, 1868-1900 (1973).

Like Horatio Robinson Storer, the nineteenth-century feminists were strongly in favor of the rational spacing of children, speaking in terms of “voluntary motherhood.”<sup>136</sup> Given the then technical incapacity to prevent conception mechanically or pharmacologically,<sup>137</sup> one is not surprised that nineteenth century feminists advocated the right to refuse a husband’s sexual advances as the means to achieve the desired “voluntary motherhood.”<sup>138</sup> If a woman lacked the ability to refuse her husband directly, Dr. Alice Bunker Stockham recommended sexual coldness as a birth control device.<sup>139</sup> Although such advice refutes the charge that feminists in general supported “free love” in the salacious sense, the advice could hardly refute the claim that feminism was inimical to the family as total abstinence would require separate households for the wife and the husband.<sup>140</sup> Nor, for that matter, could a program of sexual abstinence and emotional withdrawal assure women the fiscal security and moral power that at the time derived from the actuality or prospect of motherhood.<sup>141</sup> What such women needed rather desperately was a technique that would allow them to prevent or terminate a pregnancy without reliance on crude sexual refusal. No wonder Victorian women generally seem to have opted not for coldness, but for the appearance of frailty as a device for limiting their husband’s sexual access.<sup>142</sup>

Again we find Dr. Horatio Robinson Storer confounding his modern critics by taking the same line as nearly all feminists did. Storer apparently contemplated the sensible use of contra-

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<sup>136</sup> See Chapter 2, at notes 157-58, 177-88

<sup>137</sup> See *id.* at notes 12-121.

<sup>138</sup> See *id.* at notes 145-240.

<sup>139</sup> STOCKHAM, *supra* note 29, at 152-53.

<sup>140</sup> See Chapter 2, at notes 206-09.

<sup>141</sup> See generally GORDON, *supra* note 5, at 109-12; PETCHESKY, *supra* note 5, at 74-77.

ception or abstinence as preferred by many feminists, advocating the spacing children about three years apart in the very passages in which he argued for the necessity of pregnancy for women to retain their good health.<sup>143</sup> And the leading feminists, like Storer, condemned male complicity in the crime of abortion, but not as a means of excusing the abortion nor as a means of expressing hostility to sexual indulgence. All were uncompromising in their view of abortion.

Such attitudes persisted among feminists well into the twentieth century. For example, Margaret Sanger, famous as the founder of the birth control movement consistently and repeatedly condemned abortion as murder.<sup>144</sup> Dr. Marie Stopes, who played a similar role in England, also condemned abortion as murder.<sup>145</sup> As late as 1960, Dr. Mary Calderone, the medical director of Planned Parenthood and later one of the strongest supporters of the supposed freedom to abort, described abortion as “the taking of a life.”<sup>146</sup> 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.

#### OBFUSCATING NINETEENTH CENTURY FEMINIST ATTITUDES

*Deconstruction is the banana peel on the sidewalk of language.*

—Sydney DeLong<sup>147</sup>

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<sup>142</sup> See Chapter 2, at notes 211-39.

<sup>143</sup> STORER, REFLEX INSANITY, *supra* note 86, at 115-16.

<sup>144</sup> MARGARET SANGER, MOTHERHOOD IN BONDAGE 394-96 (1928); MARGARET SANGER, MY FIGHT FOR BIRTH CONTROL 133 (1931); MARGARET SANGER, WOMEN AND THE NEW RACE 119-22, 129 (1920). See also Chapter 11, at notes 247-54.

<sup>145</sup> MARIE STOPES, MOTHER ENGLAND: A CONTEMPORARY HISTORY 183 (1929). See also BROOKES, *supra* note 21, at 2-3, 5-8, 80; MARY KENNY, ABORTION: THE WHOLE STORY 188, 297-98 (1986).

<sup>146</sup> Mary Calderone, *Illegal Abortion as a Public Health Problem*, 50 AM. J. PUB. HEALTH 948, 951 (1960).

<sup>147</sup> Sidney DeLong, *Jacques of All Trades: Derrida, Lacan, and the Commercial Lawyer*, 45 J. LEGAL EDUC. 131, 133 (1995).

Reading the new orthodoxy of abortion history, one would never guess that the feminists of the nineteenth century were so consistently and so strongly opposed to abortion. This raises the intriguing question of why do feminist and other pro-abortion historians today seem incapable of realizing that until recently even the most militant feminists considered abortion an abominable crime against nature and against women, a crime that society should prohibit and attempt to stamp out. These historians, in crafting the new orthodox history of abortion, claim to have “deconstructed” the attitudes of the early feminists to discover hidden support for abortion for which there is no evidence except the historian’s intuition. The thought is captured in historian James Mohr’s comment that “the relationship between abortion and feminism in the nineteenth century nevertheless remained indirect and ironical.”<sup>148</sup> No extended analysis of deconstruction theory is necessary to understand how it has affected the way we envision the history of abortion. It is only necessary to know that such theories embrace a thorough going skepticism that concludes that the only truth is that there is no truth,<sup>149</sup> overlooking the contradiction inherent in such a view.<sup>150</sup> Accepting this proposition often cause such scholars to miss the fact that although one

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<sup>148</sup> MOHR, *supra* note 4, at 109.

<sup>149</sup> See, e.g. JONATHAN CULLER, ON DECONSTRUCTION: THEORY AND CRITICISM AFTER STRUCTURALISM (1982); JACQUES DERRIDA, ON GRAMMATOLOGY (Gayatri Chakravorty Spivak trans. 1976); MICHEL FOUCAULT, ARCHEOLOGY OF KNOWLEDGE AND THE DISCOURSE ON LANGUAGE (A.M. Sheridan Smith trans. 1972); DAVID HARVEY, THE CONDITION OF POSTMODERNITY (1989); JEAN-FRANÇOIS LYOTARD, THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE (Geoff Bennington & Brian Massumi trans. 1984); PAULINE MARIE ROSENAU, POST MODERNISM AND THE SOCIAL SCIENCES: INSIGHTS, INROADS, AND INSTRUSIONS(1992); STEPHEN WHITE, POLITICAL THEORY AND POSTMODERNISM (1991).

<sup>150</sup> See generally REGIS DEBRAY, TEACHERS, WRITERS, CELEBRITIES: THE INTELLECTUALS OF MODERN FRANCE (David Macey trans. 1981); PETER DEWS, LOGICS OF DISINTEGRATION: POST-STRUCTURALIST THOUGHT AND THE CLAIMS OF CRITICAL THEORY (1987); ROGER KIMBALL, TENURED RADICALS: HOW POLITICS HAS CORRUPTED HIGHER EDUCATION (1990); CHRISTOPHER LASCH, THE TRUE AND ONLY HEAVEN: PROGRESS AND ITS CRITICS(1991). See generally Chapter 20, at notes 17-40.

might not be able to determine the truth in any ultimate sense, one often can recognize lies.<sup>151</sup>

Yet, as Tatyana Tolstaya has written, “lying, perhaps humankind’s primary weakness, is precisely what historians must overcome.”<sup>152</sup> This turns out to be a serious problem for historians of abortion, although it is not always clear whether the historian is lying to her readers or to herself.

Historian Linda Gordon provides a prime example. While frankly acknowledging that nineteenth-century feminists opposed abortion, she sought to explain that reality away as representing a “false consciousness.”<sup>153</sup> Gordon at least is honest about what she is attempting. She is one of the few historians of the new orthodoxy of abortion history to admit expressly that much of her work relating to the use and regulation of birth control techniques is “not a history but a schematic hypothesis [that] does not purport to describe what actually happened but offers a theoretical model of the way it might have happened.”<sup>154</sup> In other words, Gordon writes her “history” of the lives of women in times past much like monks in medieval monasteries wrote of their “lives” of saints—works in which the imagination of the author filled in innumerable details in the absence of, or even in defiance of, relevant written records. Like those lives of saints, Gordon’s disclaimer has not prevented others from relying on Gordon’s work as if it were divine

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<sup>151</sup> See ADRIENNE RICH, *ON LIES, SECRETS, AND SILENCE* 185 (1979); Allan Hunt, *The Big Fear: Law Confronts Postmodernism*, 35 MCGILL L.J. 507, 525 (1990); Judith Lichtenberg, *Objectivity and Its Enemies*, 2 THE RESPONSIVE COMMUNITY 59 (1991); David Millon, *Objectivity and Democracy*, 67 NYU L. REV. 1, 23-35 (1992).

<sup>152</sup> Tatyana Tolstaya, *The Golden Age*, N.Y. REV. BOOKS, Dec. 17, 1992, at 3 (James Gambrell trans.).

<sup>153</sup> Linda Gordon, *Why Nineteenth Century Feminists Did Not Support “Birth Control” and Twentieth Century Feminists Do*, in *RETHINKING THE FAMILY* 40, 51 (Barrie Thorne & Marilyn Yalom eds. 1982). See also GORDON, *supra* note 5, at 108, 114-15; PETCHESKY, *supra* note 5, at 41-45; Linda Gordon, *The Struggle for Reproductive Freedom: Three Stages of Feminism*, in *CAPITALIST PATRIARCHY AND THE CASE FOR SOCIALIST FEMINISM* 110 (Zillah Eisenstein ed. 1979).

<sup>154</sup> GORDON, *supra* note 5, at 4 n.\*.

revelation.<sup>155</sup> Excessive reliance on Gordon's work comes about in no small measure because Gordon never reverts to this point again and takes no steps to indicate which parts of her work represent historical data and which represents her imagination. Furthermore, Gordon's remarks about "false consciousness" play right into her predilection to invent what she cannot discover.

Some prominent feminist scholars have long argued that "consciousness raising" is the central feminist contribution to the intellectual enterprise, precisely because they consider the "consciousness" of most women—other than some feminists—to be "false."<sup>156</sup> Claims of "false consciousness," however, often are simply a ploy to enable one to claim as fact something that the women actually involved (and other witnesses) deny. No wonder even some feminist scholars have described the theory of "false consciousness" as off-putting and counterproductive,<sup>157</sup> or as simply a strategic ploy, not a truth about certain women's experiences.<sup>158</sup>

Given Gordon's attitude towards historical evidence, one is not surprised to discover that she seems unable to recognize evidence of the widespread acceptance among all classes of women of the idea that abortion involved the killing of the child. Thus, Gordon quotes a letter from 1916 in which a young mother laments having considered killing a child through abortion, and her happiness that she had not done so, yet Gordon sees only a mother who desires to control

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<sup>155</sup> See, e.g., CONNIE PAIGE, *THE RIGHT TO LIFERS: WHO THEY ARE; HOW THEY OPERATE; WHERE THEY GET THEIR MONEY* 33 (1983); Siegel, *supra* note 5, at 304-14.

<sup>156</sup> CATHARINE MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 60-61, 217-18 (1987) ("MACKINNON, F.U."); CATHARINE MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* 83-105, 172-83, 215-34 (1989). See also Chapter 21, at notes 68-82.

<sup>157</sup> See, e.g., Kathryn Abrams, *Ideology and Women's Choices*, 24 GA. L. REV. 761 (1990).

<sup>158</sup> Frances Olsen, *Feminist Theory in Grand Style*, 89 COLUM. L. REV. 1147, 1175-79 (1989).

births.<sup>159</sup> Linda Gordon also quotes the following letter, written in 1859 by a woman school-teacher in Massachusetts to her parents in New Hampshire:

Alphens' wife has been up here with her mother all summer. Poor Alphens he has got so poor that he cant keep house so he sent his wife to live on his father all winter—her poor health was caused by getting rid of a child as I suppose Alphens didnt feel able to maintain another one you must not say anything as I have only guessed it she was very large when she came here and in a short time she shrank to her normal size.<sup>160</sup>

Gordon reads this barely literate letter as indicating a casual acceptance of abortion by persons of the writer's class ("rural, upper middle class, respectable" is Gordon's description of the writer, Elisa Adams), despite the writer's admonition not to mention the event to anyone and despite the rather evident fact that the woman involved ("Alphens' wife") did not want to advertise the event. This is similar to Gordon's insistence that knowledge of how to do safe and effective abortions was widespread even while she herself referred to numerous letters sent to birth control advocates in the early twentieth century that, directly or indirectly, indicated that numerous couples had not the foggiest notion of how to get an abortion.<sup>161</sup>

As we have seen, there is considerable warrant for believing that ignorance of how to do abortions prevailed throughout most of our history.<sup>162</sup> We find some confirmation of this in the remarkably detailed diary of midwife Martha Ballard.<sup>163</sup> Ballard's diary covers the period from 1785 to 1812, when Mohr, Gordon, and others insist that midwives were commonly performing abortions, yet Ballard does not mention even a single abortion in her diary. We cannot assume

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<sup>159</sup> GORDON, *supra* note 5, at 229-30.

<sup>160</sup> *Id.* at 51 (quoting a letter of Elisa Adams to her parents).

