

# **Examining the Cultural Landscape: A Closer Look at Prenatal and Reproductive Justice**

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# Dobbs v. Jackson Women's Health Organization

Not only was there no support for such a constitutional right until shortly before *Roe*, but abortion had long been a *crime* in every single State. At common law, abortion was criminal in at least some stages of pregnancy and was regarded as unlawful and could have very serious consequences at all stages. American law followed the common law until a wave of statutory restrictions in the 1800s expanded criminal liability for abortions. By the time of the adoption of the Fourteenth Amendment, three-quarters of the States had made abortion a crime at any stage of pregnancy, and the remaining States would soon follow.

*Roe* either ignored or misstated this history, and *Casey* declined to reconsider *Roe*'s faulty historical analysis. It is therefore important to set the record straight.

# Dobbs v. Jackson Women's Health Organization

Until the latter part of the 20th century, there was no support in American law for a constitutional right to obtain an abortion. No state constitutional provision had recognized such a right. Until a few years before *Roe* was handed down, no federal or state court had recognized such a right. Nor had any scholarly treatise of which we are aware. And although law review articles are not reticent about advocating new rights, the earliest article proposing a constitutional right to abortion that has come to our attention was published only a few years before *Roe*.<sup>23</sup>

# How a 19th century vision can inform the post-Roe 21st century

- 1) What was the vision of the early women's rights advocates?
- 2) How was that vision abandoned by the 1970s feminists?
- 3) How can we need to reclaim it today?



**What are  
rights?**

# Dobbs dissent

BREYER, SOTOMAYOR, and KAGAN, JJ., dissenting

did not understand women as full members of the community embraced by the phrase “We the People.” In 1868, the first wave of American feminists were explicitly told—of course by men—that it was not their time to seek constitutional protections. (Women would not get even the vote for another half-century.) To be sure, most women in 1868 also had a foreshortened view of their rights: If most men could not then imagine giving women control over their bodies, most women could not imagine having that kind of autonomy. But that takes away nothing from the core point.

# Declaration of Sentiments and Resolutions

## Seneca Falls (1848)

*Whereas... this law of Nature being coeval with mankind, and dictated by God himself, is of course superior in obligation to any other.* It is binding over all the globe, in all countries and at all times; no human laws are of any validity if contrary to this, and such of them as are valid, derive all their force, and all their validity, and all their authority, mediately and immediately, from this original.

