AGENTS OF (INCREMENTAL) CHANGE: FROM MYRA BRADWELL TO HILLARY CLINTON

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ABSTRACT

In this Article, the author asserts that after the Civil War, when the race and gender hierarchies that ordered American society were vulnerable, a little-studied collection of activist women lawyers led a law reform movement that established women's rights incrementally. They were among those thinking about and experimenting with different ways of framing, securing, and enforcing women's full and equal citizenship rights. Their dual status as lawyers and women shaped their goals and strategies. As lawyers and licensed members of the legal profession, they operated within the conventional institutions of power—lobbying the legislatures to enact new laws and urging judges to implement a new form of legal reasoning that supported their claims. As disenfranchised women, they operated within nongovernmental women's associations—gathering support for their law reform campaigns and using their social capital to pressure governmental institutions to grant women rights. The author argues that these nineteenth-century law reform campaigns laid the foundation for the campaigns of the twentieth-century women's rights movement that incrementally transformed the legal status of women in America from a position of subordinate inequality to a formal equality, but have not been effective in securing women's substantive equality.

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INTRODUCTION

> "I've been an agent of change . . . [for thirty-five years] . . . I [have] worked to help make the case for [many specific law reforms]."[1]
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> "[P]roducing positive change[,] [t]ranslating those words into action is something that is the . . . slow, hard, boring of hard boards in politics . . . ."[2]
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> "I think the American people are hungry for something different and can be mobilized around big changes—not incremental changes, not small changes."[3]

Former Senator Hillary Rodham Clinton (and now Secretary of State) and her 2008 presidential campaign embodied the legacy of the American women's rights movement. For almost two centuries, women's rights activists employed a strategy of law reform campaigns to secure incremental rights, and ultimately, substantive equality for women. These efforts were primarily responsible for the transformation of women's social and legal position in American society. Law reforms transformed women from *feme sole* and *feme covert* to citizen in the nineteenth century, secured the vote for women in the twentieth century, and made possible Senator Clinton's powerful presidential campaign in the twenty-first century. Clinton acknowledged that despite these progressions, "the journey [isn't] over"; substantive gender inequalities remain.[4] As a lawyer and politician, she pledged to "overcome [the] barriers and obstacles" that persist through a continued application of the law reform strategy.[5]

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[1] *See* Senator Hillary Clinton, Former Senator John Edwards, Senator Barack Obama, Governor Bill Richardson, Democratic Presidential Debate at Saint Anselm College (Jan. 5, 2008) (transcript *available at* http://www.nytimes.com/2008/01/05/us/politics/05text-ddebate.html?pagewanted=all) [hereinafter The Democratic Primary Debate in New Hampshire] (statement of Sen. Hillary Clinton).

[2] *Meet the Press*: *Hillary Clinton* (NBC television broadcast Jan. 13, 2008).

[3] The Democratic Primary Debate in New Hampshire, *supra* note 1 (statement of Sen. Barack Obama).

[4] Meet the Press: Hillary Clinton, *supra* note 2.

[5] *Id.* Secretary Clinton continues to advocate for law reforms to advance women's rights including: the Paycheck Fairness Act to address the pay disparities between men and women, *see Senator Clinton Reintroduces Bill Aimed at Ending Pay Gap*, HR.BLR.COM (Mar. 7, 2007), http://hr.blr.com/news.aspx?id=75529, the Prevention First Act to expand

In contrast, in running against Senator Clinton for the Democratic presidential nomination, then Senator Barack Obama challenged the continued use of the incremental change strategy. Obama suggested that now was time for a more effective approach, one that would secure root change.[6] He argued that despite the political courage of past activists or the import of the legislative victories, "[W]e never built the majority and coalesced the American people around being able to get the other stuff done," to achieve real equality for all Americans.[7] Senator Obama is not the first to argue for a new strategy. Over the past two centuries radical feminists and others have advocated for a fundamental restructuring of society and its institutions,[8] but despite these calls and the shortcomings of the past campaigns, the law reform strategy remains the primary tool of the women's rights movement.[9] This Article goes back to the beginnings. It examines the origins and development of the law reform strategy of the women's rights movement to inform the continuing debate on the most effective means to secure substantive equality for all people in American society.

Women's rights activists began drafting and advocating law reforms that would grant women specific rights in the early nineteenth century as a means to achieve women's emancipation and equality.[10] They used natural law, the

family planning services to low-income women, *see* Glass Booth Election 2008, Hillary Clinton on Abortion and Birth Control, http://glassbooth.org/explore/index/hillary-clinton/1/abortion-and-birth-control/16/ (last visited June 20, 2009), and the Prevention First Act, Open Congress, S.21: Prevention First Act, http://www.opencongress.org/bill/111-s21/show (last visited June 20, 2009).

[6] *See* The Democratic Primary Debate in New Hampshire, *supra* note 1 (statement of Sen. Barack Obama).

[7] *Id.*

[8] See SHULAMITH FIRESTONE, THE DIALECTIC OF SEX: THE CASE FOR FEMINIST REVOLUTION (1970), for a history of radical feminism in the United States to 1970 and an argument for a feminist revolution. *See also* GEORGE SAND, *To Members of the Central Committee of the Left*, *in* GEORGE SAND: IN HER OWN WORDS 410, 411 (Joseph Barry trans., ed., 1979); Lori D. Ginzberg, *"The Hearts of Your Readers will Shudder": Fanny Wright, Infidelity, and American Freethought*, 46 AM. Q. 195 (1994) (describing the radical positions of American feminist Frances Wright). See also MARGARET H. MCFADDEN, GOLDEN CABLES OF SYMPATHY: THE TRANSATLANTIC SOURCES OF NINETEENTH-CENTURY FEMINISM 80 (1999), for a non-American, feminist call for a radical change. Sand, a French author, argued in 1848 that there must be a radical transformation in society before women could be an effective political force. *Id.*

[9] *See* National Organization of Women, Take Action!, http://www.now.org/actions (last visited June 20, 2009) (listing NOW's agenda which is heavily weighted toward legislative action); *see also* Equal Rights Advocates, About ERA, http://www.equalrights.org/about/about_era.asp (last visited June 20, 2009) ("Since 1974, [its] mission has been to protect and secure equal rights and economic opportunities for women and girls through litigation and advocacy."); Feminist Majority, http://feministmajority.org (last visited June 20, 2009) (stating its motto "Working for Women's Equality from the Streets to the Legislature").

[10] *See* ELLEN CAROL DUBOIS, *The Limitations of Sisterhood: Elizabeth Cady Stanton and Division in the American Suffrage Movement, 1875-1902*, *in* WOMAN SUFFRAGE AND WOMEN'S RIGHTS 160, 160-61 (1998) [hereinafter DUBOIS, *The Limitations of Sisterhood*]; *see also* NANCY F. COTT, THE GROUNDING OF MODERN FEMINISM 16-17 (1987); ELLEN CAROL DUBOIS, FEMINISM AND SUFFRAGE: THE EMERGENCE OF AN INDEPENDENT WOMEN'S MOVEMENT IN AMERICA 1848-1869, at 40 (1978) [hereinafter DUBOIS, FEMINISM AND SUFFRAGE].

Declaration of Independence, and the principles of classical liberalism as the authority for their law reform campaigns and to shape their conceptions of liberty and equality.[11] They conceived of liberty as the notion that woman, like man, should be free to pursue her "own true and substantial happiness."[12] They conceived of equality in terms of human rights and argued that woman, like man, had the right to pursue whatever "station in society as her conscience shall dictate."[13] Thus, the early women's rights activists did not assert that women were either the same as men or different than men but rather, that men and women were equally human beings and therefore equally entitled to all human rights and responsibilities.

To actualize their conception of equality, what I will call "substantive equality," women's rights activists developed a law reform strategy to secure women's *legal* equality. They believed if they were able to enact positive laws that fundamentally changed women's legal position from subordinate to equal, women's substantive equality would necessarily follow.[14] They reasoned that if women were no longer subordinate under the law, the institutions of governance, which were created on the premise of women's subordination, would have to transform, structurally and operationally, to reflect and protect women's equality.[15] These transformations would then restructure American society with a new foundation based on real liberty and substantive equality for all.[16] Over the last quarter century some scholars and activists have challenged this notion that legal equality will bring substantive equality.[17] The women's

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[11] *See* DEBORAH L. RHODE, JUSTICE AND GENDER: SEX DISCRIMINATION AND THE LAW 12-13 (1989); *see also* COTT, *supra* note 10, at 16-17; KATHLEEN S. SULLIVAN, CONSTITUTIONAL CONTEXT: WOMEN AND RIGHTS DISCOURSE IN NINETEENTH-CENTURY AMERICA 6, 84-89 (2007) (arguing that as the early women's rights activists invoked classic liberalism in order to abolish coverture, they reshaped it). Sullivan argues further that their "version of liberalism became the definitive of American liberalism." *Id.* at 6.

[12] *Declaration of Sentiments and Resolutions, Seneca Falls*, *in* FEMINISM: THE ESSENTIAL HISTORICAL WRITINGS 76, 80 (Miriam Schneir ed., Vintage Books ed. 1994) (1972) [hereinafter *Declaration*].

[13] *Id.* at 81.

[14] *See* AMY DRU STANLEY, FROM BONDAGE TO CONTRACT: WAGE LABOR, MARRIAGE, AND THE MARKET IN THE AGE OF SLAVE EMANCIPATION 175-77 (1998) (describing the feminist ideology that laws securing women's legal equality in marriage would restore a wife's self sovereignty, as well as grant her property rights); SULLIVAN, *supra* note 11, at 14 (arguing that feminists advocated for married women's property acts as a means to dismantle coverture).

[15] *See* SULLIVAN, *supra* note 11, at 2; *see also* ELLEN CAROL DUBOIS, *The Radicalism of the Woman Suffrage Movement: Notes toward the Reconstruction of Nineteenth-Century Feminism*, *in* WOMAN SUFFRAGE *and Women's Rights*, supra *note 10, at 30, 30-31*.

[16] *See* SULLIVAN, *supra* note 11, at 5-6.

[17] *See* Mary Becker, *The Sixties Shift to Formal Equality and the Courts: An Argument for Pragmatism and Politics*, 40 WM. & MARY L. REV. 209, 211 (1998); Linda Hirshman, *Foreword: The Waning of the Middle Ages*, 69 CHI.-KENT L. REV. 293, 294, 296 (1993) (arguing although the American legal system employed the principles of liberalism to overturn medieval systems, medieval practices survived in the liberal regime); Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status- Enforcing State Action*, 49 STAN. L. REV. 1111 (1997); *see also* Angela P. Harris, *Equality Trouble: Sameness and Difference in Twentieth-Century Race Law*, 88 CAL. L. REV. 1925 (2000) (arguing that laws that establish formal racial equality do not result in racial justice).

rights movement, nonetheless, continues to employ the law reform strategy as its primary tool.[18]

The initial law reform campaigns that served as the foundation of the women's rights movement were aimed at abolishing the common law principle of coverture.[19] This doctrine tied women's legal status to her marital or kin relationships and rendered a married woman civilly dead.[20] Therefore, these early campaigns focused on enacting laws that granted married women the civil rights to own and control their separate property and to have equal guardianship rights to their children.[21] They also advocated for laws that would grant all women the right to pursue an education, work in their chosen occupation, and vote.[22] Finally, they advocated for the abolition of slavery, to secure liberty for all people.[23] Although their initial campaigns were not effective in enacting these legal changes, in the decades before the Civil War, their efforts laid the foundation for the law reform strategy to become a primary tool of the women's rights movement.