<sup>161</sup> *Compare id.* at 28-29, 35-39, 52-54, *with id.* at 367-68.

<sup>162</sup> *See* Chapter 1.

<sup>163</sup> LAUREL THATCHER ULRICH, *THE MIDWIFE'S TALE: THE LIFE OF MARTHA BALLARD BASED ON HER DIARY, 1785-1812* (1991).

that Ballard simply did not bother to report her participation in such activities; her diary includes accounts of incest, illegitimacy, child abuse, and other unsavory activities, as well as many routine and unremarkable activities. Either Ballard considered abortion even more vile than the things she recorded or she did not know of any abortions.

James Mohr, archpriest of the new orthodoxy of abortion history, is perhaps the best exemplar of obfuscation of the attitudes of nineteenth century feminists toward abortion. Mohr introduced his discussion of feminist attitudes by attributing the rising incidence of abortion largely to changes in social mores among upper class, native born, Protestant women.<sup>164</sup> There is some support in the anti-abortion writings of the second half of the nineteenth and early twentieth century to support this claim, notably among those who feared “race suicide.”<sup>165</sup> This conclusion might be partially correct, although it ignores the effects of changing technology on social mores. In other words, abortion had become possible by the later years of the nineteenth century because of changing medical technology, and not simply because a certain class of women now wanted abortions. And in fact, there actually is no evidence indicating whether upper class, native born, Protestant women were having abortions more often than lower class or immigrant or Catholic or Jewish women. The only indirect evidence that might support such a conclusion is

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<sup>164</sup> MOHR, *supra* note 4, at 86-118, 128-29, 166-70. *See also* GROSSBERG, *supra* note 5, at 170-71; JUDGES, *supra* note 5, at 104; SMITH-ROSENBERG, *supra* note 5, at 224-25, 235-39; R. Sauer, *Attitudes to Abortion in America, 1800-1973*, 28 POP. STUDIES 53, 54-56, 59 (1974). Similar ideas were expressed in Canada during the same period. *See* Angus McLaren, *Birth Control and Abortion in Canada, 1870-1920*, 59 CAN. HIST. REV. 319, 319-21, 328, 333 (1978).

<sup>165</sup> O.C. BEALL, *RACIAL DECAY: A COMPILATION OF EVIDENCE FROM WORLD SOURCES* (1911); LYDIA KINGSMILL COMMANDER, *THE AMERICAN IDEA: DOES THE NATIONAL TENDENCY TOWARD A SMALL FAMILY POINT TO RACE SUICIDE OR RACE DEGENERATION?* (1907); GARDNER, *supra* note 49, at 117; SAMUEL HOLMES, *THE TREND OF THE RACE* 169 (1921); ANDREW NEBINGER, *CRIMINAL ABORTION: ITS EXTENT AND PREVENTION* 31 (1870); W.E. Atlee & D.A. O'Donnell, *Report of the Committee on Criminal Abortion*, 22 TRANS. AM. MED. ASS'N 240, 241 (1871); H. Gibbons, sr., *On Foeticide*, 21 PAC. MED. & SURGICAL J. 97, 110-11 (1878); P.S. Haskell, *Criminal Abortion*, 4 TRANS. ME. MED. ASS'N 463, 467 (1873); “Kit” (Kathleen Blake Watkins), *Race Suicide*, DAILY MAIL & EMPIRE (Toronto), Mar. 21, 1908, at 21; W.S. Wallace, *The Canadian Immigration Policy*, 30 CAN. MAG. 360 (1907).

that the birthrate for upper-class, native born, Protestant women was falling faster than for other groups of women—but even Mohr conceded elsewhere in his book that abortion cannot have been the primary means for creating this differential.<sup>166</sup>

The falling birthrate was indeed the root of the “race suicide” fears, and as the physicians writing the books served an upper-class, native born, Protestant clientele, it is not surprising that the women they encountered who sought abortions fit that description. It hardly proves that these women had more frequent abortions than the groups of women about which these physicians knew little or nothing. By focusing his discussion on who was having abortions rather than how abortions were being done, however, Mohr sought to link the rise of abortion to the simultaneous widespread emergence of feminism in the United States.<sup>167</sup> Mohr found his link in allegations by men opposed to feminism who often described women who sought abortion to be selfish and fashion-driven.<sup>168</sup> Non-physician opponents of abortion sometimes made the same accusation.<sup>169</sup>

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<sup>166</sup> MOHR, *supra* note 4, at 83. *But see* McLaren, *supra* note 164, at 323, 327-28, 337-38 (arguing that abortion was the primary technique driving declining birthrates in late nineteenth and early twentieth century Canada).

<sup>167</sup> MOHR, *supra* note 4, at 103-10, 167-70.

<sup>168</sup> GARDNER, *supra* note 49, at 17-18, 180-81, 224-30; EDWIN HALE, THE GREAT CRIME OF THE NINETEENTH CENTURY, WHY IS IT COMMITTED? WHO ARE THE CRIMINALS? HOW SHALL THEY BE DETECTED? HOW SHALL THEY BE PUNISHED? 7-15 (1867); JOHN HARVEY KELLOGG, PLAIN FACTS FOR OLD AND YOUNG 271 (1881); NEBINGER, *supra* note 165, at 11; POMEROY, *supra* note 44, at vii, 137-38; STORER, WHY NOT?, *supra* note 82, at 42, 63, 73, 81, 85; STORER & HEARD, *supra* note 86, at 61; J. Boring, *Foeticide*, 2 ATLANTA MED. & SURGICAL J. 257, 258 (1857); E.M. Buckingham, *Criminal Abortion*, 10 CIN. LANCET & OBSERVER 139, 141 (1867); Walter Channing, *Effects of Criminal Abortion*, 60 BOS. MED. & SURGICAL J. 134, 134-35 (1859); “D.H.”, *On Producing Abortion: A Physician’s Reply to the Solicitations of a Married Woman to Produce a Miscarriage for Her*, 17 NASHVILLE J. MED. & SURGICAL J. 200, 200 (1876); Gibbons, *supra* note 165, at 105-07, 111; H.C. Markham, *Foeticide and Its Prevention*, 11 J.A.M.A. 805, 806 (1888); J. Miller, *Criminal Abortion*, 1 K.C. MED. REC. 295, 296 (1884); Pallen, *supra* note 44, at 201, 205-06; J.C. Stone, *Report on the Subject of Criminal Abortion*, 1 TRANS. IOWA ST. MED. SOC’Y 29, 34 (1871); J.M. Toner, *Abortion in Its Medical and Moral Aspects*, 5 MED. & SURGICAL RPTR. 443, 445 (1861). *See* DEGLER, *supra* note 11, at 233-35; MOHR, *supra* note 4, at 107-08; REAGAN, *supra* note 21, at 12; Sauer, *supra* note 164, at 56; Michael Thomson, *Women, Medicine and Abortion in the Nineteenth Century*, 3 FEM. LEG. STUD. 159, 175-77 (1995).

<sup>169</sup>E. FRANK HOWE, SERMON ON ANTE-NATAL INFANTICIDE DELIVERED AT THE CONGREGATIONAL CHURCH IN TERRE HAUTE, ON SUNDAY MORNING, MARCH 28, 1869, at 2-3 (1869). *See also* BARKER-BENFIELD, *supra* note 124, at 135-226; MOHR, *supra* note 4, at 87-88 (discussing the writings of the Rev. John Todd).

Some the nineteenth century critics of feminism depicted abortions as done by women to women.<sup>170</sup> The tone of such remarks suggests that the critics saw the feminists as engaged in a conspiracy against men.<sup>171</sup> Some physicians also suggested that the rising incidence of abortion came from growing fears on the part of some women of death or serious injury through giving birth.<sup>172</sup> And, as we have seen, complaints that midwives doubled as abortionists go back centuries, both in England and in America.<sup>173</sup> Male physicians in the mid-nineteenth-century also charged women physicians with doing abortions, but without presenting any evidence to support the claim.<sup>174</sup> Mohr was aware of these charges,<sup>175</sup> but for some reason did not mention them as relevant to whether the nineteenth century feminists supported abortion. Instead, Mohr was content with two male physicians who espoused what Mohr termed a “feminist” view of the matter.

Of Mohr’s male “feminists,” one was an anonymous male physician who did appear to support strongly what are now termed abortion rights.<sup>176</sup> Mohr buried in a distant endnote, however, an admission that the anonymous author drew his arguments from a feminist book that “itself

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<sup>170</sup> See, e.g., HALE, *supra* note 168, at 17; STORER & HEARD, *supra* note 86, at 97-103; TODD, *supra* note 49, at 4. See also SYLVANUS STALL, WHAT A YOUNG MAN OUGHT TO KNOW 198 (1897) (similar claims in a Canadian setting). See generally E.R. NORMAN, CHURCH AND SOCIETY IN ENGLAND, 1770-1970, at 270 (1976); McLaren, *supra* note 164, at 319-20. For modern echoes of this theory, see Chapter 1, at notes 18-30.

<sup>171</sup> See WALSH, *supra* note 44, at 72 n.86; Siegel, *Home as Work*, *supra* note 130, at 49-51; Siegel, *supra* note 5, at 300-01. See generally WALSH, *supra*, at 106-77.

<sup>172</sup> See, e.g., E.P. Christian, *The Pathological Consequences Incident to Induced Abortion*, 2 DET. REV. MED. & PHARMACY 147, 147 (1867); John Trader, *Criminal Abortion*, 11 ST. L. MED. & SURGICAL J., n.s. 583, 588 (1874). See also MOHR, *supra* note 4, at 108, 170.

<sup>173</sup> See Chapter 1, at notes 15-17; Chapter 2, at notes 283-89; Chapter 4, at 308-11.

<sup>174</sup> See, e.g., HARRIOT KEZIA HUNT, GLANCES AND GLIMPSES; OR FIFTY YEARS SOCIAL, INCLUDING TWENTY YEARS PROFESSIONAL, LIFE 159 (1856; reprinted 1970). See also WALSH, *supra* note 44, at 145-46.

<sup>175</sup> MOHR, *supra* note 4, at 86-90.

<sup>176</sup> Anonymous, *Abortion*, 7 MEDICO-LEGAL J. 170 (1889). See MOHR, *supra* note 4, at 108-09, 113.

was by no means pro-abortion.”<sup>177</sup> In any event, the very anonymity of the article speaks eloquently of the authors’ perception of the popular attitude. The other male “feminist” was Dr. Henry Wright, whose book seems to have been a regretful apology for the reality of abortion rather than an argument in its favor.<sup>178</sup> In an earlier book, Wright had castigated the medical profession for its apparent willingness to condone abortions when performed by allopathic physicians while prosecuting abortions when performed by others.<sup>179</sup> Such criticism hardly supports a view of Wright as a friend of abortion.<sup>180</sup>

Mohr’s problem was 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.<sup>181</sup> This reality severely undercut Mohr’s claim that only physicians were staking out such an “idiosyncratic” position.<sup>182</sup> Mohr and other researchers actually found only one undoubted feminist advocating a right to abort during the nineteenth century, and this not until 1893.<sup>183</sup> By that time, abortion laws had produced a situation where abortion no longer was, as Mohr himself put it, a “viable alternative.”<sup>184</sup>

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<sup>177</sup> MOHR, *supra* note 4, at 288 n.81.

<sup>178</sup> WRIGHT, *supra* note 124. See DEGLER, *supra* note 11, at 244; MOHR, *supra* note 4, at 109-11; OLASKY, *supra* note 75, at 68-71.

<sup>179</sup> HENRY WRIGHT, MARRIAGE AND PARENTAGE; OR, THE PROTECTIVE ELEMENT IN MAN, AS A MEANS TO HIS ELEVATION AND HAPPINESS 133 (2<sup>nd</sup> ed. 1855).

<sup>180</sup> See generally LEWIS PERRY, CHILDHOOD, MARRIAGE AND REFORM: HENRY CLARKE WRIGHT, 1797-1870 (1980).

<sup>181</sup> That he recognized this problem, see MOHR, *supra* note 4, at 111-14, 253. See the text *supra* at notes 29-146.

<sup>182</sup> MOHR, *supra* note 4, at 73-74, 182-96.

<sup>183</sup> *Id.* at 113. See also Siegel, *supra* note 5, at 307 n.185, 312 nn.202-05.

<sup>184</sup> MOHR, *supra* note 4, at 113.