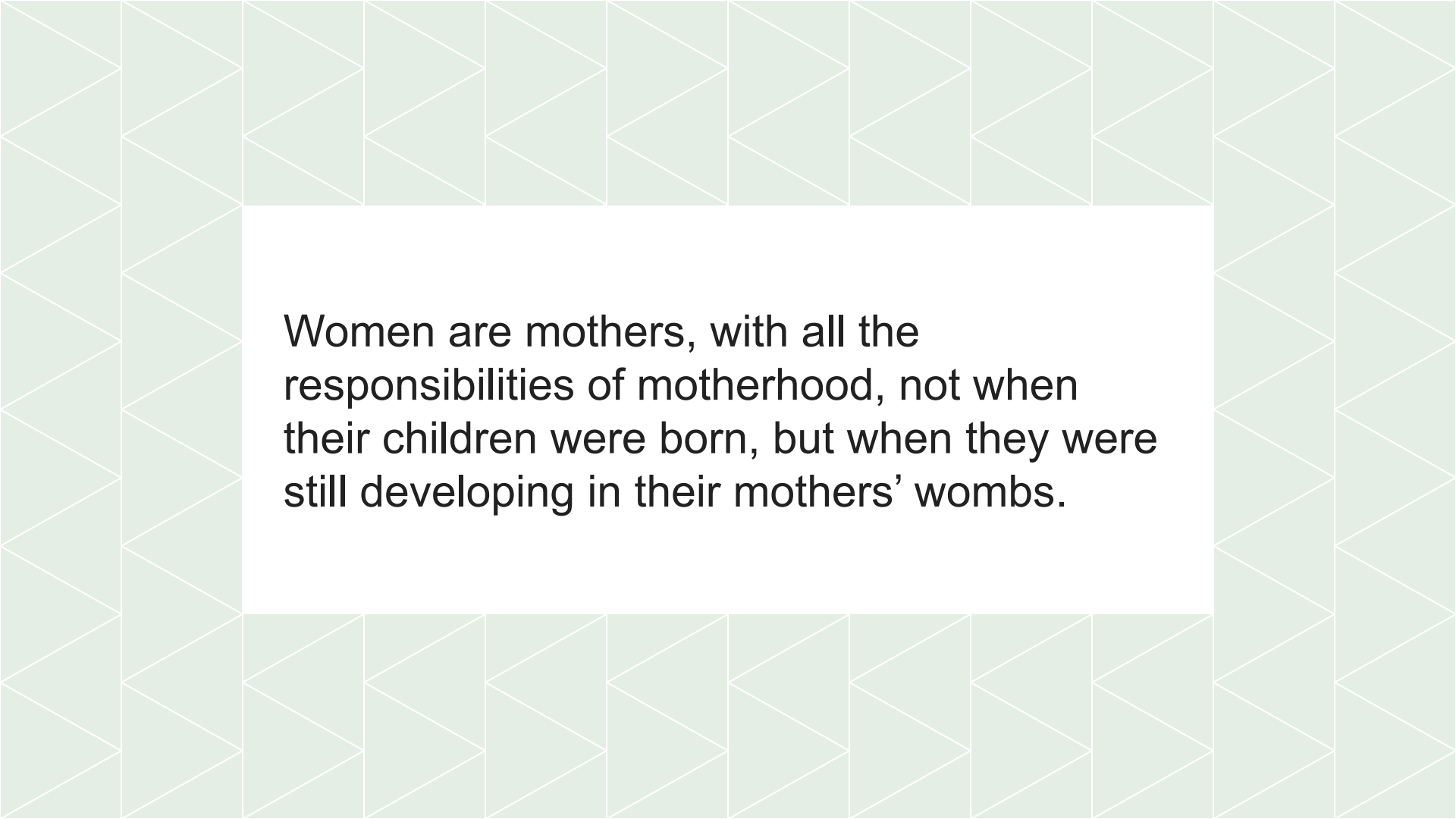
*Resolved, therefore, That, being invested by the Creator with the same capabilities, and the same consciousness of responsibility for their exercise, it is demonstrably the right and duty of woman, equally with man, to promote every righteous cause by every righteous means...*

# Mattie Brinkerhoff

*The Revolution* (1869)

“When a man steals to satisfy hunger, we may safely conclude that there is something wrong in society—so when a woman destroys the life of her unborn child, it is an evidence that by education or circumstances she has been greatly wronged.”





Women are mothers, with all the responsibilities of motherhood, not when their children were born, but when they were still developing in their mothers' wombs.

# Victoria Woodhull (1838-1927)

First woman to run for U.S. president

"[t]he rights of children as individuals begin while yet they remain the foetus."

"[Women] are appointed to the holy position of motherhood, and who, by this position, **are directly charged with the care of embryonic life**, upon which so much of future ill or good to its future depends."

"Every woman knows that if she were free, she would never bear an unwished-for child, nor think of **murdering one before its birth.**"

"Many women who would be shocked at the very thought of killing their children after birth, deliberately destroy them previously. If there is any difference in the actual crime we should be glad to have those who practice the latter, point it out. The truth of the matter is that **it is just as much a murder to destroy life in its embryonic condition**, as it is to destroy it after the fully developed form is attained, for it is the self-same life that is taken."



# **The proper ground of rights: the interdependent nature of the person**

Rights were not viewed as tools of the autonomous will, but rather as the political and civil means to carry out one's duties.

It would be incoherent to suggest that one had a right to end the life of one's own child; rather, one properly had rights to carry out the duties she owed to her children.