After the Civil War and the enactment of the Fourteenth Amendment that deemed all men and women born or naturalized in the United States to be citizens, women's rights activists argued that the Amendment meant women were fully enfranchised.[24] They developed a strategy called the "new departure" that asserted there was no further need for law reforms to secure women's

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[18] *See supra* note 9.

[19] *See infra* note 20.

[20] The ideal underlying coverture was that the husband became the wife's protector, covering her completely in most legal aspects. In return, the wife was required to be subservient to the husband and to take his name. The creation of this legal union prohibited spouses from contracting with each other or testifying in court in matters regarding the other. Since the husband was the sole embodiment of the union, the wife could not enter into a contract, sue or be sued, or execute a will. Upon marriage, a woman lost all of her personal property, including her wages, the control of her real property and all the proceeds from her land to her husband. Under the principle of curtesy, if the marriage produced a child, the husband maintained a life interest in the wife's real estate after her death. Further, under coverture, the husband could deprive a wife of guardianship of their children. *See* NORMA BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE, AND PROPERTY IN NINETEENTH-CENTURY NEW YORK 17-19, 20-24 (1982); *see also* SANDRA F. VANBURKLEO, "BELONGING TO THE WORLD": WOMEN'S RIGHTS AND AMERICAN CONSTITUTIONAL CULTURE 108-10 (2001); Carole Shammas, *Re-Assessing the Married Women's Property Acts*, J. WOMEN'S HIST., Spring 1994, at 9, 10; Linda E. Speth, *The Married Women's Property Acts, 1839-1865: Reform, Reactions, or Revolution?*, *in* 2 WOMEN AND THE LAW: A SOCIAL HISTORICAL PERSPECTIVE, 69, 69-70 (D. Kelly Weisberg ed., 1982).

[21] *See* STANLEY, *supra* note 14, at 199-217 (arguing that women's rights activists argued for property rights on the basis of contract law). They argued that women were equal partners to the marriage contract and therefore needed laws that granted them ownership and control over their bodies, labor, and wages. *Id. See also* NANCY F. COTT, PUBLIC VOWS: A HISTORY OF MARRIAGE AND THE NATION 52-55 (2000); HENDRIK HARTOG, MAN AND WIFE IN AMERICA: A HISTORY (2000).

[22] *See* Alison M. Parker, *The Case for Reform Antecedents for the Woman's Rights Movement*, *in* VOTES FOR WOMEN: THE STRUGGLE FOR SUFFRAGE REVISITED, 21, 21-23 (Jean H. Baker ed., 2002).

[23] *Id.* at 23. *See also* DUBOIS, FEMINISM AND SUFFRAGE, *supra* note 10, at 21-40.

[24] *See* Ellen Carol DuBois, *Taking the Law into Our Own Hands:* Bradwell*,* Minor*, and Suffrage Militance in the 1870s*, *in* VISIBLE WOMEN: NEW ESSAYS ON AMERICAN ACTIVISM 19, 21 (Nancy A. Hewitt & Suzanne Lebsock eds., 1993).

equality, and they claimed, specifically, that women had full suffrage rights.[25] A number of activists across the country went to the polls and demanded they be allowed to vote.[26] Most local and state officials, however, refused to comply.[27] When the United States Supreme Court ruled in the 1870s that the Fourteenth Amendment did not establish or protect women's right to vote or work, women's rights activists began to divide into overlapping but distinct factions.[28]

The factions split over a number of issues including reform priorities, strategies, and sometimes over whether and how the biological and gender differences between women and men should shape the law and the content of equality, but each continued to use law reform campaigns as one of their primary strategies. White woman suffragists, who comprised the most widely-studied faction of the women's rights movement, increasingly narrowed their law reform campaigns to the singular aim of securing the vote but divided amongst themselves over issues of race and gender ideology.[29] Women temperance activists grounded their activism in a separate spheres ideology that rested on women's status (rather than a liberal ideology rested on women's equality) and employed law reform campaigns to advance their efforts to protect women and children from physical and sexual abuse.[30] Women race activ-

[25] *See* 2 HISTORY OF WOMAN SUFFRAGE 407-520 (Elizabeth Cady Stanton, Susan B. Anthony, & Matilda Joslyn Gage eds., 1881).

[26] *See* DuBois, *supra* note 24, at 23-26.

[27] *Id*. at 25.

[28] *See* Minor v. Happersett, 88 U.S. (21 Wall.) 162, 178 (1874) (holding that the right to vote was not protected by the Fourteenth Amendment); Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 139 (1872) (holding that the right to work was not protected by the Fourteenth Amendment); *see also* Norma Basch, *Reconstructing Female Citizenship:* Minor v. Happersett, *in* THE CONSTITUTION, LAW, AND AMERICAN LIFE: CRITICAL ASPECTS OF THE NINETEENTH-CENTURY EXPERIENCE 52, 54-55 (Donald G. Nieman ed., 1992). S*ee also* DUBOIS, FEMINISM AND SUFFRAGE, *supra* note 10, at 162-202 (describing the first split in the women's rights movement, which occurred in 1869, over whether to support the Fifteenth Amendment that granted suffrage to African American men, but not to women). Susan B. Anthony and Elizabeth Cady Stanton led the dissenting faction and established an independent woman suffrage movement. *Id.*

[29] *See* RHODE, *supra* note 11, at 14 (arguing that "many nineteenth- and early-twentieth-century feminists muted the rhetoric of natural rights in favor of the rhetoric of natural roles" and emphasized women's moral superiority as grounds for the vote); DuBois, *supra* note 24, at 34 (describing how the separate suffrage faction narrowed its efforts to the singular goal of securing woman suffrage in the years after the *Minor* decision and how this allowed elitist and racist tendencies to spread within the movement); *see also* DUBOIS, *The Limitations of Sisterhood, supra* note 10, at 161 (describing the divisions of the suffrage movement in the late nineteenth century over issues of religion, sex, and family); DUBOIS, FEMINISM AND SUFFRAGE, *supra* note 10, at 9 (describing how the prevailing view of woman suffragists separated their campaigns for the vote from other women's rights issues).

[30] *See* RUTH BORDIN, WOMAN AND TEMPERANCE: THE QUEST FOR POWER AND LIBERTY, 1873-1900 3, 55 (1990) (arguing that women took over the temperance cause in the 1870s and characterized it as "a maternal struggle"). Bordin argues that by the end of the decade the Women's Christian Temperance Union began to employ law reforms to further its cause of protecting women, children, and the sanctity of the home. *Id.* at 55. *See* Jane E. Larson, *"Even a Worm Will Turn at Last": Rape Reform in Late Nineteenth-Century America*, 9 YALE J.L. & HUMAN. 1, 3 (1997) (arguing that the Women's Christian Temperance Union campaigns to raise the age of sexual consent should be understood as rape law reform campaigns). For a discussion of the separate spheres ideology, see generally NANCY F. COTT,

ists advocated law reforms aimed at abolishing race discriminations and inequities for both African American men and women.[31] Women labor activists advocated for law reforms that would establish health and safety standards for factories, a minimum wage, maximum hour restrictions, protection for girls and women from workplace sexual abuses, and the right to organize.[32] There were many activists who were members of more than one faction and fought for multiple law reforms.[33] But there was only a small collection of little-studied law activists who maintained the early movement's strategy of pursuing a wide range of law reforms with the broad aim of securing women's equality before the law.[34]

Women lawyers, with the assistance of a number of Radical Republican male lawyers, were the primary leaders of the law activist faction.[35] They insisted that women were full citizens, privileged the law and law reforms as their main strategy, and demanded rights that would secure women's substantive equality.[36] The law activists pursued law reforms to secure women's citizenship rights from two positions: within the existing governmental

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THE BONDS OF WOMANHOOD: "WOMAN'S SPHERE" IN NEW ENGLAND, 1730-1835 (1977); Carroll Smith-Rosenberg, *The Female World of Love and Ritual: Relations between Women in Nineteenth-Century America*, 1 SIGNS 1 (1975); Barbara Welter, *The Cult of True Womanhood: 1820-1860*, 18 AM. Q. 151 (1966). *But see* Linda K. Kerber, *Separate Spheres, Female Worlds, Woman's Place: The Rhetoric of Women's History*, 75 J. AM. HIST. 9, 9-13 (1988) (arguing that the practice of dividing the women's rights movement into two camps, those who privileged women's status (difference) and those who privileged women's equality (sameness), renders a false dichotomy, obscuring the fluidity of those positions and the diversity of approaches within the feminist movement).

[31] *See* CRUSADE FOR JUSTICE: THE AUTOBIOGRAPHY OF IDA B. WELLS (Alfreda M. Duster ed., 1970) (describing the law reform campaigns of Wells, including anti-lynching and woman suffrage, and the racial discriminations she faced); JANE RHODES, MARY ANN SHADD CARY: THE BLACK PRESS AND PROTEST IN THE NINETEENTH CENTURY 185-211 (1998) (describing Cary's legal education, her law reform efforts on behalf of both women and African Americans, and the race divisions she encountered); PATRICIA A. SCHECHTER, IDA B. WELLS-BARNETT AND AMERICAN REFORM, 1880-1930 (2001); Margaret Walker, *Foreword*, *in* DOROTHY STERLING, BLACK FOREMOTHERS: THREE LIVES, at vii, xi (2d ed. 1988) (arguing that black and white women within the women's rights movement divided over issues of race).

[32] *See* MEREDITH TAX, THE RISING OF THE WOMEN: FEMINIST SOLIDARITY AND CLASS CONFLICT, 1880-1917, at 45, 65-89 (1980) (describing the efforts of the Working Women's Union in the 1870s to organize women workers and its campaign for the eight-hour day law). Tax also describes the campaigns of the Illinois Woman's Alliance in the 1880s for compulsory education laws and the enforcement of factory inspection laws. *Id.* For a discussion of women's gender discrimination within the labor movement in the nineteenth century before the Progressive Era, see generally ILEEN A. DEVAULT, UNITED APART: GENDER AND THE RISE OF CRAFT UNIONISM (2004). *See also* SUSAN LEVINE, LABOR'S TRUE WOMAN: CARPET WEAVERS, INDUSTRIALIZATION, AND LABOR REFORM IN THE GILDED AGE (1984).