To buttress his claims, Mohr turned to this sole feminist who, before the very end of the century, actually seemed to support abortion rights in an anonymous letter written from Maine to *The Revolution*, a feminist journal, in 1868.<sup>185</sup> This “Conspirator,” as the letter writer styled herself, did seem to endorse the practice of abortion, but she was hardly an unequivocal supporter. So intent was she on criticizing the evils of marriage (rather than on defending abortion) that her pseudonym seems to refer to a “conspirator against marriage” rather than a conspirator seeking an abortion for herself or others. Indeed, the anonymous writer acknowledged what was in fact the major disincentive to abortion—women knew that abortion endangered their lives, a risk they were willing to undergo to escape having further children “whom the brutal lusts of a drunken husband have forced upon them.”<sup>186</sup> Mohr attempted to increase the impact of this letter by noting that the journal was owned by Susan B. Anthony and edited by Elizabeth Cady Stanton and Parker Pillsbury, as if their publication of the letter committed them to supporting abortion.<sup>187</sup> He did not bother to inform his readers that Anthony and Stanton had described abortion in signed articles in the same journal as the murder of children.<sup>188</sup>

To buttress his singular feminist advocate of abortion rights, Mohr quoted from several of the women quoted in Dr. Wright’s book. Dr. Wright’s book does demonstrate that women were beginning to have abortions by the 1850s and perhaps even before then, yet unless we are to infer from the mere existence of a practice that people accepted it as legitimate, we must ask what women who had abortions, and those who aided them, thought about what they were doing. This

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<sup>185</sup> *Id.* at 107, referring to “Conspirator,” *Letter*, THE REVOLUTION, Mar. 19, 1868, at 170.

<sup>186</sup> “Conspirator,” *supra* note 185, at 170.

<sup>187</sup> MOHR, *supra* note 4, at 288 n.73.

<sup>188</sup> Anthony, *supra* note 29; Stanton, *supra* note 29.

question is one that Mohr simply ignored. Dr. Wright quoted from several women describing their abortions, generally in the most remorseful terms and clearly indicating that they themselves considered the act to have killed a child.<sup>189</sup> Mohr translated these views into the laconic statement that the women involved “hated to have to do it.”<sup>190</sup> Mohr undercut this summation, however, by immediately quoting at length from a woman who, after describing how “a woman, a friend in whom I trusted” and the friend’s “family physician”<sup>191</sup> “labored” to convince the author that the child was not alive until birth, concluded her description of the experience thusly:

My only trouble was, with God’s view of the case, I could not get rid of the feeling that it was an outrage on my body and soul, and on my unconscious babe.... Though I determined to do the deed, my reason, my conscience, my self-respect, my entire nature, revolted against my decision. My Womanhood rose up in withering condemnation.<sup>192</sup>

Statements such as these hardly express support for a freedom to abort, or of claims that the fetus was not yet a person, or that abortion was widely accepted as morally neutral. Mohr, however, chose this very quotation to demonstrate that ordinary people in the nineteenth century did not believe that the fetus was a person and believed that abortion was morally neutral.<sup>193</sup> Mohr also saw such stories as supporting the quickening doctrine.<sup>194</sup> The quotation, to the contrary, explicitly indicates that while the “friend” and the “physician” rejected the recognition of fetal personhood at any point before birth, the mother did not express doubt about fetal personhood at

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<sup>189</sup> WRIGHT, *supra* note 124, at 65-69, 101-11.

<sup>190</sup> MOHR, *supra* note 4, at 110-11.

<sup>191</sup> The quotation marks around the term “family physician” are in the original letter. WRIGHT, *supra* note 124, at 101.

<sup>192</sup> *Id.* For similar stories from modern times, see MARY ZIMMERMAN, *PASSAGE THROUGH ABORTION: THE PERSONAL AND SOCIAL REALITY OF WOMEN’S EXPERIENCES* (1977). See also GILLIGAN, *supra* note 73, at 80; SUSAN NATHANSON, *SOUL CRISIS* (1989).

<sup>193</sup> MOHR, *supra* note 4, at 111-12.

any point of gestation. Mohr went on to claim that the views of the friend and the physician “became the basis of the official position of American feminists toward abortion after the Civil War,”<sup>195</sup> without indicating what made any nineteenth-century woman’s position “official.” Mohr chose instead to refer to several leading feminists as supporting his claim that feminists’ viewed abortion as a tragic necessity.<sup>196</sup>

Mohr simply did not bother to quote a letter in which the writer described abortion as a response to abuse within marriage, the desperation of the response shown, as the writer acknowledged, by the willingness of women knowingly to risk death from the procedure. Nor did he consider the extensive evidence that women who underwent abortions often felt great guilt about the procedure even decades after the event. Elizabeth Evans gathered remembrances from women who had survived abortions in a book she published in 1875 under the name *The Abuse of Maternity*.<sup>197</sup> One woman recalled that she had “mourned for many years the sin committed in her youth,”<sup>198</sup> while another woman stated that her memory of an abortion “serves as an effectual damper upon whatever degree of pride or satisfaction I might otherwise feel in the more praiseworthy deeds of my career.”<sup>199</sup> Numerous other women remembered terrible sorrow over the loss of a child never seen and lying in an unknown grave.<sup>200</sup> According to Evans, doctors already recognized what today we would call “post-abortion syndrome”—“remorse [over abortion] ...

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<sup>194</sup> *Id.* at 117-18.

<sup>195</sup> *Id.* at 112-13. *See also* Siegel, *supra* note 5, at 50-51.

<sup>196</sup> MOHR, *supra* note 4, at 112-13.

<sup>197</sup> ELIZABETH EDSON GIBSON EVANS, *THE ABUSE OF MATERNITY* (1875).

<sup>198</sup> *Id.* at 31.

<sup>199</sup> *Id.* at 67.

causing nervous maladies.”<sup>201</sup> Today many would argue that this was simply a “guilt trip” laid on women, a kind of “false consciousness,” and not a genuine expression of their “true selves.”

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Whatever one thinks of the idea of a “false consciousness,” the fact remains that many women did internalize the belief that abortion was wrong and reacted predictably to the guilt that resulted from the collision of those beliefs with having an abortion. Whether such feelings derived from a false or a true consciousness, a great many people condemned abortion, even (or especially) after having undergone the procedure. None of this suggests that abortion was either common or widely accepted, by women or men. Nor does any shred of evidence suggest that the feminists of the time felt differently.

Mohr’s “evidence” of a feminist link to abortion was based more on an effort by the anti-feminists of the time to smear feminists with the brush of a widely-aborred practice than a genuine indication of the role of the emerging women’s movement. Law professor Reva Siegel virtually conceded as much when she wrote: “The [medical] profession’s antifeminist arguments imbued the practice of controlling birth with emancipatory significance, whether or not it had

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<sup>200</sup> See OLASKY, *supra* note 75, at 183-87.

<sup>201</sup> EVANS, *supra* note 197, at 70.

<sup>202</sup> See, e.g., RUTH COLKER, ABORTION & DIALOGUE—PRO-CHOICE, PRO-LIFE, AND AMERICAN LAW 6-9 (1992); ANDREA DWORKIN, INTERCOURSE 143 (1987); ANDREA DWORKIN, RIGHT-WING WOMEN 227-31 (1982); MACKINNON, F.U., *supra* note 156, at 70-77; PETCHESKY, *supra* note 5, at 76; Patricia Cain, *Feminist Jurisprudence: Grounding the Theories*, 4 BERKELEY L.J. 191, 193-95 (1989); Patricia Cain, *Feminist Legal Scholarship*, 77 IOWA L. REV. 19, 25-27 (1991); Mari Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763 (1990); Olsen, *supra* note 158, at 1168; Jeanne Schroeder, *Abduction from the Seraglio: Feminist Methodologies and the Logic of Imagination*, 70 TEX. L. REV. 109, 193-94, 206-07 (1991); Jeanne Schroeder, *The Taming of the Shrew: The Liberal Attempt to Mainstream Radical Feminist Theory*, 5 YALE J.L. & FEM. 123, 158-60 (1992); Carol Weisbrod, *Practical Polyphony: Theories of the State and Feminist Jurisprudence*, 24 GA. L. REV. 985, 990-91 (1990); Joan Williams, *Gender Wars: Selfless Women in the Republic of Choice*, 66 NYU L. REV. 1559, 1561, 1564-72, 1612-15 (1991). See also Chapter 20, at notes 105-23.

this meaning for women who sought abortions.”<sup>203</sup> Mohr’s argument<sup>204</sup> that only allopathic physicians really wanted the new laws and that the public generally was tolerant or even supportive of abortion and abortionists thus fails even in terms of his own report of the attitudes of such a significantly interested group as politically active nineteenth-century women. This fact returns us to the central puzzle that arises if we take Mohr’s second thesis seriously: Why would such self-aware and active women<sup>205</sup> be so gullible when it came to male assertions of control over their reproductive processes, particularly given their own defiant criticism of “male sexual license.”<sup>206</sup> It is worth recalling in this context the slogan coined by Christabel Pankhurst (a prominent English suffragist) that the feminists’ goal was “Votes for women and chastity for men.”<sup>207</sup>

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<sup>203</sup> Siegel, *supra* note 5, at 302. *See generally* BARKER-BENFIELD, *supra* note 124, at 84-88, 193, 284-85; HALLER & HALLER, *supra* note 50, at 76-87, 123; SARAH STAGE, FEMALE COMPLAINTS: LYDIA PINKHAM AND THE BUSINESS OF WOMEN’S MEDICINE 84-85 (1979); WALSH, *supra* note 44, at 70 n.86; Siegel, *supra*, at 301-04, 310-14.

<sup>204</sup> MOHR, *supra* note 4, at 73.

<sup>205</sup> *See, e.g.*, STANTON, *supra* note 41. *See also* LOIS BANNER, ELIZABETH CADY STANTON: A RADICAL FOR WOMEN’S RIGHTS (1980); BUHLE & BUHLE, *supra* note 41; MARI JO BUHLE, WOMEN AND AMERICAN SOCIALISM (1981); OLIVIA COOLIDGE, WOMEN’S RIGHTS: THE SUFFRAGE MOVEMENT IN AMERICA, 1848-1920 (1966); DEGLER, *supra* note 11, at 144-77, 279-97; MARJORIE HOUSEPIAN DOBKIN, THE MAKING OF AN AMERICAN FEMINIST: EARLY JOURNALS AND LETTERS OF M. CAREY THOMAS (1979); DUBOIS, *supra* note 128; SARA EVANS, BORN FOR LIBERTY: A HISTORY OF WOMEN IN AMERICA 67-81, 93-95, 101-07, 122-30, 147-56 (1989); ELEANOR FLEXNER, CENTURY OF STRUGGLE: THE WOMEN’S RIGHTS MOVEMENT IN THE UNITED STATES (rev. ed. 1975); ELIZABETH GRIFFITH, IN HER OWN RIGHT: THE LIFE OF ELIZABETH CADY STANTON (1984); BLANCHE GLASSMAN HERSCH, THE SLAVERY OF SEX: FEMINIST ABOLITIONISTS IN AMERICA (1978); NANCY HEWITT, WOMEN’S ACTIVISM AND SOCIAL CHANGE: ROCHESTER, NEW YORK, 1822-1872 (1984); MARY RYAN, CRADLE OF THE MIDDLE CLASS: THE FAMILY IN ONEIDA COUNTY, NEW YORK, 1790-1865, at 89-142 (1981); EMANIE SACHS, “THE TERRIBLE SIREN,” VICTORIA WOODHULL (1838-1927) (1928); KATHRYN KISH SKLAR, CATHERINE BEECHER: A STUDY IN AMERICAN DOMESTICITY (1973); SMITH-ROSENBERG, *supra* note 5, at 88-89, 109-64, 173-78, 245-58, 262-64; Nancy Hewitt, *Feminine Friends: Agrarian Quakers and the Emergence of Women’s Rights in America*, 12 FEMINIST STUD. 27 (1986); Mary Ryan, *The Power of Female Networks: A Case Study of Female Moral Reform in Antebellum America*, 5 FEMINIST STUD. 66 (1979).

<sup>206</sup> *See, e.g.*, ELIZA BISBEE DUFFEY, WHAT EVERY WOMAN SHOULD KNOW (1873); EVANS, *supra* note 197. *See generally* GORDON, *supra* note 5, at 24-25; RUTH ROSEN, THE LOST SISTERHOOD: PROSTITUTION IN AMERICA, 1900-1918 (1982); SMITH-ROSENBERG, *supra* note 5, at 46, 109-28.

<sup>207</sup> BROOKES, *supra* note 21, at 81. *See also* TANNAHILL, *supra* note 20, at 398-400 (noting the puritan streak among American feminists demanding a “harsh ... rectitude”).

Mohr was forced, somewhat reluctantly, to acknowledge the problem feminists posed for his thesis when he wrote “the relationship between abortion and feminism in the nineteenth century nevertheless remained indirect and ironical.”<sup>208</sup> Only at the very end of his discussion of feminists and abortion, however, did Mohr acknowledge that all of the women whom he claimed supported a right to abort “found themselves in the anomalous position of endorsing the anti-feminist physicians’ calls for anti-abortion legislation.”<sup>209</sup> Indirect and ironical indeed.