# Dobbs dissent

171–172 (2007) (Ginsburg, J., dissenting). Respecting a woman as an **autonomous** being, and granting her full equality, meant giving her substantial choice over this most

U. S. 644 (2015). They are all part of the same constitutional fabric, protecting **autonomous** decisionmaking over the most personal of life decisions. The majority (or to be

a woman as an “equal citizen[],” with all the rights, privileges, and obligations that status entails. *Gonzales*, 550 U. S., at 172 (Ginsburg, J., dissenting); see *supra*, at 23–24. It reflects that she is an **autonomous** person, and that society and the law recognize her as such. Like many constitu-

## Dr. Elizabeth Blackwell (1821-1910)

First woman licenced to practice medicine

“[Madame Restell] was known distinctively as a ‘female physician,’ a term exclusively applied at that time to those women who carried on her vile occupation. . . . That [this] honorable term should be exclusively applied to those women who carried on this shocking trade seemed to me a horror. It was an utter degradation of what might and should become a noble position for women.”

“The gross perversion and destruction of motherhood by the abortionist filled me with indignation, and awakened active antagonism.”

## Dr. Charlotte Lozier (1844-1870)

“The Dr. assured him that he had come to the wrong place for any such shameful, revolting, unnatural and unlawful purpose.”

“as the commission of a crime is not one of the functions of the medical profession, a person who asks a physician to commit the crime of ante-natal infanticide can no more be considered his patient than one who asks him to poison his wife.”

## **Dr. Alice Bunker Stockham (1833-1912)**

“By what false reasoning does she convince herself that another life, still more dependent upon her for its existence, with equal rights and possibilities, has no claim upon her for protection?”

## Anna Dunsmore French

"Few women, even among the educated and intelligent, realize that the embryo is imbued with the life element prior to the moment when its physical movements become conscious to her."



# 19th Century Doctors' Campaign Against Abortion

"It is not **arrant laziness, sheer, craven, culpable cowardice**, which is at the bottom of this base act?...Have you the right to choose an indolent, **selfish life**, neglecting the work God has appointed you to perform?"

"[Alre you not ignoring the demands of duty and pleading the most intense and unmitigated selfishness as a justification for destroying life? Is **self-indulgence** the only thing to be sought in this life?"

"[The woman] becomes unmindful of the course marked out for her by Providence, she overlooks the duties imposed on her by the marriage contract. **She yields to the pleasures** – but shirks from the pains and responsibilities of maternity." *Report on Criminal Abortion*, American Medical Association (1871)

"I would not transplant [women] from their proper and God-given sphere, to the pulpit, the forum, or the cares of state, nor would I repeat the experiment, so patiently tried by myself, and at last so emphatically condemned-offemales attempting the practice of the medical profession." (Leading anti-abortion doctor Horatio Storer)

# Matilda Gage

*The Revolution* (1869)

“To my certain knowledge this crime is not confined to those whose love of ease, amusement and fashionable life leads to desire immunity from the cares of children; but it is **practiced by those whose inmost souls revolt from the dreadful deed.**”

# Sarah Norton

*Woodhull & Claflin Weekly (1870)*

“Is there no remedy for all this ante-natal child murder? . . . Perhaps there will come a time when. . . . the unchastity in men will be placed on an equality with the unchastity of women, and when the right of the unborn will not be denied or interfered with.”

# Matilda Gage

*The Revolution* (1869)

“What then, has driven these women to the desperation necessary to force them to commit such a deed? . . . **The wife has . . . no right over her own body.** . . No matter what her condition, physical or mental, no matter how ill-prepared she may feel herself for maternity, the demands of his passion must never be refused. He thinks, or cares nothing, for the possible result of his gratification....**It is clear to my mind that this evil wholly arises from the false position which woman occupies in civilized society.** . .

Guilty? Yes, no matter what the motive, love of ease, or a desire to save from suffering the unborn innocent, the woman is awfully guilty who commits the deed. It will burden her conscience in life, it will burden her soul in death; but oh! thrice guilty is he who, for selfish gratification, heedless of her prayers, indifferent to her fate, drove her to **the desperation which impelled her to the crime.**”

# Matilda Gage

*The Revolution* (1869)

“Much as I deplore the horrible crime of child-murder, I cannot believe ... that such a law would have the desired effect. It seems to me to be only mowing off the top of the noxious weed, while the root remains. **We want *prevention*, not merely punishment. We must reach the root of the evil, and destroy it.**”

Desperate women have always resorted to desperate measures.