[33] *See e.g.*, BORDIN, *supra* note 30, at 6-61 (describing Frances Willard's activism for temperance and later woman suffrage); KATHRYN KISH SKLAR, FLORENCE KELLEY AND THE NATION'S WORK: THE RISE OF WOMEN'S POLITICAL CULTURE, 1830-1900, at 216-22, 303 (1995) (describing Florence Kelley's activism for labor reform and woman suffrage); *see also* CRUSADE FOR JUSTICE, *supra* note 31, at 81-86, 345-47(describing Ida B. Wells' race activism and woman suffrage).

[34] *See infra* Part II.

[35] *See infra* Part II.

[36] *See infra* Part II.

institutions and within the emerging nongovernmental women's associations.[37] As lawyers, insiders within the conventional institutions of power, they pressed rights claims and developed a new form of legal reasoning to advance their arguments.[38] Being disenfranchised, the women developed law reform agendas within nongovernmental women's associations that then pressured governmental institutions to grant women rights.[39]

The story of the law activists is unfamiliar because of the pervasive tendency to conflate the suffrage movement and the women's rights movement and because of the dearth of information on the reform activities of nineteenth-century women lawyers.[40] Most of the literature on nineteenth and early twentieth-century women lawyers focuses on their efforts to win the right to be lawyers and their struggles and movements to work as practicing attorneys.[41] While scholars have long acknowledged that many of the early women lawyers were suffragists, temperance workers, race activists, and labor activists, only recently do works suggest that they may have played a unique role in the larger women's right movement.[42] I argue that the activities of the nineteenth-century activist women lawyers were part of a conscious and deliberate women's law reform movement and that their law reform campaigns laid the foundation for the twentieth-century women's rights claims that incrementally transformed the legal status of women in American society into a position of formal, but not substantive, equality.

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[37] *See infra* Part II.

[38] *See infra* Part II.

[39] *See infra* Part II.

[40] *See* Rebecca Edwards, *Not For Ourselves Alone: The Story of Elizabeth Cady Stanton and Susan B. Anthony*, J. FOR MULTIMEDIA HIST. (2000) (video review), http://www.albany.edu/jmmh/vol3/ourselves_alone/ourselves-alone.html.

[41] *See generally* RONALD CHESTER, UNEQUAL ACCESS: WOMEN LAWYERS IN A CHANGING AMERICA (1985); CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW (2d ed. 1993); HEDDA GARZA, BARRED FROM THE BAR: A HISTORY OF WOMEN IN THE LEGAL PROFESSION (1996); JOAN HOFF, LAW, GENDER, AND INJUSTICE: A LEGAL HISTORY OF U.S. WOMEN (1991); KAREN BERGER MORELLO, THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA 1638 TO THE PRESENT (1986); Nancy T. Gilliam, *A Professional Pioneer: Myra Bradwell's Fight to Practice Law*, 5 LAW & HIST. REV. 105 (1987); Jill Norgren, *Before It Was Merely Difficult: Belva Lockwood's Life in Law and Politics*, 23 J. SUPREME CT. HIST. 16 (1999); D. Kelly Weisberg, *Barred from the Bar: Women and Legal Education in the United States, 1870-1890*, 28 J. LEGAL EDUC. 485 (1977).

[42] *See* VIRGINIA G. DRACHMAN, SISTERS IN LAW: WOMEN LAWYERS IN MODERN AMERICAN HISTORY 9-36 (1998) [hereinafter DRACHMAN, SISTERS IN LAW]; VIRGINIA G. DRACHMAN, WOMEN LAWYERS AND THE ORIGINS OF PROFESSIONAL IDENTITY IN AMERICA 1-38 (1993) [hereinafter DRACHMAN, WOMEN LAWYERS]; Felice Batlan, *Engendering Legal History*, 30 LAW & SOC. INQUIRY 823, 843 (2005); *see also* JANE M. FRIEDMAN, AMERICA'S FIRST WOMAN LAWYER: THE BIOGRAPHY OF MYRA BRADWELL (1993); SKLAR, *supra* note 33, at 248-49; STANLEY, *supra* note 14, at 201-07 (describing the legislative efforts for women's emancipation of Myra Bradwell, Elizabeth Cady Stanton, Mary Livermore, Frances Gage and Lucy Stone); VANBURKLEO, *supra* note 20, at 153-63; Barbara Allen Babcock, Book Review, *Feminist Lawyers*, 50 STAN. L. REV. 1689, 1695-1702 (1998) (reviewing DRACHMAN, SISTERS IN LAW, *supra*); Catherine B. Cleary, *Lavinia Goodell, First Woman Lawyer in Wisconsin*, 74 WIS. MAG. HIST. 243 (1991); Kenneth Walter Mack, *A Social History of Everyday Practice: Sadie T.M. Alexander and the Incorporation of Black Women into the American Legal Profession, 1925-1960*, 87 CORNELL L. REV. 1405 (2002).

This Article narrates the story of the law activists, the handful of women and men lawyers who were among those thinking about and experimenting with different ways of framing, securing, and enforcing women's full and equal citizenship rights. They chose to operate institutionally and developed a complex, three-prong strategy that they employed primarily through the courts and the legislatures. First, they led law reform campaigns that secured incremental social, civil, and political rights for women through positive laws. Second, they infiltrated the legal profession, positioning themselves as insiders within the legal system, enabling them to better influence the interpretation and enforcement of the positive laws they worked to enact. Third, they became leaders in national and international women's associations helping to translate women's social capital into a new form of nongovernmental, political power that they used to advance law reforms. The legacy of this movement is manifest in the work of twenty-first-century women's rights activists, including Hillary Clinton, who continue to employ these strategies in their persistent aim for true equality.

Part I begins with the development of the American women's rights movement in the early nineteenth century. It argues that in the decades before and after the Civil War, the movement advocated for married women's property acts (MWPAs) and woman suffrage as specific law reforms intended to grant women important incremental rights that would aid in their goal of securing women's equality. Woman suffrage was not originally perceived as *the* key to women's emancipation, but as one of many rights and privileges that women, as citizens, should possess.[43] Part I further argues that though male legislatures did not enact MWPAs in order to grant women rights, the efforts of the women's rights activists to secure those acts were important to the development of the women's law reform movement. Finally, this section tells the story of the emergence of a distinct women's law reform movement and Myra Bradwell's rise as a leader within that movement.[44]

Part II revisits the story of Myra Bradwell's fight to attain a law license.[45] It argues that Bradwell and her advocates were part of a deliberate and collective effort of law activists who sought to use the law to secure women's equal-

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[43] *See* VANBURKLEO, *supra* note 20, at 171; Parker, *supra* note 22, at 21.

[44] Myra Bradwell was an abolitionist, a women's rights activist, a legal scholar, a journalist, and a businesswoman. She founded, edited, and published the *Chicago Legal News*, a weekly legal newspaper, from 1868 until her death in 1894. In her paper and through her organizational activities, Bradwell advocated for a wide range of law reforms, including, especially, law reforms that would secure women's full citizenship rights, privileges, and obligations. For biographical assessments of Bradwell, see FRIEDMAN, *supra* note 42; Caroline K. Goddard, *Bradwell, Myra Colby*, *in* WOMEN BUILDING CHICAGO 1790-1990: A BIOGRAPHICAL DICTIONARY 112, 112-14 (Rima Lunin Schultz et al. eds., 2001); Dorothy Thomas, *Bradwell, Myra Colby*, *in* 1 NOTABLE AMERICAN WOMEN 1607-1950: A BIOGRAPHICAL DICTIONARY 223-25 (Edward T. James et al. eds., 1971).

[45] For accounts of Bradwell's case, see DRACHMAN, SISTERS IN LAW, *supra* note 42, at 19-25; FRIEDMAN, *supra* note 42, at 17-33; GARZA, *supra* note 41, at 32-39; HERMAN KOGAN, THE FIRST CENTURY: THE CHICAGO BAR ASSOCIATION, 1874-1974, at 24-29 (1974); MORELLO, *supra* note 41, at 13-21; Herman Kogan, *Myra Bradwell: Crusader at Law*, 3 CHI. HIST. 132 (1974); Gilliam, *supra* note 41; Frances Olsen, *From False Paternalism to False Equality: Judicial Assaults on Feminist Community, Illinois 1869-1895*, 84 MICH. L. REV. 1518 (1986).

ity when the race and gender hierarchies that had ordered American society, from its founding, were vulnerable. The debates and uncertainty over how to reconstruct the nation after the Civil War, and which principles would serve as foundations, created space for the law activists to advocate their visions of liberty and equality. The simultaneous transformation within the legal profession of the dominant understanding of the nature and philosophy of law, and the debates over which methods of judicial interpretation should be employed, created the opportunity for the law activists to espouse new jurisprudential arguments. I posit that these arguments were an early manifestation of what later became known as sociological jurisprudence.[46]

Part III depicts how activist women lawyers operated within nongovernmental women's associations to advance their law reform movement. The associations employ the model of transnational advocacy networks, analyzed by Margaret E. Keck and Kathryn Sikkink.[47] The networks illustrate how actors with shared common values and aims exchanged information and experiences, using their collective knowledge strategically to "persuade, pressure, and gain leverage over much more powerful organizations and governments."[48] Activist women lawyers formed both their own organizations and committees within larger women's associations, in order to exchange information and experiences regarding the unequal status of women. They used their collective knowledge to broaden their law reform campaigns and to mobilize greater numbers of women to support these campaigns. They then used their amplified voices to influence the dominant legal and political systems to advance women's rights. This section particularly examines what I posit was the women lawyers' first major invocation of their transnational advocacy networks at the 1893 World's Columbian Exposition.[49] I argue that these efforts were one of the historical precursors to the political activism of twentieth-century nongovernmental organizations (NGOs).

Part IV illustrates how the nineteenth-century women's law reform strategies for legal equality resonated in the strategies of twentieth and twenty-first-century law activists. It argues that although the law reform movement did make significant strides in securing women's formal legal equality, it fell short of its goal to achieve substantive equality for women. The strategy of law reform, which works within the existing structures of society, has not yet spawned a restructuring of the institutions of governance. Rather, it has left in place the institutions and traditions that formed the foundation of women's ine-

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[46] *See generally* WILLIAM M. WIECEK, THE LOST WORLD OF CLASSICAL LEGAL THOUGHT: LAW AND IDEOLOGY IN AMERICA, 1886-1937, at 191-97 (1998).

[47] *See* MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS 1-37 (1998).

[48] *Id.* at 2.

[49] The 1893 World's Columbian Exposition, the second major international fair held in the United States, was intended to commemorate Columbus's arrival in the "new world." Chicago won a rigorous competition to host the exposition. Contemporary observers estimated that twenty-seven million people attended the fair, half of them coming from other countries. *See* DONALD L. MILLER, CITY OF THE CENTURY: THE EPIC OF CHICAGO AND THE MAKING OF AMERICA 378-80, 488 (1997).

quality.[50] It has also failed to address the acts of discrimination and circumstances of inequality that exist beyond the reach of the law.[51] This Article concludes with an assessment that this history of the law reform campaigns of the women's rights movement may suggest that activists will only achieve substantive equality if they develop an alternate, radical strategy to abolish the status regime.