Most other scholars writing on the history of abortion have taken the same or a similar line as Mohr. For example, sociologist Rosalind Petchesky preferred to dismiss feminist opposition to abortion as reflecting the pervasive influence of the patriarchal society in which these women lived.<sup>210</sup> In sharp contrast, historian Carl Degler did not find feminist opposition to abortion as so anomalous; he saw it as of a piece with the opposition of organized feminists to slavery, the death penalty, war, and corporal punishment for crimes.<sup>211</sup> Others, including the authors of the *Historians’ Briefs*, preferred simply to misrepresent what the feminists of the time thought.<sup>212</sup>

Despite such clear and direct evidence of what feminist leaders, and even ordinary women, knew and believed about fetuses and abortion in the middle and later years of the nineteenth century, there actually is some evidence that ordinary people did not accept the personhood of the fetus during that period.<sup>213</sup> That evidence is, however, similar to the strategy of the anti-feminists

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<sup>208</sup> MOHR, *supra* note 4, at 113. See also BROOKES, *supra* note 52, at 109; GINSBURG, *supra* note 5, at 29-30.

<sup>209</sup> MOHR, *supra* note 4, at 113. See generally D’EMILIO & FREEDMAN, *supra* note 24, at 150-67; GORDON, *supra* note 5, at 106-20; SMITH-ROSENBERG, *supra* note 5, at 243.

<sup>210</sup> PETCHESKY, *supra* note 5, at 44-45.

<sup>211</sup> DEGLER, *supra* note 11, at 247.

<sup>212</sup> See the text *supra* at notes 31-46.

<sup>213</sup> EVANS, *supra* note 197, at 58.

of blaming abortion on the feminists. Long after a good many ordinary people had accepted the personhood of the fetus from conception onward and the view that even the earliest abortion was “child murder,” many in the professions of law and medicine apparently continued to believe that ordinary people entertained no such ideas.<sup>214</sup> As late as 1923 the Wisconsin Supreme Court would justify that state’s continued reliance on the quickening distinction as a practical necessity because of popular ignorance that a pre-quickening fetus was a living person in these words:

In a strictly scientific and physiological sense there is life in an embryo from the time of conception, and in such sense there is also life in the male and female elements that unite to form the embryo. But law for obvious reasons cannot in its classifications follow the latest or ultimate declarations of science. It must for purposes of practical efficiency proceed upon more everyday and popular conceptions, especially as to definitions of crimes that are *malum in se*. These must be of such a nature that the ordinary normal adult knows it is morally wrong to commit them. That it should be less of an offense to destroy an embryo in a stage where human life in its common acceptance has not yet begun than to destroy a quick child is a conclusion that commends itself to most men.<sup>215</sup>

Similarly, Dr. Frederick Taussig, in his famous early (1936) study of abortion, reached much the same conclusion regarding his experience with patients: “Every physician will testify that it is without any feeling of guilt that most women speak of induced abortions in the consultation room.”<sup>216</sup> Perhaps such thinking had become more common in the early years of the twentieth century, or perhaps such thinking commended itself to professionals (doctors as well as

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<sup>214</sup> See, e.g., HUGH HODGE, FOETICIDE OR CRIMINAL AOBRTION 32-33 (1869); O.A. Cannon, *Septic Abortion*, 12 CAN. MED. ASS’N J. 166 (1922); Mary Dixon-Jones, *Criminal Abortion—Its Evils and Its Sad Consequences*, 3 WOPMEN’S MED. J. 34, 34 (1894); Palmer Findley, *The Slaughter of the Innocents*, 3 AM. J. OBSTET. & GYNECOLOGY 35, at 36 (1922); Joseph Taber Johnson, *Abortion and Its Effects*, 33 AM. J. OSTET. & DISEASES OF WOMEN & CHILDREN 86, 91 (1895); Minnie Love, *Criminal Abortion*, 1 COLO. MED. 55, 58 (1903). See generally REAGAN, *supra* note 21, at 25, 80-85, 109-10; GLANVILLE WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 207-08, 215 (1957, reprinted 1972); McLaren, *supra* note 164, at 334-35.

<sup>215</sup> *Foster v. State*, 196 N.W. 233, 235 (Wis. 1923). See also BROOKES, *supra* note 21, at 26, 30 (quoting Lord Darling to the same effect while presiding over a trial of two abortionists).

<sup>216</sup> FREDERICK TAUSSIG, ABORTION: SPONTANEOUS AND INDUCED 403 (1936). See also BROOKES, *supra* note 21, at 3-9, 14; REPORT OF THE INTERDEPARTMENTAL COMMITTEE ON ABORTION 5, 105 (1939) (“INTERDEPARTMENTAL

lawyers) who encounter a rather select sample of those who are seeking or have obtained abortions, yet (as Dr. Wright's informants demonstrate) there actually is little evidence that such beliefs were still widely shared by "ordinary normal adults" in the nineteenth or twentieth centuries except in the professionals' own impressions.<sup>217</sup>

Other modern historians indulge in even weaker arguments to explain why we must understand that the early feminists simply did not mean it when they said over and over again that they considered abortion murder and wanted to put an end to it. Historian Janet Brodie contended that "social opprobrium" attached to abortion and contraception in the late nineteenth century solely because these had suddenly (and apparently inexplicably) been made criminal.<sup>218</sup> Brodie also tells us that the women organized in a crusade for social purity opposed abortion only "in vague and general ways" as if this meant they did not really mean it.<sup>219</sup> But what can you expect of an historian who tells us that Comstock's law was passed by an inattentive Congress that really did not support the law<sup>220</sup>—a law that, as Judge John Noonan wrote, "[i]n penalizing the possession of contraceptives, ... went further than any Pope or Canonist."<sup>221</sup>

Historian Joan Hoff attempts much the same ploy when she attributes the failure of the nineteenth-century feminists to oppose abortion to their supposed single-minded devotion to securing

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COMM."); KERRY PETERSEN, ABORTION REGIMES 52 (1993); ABRAHAM RONGY, ABORTION: LEGAL OR ILLEGAL? 90 (1933).

<sup>217</sup> INTERDEPARTMENTAL COMM., *supra* note 216, at 45.

<sup>218</sup> BRODIE, *supra* note 21, at 281.

<sup>219</sup> *Id.* at 262-63, 272-75.

<sup>220</sup> *Id.* at 263-66. See also TONE, *supra* note 99, at 3-4; C. Thomas Dienes, *The Progency of Comstockery—Birth Control Laws Return to Court*, 21 AM. U. L. REV. 1, 3-9 (1971). Tone, remarkably, goes on to tell us that Congress had passed two similar laws in the preceding eight years, apparently without anyone ever noticing. TONE, *supra*, at 4-5.

<sup>221</sup> JOHN NOONAN, JR., CONTRACEPTION 412 (1986).

the vote, completely ignoring their publicly and frequently stated opposition to abortion as child-murder.<sup>222</sup> Historian Cornelia Dayton actually admitted to a certain puzzlement over why reported abortions were invariably covert, even in the first months of pregnancy when (she presumed) it was legal, if abortion were widely known and socially accepted in eighteenth- and nineteenth-century America.<sup>223</sup> Her unlikely answer is that abortion was hidden because it signaled other acts that were socially condemned—fornication and adultery—even though everyone considered abortion itself unproblematic. There are two problems with her reasoning. First, did no married women seek an abortion when the child was not a result of adultery? Second, how, if abortion usually signaled unsavory conduct, would abortion avoid unsavory connotations?

Finally we come to the work of law professor Reva Siegel, whom Justice Blackmun adopted as his new primary source for the history of abortion in his separate opinion in the *Casey* decision.<sup>224</sup> Siegel virtually conceded that the only people who saw feminism at work in such limited resistance to abortion laws as there was were the very same male physicians whom she saw as campaigning against women generally. Her observation that the antifeminist's arguments "imbued the practice of controlling birth with emancipatory significance, whether or not it had this meaning for women who sought abortions"<sup>225</sup> reveals her strategy for obfuscating this fact. Siegel consistently chose to write about "controlling birth" or "voluntary motherhood" rather

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<sup>222</sup> HOFF, *supra* note 119, at 182. See also Deborah Rhode, *The "No-Problem" Problem: Feminist Challenges and Cultural Change*, 100 *YALE L.J.* 1731, 1742 (1991).

<sup>223</sup> Cornelia Hughes Dayton, *Taking the Trade: Abortion and Gender Relations in an Eighteenth-Century New England Village*, 48 *WM. & MARY Q.* 19, 23 (1991).

<sup>224</sup> (Blackmun, J., partially concurring).

<sup>225</sup> Siegel, *supra* note 5, at 302. See also *id.* at 304-14. The sentence is quoted in full *supra* at note 203.

than about abortion as such.<sup>226</sup> Siegel also repeatedly insisted that the common law did not require a woman to secure her husband's consent to have an abortion.<sup>227</sup> That is a meaningless claim—after all, abortion was a serious crime to which no one could assent.

Siegel would have us believe that anyone advocating birth control in the nineteenth century supported the practice of abortion.<sup>228</sup> This same ploy was used in the *Casey Historians' Brief*<sup>229</sup> and in numerous other histories that seek to obfuscate the nineteenth century feminist position on abortion.<sup>230</sup> In fact, however, nineteenth-century feminists strongly condemned abortion as a crime<sup>231</sup> while many of the same feminists openly espoused contraception.<sup>232</sup> Siegel acknowledged both of these facts only indirectly. After first noting that some feminists criticized contraceptives as well as abortion,<sup>233</sup> she simply asserted that “focusing on [the refusal of the feminists to endorse abortion] obscures the extent to which feminists of the era tacitly condoned abortion.”<sup>234</sup> At other points, Siegel noted several feminist tracts as “virtually condoning abortion.”<sup>235</sup> These tracts describe abortion with such names as “child murder,” hardly suggesting approval of

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<sup>226</sup> Siegel, *supra* note 5, at 294-95, 302-14.

<sup>227</sup> *Id.* at 287 n.94, 296-97, 320 n.242.

<sup>228</sup> *Id.* at 318.

<sup>229</sup> *Casey Historians' Brief*, *supra* note 15, at 18-20.

<sup>230</sup> See also DEGLER, *supra* note 11, at 202-06, 215; HARRISON, *supra* note 21, at 161-72; RHODE, *supra* note 20, at 202; SMITH-ROSENBERG, *supra* note 5, at 220; Gordon, *Voluntary Motherhood*, *supra* note 42; Gordon, *Nineteenth Century Feminists*, *supra* note 42. See the text *supra* at notes 42-60.

<sup>231</sup> See the text *supra* at notes 75-125.

<sup>232</sup> See the text *supra* at notes 42-60.

<sup>233</sup> Siegel, *supra* note 5, at 304.

<sup>234</sup> *Id.* at 305, 307.

<sup>235</sup> *Id.* at 306 n.179, 307 n.184, 311 n.201.

the practice, tacit or otherwise.<sup>236</sup> In other words, Siegel found no evidence of nineteenth century feminist support for abortion; she presents us with a search for the lost meanings of not so lost voices, with nothing more to go on than the passionate certainty of her convictions.<sup>237</sup>

Siegel argued that the feminists were unwilling to express their support for abortion openly because women needed the hope for children to snare a husband and because the feminists were already marginalized as inimical to the family and as favoring “free love.”<sup>238</sup> She relied on the work of historian Linda Gordon for “proof” of these conclusions regarding the nineteenth-century feminists.<sup>239</sup> We have already noted why there are serious problems in relying on Gordon’s work.<sup>240</sup> Furthermore, Siegel acknowledged that the nineteenth-century feminists actually advocated the right to refuse a husband’s sexual advances as the means to achieve “voluntary motherhood.”<sup>241</sup> This entire argument collapses on itself when Siegel tells us that the argument for voluntary motherhood derived from a far-ranging and strident critique of marriage.<sup>242</sup>

The closest Siegel came to finding a feminist directly supporting abortion is the same anonymous letter from somewhere in Maine that Mohr had relied on.<sup>243</sup> Regarding this letter, Siegel can charitably be called confused. For some reason, Siegel miscited this letter by referring

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<sup>236</sup> See, e.g., Stanton, *supra* note 97.

<sup>237</sup> Cf. Kenneth Lasson, *Feminism Awry: Excesses in the Pursuit of Rights and Trifles*, 42 J. LEGAL EDUC. 1, 18 (1992) (so describing the work of Catherine MacKinnon).

<sup>238</sup> Siegel, *supra* note 5, at 305 n.175.

<sup>239</sup> Siegel referred to GORDON, *supra* note 5, at 70, 97-111.

<sup>240</sup> See the text *supra* at notes 153-61.

<sup>241</sup> Siegel, *supra* note 5, at 305, 312-13 n.208. See generally Chapter 2, at notes 157-91.

<sup>242</sup> Siegel, *supra* note 5, at 305-08.