- **Equal marital, civil, political rights**
- **Voluntary motherhood: the right to say no to sex**
- **Education and entry into the professions**
- **Improvements in maternal and fetal health**
- **Maternity homes**

# U.S. Abortion Patients

## INCOME

**75% poor or low income**

## RELIGION

**62% religiously affiliated**

## FAMILY SIZE

**59% already have a child**

## RACE

**39%** White

**28%** Black


**25%** Hispanic

**6%** Asian/Pacific  
Islander

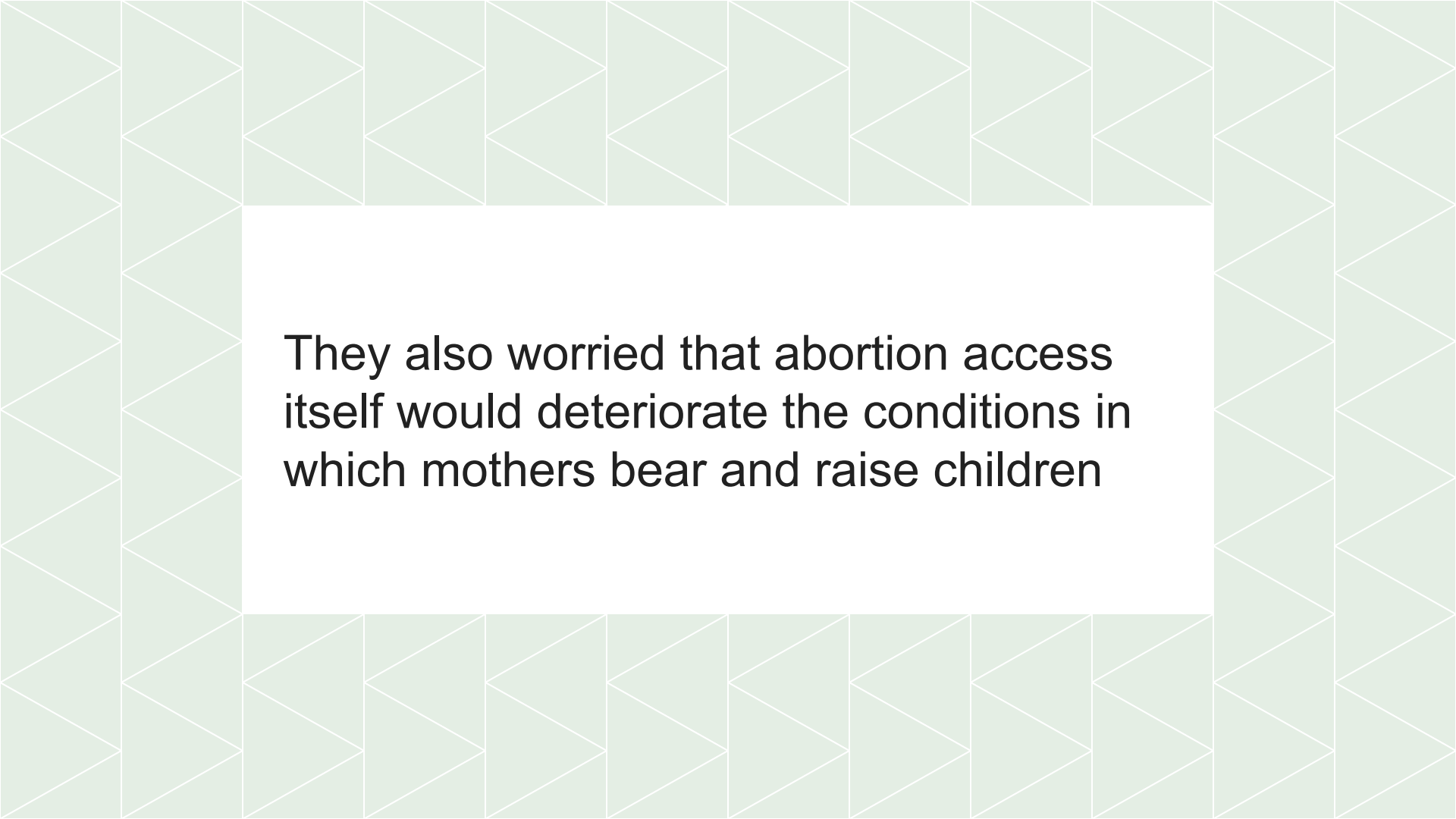
**3%** Other

**AGE** **60% are in their 20s (only 12% are teens, of which 4% are minors)**

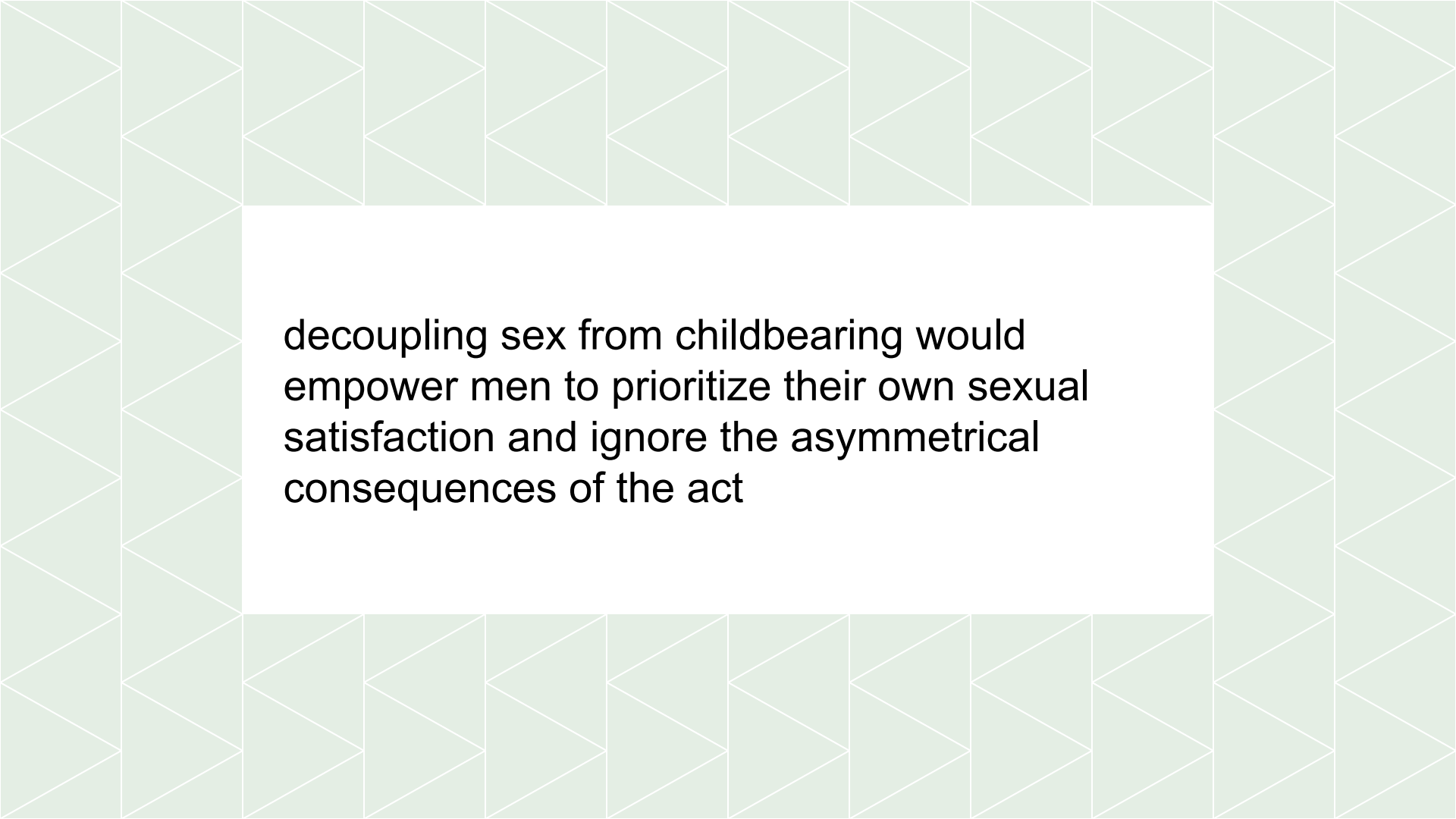




As the most basic purpose of a political community is to provide the stable, just, and peaceable conditions for persons to carry out their duties to one another, ensuring the poor have the material resources to do so is simply a matter of social (or distributive) justice.