I. THE ORIGINS OF THE WOMEN'S LAW REFORM MOVEMENT

Before states allowed women to be licensed lawyers, women learned in the law began to organize and engage in efforts to change the law to establish women as autonomous citizens.[52] These early women's rights activists, primarily white women of some privilege, joined with abolitionist men who believed that the principles of liberty and equality should apply to men and women of all races.[53] Their first efforts focused on abolishing the enforcement of the common law principle of coverture.[54] They compared coverture to slavery and demanded women's emancipation with full citizenship rights, including the right of married women to own property and the right to vote for all women.[55] After the Civil War, a handful of these activists determined to become lawyers.[56] They sought to use their position inside the profession to directly influence the development of positive law, the way the law was interpreted, and the application of law.

A. Married Women's Property Acts

By 1860 a national law reform movement advocated the enactment of married women's property rights. The trend began in the 1830s when the legislatures in the Arkansas Territory (1835) and the state of Mississippi (1839) each passed a law allowing a married woman to maintain property separate from her husband.[57] Two decades later, twenty of the states admitted to the Union (sixty-one percent) had laws establishing separate estates for married women.[58] Historians and legal scholars diversely interpret the motivations and effects of the acts, but they generally agree that the principal motivations were men's economic concerns—not women's rights.[59] Women's rights activists

[50] *See* SULLIVAN, *supra* note 11, at 10-11; Rogers M. Smith, *Beyond Tocqueville, Myrdal, and Hartz: The Multiple Traditions in America*, 87 AM. POL. SCI. REV. 549, 549 (1993) (explaining that throughout American political history, liberal reforms co-exist with, rather than replace, America's illiberal traditions).

[51] Harris, *supra* note 17, at 1927-28 (arguing that anti-discrimination laws fail to eliminate racism and its practices).

[52] *See* STANLEY, *supra* note 14, at 201-07; *see also* COTT, *supra* note 10, at 16-17.

[53] *See supra* note 21.

[54] *See supra* note 20.

[55] BASCH, *supra* note 20, at 118; STANLEY, *supra* note 14, at 175-76.

[56] *See infra* note 164.

[57] *See* SULLIVAN, *supra* note 11, at 69; Michael B. Dougan, *The Arkansas Married Woman's Property Law*, 46 ARK. HIST. Q. 3 (1987).

[58] *See* HOFF, *supra* note 41, at 127-35, 377-82; *see also* Carole Shammas, *Re-Assessing the Married Women's Property Acts*, 6 J. WOMEN'S HIST. 11 (1994).

[59] *See* LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 208-11 (2d ed. 1985) (arguing reformers' desire to provide relief to debtors in order to foster economic growth

were, nonetheless, involved in campaigns for such acts.[60] Although their efforts may not have been the primary reason for the acts' passage, their vision and strategies were critical to the development of a women's law reform movement.

The first law reform campaigns that advocated for married women's property laws as a women's rights issue began in the northeast in the 1830s. A loose coalition of activist women and radical men drafted bills, lobbied state legislatures, and spoke publicly in support of the acts.[61] Assemblyman Thomas Herttell, a leader in the movement, introduced one of the first of these bills to the New York Legislature in 1837.[62] He argued that under the guarantees of the United States Constitution, the state of New York must restore to married women their natural right to "life, liberty, and property."[63] Although this bill failed, over the next decade men and women activists, throughout the United States and across the Atlantic, increasingly agitated for women's rights—and married women's property rights in particular—on the principle of equality.[64]

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was the primary motivation for the acts); *see also* BASCH, *supra* 20, at 123-25; PEGGY A. RABKIN, FATHERS TO DAUGHTERS: THE LEGAL FOUNDATIONS OF FEMALE EMANCIPATION 106-07 (1980); SULLIVAN, *supra* note 11, at 21-44 (arguing the acts were part of the larger codification movement); Shammas, *supra* note 58, at 11, 24 (arguing the motivations for the acts included a desire to stabilize the volatile economy of the 1830s that had spurred a rise in bankruptcies; a desire to shield the wife's pre-marital property; especially patrimony, from a husband's creditors; and a desire to ameliorate the escalating litigation in the chancery courts regarding women's separate estates).

The relationship between women's rights activists and the MWPA has generated the greatest debate among scholars. For studies that argue the pre-1850 statutes were passed without the influence of any organized women's rights agitation, see FRIEDMAN, *supra* note 42, at 210; KERMIT L. HALL, THE MAGIC MIRROR: LAW IN AMERICAN HISTORY 158 (1989). *See generally* RABKIN, *supra,* at 106-107 (arguing the New York acts actually motivated the women's rights movement, rather than the other way around); Megan Benson, Fisher v. Allen*: The Southern Origins of the Married Women's Property Acts*, 6 J. S. LEGAL HIST. 97 (1998).

[60] *See infra* notes 61-65.

[61] *See* BASCH, *supra* note 20, at 119-20 (arguing in the 1830s, a handful of activists joined the fight and publicly spoke out for women's rights. These included Sarah Grimke, Ernestine Rose, and Thomas Herttell, all of whom argued for women's equality, and Sarah Hale, who argued for women's rights based on women's moral superiority); Ginzberg, *supra* note 8, at 200-01 (arguing in the 1820s, many of the men and women characterized as freethinkers, especially Fanny Wright and Robert Owen, advocated for women's citizenship rights);.

[62] *See* BASCH, *supra* note 20, at 115.

[63] *See* Judge Thomas Herttell, Remarks on the Bill to Restore to Married Women "The Right of Property," as Guaranteed by the Constitution of the United States (1837), *available at* http://www.pinn.net/~sunshine/book-sum/herttell3.html; *see also* YURI SUHL, ERNESTINE L. ROSE: WOMEN'S RIGHTS PIONEER (2d ed. 1990).

[64] *See* LETTERS ON THE EQUALITY OF THE SEXES AND THE CONDITION OF WOMAN (1838) (comprised of fifteen letters Sarah M. Grimké wrote to Mary S. Parker, President of the Boston Female anti-Slavery Society advocating rights for women). The letters are republished in THE PUBLIC YEARS OF SARAH AND ANGELINA GRIMKÉ: SELECTED WRITINGS 1835-1839 (Larry Ceplair ed., 1989). *See also* BASCH, *supra* note 20, at 117-20; E. P. HURLBUT, ESSAYS ON HUMAN RIGHTS AND THEIR POLITICAL GUARANTIES 144-72 (1845) (arguing for women's rights as human rights); MCFADDEN, *supra* note 8, at 20; RABKIN, *supra* note 59, at 106-07; MARION KIRKLAND REID, A PLEA FOR WOMEN (1843) (arguing for women's right to financial independence and suffrage in Great Britain. The book was also popular in America, with five editions published in the U.S. between 1847 and 1852.); 1 THE SELECTED PAPERS

They also persistently re-introduced married women's property acts in New York and a number of other states and territories.[65]

By the late 1840s, the loose coalition of women's rights activists began to formalize. The leaders organized local, then national, conventions where men and women dedicated to the liberal principles of liberty and equality congregated to advance women's rights. They set their agenda at the first of these meetings, the Seneca Falls Women's Rights Convention (1848), invoking the principles and words articulated in the Declaration of Independence.[66] Specifically, they called for the demise of coverture and the enactment of a number of positive laws that granted women rights, such as a married woman's right to own and control her real and personal property, including her labor and her wages.[67] A handful of states, including New York, had passed married women's statutes that granted women limited property rights, but no state provided the equality that the women's rights activists sought.[68] By 1850, at the first National Women's Rights Convention, the activists demanded all states enact statutory reforms of married women's property rights.[69] They then developed networks, where experienced advocates traveled state to state to initiate or enhance local campaigns.[70]

The Illinois campaign for women's rights developed out of these mixed-sex networks of activists. In 1855, in the small town of Earlville, Illinois, a local attorney Alonzo Grover delivered an address that sparked the formation of Illinois' first woman suffrage organization; Susan Hoxie Richardson, a cousin of Susan B. Anthony, served as president of the association and Grover's wife, Octavia, was elected secretary.[71] Grover, whom Stanton and Anthony described as "an able champion of the constitutional rights of women," then published articles supporting women's rights in the Earville *Transcript* to further the cause and expand the network.[72] The campaign grew to include reform-minded male lawyers, like Charles Waite, and women activists who were studied in the law, including Catharine Van Valkenburg Waite,

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OF ELIZABETH CADY STANTON AND SUSAN B. ANTHONY: IN THE SCHOOL OF ANTI-SLAVERY, 1840 TO 1866, at 76 n.4 (Ann D. Gordon ed., 1997), *available at* http://ecssba.rutgers.edu/docs/seneca.html#senf4 [hereinafter SELECTED PAPERS].

[65] *See* BASCH, *supra* note 20, at 136-38.

[66] *See Declaration*, *supra* note 12, at 76-81.

[67] *See id.*; SELECTED PAPERS, supra *note 64, at 76 n.4.*

[68] *See* BASCH, *supra* note 20, at 137.

[69] *See* Paulina Wright Davis, Opening Address at the 1850 Woman's Rights Convention at Worcester, Mass., (Oct. 23, 1850) (*available at* http://www.wwhp.org/Resources/WomansRights/proceedings.html#resolutions%20unanimously%20adopted).

[70] *See* Eugene H. Roseboom, *Gage, Frances Dana Barker*, *in* 2 NOTABLE AMERICAN WOMEN, *supra* note 44, at 2, 2-4; Elizabeth B. Warbasse, *Cutler, Hanna Maria Conant Tracy*, in 1 NOTABLE AMERICAN WOMEN, *supra* note 44, at 426, 426-27.

[71] 3 HISTORY OF WOMAN SUFFRAGE 560 (Elizabeth Cady Stanton, Susan B. Anthony, & Matilda Joslyn Gage eds., 1886).

[72] *Id.* One of these articles was written by Catharine V. Waite. *Id.* at 561.

Hannah Tracy Cutler, and Frances Dana Gage.[73] In the years before the Civil War, these activists traveled throughout the state lecturing on women's rights.[74]

The early Illinois reformers, like other pre-Civil War women's rights activists, centered their activities on changing laws that restricted the civil and political rights of women.[75] They initially advanced their cause by participating in what Sandra VanBurkleo describes as "republican" speech communities.[76] The communities, comprised predominately of white, educated women and men, and a few African American men and women, spoke out for women's rights, engaged in political activities and civil demonstrations, and called for law reforms and positive laws to grant women rights.[77] Throughout the 1850s Frances Gage worked within these communities, traveling extensively between New York and Ohio as well as to Illinois, Missouri, and even Louisiana.[78] In 1859, she and Cutler went to New York to assist Elizabeth Cady Stanton, Ernestine Rose, and Susan B. Anthony secure the Earnings Act, an addition to the New York MWPAs that allowed a married woman to own and control her wages.[79] In 1860, Gage and Cutler initiated a campaign for a MWPA in Illinois.[80]

Illinois followed the pattern of New York and other states by passing MWPAs in stages, granting married women property rights incrementally. The first Illinois MWPA became law on April 24, 1861, just over a week after the battle at Fort Sumter began the Civil War.[81] The law granted a married woman the right to maintain as her sole and separate property, outside of the control or interference of her husband, all property that she owned at the time of marriage or acquired during marriage.[82] This law, however, left in tact many of the

[73] *Id.* Cutler and Gage had been leaders in the woman's rights movement in Ohio until 1852 when Hannah Tracy married Samuel Cutler and moved to Illinois. *See* Warbasse, *supra* note 70, at 426-27.