<sup>243</sup> See the text *supra* at notes 185-88.

to an article, *Child Murder*,<sup>244</sup> written by Elizabeth Cady Stanton and published a week earlier than the anonymous letter.<sup>245</sup> Siegel dated the article nearly a month later than its actual publication date. Beyond this, Siegel, like Mohr, could only argue that the feminist focus on the causes of abortion and hence on the behavior of men involved indicated that feminists opposed enactment of the abortion statutes.<sup>246</sup> Yet she herself offered in support of this claim quotations from an editorial by Susan B. Anthony that feminists “wanted *prevention*, not merely punishment,” that they wanted “to reach the root of *evil*, and destroy it,” and that they considered the women who sought abortions to be “awfully guilty” even if their men were “thrice guilty.”<sup>247</sup> Siegel’s reliance on this as an endorsement of abortion rights sums up the quality of her “history.”

Have we crossed such a divide that feminist historians simply cannot conceive of a genuine feminist who actually opposed abortion? Or shall we accuse modern historians of frankly misrepresenting the historical record for political purposes? Or is it perhaps a little of both? Trying to answer this question requires a closer look at the strained efforts of the historians of the new orthodox history of abortion to “prove” that the nineteenth century feminists secretly supported abortion and only said they opposed abortion as a tactical maneuver. The plain fact is that no historian can afford to ignore “the stubborn resistance of the raw materials.”<sup>248</sup> Yet this is precisely what those who seek to obfuscate the attitudes of the nineteenth century feminists do. Their approach lends itself to the very sort of advocacy scholarship that has come to bedevil the legal en-

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<sup>244</sup> Stanton, *supra* note 97.

<sup>245</sup> Siegel, *supra* note 5, at 307 n.185, 312 nn.202-05.

<sup>246</sup> *Id.* at 312.

<sup>247</sup> Anthony, *supra* note 29, at 4 (emphasis in the original).

<sup>248</sup> J. WILLARD HURST, JUSTICE HOLMES ON LEGAL HISTORY 61 (1964).

terprise.<sup>249</sup> As a result, even radically revisionist historians have been skeptical, if not downright hostile, to such “post-modern” history.<sup>250</sup>

WOMEN PHYSICIANS IN THE NINETEENTH CENTURY

*Two roads diverged in a wood, and I –  
I took the one less traveled by.  
And that has made all the difference.*

—Robert Frost<sup>251</sup>

Those who would paint the struggle between allopaths and other healthcare providers in starkly genderized terms stumble over certain facts from the late nineteenth century. Although most allopathic physicians harbored genuine hostility toward the idea of women providing medical services and particularly towards midwives (not all of whom were women),<sup>252</sup> women were by no means so thoroughly excluded from the medical profession as they later would be. In the second half of the nineteenth century, the period when the most restrictive abortion statutes were enacted, women achieved considerable success in entering the allopathic medical profession, far more success than they would in the first seventy years of the twentieth century.

Women have been heavily involved in the informal healing arts since time immemorial. The nineteenth century saw significant numbers of women enter the formal medical professions—

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<sup>249</sup> MARY ANN GLENDON, A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY 208 (1994); Ronald Collins, *A Letter on Scholarly Ethics*, 45 J. LEGAL EDUC. 139 (1995); Michael Sean Quinn, “*Scholarly Ethics*”: A Response, 46 J. LEGAL EDUC. 110 (1996).

<sup>250</sup> See, e.g., BRYAN STONE, DESCENT INTO DISCOURSE: THE REIFICATION OF LANGUAGE AND THE WRITINGS OF SOCIAL HISTORY (1990); Lawrence Stone, *History and Post-Modernism*, 135 PAST & PRESENT 189 (1992); Steven Watts, *The Idiocy of American Studies: Poststructuralism, Language, and Politics in the Age of Self-Fulfillment*, 43 AM. Q. 625 (1991).

<sup>251</sup> Robert Frost, *The Road Not Taken*, THE POCKET BOOK OF ROBERT FROST’S POEMS 223 (Louis Untermeyer ed. 1971).

<sup>252</sup> See generally DEGLER, *supra* note 11, at 56-59; WALSH, *supra* note 44, at 37-39. On advent of male midwives, see Chapter 6, at notes 247-62, and Chapter 7, at notes 227-302.

allopathic, homeopathic, or other forms—for the first time.<sup>253</sup> While women undoubtedly chose a formal medical career for many different reasons, a commonly expressed reason for their choice was to provide an alternative for women patients who, with the increasing medicalization of birth and related health problems, would otherwise be forced to turn to male physicians for services previously provided by informal—usually female—healers.<sup>254</sup> This was the era, remember, when women patients were still reluctant to allow male physicians to conduct genital examinations or to examine them while disrobed, and when suspicions of sexual misbehavior by male physicians attending women patients were just beginning to subside.<sup>255</sup>

Women physicians were outspoken in criticizing the errors they believed male physicians made regarding women, women's physiology, and women's rights.<sup>256</sup> Some of the women physicians also argued that they related fundamentally differently to their patients—female or male—than did men physicians.<sup>257</sup> This era saw the opening of medical schools specifically to

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<sup>253</sup> See generally WALSH, *supra* note 44.

<sup>254</sup> See, e.g., HUNT, *supra* note 174, at 135-39, 156-58, 251; Harriet Martineau, *On Female Industry*, EDINBURGH REV., April 1859, at 293, 331-32. See also DONNISON, *supra* note 120, at 61-62, 91; REGINA MARKELL MORANTZ-SANCHEZ, SYMPATHY AND SCIENCE: WOMEN PHYSICIANS IN AMERICAN MEDICINE 47-65, 216-28 (1985); SMITH-ROSENBERG, *supra* note 5, at 231-32; WALSH, *supra* note 44, at 25; John Blake, *Women and Medicine in Antebellum America*, 39 BULL. HIST. MED. 99 (1965).

<sup>255</sup> See DONNISON, *supra* note 120, at 79-80; WALSH, *supra* note 44, at 40-42. See also Chapter 6, at notes 251-55, and Chapter 7, at notes 228, 285.

<sup>256</sup> See, e.g., SARAH STEVENSON, THE PHYSIOLOGY OF WOMAN, EMBRACING GIRLHOOD, MATERNITY AND MATURE AGE 68, 77, 79 (2<sup>nd</sup> ed. 1881); STOCKHAM, *supra* note 29, at 257. See generally SMITH-ROSENBERG, *supra* note 5, at 262-63.

<sup>257</sup> The premise was put forward by Dr. Elizabeth Blackwell that women made better physicians generally because of their greater capacity for empathy and caring. See Regina Morantz-Sanchez, *Feminist Theory and Historical Practice: Rereading Elizabeth Blackwell*, 31 HIST. & THEORY 51 (1992). See also Regina Morantz-Sanchez, *Physicians*, in WOMEN, HEALTH & MEDICINE IN AMERICA 477, 487 (Rima Apple ed. 1990); Regina Morantz-Sanchez, *The Gendering of Empathic Expertise: How Women Physicians Became More Empathic than Men*, in THE EMPATHIC PRACTITIONER 40 (Maureen Milligan & Ellen Singer More eds. 1994); Regina Markell Morantz & Sue Zschoche, *Professionalism, Feminism, and Gender Roles: A Comparative Study of Nineteenth-Century Medical Therapeutics*, 67 J. AM. HIST. 568, 569, 577-80, 584 (1980); Ann Shalleck, *Feminist Legal Theory and the Reading of O'Brien v. Cunard*, 57 MO. L. REV. 371, 391-96 (1992).

train women as physicians, in part because of the refusal of established medical faculties to accept women students. Samuel Gregory in Boston founded the first women's medical school in 1848.<sup>258</sup> The second was founded in 1850 in Philadelphia.<sup>259</sup> For one year (1851-52), the two schools even shared faculty, offering the fall semester in Philadelphia and the spring semester in Boston.<sup>260</sup>

These schools often also developed what were first termed "lying-in" hospitals, and later "women's and children's hospitals," attached both as teaching facilities and to provide for better supervised births. In the British Isles, lying-in hospitals were far older than in the United States, dating back to 1745 in Dublin, to 1747 in London, and to 1756 in Edinburgh.<sup>261</sup> The Gregory school, renamed the New England Medical College, took over the Boston Lying-In Hospital in 1858.<sup>262</sup> The original resident physician at the hospital under the college, Dr. Marie Zakrzewska, resigned in 1862 to found the New England Hospital for Women and Children ("Women's Hospital").<sup>263</sup> Dr. Zakrzewska was a woman of considerable distinction, having been appointed chief midwife and professor of midwifery at Charité Hospital, the largest hospital in Prussia, in 1852 at the age of 23, only to resign the position in the face of the intense resistance she encountered

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<sup>258</sup> FREDERICK WAITE, *HISTORY OF THE NEW ENGLAND FEMALE MEDICAL COLLEGE* (1950); WALSH, *supra* note 44, at 35-75.

<sup>259</sup> GUILIELMA FELL ALSOP, *HISTORY OF WOMEN'S MEDICAL COLLEGE, PHILADELPHIA, PENNSYLVANIA, 1850-1950* (1950); CLARA MARSHALL, *THE WOMEN'S MEDICAL COLLEGE OF PENNSYLVANIA: AN HISTORICAL OUTLINE* (1897).

<sup>260</sup> WALSH, *supra* note 44, at 53-54.

<sup>261</sup> DONNISON, *supra* note 120, at 37-40, 50, 61-62. A proposal to found such an institution made in England in 1660 came to nothing. *Id.* at 31.

<sup>262</sup> WALSH, *supra* note 44, at 57; FREDERICK IRVING, *SAFE DELIVERANCE* 121-23 (1942).

<sup>263</sup> AGNES VIETOR, *A WOMAN'S QUEST: THE LIFE OF MARIE E. ZAKRZEWSKA* 281-84 (1924); WAITE, *supra* note 258, at 52, 237-39; WALSH, *supra* note 44, at 64-66, 82-85. *See also* Chapter 7, at notes 385-88. On Women's Hospital, see VIRGINIA DRACHMAN, *HOSPITAL WITH A HEART: WOMEN DOCTORS AND THE PARADOX OF SEPARATISM AT THE NEW ENGLAND HOSPITAL, 1862-1969* (1984).

because of her gender and her youth.<sup>264</sup> Zakrzewska was also a co-founder, in 1857, of the New York Infirmary for Women and Children, the first hospital staffed entirely by women in the United States.<sup>265</sup> The Boston Lying-In Hospital closed one week after Zakrzewska's new hospital opened.<sup>266</sup> The New England Medical College failed a decade later, and merged with the homeopathic Boston University medical faculty in 1873.<sup>267</sup>

Women's Hospital survived and thrived as leading teaching institution for women in Boston and as a pioneering institution for providing gynecological, obstetric, and pediatric care in a setting run by women for women. Women's Hospital and St. Elizabeth's were the only hospitals in Boston that allowed gynecological surgery before 1880.<sup>268</sup> One of Zakrzewska's principal assistants was Dr. Anita Tyng, a woman turned down for admission by Harvard Medical School.<sup>269</sup> Noted anti-abortion crusader Horatio Robinson Storer was the only male physician appointed to the staff of the Women's Hospital during the nineteenth century—in fact until 1958, barely a decade before Women's Hospital closed.<sup>270</sup>

Opposition to women entering the formal medical profession was strong in the United States from the beginning. Dr. Charles Meigs led the early attack with the observation, during a lecture to medical students, that women have “a head almost too small for intellect but just big enough

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<sup>264</sup> DRACHMAN, *supra* note 263, at 28-29; VIETOR, *supra* note 263, at 84-85; WALSH, *supra* note 44, at 77-78. On Zakrzewska's career generally, see DRACHMAN, *supra*, at 21-43, 114-18, 135-38, 154; VIETOR, *supra*; WALSH, *supra*, 57-105, 108-09, 117-20, 148, 152.

<sup>265</sup> DRACHMAN, *supra* note 263, at 34-36; VIETOR, *supra* note 263, at 211; WALSH, *supra* note 44, at 81-82.

<sup>266</sup> WALSH, *supra* note 44, at 66.

<sup>267</sup> *Id.* at 68-71, 75, 195-99.

<sup>268</sup> *Id.* at 113.

<sup>269</sup> *Id.* at 165-66. Harvard did not get around to admitting women as medical students until 1945. *Id.* at xiv.

for love.”<sup>271</sup> This shocking comment reflected the widespread nineteenth century view, based in part on the then recent discovery that women’s brains were, on average, measurably smaller than men’s, that women were incapable of higher education.<sup>272</sup> Also widespread at the time was the notion that women were predisposed to mental disorders because of their periodic menses, especially if they avoided becoming pregnant, leading to criticism of higher education for women as posing a threat to their health or to the health of their children.<sup>273</sup> Dr. William Warren Potter expressed a common thought in these words: “Why spoil a good mother by making an ordinary

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<sup>270</sup> *Id.* at 109.

<sup>271</sup> C.D. MEIGS, LECTURE ON SOME OF THE DISTINCTIVE CHARACTERISTICS OF THE FEMALE, DELIVERED BEFORE THE CLASS OF THE JEFFERSON MEDICAL COLLEGE, JAN. 1847, at 67 (1847).