They also worried that abortion access  
itself would deteriorate the conditions in  
which mothers bear and raise children



decoupling sex from childbearing would  
empower men to prioritize their own sexual  
satisfaction and ignore the asymmetrical  
consequences of the act

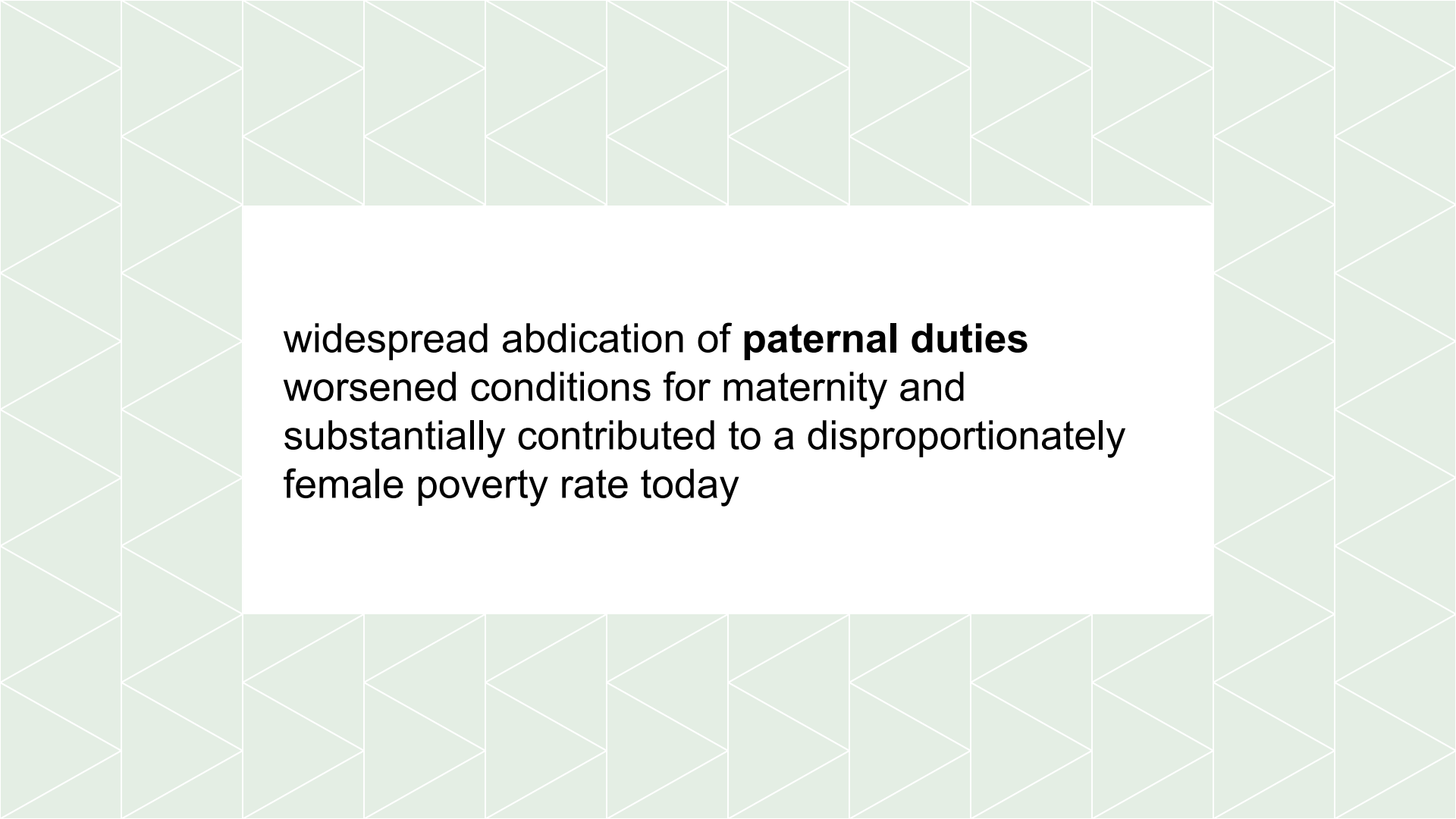
a high standard of sexual integrity, reciprocity, companionship, and care