[74] *See* 3 HISTORY OF WOMAN SUFFRAGE, *supra* note 71, at 561-62.

[75] DUBOIS, FEMINISM AND SUFFRAGE, *supra* note 10, at 22-23.

[76] VANBURKLEO, *supra* note 20, at 81.

[77] *Id.* at 93; BASCH, *supra* note 20, at 175, 181-89 (documenting the speeches of women's rights activists and their demands for law reform during the 1850s). The activists included Frances Gage, Lucy Stone, Wendell Phillips, Antoinette Brown, Lucretia Mott, Ernestine Rose, Elizabeth Cady Stanton, Susan B. Anthony, and Amelia Bloomer. *Id.* S*ee also* DUBOIS, FEMINISM AND SUFFRAGE, *supra* note 10, at 29; Nell Irvin Painter, *Voices of Suffrage: Sojourner Truth, Frances Watkins Harper, and the Struggle for Woman Suffrage*, *in* VOTES FOR WOMEN, *supra* note 22, at 42, 42-55 (arguing that some African American women advocated for women's rights before the Civil War, including most prominently Sojourner Truth).

[78] Frances Gage was an abolitionist and a women's rights activist. *See* Roseboom, *supra* note 70, at 2-4.

[79] Warbasse, *supra* note 70, at 426-27.

[80] *See* 3 HISTORY OF WOMAN SUFFRAGE, *supra* note 71, at 561-62; Warbasse, *supra* note 70, at 426-27.

[81] 1861 Ill. Laws 143. *See also* 3 HISTORY OF WOMAN SUFFRAGE, *supra* note 71, at 561.

[82] *See* 1861 Ill. Laws 143; 3 HISTORY OF WOMAN SUFFRAGE, *supra* note 71, at 561-62 (explaining how Cutler drafted the bill). Although an unnamed state legislator had promised that he would act on this petition, Cutler undertook the task when the legislator failed to act. *Id.* After researching the form and procedure of drafting a bill at the state library, Cutler authored a bill that gave married women the right to maintain as her sole and separate property, outside the control or interference of her husband, all property that she owned at the time of marriage or acquired during marriage. *Id.*

restrictions of coverture that maintained married women's financial dependence as well as the underlying status regime of the common law.[83] The law activists, nonetheless, viewed it as a start in their movement.[84] They immediately began to advocate for other broad and specific legislation for women's rights, including granting women equal guardianship rights to their children.[85] But the Civil War intensified, suppressing many of their efforts until after the war.[86]

For the next four years, northern activists focused much of their energy on supporting the Union Army, unwittingly developing critical social and political skills that enhanced the women's rights movement after the War.[87] They joined local Sanitary Commissions, established to assist the Union Army in maintaining hygienic field hospitals and camps societies, held fundraisers for the war effort, and formed charitable organizations that provided direct services to the troops.[88] Myra Bradwell, an abolitionist and emerging women's rights activist, was president of the Soldiers' Aid Society, one of the organizations that provided medical services and supplies to wounded soldiers and relief to their families.[89] Commission work taught Bradwell and the other volunteers how to develop and operate large advocacy organizations.[90] After the war, many women who had worked in the Sanitary Commissions and other organizations, as well as women who had worked during the war in the factories, on farms, in business offices as clerks, or as teachers in the grammar and normal schools believed they had fulfilled their citizenship duties and that their efforts entitled them to full civil and political citizenship rights.[91] With the passage of the Thirteenth, Fourteenth, and ultimately the Fifteenth Amendments, these women activists demanded that the promises embedded in these laws—to endow freed men with citizenship rights—also granted white, black, and freed women those same rights.[92]

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[83] *See Talk with the Legislature*, CHI. LEGAL NEWS, Feb. 27, 1869, at 172 ; *Husband and Wife–Property of Latter under Law of 1861*, CHI. LEGAL NEWS, Oct. 17, 1868, at 22 (specifying the inequalities that persisted in the Illinois property laws).

[84] *See* 3 HISTORY OF WOMAN SUFFRAGE, *supra* note 71, at 561-62.

[85] *Id.* at 562 (explaining Cutler also proposed a bill that granted a widow, with an estate valued at $5000 or less, the right to maintain her husband's property after his death). This was intended to assist women whose husbands died in battle by allowing them to continue to operate the family estate to care for themselves and their children. *Id.*

[86] *Cf.* Faye Dudden, *New York Strategy: The New York Woman's Movement and the Civil War*, *in* VOTES FOR WOMEN, *supra* note 22, at 56, 56 (arguing that women's rights activism in New York continued during the Civil War).

[87] *See* ELEANOR FLEXNER & ELLEN FITZPATRICK, CENTURY OF STRUGGLE: THE WOMAN'S RIGHTS MOVEMENT IN THE UNITED STATES 101-02 (enlarged ed. 1996).

[88] *See* MARY A. LIVERMORE, MY STORY OF THE WAR: A WOMAN'S NARRATIVE OF FOUR YEARS PERSONAL EXPERIENCE 411-56, 455 (1887); BESSIE LOUISE PIERCE, A HISTORY OF CHICAGO VOLUME II: FROM TOWN TO CITY 1848-1871, at 453, 455 (1940).

[89] *See* FLEXNER & FITZPATRICK, *supra* note 87, at 100-01; Thomas, *supra* note 44, at 223-24.

[90] *See* STEVEN M. BUECHLER, THE TRANSFORMATION OF THE WOMAN SUFFRAGE MOVEMENT: THE CASE OF ILLINOIS, 1850-1920, at 59 (1986).

[91] *See* FLEXNER & FITZPATRICK, *supra* note 87, at 136-37; *see also* BUECHLER, *supra* note 90, at 59; DUBOIS, FEMINISM AND SUFFRAGE, *supra* note 10, at 181.

[92] *See* ROGERS M. SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 285 (1997); *see also* FLEXNER & FITZPATRICK, *supra* note 87, at 136-37.

Myra Bradwell understood the potential power of the Reconstruction Amendments for women's rights.[93] The Amendments provided new constitutional grounds to bolster activists' natural law arguments for women's equality.[94] Bradwell was well trained in the law. She began studying law in the Chicago office of her husband and brother in 1854.[95] After the War, in 1868, she founded and edited the *Chicago Legal News* (*CLN*), a weekly legal newspaper for lawyers and judges, which she used to champion women's rights.[96] In her paper, she argued that the Constitution now secured women's substantive equality: "[U]nder the [Thirteenth and Fourteenth] [A]mendments to the constitution of the United States and the 'Civil Rights Bill,' [a woman] stands equal before the law in respect to her *civil rights*, with the most favored citizen of the state *male* or *female*."[97] To secure and enforce this equality, Bradwell used the *CLN* to continue the law reform strategy activists began before the War.

The *CLN* differed from Elizabeth Cady Stanton and Susan B. Anthony's *The Revolution*, and later from Lucy Stone's *The Women's Journal*.[98] Its actual and intended audience was primarily men, especially male lawyers, judges, legislators, and businessmen.[99] Bradwell built her readership by promptly publishing legal decisions from state and federal courts, allowing attorneys to read these decisions well in advance of the published state reporters.[100] Alongside the court decisions, she published stories and editorials that described the dire consequences of women's legal inequality.[101] She urged her large readership to support the enactment and enforcement of law reforms aimed at securing women's equality, including the MWPAs.[102]

In 1869, Bradwell published a full accounting of the way the Illinois Supreme Court had interpreted and applied the Illinois MWPA since its enactment in 1861.[103] She first discussed the way the court altered the original intent of the statute.[104] Bradwell explained that, although the court acknowledged the act was intended to be and did effect a root change in the rights of

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[93] *See Women in Iowa*, CHI. LEGAL NEWS, Dec. 25, 1869, at 100 (Bradwell asserts her interpretation on the amendments).

[94] *See* Basch, *supra* note 28, at 52-53.

[95] *See* FRIEDMAN, *supra* note 42, at 41-42.

[96] *See The Chicago Legal News*, *in* 6 INDUSTRIAL CHICAGO: THE BENCH AND BAR 642, 642 (1896). Because the laws of coverture still applied, Bradwell petitioned the Illinois legislature for a special charter that allowed her to enter into contracts and own her own business. *Id.* Under the authority of her charter, Bradwell founded the *Chicago Legal News*, the city's only weekly legal newspaper. *Id.* She and her husband then established a publishing company that printed and published the paper. *Id.*

[97] *Women in Iowa*, *supra* note 93.

[98] *See* BUECHLER, *supra* note 90, at 76-77 (describing the similarities in mission of *The Revolution* and *The Woman's Journal* and Mary Livermore's *The Agitator*, which merged with *The Women's Journal*).

[99] *See Prospectus*, CHI. LEGAL NEWS, Oct. 3, 1868, at 1.

[100] *See The Chicago Legal News*, *supra* note 96, at 642.

[101] *See* Goddard, *supra* note 44, at 112-14.

[102] Bradwell argued that a woman "has a right to think and act as an individual." *Woman's Right to Vote*, CHI. LEGAL NEWS, July 7, 1868, at 45.

[103] *Married Women's Separate Property Under Act of 1861*, CHI. LEGAL NEWS, Nov.13, 1869, at 53.

[104] *See id.*

married women, its interpretation and application of the law as an economic measure blunted its transformational purpose.[105] Bradwell specified that in its initial construction of the act, the Illinois Supreme Court found that the legislature "designed to make, and did make, a radical and thorough change in the condition of a *feme covert*."[106] The court then discounted this design, however, by asserting that the legislature's real motivation was the volatile emerging marketplace, where "excitement and speculation, by which fortunes are wrecked in a moment, and the innocent made to suffer from no misconduct of their own."[107] "The object of the legislature," the court explained, "was, not to loosen the bonds of matrimony, or create an element of constant strife between husband and wife, but to protect the latter against the misfortunes, imprudence, or possible vice of the former, by enabling her to withhold her property from being levied on and sold for the payment of his debts, or squandered by him against her wishes."[108] Through its decisions, the court reshaped the law's purpose into a perpetuation, rather than a transformation, of the status regime.