<sup>272</sup> See, e.g., 558 (1871; reprint ed. 1981); Herbert Spencer, *Psychology of the Sexes*, 4 POPULAR SCI. MONTHLY 30 (Nov. 1873). See also FERNAND CORCOS, LES AVOCATES 158 (1926). See generally STEVEN JAY GOULD, THE MISMEASURE OF MAN 105 (1981); SARAH BLAFFER HRDY, MOTHER NATURE: A HISTORY OF MOTHERS, INFANTS, AND NATURAL SELECTION 13-23 (1999); CYNTHIA EAGLE RUSSETT, SEXUAL SCIENCE: THE VICTORIAN CONSTRUCTION OF WOMANHOOD (1989); CAROL TAVRIS, THE MISMEASURE OF WOMAN: WHY WOMEN ARE NOT THE BETTER SEX, THE INFERIOR SEX, OR THE OPPOSITE SEX (1992); Stephanie Shields, *The “Variability Hypothesis”: The History of a Biological Model of Sex Differences in Intelligence*, 7 SIGNS 769 (1982).

<sup>273</sup> See EDWARD CLARKE, SEX IN EDUCATION, OR, A FAIR CHANCE FOR GIRLS 63 (1878); THOMAS SMITH CLOUSTON, FEMALE EDUCATION FROM A MEDICAL POINT OF VIEW (1882); THOMAS ADDIS EMMETT, THE PRINCIPLES AND PRACTICE OF GYNECOLOGY 21-22 (1879); WILLIAM GOODELL, LESSONS IN GYNECOLOGY 355 (1879); WILLIAM WARREN POTTER, HOW SHOULD GIRLS BE EDUCATED? A PUBLIC HEALTH PROBLEM FOR MOTHERS, EDUCATORS, AND PHYSICIANS (1891); UNIV. OF WIS. BD. REGENTS, ANNUAL REPORT FOR THE YEAR ENDING SEPTEMBER 30, 1877, at 45 (1877); Christian, *supra* note 172, at 152-53; William Edgar Darnall, *The Pubescent Schoolgirl*, 18 AM. GYNECOLOGICAL & OBSTETRICS J. 490 (1901); Johnson Martin, *Injury to Health from the Present System of Public Education*, BRIT. MED. J., Feb. 16, 1884, at 311; Withers Moore, *The Higher Education of Women*, BR. MED. J., Aug. 14, 1889, at 295; Willoughby Francis Wade, *On Some Functional Disorders of Females*, BRIT. MED. J., June 5, 1886, at 1053 (Lecture I), BRIT. MED. J., June 12, 1886, at 1095 (Lecture II). See also George Reid, *Legal Restraint upon Employment of Women before and after Childbirth*, BRIT. MED. J., July 30, 1892, at 275; W. Stanley Jevons, *Marrried Women in Factories*, BRIT. MED. J., Jan. 14, 1882, at 63. See generally CATHARINE BEECHER, THE PECULIAR RESPONSIBILITIES OF AMERICAN WOMEN, IN ROOT OF BITTERNESS 171 (Nancy Cott ed. 1972); VIRGINIA DRACHMAN, WOMEN LAWYERS AND THE ORIGINS OF PROFESSIONAL IDENTITY IN AMERICA: THE LETTERS OF THE EQUITY CLUB, 1887-1890, at 31-37 (1993); BARBARA EHRENREICH & DIEDRE ENGLISH, FOR HER OWN GOOD: 150 YEARS OF ADVICE TO WOMEN 108-16 (1978); GOULD, *supra* note 272, at 105; MORANTZ-SANCHEZ, *supra* note 254, at 54-55; REGINA MORANTZ-SANCHEZ, CONDUCT UNBECOMING A WOMAN: MEDICINE ON TRIAL IN BROOKLYN 117, 121 (1999) (“MORANTZ-SANCHEZ, CONDUCT”); ROSALIND ROSENBERG, BEYOND SEPARATE SPHERES: INTELLECTUAL ROOTS OF MODERN FEMINISM 1-27 (1982); SMITH-ROSENBERG, *supra* note 5, at 258-61; WALSH, *supra* note 44, at 106-46; Charles Rosenberg & Carroll Smith-Rosenberg, *The Female Animal: Medical and Biological Views of Women and Her Role in Nineteenth-Century America*, 4 J. INTERDISCIPLINARY HIST. 25 (1973); Thomson, *supra* note 168; Sue Zschoche, *Dr. Clarke Revisited: Science, True Womanhood, and Female Collegiate Education*, 29 HIST. OF EDUC. Q. 545 (1989).

grammarians?”<sup>274</sup> Dr. Withers Moore summed up this attitude with his observation that “women are made and meant to be not men, but the mothers of men.”<sup>275</sup> Apparently confirming such attitudes was the fact that during the nineteenth century fewer than five percent of white women in the United States worked outside the home after marriage.<sup>276</sup> Most male medical authorities of the time shared the opinion that women were physiologically unsuited to be physicians.<sup>277</sup>

Feminist leaders of the time hotly contested such claims. One of the cleverer ripostes to the claim that women would be rendered unfit for marriage and motherhood by education was to point out that too many women were not adequately prepared to become mothers. As Helen Cameron Parker wrote:

Society has seen and said—“the hand that rocks the cradle rules the world, and it is therefore a moral necessity that women should receive the best intellectual training which the State can give;”... Is it a small matter to the nation that each day scores of women become wives without one idea of the true duties of a wife, of the awful responsibility of a mother,... Would ignorance be tolerated in any other profession?<sup>278</sup>

To a degree, social institutions developed to respond to this argument, but separately from the general education system. A large industry emerged to provide instruction to women on the proper performance of their social roles—mostly through public lectures and books.<sup>279</sup> The separation of this program of instruction from the general education establishment served to protect

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<sup>274</sup> POTTER, *supra* note 273, at 9.

<sup>275</sup> Moore, *supra* note 273, at 299.

<sup>276</sup> PETCHESKY, *supra* note 5, at 75; WEINER, *supra* note 134, at 6.

<sup>277</sup> See, e.g., CLARKE, *supra* note 273; 2 G. STANLEY HALL, *ADOLESCENCE* 569-70 (1904); Jonathon Hutchinson, *A Review of Current Topics of Medical and Social Interest*, BRIT. MED. J., Aug. 9, 1876, at 231, 232; Editorial, *Female Physicians*, BRIT. MED. J., July 26, 1862, at 96; Editorial, *The Female Doctor Question*, BRIT. MED. J., Nov. 22, 1862, at 537; Editorial, *Medical Education for Women*, BRIT. MED. J., Apr. 30, 1870, at 445; *Shall We Have Female Graduates in Medicine?*, BRIT. MED. J., Aug. 2, 1856, at 653.

<sup>278</sup> Helen Cameron Parker, *Technical Schools for Women*, 1 CAN. MAG. 633, 634-37 (1893).

against arguments that women were unfit to develop their intellects. As a result, throughout the nineteenth century and well into the twentieth century, the prejudice against women becoming doctors prevailed without serious challenge within the medical establishment.

Only a few male doctors who had female associates came to accept the ability and right of women generally to become doctors.<sup>280</sup> This is hardly surprising considering the prevailing sentiments of female frailty and of the limited functions in life appropriate to the female intellect pervasive throughout much of human history, and particularly in the nineteenth century. Even at Oberlin College, the first co-educational institution in the United States, the strong emphasis on maintaining gender roles extended to requiring “coeds” to clean the rooms of male students,<sup>281</sup> while they were prohibited from reading novels for fear that such an activity would threaten their chastity.<sup>282</sup> So widely shared was the notion that women were generally not capable of serving as physicians that the leading woman physicians of the time, including those at Women’s Hospital, seldom publicly opposed the prevailing wisdom. Public opposition to the notion of feminine in-

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<sup>279</sup> See generally BARBARA EHRENREICH & DEIDRE ENGLISH, *FOR HER OWN GOOD: 150 YEARS OF EXPERTS’ ADVICE TO WOMEN* (1978).

<sup>280</sup> WALSH, *supra* note 44, at 132, 148-50, 155-62, 170-71. Eventually, this would include Horatio Robinson Storer, although not before he had opposed the idea of women physicians for some years. See Chapter 7, at notes 394-439.

<sup>281</sup> See 1 ROBERT FLETCHER, *A HISTORY OF OBERLIN COLLEGE: FROM ITS FOUNDATION THROUGH THE CIVIL WAR* 382 (1943). See also Chapter 7, at notes 408-12.

<sup>282</sup> 1 FLETCHER, *supra* note 281, at 308.

capacity to be educated generally or as physicians was expressed by various feminists,<sup>283</sup> but seldom by women physicians—or by women lawyers, either.<sup>284</sup>

One of the few female physicians to dispute publicly the claims about women's natural fitness to become doctors was Dr. Mary Putnam Jacobi, but she did so purely in terms of disputing whether menstruation periodically incapacitated them physically or intellectually.<sup>285</sup> The general silence even of women physicians on whether women in general had the intellectual capacity to become educated tells much about the temper of the times even if one concludes that the women failed to respond solely because they considered it impolitic.<sup>286</sup> Although today we see such sentiments as absurd, just such ideas were expressed regarding university education for women generally as recently as 1962.<sup>287</sup> There were, of course, numerous women in the later nineteenth century who proved themselves fit to become physicians, lawyers, soldiers, and virtually any other profession open to men. Historian Mary Walsh surmised that the reason so many male physicians denigrated the abilities of female physicians was simply to eliminate competition from a quarter likely to be able to appeal with particular effectiveness to the clientele for gynecological services.<sup>288</sup> If the claimed attraction of women patients to women physicians were real, it would

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<sup>283</sup> See, e.g., ELIZA BISBEE DUFFEY, *NO SEX IN EDUCATION; OR AN EQUAL CHANCE FOR BOTH GIRLS AND BOYS* (1874); THE EDUCATION OF AMERICAN GIRLS (Anna Callender Brackett ed. 1874); GEORGE FISK & ANNA MANNING COMFORT, *WOMAN'S EDUCATION AND WOMAN'S HEALTH: CHIEFLY IN REPLY TO "SEX IN EDUCATION"* (1874); JULIA WARD HOWE, *SEX AND EDUCATION: A REPLY TO DR. CLARKE'S "SEX IN EDUCATION"* (1874). See generally WALSH, *supra* note 44, at 128-32.

<sup>284</sup> DRACHMAN, *supra* note 263, at 33.

<sup>285</sup> MARY PUTNAM JACOBI, *THE QUESTION OF REST FOR WOMEN DURING MENSTRUATION* (1877). See also EMILY POPE, C. AUGUSTA POPE, & EMMA CALL, *THE PRACTICE OF MEDICINE BY WOMEN IN THE UNITED STATES* (1881).

<sup>286</sup> WALSH, *supra* note 44, at 117-18, 127-28.

<sup>287</sup> FREDERICK RUDOLPH, *THE AMERICAN COLLEGE AND UNIVERSITY: A HISTORY* 324 (1962).

<sup>288</sup> WALSH, *supra* note 44, at 116-17, 133-36.

have been devastating to men physicians—women were a clear majority of the patients in the nineteenth century.<sup>289</sup> And we do find that Dr. Horatio Robinson Storer—the favorite whipping boy of modern feminist historians—did strenuously attack claims that women were best treated by women, but then so did Dr. Marie Zakrzewska.<sup>290</sup>

Women physicians were not welcomed by their male counterparts, but the women physicians did achieve considerable success in entering the allopathic (and homeopathic) medical profession despite the male opposition.<sup>291</sup> By 1890, there were 13 allopathic medical schools (and one homeopathic medical school) specifically for women, and women, after prolonged and bitter struggles, were beginning to gain admission to the formerly all-male medical schools.<sup>292</sup> In that same year, 18 percent of the physicians in Boston were women, and they maintained their own hospital and their own medical school.<sup>293</sup> In 1890 there were more woman doctors in Boston alone (210) than there were woman lawyers in the entire United States (200).<sup>294</sup> By 1893, women were 19 percent of the students at the University of Michigan Medical School, 31 percent of the students enrolled at the Kansas Medical College, and 10 percent or more of the students at another 16 “regular” medical colleges across the United States.<sup>295</sup> The number of women physi-

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<sup>289</sup> *Id.* at 135.

<sup>290</sup> *Id.* at 118. *See also* DRACHMAN, *supra* note 263, at 54-57; Richard Shryock, *Women in American Medicine*, 5 J. AM. MEDICAL WOMEN'S ASS'N 375 (1950).

<sup>291</sup> *See generally* WALSH, *supra* note 44.

<sup>292</sup> PENINA GLAZER & MIRIAM SLATER, *UNEQUAL COLLEAGUES: THE ENTRANCE OF WOMEN INTO THE PROFESSIONS, 1890-1940*, at 1-23 (1987); MORANTZ-SANCHEZ, *supra* note 254, at 64-183; WALSH, *supra* note 44, at 147-92.