# Sarah Grimke

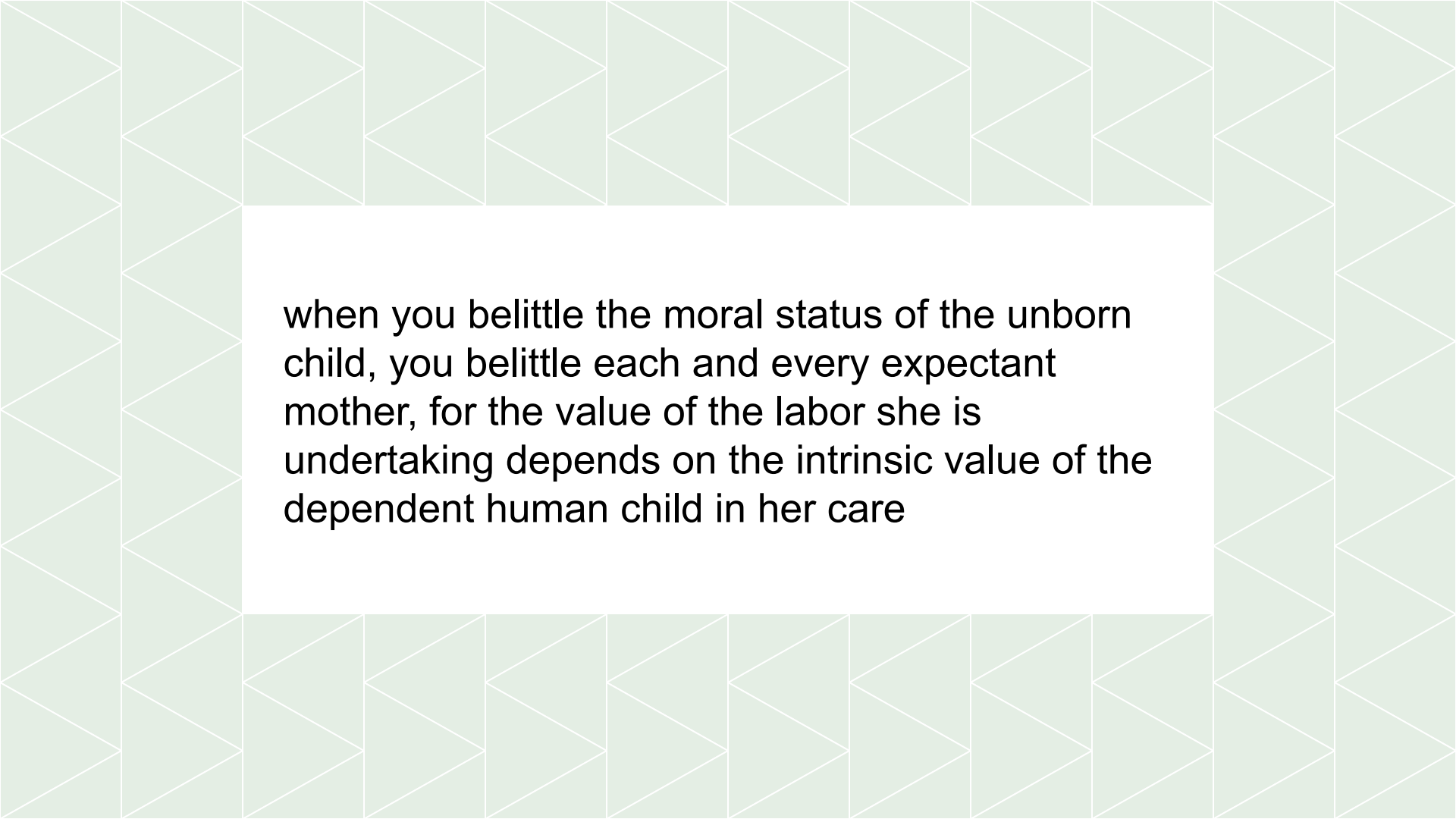
*“Marriage”* (1856)