In her paper, Bradwell also highlighted the way the court used its interpretation of the act to significantly limit its scope.[109] She emphasized, disapprovingly, the court's finding that the act did not include a wife's earnings or any property she bought with those earnings as her sole property.[110] The court ruled instead that these belonged to her husband.[111] It also held that the law did not eliminate curtesy, and therefore a wife could not sell her real property without her husband's consent.[112] Further, the court found that the act only allowed a married woman to enter into contracts regarding her separate property.[113] But it did not remove other common law liabilities that prohibited her from entering into other contracts, engaging in trade, or acting as a surety for her husband.[114] Finally, emphasizing its commitment to coverture, the court ruled that because the husband owned his wife's earnings and had the limited right of curtesy, he was still liable for his wife's debts.[115]

Following the law activists in New York and elsewhere, Bradwell engaged in a vigorous campaign for a married woman's earnings law and a law that granted women equal guardianship rights to their children in Illinois.[116] In the *CLN*, she explained the proposed statutes and published arguments in favor of

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[105] *See* Elijah v. Taylor, 37 Ill. 247, 249 (1865).
[106] Emerson v. Clayton, 32 Ill. 493, 497 (1863).
[107] *Id.* at 496.
[108] Cole v. Van Riper, 44 Ill. 58, 64 (1867).
[109] *See* SULLIVAN, *supra* note 11, at 101 (arguing that the same phenomenon occurred in other states). The courts did not interpret the statutes as an abolishment of coverture, rather they collaborated with their state legislatures to reconcile the tensions created by married women's property rights and coverture. *Id.*
[110] *Married Women's Separate Property Under Act of 1861*, *supra* note 103.
[111] *See* Bear v. Hays, 36 Ill. 280, 281 (1865); *see also* Farrell v. Patterson, 43 Ill. 52, 58 (1867).
[112] *See Cole*, 44 Ill. at 66.
[113] *See* Carpenter v. Mitchell, 50 Ill. 470, 471-72 (1869).
[114] *Id.* at 474.
[115] *See* Connor v. Berry, 46 Ill. 370, 372 (1868).
[116] *See Custody of Children*, CHI. LEGAL NEWS, Apr. 29, 1871, at 243; *Talk with the Legislature*, *supra* note 83; *see also Custody of Children in Illinois*, CHI. LEGAL NEWS, May 18, 1872, at 252; *The Legal Existence of the Wife*, CHI. LEGAL NEWS, Jan. 25, 1873, at 211.

the reforms to win the support of the male legal community and as an indirect appeal to the legislature.[117] She dramatically described the negative effect the law had on laboring women who were married to financially irresponsible husbands:

> since the Supreme Court decided that the act of 1861 did not extend to the earnings of a married woman, and that they belonged to the husband, and might be taken to pay his debts[,] [r]ich shoddy creditors of the husband have ever since been taking to pay his debts the money earned by the honest toil of the wife, for the purpose of supporting her ragged, starving children, which a drunken or unfortunate husband failed to provide for, and the law still remains the same.[118]

Bradwell also appealed to men's economic interests, publishing articles that criticized the court's findings that the 1861 act did not relieve a husband from the common law liability for his wife's debts and exempted a wife's property from liability for her own debts as well as her husband's.[119]

The state legislature responded in 1869 with a second MWPA.[120] As in other states, the new law granted married women limited additional property rights.[121] It deemed a married woman's earnings her sole and separate property and allowed a married woman to sue in her own name.[122] But, it did not grant her equal guardianship rights to their children, nor address the concerns of those who believed that husbands and wives would use the law to evade creditors, as it failed to remove the common law prohibition against suing a married woman.[123] Bradwell agreed with the law's opponents that the statutory amendments were inadequate, but explained her objection was not because the law encouraged swindling, but because it failed to make women's property rights and obligations equal to men's under the law.[124] "[A married woman is a] citizen of our State and of the United States . . . as much a citizen as a married man," Bradwell asserted.[125] Women should have the full benefits and obligations of that status.[126] Another five years passed before the 1874 Illinois legislature passed a third MWPA.[127] This act moved married women's property rights closer to formal equality, but still failed to displace the underlying status regime.[128]

Law activists continued their fight for married women's property rights throughout the nineteenth century as they broadened their agenda.[129] They linked their MWPA campaigns with campaigns for other civil and political

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[117] *Laws Relating to Women*, CHI. LEGAL NEWS, Oct. 31, 1868, at 37.
[118] *Id.*
[119] *See Married Woman's Property*, CHI. LEGAL NEWS, Nov. 14, 1868, at 53; Letter to the Editor, *The Property Rights of Married Women*, CHI. LEGAL NEWS, Dec. 12, 1868, at 85.
[120] 1869 Ill. Laws 255.
[121] *Id.*
[122] *Id.*
[123] *See id.*
[124] *Married Woman's Property*, *supra* note 119.
[125] *Married Women's Separate Property Under Act of 1861*, CHI. LEGAL NEWS, Nov. 27, 1869, at 68.
[126] Bradwell asserted that if a "judgment be recovered against her. . . [a married woman's] separate property [should] be sold to satisfy it." *Id.*
[127] 68 Ill. Laws 576, 576-78 (1874).
[128] *See Husband and Wife*, CHI. LEGAL NEWS, Jan. 31, 1874, at 153.
[129] *See infra* Parts I.B, II.

rights, including woman suffrage.[130] As women learned in the law, they continued to apply their strategy of advocating law reforms to secure women's full emancipation and equality.[131] Their campaigns were a core part of the early women's rights movement, but their focus on rights claims and law reform made them exceptional in the decades after the Civil War. It allowed them to maintain relationships with most women's rights associations despite divisions that arose between and among those groups, most dramatically within the woman suffrage movement.[132]

B. Woman Suffrage

The law activists emerged as a distinct faction within the women's rights movement when the leaders of the movement divided over the issue of suffrage. Part of the story is familiar. Woman suffrage was one of the central law reforms women's rights activists demanded during the movement's formalizing conventions in the 1840s and 1850s.[133] After the Civil War, women's rights activists who had fought for the abolition of slavery, as well as women's emancipation, believed the government would enfranchise all African Americans and all women.[134] When Congress passed constitutional amendments that granted suffrage to black men alone, an independent woman suffrage movement emerged.[135] Suffragists then divided among themselves over whether to support the Fifteenth Amendment as they fought for woman suffrage, or whether to denounce it because women were not included.[136]

The less familiar part of the story is the emergence of a connected, yet distinct, law reform movement. To be clear, the leaders of the woman suffrage movement continued to support a broad range of law reform campaigns to advance women's rights in the second half of the nineteenth century, but they subordinated those efforts to securing the vote.[137] Further, they allowed their position on the Fifteenth Amendment and their suffrage strategies to divide themselves from each other.[138] Women law activists did not. They maintained an extensive law reform agenda that included but did not privilege suffrage, and they maintained relationships with both of the main, oppositional suffrage camps.[139] Myra Bradwell served as a leader of this law activist faction.[140]

Law activists articulated their law reform agenda at a suffrage convention in Illinois in 1869.[141] After the Civil War, women suffragists in Illinois, as in other states, proposed a woman suffrage provision as part of the state's new

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[130] *See infra* Parts I.B, II.
[131] *See infra* Parts I.B, II.
[132] *See infra* Parts I.B, II.
[133] FLEXNER & FITZPATRICK, *supra* note 87, at 136-37.
[134] *See* DUBOIS, FEMINISM AND SUFFRAGE, *supra* note 10, at 53-55.
[135] *See id.* at 189-202.
[136] *See id.* at 162-202; FLEXNER & FITZPATRICK, *supra* note 87, at 145-48.
[137] DUBOIS, FEMINISM AND SUFFRAGE, *supra* note 10, at 18-20.
[138] *See id.* at 162-202; FLEXNER & FITZPATRICK, *supra* note 87, at 145-48.
[139] *See infra* Part II.
[140] *See infra* Part II; *see also* BUECHLER, *supra* note 90, at 62-64 (summarizing Bradwell's leadership role in the women's rights movement and her focus on women's legal rights).
[141] *See Chicago Woman Suffrage Convention*, CHI. LEGAL NEWS, Feb. 20 1869, at 164.

constitution.[142] Illinois was one of many states spurred by the enactment of the Thirteenth Amendment (1865) and the Fourteenth Amendment (1868) to hold constitutional conventions to redefine the roles of individuals, the law, and the state in light of these new amendments.[143] In preparation of the Illinois convention, the Woman's Association (later Chicago Sorosis), one of the city's first woman's clubs, determined to hold a suffrage convention to generate support for a woman suffrage provision in the new state constitution.[144] During the planning stages, however, significant debates over political strategy caused some of the members to leave the club and form a second woman's suffrage association.[145] The conflicts were similar to the rift that occurred between the leaders of the national woman's suffrage movement over the Fifteenth Amendment during the same period,[146] but the outcome was distinguishable.

The law activists in Illinois, and Bradwell principal among them, refused to allow the debate over women suffragists' support of the Fifteenth Amendment to determine their associations or their strategies.[147] Like all woman suffragists, they were frustrated by the Republican Party's failure to include women in the suffrage provision.[148] Yet, they continued to support Lucy Stone, the subsequent leader of the American Woman Suffrage Association (AWSA), and other national leaders who, nonetheless, endorsed the amendment that gave African American men alone the vote.[149] They also continued to support Elizabeth Cady Stanton and Susan B. Anthony, who denounced the Fifteenth Amendment, since women were not included, and subsequently established the National Woman Suffrage Association (NWSA).[150] The Illinois law activists carved out a middle ground.

To maintain this middle ground, they focused on the issue with which the oppositional factions agreed, that women secure the right to vote.[151] Bradwell joined with a number of other law activists and woman suffragists who formed their own association, the Illinois Women's Suffrage Association (IWSA), at a

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142 ALEXANDER KEYSSAR, THE RIGHT TO VOTE: THE CONTESTED HISTORY OF DEMOCRACY IN THE UNITED STATES 184 (2000). *See also* BUECHLER, *supra* note 90, at 103.

143 *See* JANET CORNELIUS, CONSTITUTION MAKING IN ILLINOIS, 1818-1970, at 56-64 (1972).

144 *See The Women's Association*, CHI. TRIB., June 19, 1868, at 1 (documenting its founding and its goal: "to increase the social relations of women and mankind, and to advocate anything that will, in any way, tend to promote the welfare of both sexes—the female sex especially"); *see also* Lana Ruegamer, *Livermore, Mary Ashton Rice*, *in* WOMEN BUILDING CHICAGO, *supra* note 44, at 512, 512-514 (documenting the name change of the Woman's Association to the Chicago Sorosis).

145 *See* BUECHLER, *supra* note 90, at 68.

146 *Id.* at 71.

147 *See id.* at 104-05.

148 *See* DUBOIS, FEMINISM AND SUFFRAGE, *supra* note 10, at 163-64; *see also* BUECHLER, *supra* note 90, at 69-76.

149 *See* DUBOIS, FEMINISM AND SUFFRAGE, *supra* note 10, at 163-64; *see also* BUECHLER, *supra* note 90, at 69-76.

150 *See* DUBOIS, FEMINISM AND SUFFRAGE, *supra* note 10, at 163-64; *see also* BUECHLER, *supra* note 90, at 69-76.