<sup>293</sup> PAUL STARR, *THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE: THE RISE OF A SOVEREIGN PROFESSION AND THE MAKING OF A VAST INDUSTRY* 117 (1982); WALSH, *supra* note 44, at xvi-xvii, 107-108, 185-86.

<sup>294</sup> WALSH, *supra* note 44, at 107-08.

<sup>295</sup> *Id.* at 182, 193.

cians in the United States was also impressive by international standards. For example, there were only 95 woman physicians in France in 1900 compared to 7,387 in the United States (counting only those with medical degrees).<sup>296</sup> The situation in England was even more dismal than in France. Historian Mary Walsh's report that there were then some 258 women physicians in England in 1900 ignores the fact that four-fifths of the woman physicians registered in England were then practicing in India!<sup>297</sup>

Eventually the criticism of women as physicians succeeded, but not until they gained admission to coeducational medical schools. The admission of women to coeducational medical schools was the death-knell for the women's medical schools. Only three—Woman's Medical College in Baltimore, New York Woman's Medical College in New York City, and Woman's Medical College of Pennsylvania in Philadelphia—survived after 1903.<sup>298</sup> Still, as late as 1926, 75 percent of the women in the American College of Surgeons had graduated from women's medical colleges.<sup>299</sup> Unfortunately, the apparent acceptance of women into the male medical schools proved illusory, and after 1910 women students were admitted to the coeducational schools only in sharply reduced numbers (in some cases they were excluded altogether).<sup>300</sup> By 1914, nationally only four percent of all medical students were women.<sup>301</sup> As a result, women

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<sup>296</sup> *Id.* at 186.

<sup>297</sup> Compare *id.* at 181, with DONNISON, *supra* note 120, at 225 n. 26.

<sup>298</sup> WALSH, *supra* note 44, at 179-80.

<sup>299</sup> *Id.* at 262.

<sup>300</sup> *Id.* at 182-267; GLAZER & SLATER, *supra* note 292, at 76. See generally GLAZER & SLATER, *supra*, at 69-117; GLORIA MELNICK MOLDOW, WOMEN DOCTORS IN GILDED AGE WASHINGTON: RACE, GENDER, AND PROFESSIONALISM 48-74 (1987); STARR, *supra* note 293, at 124; Jodi Elgart Paik, *The Feminization of Medicine*, 283 JAMA 666, 667 (2000).

<sup>301</sup> Paik, *supra* note 300, at 667.

reached a peak of six percent of all physicians in the United States in 1910.<sup>302</sup> In fact, there were fewer women physicians in Boston in 1970 than in 1900.<sup>303</sup> The total number of woman physicians in the whole of the United States in 1910 (9,015) declined and was not equaled again until 1950.<sup>304</sup> Even as late as 1970, only eight percent of all physicians in the United States were women, as were 13 percent of the medical students in that year.<sup>305</sup> Black women in particular found it nearly impossible to enter the profession, particularly after the turn of the century.<sup>306</sup>

In short, after 1910 women were largely excluded from the medical profession except in the role of nurses. Only after 1970 did the number of women in medical schools begin to grow significantly, soon exceeding the numbers at the end of the nineteenth century.<sup>307</sup> Yet at no time in this process of exclusion did opposition to the claim that women were by their nature incapable of being physicians correlate with support for abortion.<sup>308</sup>

Women physicians stood at a special place in the history of the nineteenth century abortion statutes, being at the intersection of the two major groups most interested in the practice and legality of abortion. Yet given that the predominant attitudes among both women (or at least among feminist leaders—who alone have left extensive records of their thought) and physicians

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<sup>302</sup> WALSH, *supra* note 44, at 186. *See generally* CAROL LOPATE, *WOMEN IN MEDICINE* (1968); Lee Powers, Harry Weisenfedler, & Rexford Parmelee, *Practice Patterns of Women and Men Physicians*, 44 *J. MED. EDUC.* 481 (1969).

<sup>303</sup> WALSH, *supra* note 44, at 186. There was a similar decline the number of women medical faculty in the United States. *See, e.g.*, Kathleen Farrell, Marlys Hearst Wills, & Miguel Holguin, *Women Physicians in Medical Academia*, 241 *JAMA* 2808 (1979).

<sup>304</sup> WALSH, *supra* note 44, at 186.

<sup>305</sup> Paik, *supra* note 300, at 666.

<sup>306</sup> STARR, *supra* note 293, at 102-06, 116-25, 162-63; MOLDOW, *supra* note 300, at 94-113.

<sup>307</sup> WALSH, *supra* note 44, at 268-83, 303. *See also* Farrell, Wills, & Holguin, *supra* note 303.

was decidedly hostile to abortion, we should not be surprised to discover that women physicians in the nineteenth century were also outspoken supporters of the criminality of abortion. The hostility of women physicians towards abortion began with Elizabeth Blackwell, the first formally licensed woman physician in the United States.<sup>309</sup> Blackwell abhorred abortion, although the evidence of her attitude is confined to private letters.<sup>310</sup>

Women physicians were among the strongest crusaders against abortion and provided us with some of the most rigorous defenses of the unborn child's right to life. For example, Dr. Charlotte Denman Lozier, a professor at the New York City Medical College for Women, won acclaim both in the popular press and in the feminist press for her personal crusade against abortion. Her crusade was cut short by an untimely death at the age of 26 in 1870. She was eulogized in an obituary published in *The Revolution*.<sup>311</sup> *The Revolution* was a leading feminist journal of the time, owned by Susan B. Anthony and edited by Elizabeth Cady Stanton and Parker Pillsbury.<sup>312</sup> The obituary was written by Paulina Wright Davis, an ardent advocate of women's

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<sup>308</sup> Compare, e.g., DUFFEY, *supra* note 283 (supporting equal educational opportunities for girls), with DUFFEY, *supra* note 29, at 274-75 (opposing abortion).

<sup>309</sup> Blackwell was also the first woman officially recognized as a physician in England. BRODIE, *supra* note 21, at 14; DONNISON, *supra* note 120, at 79. The second in England was Elizabeth Garrett. See DONNISON, *supra*, at 81; JO MANTON, ELIZABETH GARRETT ANDERSON (1966). Historian Mary Walsh identifies Harriot Hunt as the first actual female physician in the United States, although Dr. Hunt was never formally licensed. WALSH, *supra* note 44, at 1, 20-33. See also 1 ELIZABETH CADY STANTON, SUSAN ANTHONY, & MATILDA JOSLYN GAGE, HISTORY OF WOMEN SUFFRAGE 224 (1969); Ann Douglas Wood, *The Fashionable Diseases: Women's Complaints and Their Treatment in Nineteenth-Century America*, 4 J. INTERDISCIPLINARY HIST. 25, 44-47 (1973); Regina Markell Morantz, *The Perils of Feminist History*, 4 J. INTERDISCIPLINARY HIST. 649 (1973). See generally HUNT, *supra* note 254.

<sup>310</sup> BRODIE, *supra* note 21, at 34, 82, 128, 228.

<sup>311</sup> See, e.g., Paulina Wright Davis, *Obituary*, THE REVOLUTION, Jan. 20, 1870, at 42.

<sup>312</sup> MOHR, *supra* note 4, at 288 n.73.

rights who on another occasion chose to describe marriage as “legalized prostitution.”<sup>313</sup> This attitude did not deter Ms. Davis, in her obituary of Dr. Lozier, from giving fulsome praise to the deceased young doctor’s efforts of to suppress abortion.

The position taken by virtually all women physicians is illustrated by this passage from a book by Dr. Alice Bunker Stockham:

When the female germ and male sperm unite, then is the inception of a new life; all that goes to make up a human being—body, mind, and spirit, must be contained in embryo within this minute organism. Life must be present from the very moment of conception. If there was not life there could not be conception. At what other period of a human being’s existence, either pre-natal or post-natal, could the union of soul and body take place? Is it not plain that the violent or forcible removal of it from the citadel of life, is its premature death, and hence the act can be denominated by no more mild term than murder, and whoever performs that act, or is accessory to it, guilty of the crime of all crimes?<sup>314</sup>

Stockham was not some simpering woman currying favor with male practitioners. Stockham was a pioneer in women’s health. She enjoyed inventing a new vocabulary to suggest that her ideas were not simply derived from past or current popular ideas, and she was not afraid to outrage public opinion. Thus Stockham was one of the earliest public advocates of family planning.<sup>315</sup> The term she invented for her preferred method of contraception was “karezza,” by which she meant *coitus reservatus*—intercourse without male ejaculation.<sup>316</sup>

The book that I have quoted for Stockham’s attitude toward abortion was yet another work in which she sought to challenge conventional thinking. Even its title, *Tokology: A Book for Every Woman*, would be a challenge to many potential readers. Nonetheless, that book was not

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<sup>313</sup> Paulina Wright Davis, *Address to the National Women’s Suffrage Association*, quoted in GORDON, *supra* note 5, at 104.

<sup>314</sup> STOCKHAM, *supra* note 29, at 246. See also Mary Dixon-Jones, *Criminal Abortion—Its Evil and Its Sad Consequences*, 3 WOMEN’S MED. J. 28 (1894).

<sup>315</sup> See, e.g., ALICE DUNCAN STOCKHAM, *KAREZZA: THE ETHICS OF MARRIAGE* 53, 82-83 (1898).

merely a tract read by a few other physicians. As its title indicates, the book was intended for lay readers, and it enjoyed great popularity. The book went through 45 editions between its publication in 1883 and 1897—an average of better than three per year.<sup>317</sup>

Dr. Stockham's analysis illustrated the sharp contrast—even among women who had had abortions—between the horror feminists expressed for abortion and their accepting attitude towards contraception.<sup>318</sup> This contrast suggests that their attitude toward abortion was focused on abortion rather than on either sex or men. This conclusion is also supported by strong evidence that women themselves were the primary movers in the process of medicalizing birth.<sup>319</sup> Dr. Jennie Oremán, a contemporary of Stockham, expressed similar views in a journal targeted at women readers.<sup>320</sup> Dr. Anne Densmore lectured to the same effect a generation earlier.<sup>321</sup> In 1894, Dr. Mary Dixon Jones, perhaps the most prominent woman physician in Brooklyn (then a large and separate city), also eloquently and passionately condemned abortion.<sup>322</sup>

Feminist historians have responded to this reality by arguing that women physicians feared association with abortion because of their vulnerability to criticism by men physicians.<sup>323</sup> This seems unlikely given the general pattern of hostility to abortion by nineteenth century femi-

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<sup>316</sup> See Chapter 2, at notes 79-81.

<sup>317</sup> D'EMILIO & FREEDMAN, *supra* note 24, at 67.

<sup>318</sup> See, e.g., *id.* at 50-63, 64-65. See also the text *supra* at notes 42-60.

<sup>319</sup> See Chapter 2, at notes 211-39.

<sup>320</sup> Jennie Oremán, *The Medical Woman's Temptation and How to Meet It*, 3 THE WOMEN'S MED. J. 87 (1901).

<sup>321</sup> Densmore, *supra* note 29.

<sup>322</sup> Mary Dixon Jones, *Criminal Abortion—Its Evils and Its Sad Consequences*, 3 WOMEN'S MED. J. 28 (1894). Like so many others mentioned in this chapter, Dixon Jones in other respects was a strong defender of women's interests even while she condemned abortion. See MORANTZ-SANCHEZ, CONDUCT, *supra* note 273, at 131-33.

<sup>323</sup> REAGAN, *supra* note 21, at 57-58. MORANTZ-SANCHEZ, CONDUCT, *supra* note 273, at 180.

nists—women who did not shy away from advocating the outrageous. Indeed, as we have seen, Stockham's denunciations of abortion were contained in writings that were medically and sexually radical. Arguments that these women physicians were simply afraid of criticism over abortion are not credible. Moreover, if these arguments are credible, they undercut the argument that abortion was socially acceptable: if abortion were considered socially acceptable, men physicians could not deploy accusations of support for abortion to discredit women physicians with the general public.

Dr. Horatio Robinson Storer, he of the Women's Hospital staff, has been accused of blaming the rise in abortions on the emergence of women physicians in the later nineteenth-century. Storer never said this, forcing his accusers to claim that he did so by innuendo.<sup>324</sup> Neither he nor others campaigning against abortion who also criticized the possibility of women becoming physicians made any rhetorical use of abortion against the women doctors. Nothing could more eloquently indicate the rarity of support for the practice of abortion among female physicians.

DID FEMINIST OPPOSITION TO ABORTION MAKE A DIFFERENCE?