“In a pure, true relation between the sexes, no difficulties can ever arise, but a **willing recognition of each other’s rights and mutual wants**, naturally and spontaneously resulting in **voluntary motherhood**, a **joyful appreciation of the blessedness of parentage**, the birth of **healthy, comely children and a beautiful home.**”

If legal reforms to marriage and criminal law in late twentieth century worked to undo the institutionalized male sexual prerogative the advocates of voluntary motherhood had fought, the unfettered right to abortion entrenched that prerogative once again, unleashing a casual sex ethic favorable not to women, but to irresponsible male sexuality, just as the early feminists had feared.



widespread abdication of **paternal duties**  
worsened conditions for maternity and  
substantially contributed to a disproportionately  
female poverty rate today



when you belittle the moral status of the unborn  
child, you belittle each and every expectant  
mother, for the value of the labor she is  
undertaking depends on the intrinsic value of the  
dependent human child in her care



transform social institutions to be more hospitable to women and children



# Fundamental Reversal

The act that women's rights advocates once considered evidence of women's unequal status in society is championed as an essential component of women's equal status today.

The act that poor women were “forced to commit” is now the privileged response to female poverty in our day.

# Open Letter to State Lawmakers from America's Leading Pro-Life Organizations (May 12, 2022)

**Women are victims of abortion and require our compassion and support as well as ready access to counseling and social services in the days, weeks, months, and years following an abortion.**

**As national and state pro-life organizations, representing tens of millions of pro-life men, women, and children across the country, let us be clear: We state unequivocally that we do not support any measure seeking to criminalize or punish women and we stand firmly opposed to include such penalties in legislation.**

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Doctors should always  
act to save a woman's life

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OPINION  
GUEST ESSAY

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# The End of Roe Doesn't Need to Bring an Increase in Maternal Mortality

July 9, 2022

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**Justice:**  
**to give each his or**  
**her due**

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# **Prenatal and Reproductive Justice**

What do mothers and fathers owe their unborn children?

What do we, as a community, owe mothers and fathers?

# Pro-Life, Pro-Woman, Pro-Family Policies

- Child support enforcement
  - Medical costs for pregnancy and delivery
  - Lost wages
  - “Preglimony”
- Improve work situation of disadvantages men
  - Trades



## Pro-Life, Pro-Woman, Pro-Family Policies

- Greatly reduce maternal mortality
  - Medicaid coverage & extensions
  - Perinatal doulas
  - Overall health
- Reduce costs of pregnancy and L&D for all women
- Advance pro-adoption initiatives

Elizabeth Kirk, JD  
Columbus School of Law

“We have a paradox of generalized abstract public esteem for the institution of adoption but a soft stigma against the actual choice of it, especially when legalized abortion is available.”

(Used with permission)

## **Pro-Life, Pro-Woman, Pro-Family Policies**

- Paid family leave and family allowance or refundable child tax credit
- The Pregnant Worker Fairness Act
- Caregiving Responsibilities Discrimination
- Incentivize flexible work options; at home work; babies-at-work; outlaw just-in-time scheduling; childcare options