151 *See* DUBOIS, FEMINISM AND SUFFRAGE, *supra* note 10, at 164 (arguing that although there was a split in the suffrage movement, the two rival organizations advanced cause of woman suffrage).

separate convention in Chicago in February 1869.[152] During its first two years the IWSA resolved to remain impartial in the fight between the national leaders and focused its efforts on advancing a law reform agenda—the IWSA's first act was to create a commission dedicated to advocating changes in the laws affecting the social and legal status of women.[153] One of its leaders, Judge Charles Waite (who was a member of the state's first women's rights association in 1855) drafted a resolution calling for woman suffrage to be included in the new state constitution.[154] Judge Waite also demanded an end to any legal barrier that limited women's full participation in "social, civil and political life."[155] Myra Bradwell, who was elected corresponding secretary, detailed the organization's agenda in the *CLN*.[156]

The law activists worked for a number of critical rights they believed were necessary for women to achieve liberty and equality.[157] As they were advocating for suffrage laws, either as a state statute, a state constitutional provision, or a federal constitutional amendment, they simultaneously sought additional law reforms to further their cause.[158] But because law reform was their primary strategy, they recognized that advocating from outside the legal system was not enough.[159] They determined to change their relationship with the legal system to become accepted members inside the legal profession.[160] Myra Bradwell was among the first of this small group to seek official entry into the male legal realm.

II. THE DEVELOPMENT OF THE WOMEN'S LAW REFORM MOVEMENT: WOMEN LAWYERS AND THEIR ARGUMENTS FOR A NEW JURISPRUDENCE

The law activists never formalized their law reform movement by naming it or establishing a separate, specific organization. The members included those committed to the strategy of securing women's rights through a broad range of law reforms and the networks they developed.[161] The movement took

[152] *See* BUECHLER, *supra* note 90, at 75; *see also* 3 HISTORY OF WOMAN SUFFRAGE, *supra* note 71, at 564-65.

[153] *Woman's Suffrage*, CHI. TRIB., Jan. 5, 1870, at 4 (citing and discussing the resolution the IWSA passed regarding its refusal to join either the AWSA or the NWSA: "*Resolved*, That while we sympathize with the objects had in view in the formation of the National Women Suffrage Associations formed in Cleveland and New York, we will *not* become auxiliary to either, until the difficulties between the two are settled."). *See also Chicago Woman Suffrage Convention*, *supra* note 141.

[154] *See Woman's Kingdom*, CHI. INTER OCEAN, May 20, 1882 (published a reprint of Judge Waite's 1869 convention speech).

[155] *See The Women*, CHI. TRIB., Feb. 13, 1869, at 4.

[156] BUECHLER, *supra* note 90, at 69-73; *Chicago Woman Suffrage Convention*, *supra* note 141.

[157] *See supra* note 59; *see also infra* Part II.

[158] *See supra* note 59; *see also infra* Part II.

[159] *See* Grace H. Harte, *The Battle for the Right of Women to Practice Law*, 33 WOMEN LAW. J. 141, 145 (1947) (describing the historical fight for women to be lawyers and arguing that their motivation for the fight was that "the doors of the temple of justice must be opened to women").

[160] *See id.* at 141-45.

[161] *See infra* Parts II, III.

shape as a handful of law activists determined to become licensed lawyers. They saw the period of reconstruction, after the Civil War, as their opportunity to infiltrate the legal profession.[162] They developed new legal arguments to both persuade courts and legislatures to grant them a law license and to ensure that their law reforms were enacted and enforced.[163]

In the summer of 1869, working in mixed-sex, loosely formed networks, two women (both white) applied for a state license to practice law, and five women (four white and one African American) enrolled in the few law departments in the country that would admit women.[164] Their motivation for entering the legal profession was threefold: (1) they sought to establish that women had the right to work in any profession or occupation; (2) they wanted to practice law as a career; and (3) they intended to use their positions as lawyers—official members inside the legal system—to advance and enforce the social, civil, and political rights of women.[165] Their efforts were not individual, but rather part of a collective effort.[166] Myra Bradwell, who was the second American woman to apply for a law license (and the only one of this group whose application was denied),[167] became the leader of this collective.[168] She used her licensure case and her legal newspaper, the *CLN*, to foster the development of trans-state networks that became the core of the women's law reform movement over the next several decades.[169]

The legal profession to which these women sought entry was in the midst of transformation. The new, and increasingly dominant, view was that law was a science and should be interpreted and administered only by professional

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[162] *See* Gilliam, *supra* note 41, at 107.

[163] *See infra* Part II.A; *see also* Gilliam, *supra* note 41, at 112 (arguing that Bradwell's reasoning in her case deviated from conventional judicial reasoning).

[164] Arabella Mansfield applied for her law license in Iowa on June 15, 1869. *See* Dorothy Thomas, *Arabella Mansfield*, *in* 2 NOTABLE AMERICAN WOMEN, *supra* note 44, at at 492, 493. Myra Bradwell applied for her law license in Illinois in September 1869. *See A Woman Cannot Practice Law or Hold any Office in Illinois*, CHI. LEGAL NEWS, Feb. 5, 1870, at 145. Lemma Barkaloo and Phoebe Couzins gained admission to the law school at Washington University in St. Louis, after Barkaloo was initially denied admission to the law school at Columbia University. African American Mary Ann Shadd Carey was admitted to Howard University Law School in Washington, D.C. Sarah Kilgore and Ada Kepley were admitted to the University of Chicago Law School. Also in their class at the University of Chicago was Richard A. Dawson, the first African American man admitted to the law school. *See* DRACHMAN, SISTERS IN LAW, *supra* note 42, at 37, 45; MORELLO, *supra* note 41, at 46-53; Ellen A. Martin, *Admission of Women to the Bar*, 1 CHI. L. TIMES 76, 76, 78 (1887); Lelia J. Robinson, *Women Lawyers in the United States*, 2 GREEN BAG 10, 13, 17, 28 (1890).

[165] *See* Barbara Allen Babcock, *Foreword: A Real Revolution*, 49 U. KAN. L. REV. 719, 726 (2001) (arguing that nearly all of the first women lawyers were feminists and that they became lawyers to further the women's rights movement); *cf*. DRACHMAN, SISTERS IN LAW, *supra* note 42, at 50-51 (arguing that the motivations of the first generation of women lawyers to enter the profession were diverse, though Drachman does assert that some were motivated by the desire to use the law to advance women's rights).

[166] *See* Babcock, *supra* note 42, at 1699 (arguing that when the individual efforts of the first women lawyers are considered together, they reveal a "larger movement").

[167] *See* Robinson, *supra* note 164, at 14. *See generally infra* Part II.

[168] *See* I The Bench and Bar of Illinois 277 (John M. Palmer ed., 1899).

[169] *See* Goddard, *supra* note 44, at 112-14.

experts.[170] Elite lawyers sought to discount the philosophy promoted in the early nineteenth century by President Andrew Jackson that the learned professions did not require any special qualifications and should be open to ordinary men.[171] Law schools, in large part due to the work of Christopher Columbus Langdell, Dean of Harvard Law School, were replacing apprenticeships as the preferred method of studying law.[172] These developments, coupled with pressure from elite lawyers to exclude the growing numbers of non-elites seeking entrance to the profession (immigrant and African American men, and all women) inspired state legislatures to revive law licensing and certification requirements for admission.[173]

Against the intentions of the elite, these transformations of the legal system provided women and minority men new opportunities to demand their equality before the law and to become lawyers.[174] The proliferation of law schools created a number of institutions that admitted women and minority men.[175] The new statutes setting requirements for a law license standardized admissions and lessened the opportunities for nepotism and overt discrimination.[176] Further, the Fourteenth Amendment, which deemed as citizens all men and women born in the United States and those naturalized, provided new legal arguments for women's rights activists to employ in their movement.[177] Included in these arguments were demands that would be the basis for a legal philosophy known later as sociological jurisprudence.[178]

Legal thought also was in transition in the decades after the war. Elite lawyers and Justices employed an ideology that William Wiecek labels "legal classicism."[179] Legal classicists believed the legal order was an "autonomous,

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[170] *See* Robert W. Gordon, *Legal Thought and Legal Practice in the Age of American Enterprise 1870-1920*, *in* PROFESSIONS AND PROFESSIONAL IDEOLOGIES IN AMERICA 70, 72, 89-91 (Gerald L. Geison ed., 1983); *see also* BURTON J. BLEDSTEIN, THE CULTURE OF PROFESSIONALISM: THE MIDDLE-CLASS AND THE DEVELOPMENT OF HIGHER EDUCATION IN AMERICA 86-88 (1976); BRUCE A. KIMBALL, THE "TRUE PROFESSIONAL IDEAL" IN AMERICA: A HISTORY 186, 192-93, 245-50 (1992); THE PROFESSIONS IN AMERICAN HISTORY 1 (Hathan O. Hatch ed., 1988).

[171] *See* SAMUEL HABER, THE QUEST FOR AUTHORITY AND HONOR IN THE AMERICAN PROFESSIONS, 1750-1900, at 210 (1991). From the Revolution to 1869, the American legal profession had been exclusively male in membership and character. The characteristics of a lawyer, as delineated by Michael Grossberg, were "camaraderie, competitiveness, physical courage, practicality, personal trust, oratorical prowess, entrepreneurial skill, and an aversion to bookishness[,]" all traits were associated with masculinity in the nineteenth century. Michael Grossberg, *Institutionalizing Masculinity: The Law as a Masculine Profession*, *in* MEANINGS FOR MANHOOD: CONSTRUCTIONS OF MASCULINITY IN VICTORIAN AMERICA 133, 137 (Mark C. Carnes & Clyde Griffen eds., 1990).

[172] *See* HALL, *supra* note 59, at 218-21.

[173] *See* JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA 96, 100 (1976).

[174] *Id.* at 81, 88, 98, 295.

[175] *See* DRACHMAN, SISTERS IN LAW, *supra* note 42, at 43-51; FRIEDMAN, *supra* note 59, at 620; MORELLO, *supra* note 41, at 39-87.

[176] *See* FRIEDMAN, *supra* note 59, at 634.

[177] U.S. CONST. amend. XIV. *See* Basch, *supra* note 28, at 53; Dubois, *supra* note 24, at 21.

[178] WIECEK, *supra* note 46, at 191.