*[K]nowledge and truth are always fragmentary.*

—Allan Hutchinson<sup>325</sup>

There remains the question of whether the feminist opposition to abortion was of any real significance given the “allopathic conspiracy” that we are told was the real force behind the increasingly stringent abortion statutes of the nineteenth century. This is akin to asking whether environmentalists or business interests better explain why modern environmental regulations ex-

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<sup>324</sup> WALSH, *supra* note 44, at 145-46. One unidentified doctor did make such a claim at a meeting where Storer spoke in 1857, but as Storer is identified repeatedly in the same article and is not identified as the speaker in this instance, there seems to be no reason to assume that the doctor who made this statement was Storer. See “Medicus,” *Communication—Suffolk District Medical Society*, 2 MED. WORLD 211 (1857).

<sup>325</sup> Allan Hutchinson, *Identity Crisis: The Politics of Interpretation*, 26 NEW ENG. L. REV. 1173, 1185 (1992).

ist, or have taken one particular form rather than another. The answer is, of course, that both are responsible to some degree, and that often the precise influences are difficult to assess—particularly as neither group is monolithic and each group sometimes finds closer allies in the other group than among its “like kind.” Going back to the nineteenth century to compare the effects of feminist opposition to abortion with medical or other opposition to abortion is even more uncertain because, by and large each, of these groups (and many others) were on the same side.

We are also somewhat befuddled by the understandable tendency of modern historians to anachronism. We tend to think of the organized medical profession and the organized legal profession as having enormous and disproportionate influence back then if we perceive them as wielding such influence today. Whatever may be the truth today, those professions had no such influence through much of the nineteenth century. We have already noted the failure of the allopathic medical societies to block legislative recognition of competing medical organizations or professions in the face of Jacksonian democracy.<sup>326</sup> In the next chapter, we shall examine the similar deprofessionalization of the Bar.<sup>327</sup> The disorganization of the Bar was particularly pronounced; the American Bar Association was not even organized until 1878—a full generation after the organization of the American Medical Association in the 1850s—and it was decades before it had any real political influence.<sup>328</sup> In contrast, the nineteenth-century feminists were

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<sup>326</sup> See Chapter 6, at notes 268-72.

<sup>327</sup> See Chapter 9, at notes 78-82.

<sup>328</sup> Colin Croft, Note, *Reconceptualizing American Legal Professionalism: A Proposal for Deliberate Moral Community*, 67 NYU L. REV. 1256, 1287-98 (1992). See generally MAXWELL BLOOMFIELD, *AMERICAN LAWYERS IN A CHANGING SOCIETY, 1776-1876* (1978); ROBERT STEVENS, *LAW SCHOOL: LEGAL EDUCATION IN AMERICA FROM THE 1850S TO THE 1980S* (1983); *THE LEGAL PROFESSION: MAJOR HISTORICAL INTERPRETATIONS* (Kermit Hall ed. 1987).

highly organized and were successful in such areas as the reform of property regimes, of divorce, and (in some states) of the franchise.<sup>329</sup>

We need not rely solely on inferences about the legislative clout of these several groups. In at least one political fight, the doctors and the feminists were on opposite sides—and the feminists won. In the 1870s, many members of the American Medical Association were strong supporters of the legalization of prostitution on the state and local level, arguing that legalization would allow for mandatory health inspections as well as providing some measure of protection against the exploitation and abuse that were common in that trade.<sup>330</sup> Dr. J. Marion Sims, president of the American Medical Association in 1876 and notorious practitioner of dubious gynecological surgery, made the legalization and regulation of prostitution the theme of his year at the head of the organization.<sup>331</sup> In the fight to legalize prostitution, the physicians found themselves largely alone, and they lost.

Feminists, organized in the “social purity” crusade, were strongly opposed to the legalization of prostitution, even introducing the term “white slavery” in an effort to link their crusade to the recently successful abolition movement.<sup>332</sup> Historian Jean Donnison suggests that the “social purity” movement, with its escalating intense attention to the hitherto largely neglected issue of

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<sup>329</sup> See Chapter 2, at notes 153-62.

<sup>330</sup> See, e.g., Samuel Gross, *Syphilis in Its Relation to Natural Health*, 25 TRANS. AM. MED. ASS'N 249 (1874).

<sup>331</sup> J. Marion Sims, *Address*, 27 TRANS. AM. MED. ASS'N 100 (1876). On his career, see BARKER-BENFIELD, *supra* note 124, at 91-119; JAMES RICCI, ONE HUNDRED YEARS OF GYNECOLOGY, 1800-1900, at 36-37, 46-47 (1945); J. MARION SIMS, *THE STORY OF MY LIFE* (H. Marion Sims ed. 1891); WALSH, *supra* note 44, at 115-16; Isabelle Gunning, *Arrogant Perception, World-Traveling and Multicultural Feminism: The Case of Female Genital Surgeries*, 23 COLUM. H. RTS. L. REV. 189, 205-09 (1991); Isabel McAslan, *Pornography or Misogyny? Fear and the Absurd*, in *THE ANATOMY OF GENDER: WOMEN'S STRUGGLE FOR THE BODY* 37 (Dawn Currie & Valerie Raoul eds. 1992).

<sup>332</sup> See, e.g., Dietrick, *supra* note 110. See generally BERG, *supra* note 20, at 181-84, 211; D'EMILIO & FREEDMAN, *supra* note 24, at 140-45, 148-56, 202-15; EPSTEIN, *supra* note 110, at 125-28; GORDON, *supra* note 5, at 116-35;

prostitution, reflected a rising incidence of prostitution fueled by the increasing difficulty of women to find work outside the home.<sup>333</sup> Whatever the causes of the feminist concern about prostitution, nearly everywhere the proposed statutes or ordinances were defeated, and in St. Louis, where such an ordinance was enacted in 1870, the social purists succeeded in obtaining its repeal in 1874.<sup>334</sup> The feminists, of course, were not alone in their effort. Among their allies was Anthony Comstock, who was neither a physician nor a lawyer.<sup>335</sup> In fact, nineteenth century feminists were strong supporters of the Comstockery that today's feminists love to decry,<sup>336</sup> while Comstock himself devoted only a brief period in his long career crusading against the vices of others to pursuing abortionists.<sup>337</sup> When the doctors, the feminists, and the lawyers (together with the clergy, journalists, and others) joined together to fight the emerging practice of abortion, they were nearly irresistible.

Ultimately, we might never be able to sort out whether feminist opposition to abortion was a significant factor in bringing about the enactment of the abortion statutes. In one area, the influence of the men and the women physicians strongly coincided, and that coincidence could indeed have been critical to the success of the legislative effort regarding abortion. Rather than express-

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PIVAR, *supra* note 110; ROSEN, *supra* note 109, at 112-36; SHANLEY, *supra* note 29, at 79-86, 92-93; SMITH-ROSENBERG, *supra* note 5, at 109-28; Pleck, *supra* note 110.

<sup>333</sup> DONNISON, *supra* note 120, at 72-73.

<sup>334</sup> MARVIN OLASKY, *THE PRESS AND ABORTION, 1838-1988*, at 126-28 (1988); Neil Shumsky, *Tacit Acceptance: Respectable Americans and Segregated Prostitution, 1870-1910*, 19 J. SOC. HIST. 665, 669 (1986). Similar episodes occurred in England (1864-1883), and in New Orleans (1870-1874) and in San Francisco (1911-1913) in the United States. TANNAHILL, *supra* note 20, at 366-68. *See generally* BARBARA MEIL HOBSON, *UNEASY VIRTUE: THE POLITICS OF PROSTITUTION AND THE AMERICAN REFORM TRADITION* (2<sup>nd</sup> ed. 1990); JUDITH WALKOWITZ, *CITY OF DREADFUL DELIGHT: NARRATIVES OF SEXUAL DANGER IN LATE-VICTORIAN LONDON* (1992); JEFFREY WEEKS, *SEX, POLITICS AND SOCIETY: THE REGULATION OF SEXUALITY SINCE 1800* (1981); Mary Ryan, *The Power of Women's Networks: A Case Study of Female Moral Reform in Antebellum America*, 5 FEMINIST STUD. 66 (1979).

<sup>335</sup> BROUN & LEECH, *supra* note 99, at 18.

<sup>336</sup> *See, e.g.*, BRODIE, *supra* note 21, at 263-66, 281-88; GORDON, *supra* note 5, at 164-66, 208-09.

ing some sort of womanly solidarity with midwives, women physicians were in the forefront of the movement to eliminate midwives, charging midwives with being unsanitary and inadequately trained.<sup>338</sup> Elisabeth Crowell, a nurse, was also one of the persons who most vehemently denounced the word “midwife” as virtually synonymous with “abortionist.”<sup>339</sup> Women physicians and nurses might have been especially sensitive to competition from midwives, so their criticism might indeed have been nothing more than an effort to eliminate competitors from the market place.<sup>340</sup> Still, this hardly marks such an effort as a “male conspiracy.”<sup>341</sup>

The women physicians and nurses involved in this effort saw themselves as protecting other women from the incompetence and unsanitary practices of midwives rather than as putting these other women more firmly under the control of men.<sup>342</sup> Acting from this perspective, non-professional women’s organizations like the Welfare League and the Women’s City Club joined the call for suppressing abortion and regulating midwifery in turn of the century Chicago.<sup>343</sup> No wonder historians of midwifery do not explain the suppression of midwifery as a male conspir-

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<sup>337</sup> See OLASKY, *supra* note 75, at 190-92.

<sup>338</sup> See, e.g., Georgina Grothan, *Evil Practices of the So-Called Midwife*, 7 OMAHA CLINIC 175 (1895); Elizabeth Jarrett, *The Midwife or the Women Doctor*, 54 MED. REC. 610 (1898); Ella Marble, *The First Pan-American Medical Congress—Some of the Women Who Took Part*, 1 WOMEN’S MED. J. 199 (1893); Eliza Root, *The Status of Obstetrics in General Practice*, TRANS. FIRST PAN-AM. MED. CONG., pt. I, at 901 (1895). See generally DONNISON, *supra* note 120, at 90-91, 121-24, 134, 140, 142, 144-49, 167, 169-70, 172; MORANTZ-SANCHEZ, *supra* note 254, at 232-33; REAGAN, *supra* note 21, at 92-93.

<sup>339</sup> F. Elisabeth Crowell, *The Midwives of New York*, 17 CHARITIES & THE COMMONS 667 (1907).

<sup>340</sup> DONNISON, *supra* note 120, at 122, 134, 140, 178-79; REAGAN, *supra* note 21, at 93-94.

<sup>341</sup> *Id.* at 94.

<sup>342</sup> *Id.* at 95-96.

<sup>343</sup> *Id.* at 105-07.

acy, but in terms of class, ethnicity, and professional interest.<sup>344</sup> The charges of male conspiracy come only from historians of abortion.<sup>345</sup> Neither set of historians bother to explain, however, how the charges of incompetence or worse could be sustained in a public forum in which, at the beginning at least, nearly every women hearing the claims would have had personal experience with a midwife, if there was no substance whatsoever to the charges—as some historians would apparently have us believe.

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<sup>344</sup> ROBYN MUNCY, CREATING A FEMALE DOMINION IN AMERICAN REFORM, 1890-1935, at 115-19 (1990); Molly Ladd-Taylor, "Grannies" and "Spinsters": Midwife Education under the Sheppard-Towner Act, 22 J. SOC. HIST. 255 (1988); Judy Barrett Litoff, *Midwives and History*, in WOMEN, HEALTH, AND MEDICINE IN AMERICA: A HISTORICAL HANDBOOK 443, 446-47, 451 (Rima Apple ed. 1990). See generally CHARLOTTE BORST, CATCHING BABIES: THE PROFESSIONALIZATION OF BIRTH, 1870-1920 (1995).

<sup>345</sup> See BRODIE, *supra* note 52, at 54-56; RAYMOND DEVRIES, MAKING MIDWIVES LEGAL: CHILDBIRTH, MEDICINE, AND THE LAW 25-27 (2<sup>nd</sup> ed. 1996); GORDON, *supra* note 5, at 59-60, 160-72; MCLAREN, *supra* note 46, at 115; REAGAN, *supra* note 80, at 10-11, 81-82, 90-112; SMITH-ROSENBERG, *supra* note 5, at 223-44; Jane Pacht Brickman, *Public Health, Midwives, and Nurses, 1880-1930*, in NURSING HISTORY: NEW PERSPECTIVES, NEW POSSIBILITIES 65, 69 (Ellen Condliffe Lagemann ed. 1983); Jane Maslow Cohen, *A Jurisprudence of Doubt: Deliberative Autonomy and Abortion*, 3 COLUM. J. GENDER & LAW. 175, 208-10 (1992). See also Neal Devitt, *How Doctors Conspire to Eliminate the Midwife even though the Scientific Data Support Midwifery*, in COMPULSORY HOSPITALIZATION: FREEDOM OF CHOICE IN CHILDBIRTH? 345 (D. & L. Stewart eds. 1979); Frances Kobrin, *The American Midwife Controversy: A Crisis of Professionalization*, 40 BULL. HIST. MED. 350, 358 (1966).