[179] *Id.* at 3.

determinate, natural, neutral, necessary, objective, and apolitical structure of principles and norms."[180] Most legal and historical scholars credit Justice Oliver Wendell Holmes as one of the first intellectuals to question the notion that judicial decisions were based on such detached criteria.[181] Populists, and then the Progressives, were the first to politically attack classicism.[182]

The core of the movement to replace classicism is most often tied to Roscoe Pound, a law professor and later Dean of Harvard Law School.[183] Pound coined the term "sociological . . . jurisprudence" in the first decade of the twentieth century in his call for "pragmatism as a philosophy of law."[184] Pound asserted that the law ought to address current social needs and secure social justice.[185] But Pound was not the first to articulate these arguments. Women's rights activists made these demands in the years after the Civil War, when a handful of Radical Republicans and women law activists sought to remove the gender barriers to the legal profession as part of the women's rights movement.[186]

A. Myra Bradwell's Case and the Gendered Origins of Sociological Jurisprudence

The movement to open the legal profession to women began in Iowa. A small group of Radical Republican judges and lawyers who had been attempting to use the law and legal system to secure liberty and equality for African Americans organized the effort.[187] Judge Francis Springer, a leader in this movement, encouraged Arabella Babb Mansfield, a married white woman, to seek admission to practice law in the state.[188] Mansfield, who had been studying law for two years in her brother's law office while a professor at Iowa Wesleyan, agreed.[189] On June 15, 1869, she applied to the Iowa District Court for her law license.[190] As the presiding judge, Springer appointed two male lawyers who supported women's rights to examine her.[191] Each passed Mansfield with high honors, noting their authority to admit Mansfield rested on her exceptional ability and "the demands and necessities of the present time and

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[180] *Id.* at 175, 177-80. *See also* HALL, *supra* note 59, at 223; MORTON J. HOROWITZ, THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 3, 109-42 (1992); Gordon, *supra* note 170, at 70-71 (arguing that elite lawyers during this time fought against an instrumental approach to law and advocated instead a scientific, formalist approach).

[181] *See* HALL, *supra* note 59, at 223; HOROWITZ, *supra* note 180, at 109-10.

[182] *See* HOROWITZ, *supra* note 180, at 3, 109-42; WIECEK, *supra* note 46, at 177-80.

[183] WIECEK, *supra* note 46, at 191-93.

[184] *See* Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 609 (1908).

[185] *See id.* at 605, 609; *see also* WIECEK, *supra* note 46, at 191-93. *See generally* Roscoe Pound, *The Need of a Sociological Jurisprudence*, 19 GREEN BAG 607 (1907).

[186] *See* Adam Winkler, *A Revolution Too Soon: Woman Suffragists and the "Living Constitution,"* 76 N.Y.U. L. REV. 1456, 1458 (2001).

[187] *See* J. CLAY SMITH, JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER 1844-1944, at 451-55 (1993).

[188] *See* Thomas, *supra* note 164, at 493.

[189] *See id.*

[190] *Id.*; Louis A. Haselmayer, *Belle A. Mansfield*, 55 WOMEN LAW. J. 46, 46 (1969).

[191] *See* Thomas, *supra* note 164, at 493.

occasion."[192] The committee concluded that Mansfield's performance in her examination "has given the very best rebuke possible to the imputation that ladies can not qualify for the practice of law."[193]

The examiners' remarks helped lay the foundation for a new ideology of judicial interpretation that would follow, one that required judges to interpret and apply statutes in light of "the needs and interests and opinions of society of to-day [sic]."[194] The judges needed to employ an ideology that allowed them to circumvent a literal interpretation of the law. The Iowa statute regulating the admission of attorneys restricted the profession to "white male person[s]."[195] Judge Springer interpreted the word "male" in the statute to include women, and admitted Mansfield to the bar.[196] He reasoned, "the affirmative declaration that male persons may be admitted is not implied denial to the right of females."[197] An article in the local newspaper evidenced popular support for Springer's decision, exclaiming Mansfield to be a "lady of strong mind . . . . That she has the brains and the necessary ability to make a good record for herself" no one will dispute.[198] Women's rights activists also celebrated and spread the word of Mansfield's admission, including publishing an article about the event in *The Revolution*.[199]

Six weeks later, Myra Bradwell applied for her Illinois law license with a goal to advance the movement.[200] Bradwell had received her certificate of examination and submitted it and her certificate of study to the court as required by statute.[201] She additionally included a brief, as she was the first woman to apply for a law license in the state.[202] The statute governing law licenses in Illinois used the male pronoun in its recitation of requirements.[203] In her brief, Bradwell acknowledged this circumstance but asked the court to interpret the statute regarding admission to the bar in light of subsequent laws and grant her application.[204]

Bradwell's brief followed the reasoning Judge Springer applied in Mansfield's case. She argued that the law did not overtly include a requirement that the applicant be male.[205] Further, she explained that chapter 90 of the Illinois Revised Statutes specified, "When any party or person is described or referred to by words importing the masculine gender, females as well as males shall be deemed to be included."[206] Bradwell noted that in all fifty-three sections of the Illinois Chancery Code, the words "woman," "female," or any feminine pro-

192 *See* Martin, *supra* note 164, at 76.
193 *Id.* at 77. *See also* Thomas, *supra* note 164, at 493; *A Married Woman Admitted to the Bar in Iowa*, CHI. LEGAL NEWS, Oct. 16, 1869, at 20.
194 Pound, *The Need of a Sociological Jurisprudence*, *supra* note 185, at 611.
195 Haselmayer, *supra* note 190, at 47.
196 *Id.*; Thomas, *supra* note 164, at 493.
197 Haselmayer, *supra* note 190, at 47.
198 *A Married Woman Admitted to the Bar in Iowa*, *supra* note 193.
199 *See Woman as Lawyer*, REVOLUTION, July 8, 1869, at 10.
200 *The XIV Amendment and Our Case*, CHI. LEGAL NEWS, Apr. 19, 1873, at 354 .
201 *See A Woman Cannot Practice Law or Hold any Office in Illinois*, *supra* note 164.
202 *See id.*
203 *See id.*
204 *See id.*
205 *See id.*
206 *Id.*

nouns never appeared, although masculine pronouns were used throughout.[207] If the court determined the use of the male pronoun in the section regarding the practice of law excluded women, Bradwell argued, it would follow that none of the sections of the chancery code applied to women.[208] But because "no respectable attorney would claim because defendants in chancery are represented in law by masculine pronouns, that a woman could not be made a defendant in chancery," Bradwell insisted that she was entitled to her law license.[209]

When the Illinois court used the doctrine of coverture to support its denial of her application, Bradwell crystallized the new method of legal reasoning. She demanded that the court reject the outdated principles and interpret the statute in light of the current needs, interests, and opinions of society.[210] She gave the Illinois Supreme Court a chance to reconsider its decision, as she sought to establish legal grounds to take her case beyond the state court should it rule against her; she submitted an additional brief asserting that though she was indeed married, "although she believes that fact does not appear in the record," being married did not disqualify her from admission to the bar.[211] Bradwell attempted to persuade the judges that the common law notions of coverture no longer applied.[212] Women were neither child-like nor burdened by the limitation of coverture principles; rather, she pronounced that women stood on a ground of equality with men.[213]

This alternative method of legal interpretation required judges to consider the current social and economic circumstances and conditions when applying the law.[214] Bradwell argued that in her case, the justices must consider the new laws that granted married women property rights, as well as the social advances women had made in public life.[215]

> The doors of many of our universities and law schools are now open to women upon an equality with men. The Government of the United States has employed women in many of its departments, and appointed many, both single and married, to office. Almost every large city in the Union has its regularly admitted female physicians . . . The bar itself is not without its women lawyers, both single and married.[216]

Bradwell hoped the justices would consider these examples as precedent-setting changes in the social and legal position of women, and thus apply the law to her case in line with this changed reality.

Bradwell ended her brief with her boldest invocation of this alternative mode of judicial interpretation. She cited a decision by a prominent English jurist, Lord Mansfield, who found in a separate case that, despite the dictates of common law, there were certain circumstances where a married woman could

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[207] *Id.*

[208] *See id.*

[209] *Id.*

[210] *See id.*

[211] *Id.*; Gilliam, *supra* note 41, at 113-14.

[212] *See A Woman Cannot Practice Law or Hold any Office in Illinois*, *supra* note 164.

[213] *See id.*

[214] *See* Winkler, *supra* note 186, at 1458; *see also* Gilliam, *supra* note 41, at 112 (describing Bradwell's appeal for a judicial interpretation that employed the principles of equity).

[215] *See* Olsen, *supra* note 45, at 1524.

[216] *A Woman Cannot Practice Law or Hold any Office in Illinois*, *supra* note 164.

contract and be sued.[217] Although Lord Mansfield was considered an instrumentalist and was championing a free market, not women's rights, she argued that his decision rested on the realization that because social conditions had changed, the law, too, must change.[218] He had to apply the law in light of the new reality. According to Bradwell, the justice believed that because "the reason of the law [ceased] the law itself must cease; and that, as the usages of society alter, the law must adapt itself to the various situations of mankind."[219]

Bradwell did not develop these arguments in isolation, but as part of a mixed-sex network of law activists. Bradwell participated in and fostered the growth of this network by reporting on women's rights endeavors, visiting with other activists, and participating in women's rights organizing efforts.[220] She celebrated Arabella Mansfield's admission to practice law in Iowa in the *CLN* and used Mansfield's case as evidence in the briefs she submitted in her own case.[221] Prior to filing her case, she met with Susan B. Anthony and Elizabeth Cady Stanton on at least three occasions in the first half of 1869.[222] Locally, Bradwell had the support and assistance of her husband, James Bradwell (a lawyer and Radical Republican), and long-time women's rights activists, Catharine and Charles Waite.[223]

Even as Bradwell was responding to the Illinois Supreme Courts' letter of denial, other activists within the network were developing a new strategy to secure women's rights based on the Fourteenth Amendment. Ellen Carol DuBois credits Frances and Virginia Minor with the origins of the New Departure argument, which included the notion that the right to vote was one of the privileges and immunities of United States citizens protected by the Fourteenth Amendment.[224] Women activists quickly seized on the New Departure argument and put it into practice by demanding the right to vote.[225] The majority of this activity occurred in 1868 and 1869.[226] Bradwell adapted the argument for use in her own case. She filed yet another brief on January 2, 1870, that rested

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[217] *See id.*

[218] *See id.*

[219] *Id.*

[220] *See* Goddard, *supra* note 44, at 112-14; I THE BENCH AND BAR OF ILLINOIS, *supra* note 168, at 278-79.

[221] *See A Woman Cannot Practice Law or Hold any Office in Illinois*, *supra* note 164.

[222] *See* DUBOIS, FEMINISM AND SUFFRAGE, *supra* note 10, at 180-86 (describing how Bradwell met with Anthony and Stanton in Chicago in both February, when they participated in the Illinois Woman Suffrage conference). Bradwell also attended the Equal Rights Association meeting in May 1869 in New York where Anthony and Stanton argued against supporting the Fifteenth Amendment. *Id.* at 186. *See also* 3 HISTORY OF WOMAN SUFFRAGE, *supra* note 71, at 569-70 (describing how Bradwell and Stanton went to Springfield, Illinois in February 1869 after the Chicago convention as part of a committee to lobby the Illinois legislature to pass an earning law for married women).

[223] *See* Catharine Waugh McCulloch, *Catharine Van Valkenburg Waite: Lawyer*, (unpublished biographical sketch, on file with Grace H. Harte, Series III of the Mary Earhart Dillon Collection, 1890-1945, Schlesinger Library, Radcliffe Institute, Harvard University).

[224] *See* DuBois, *supra* note 24, at 21-22.

[225] *See id.* at 23.

[226] *See id.*

women's right to practice law on the Fourteenth Amendment and the 1866 Civil Rights Act.[227]

Bradwell's third and final brief to the Illinois Supreme Court included two constitutional arguments in support of her application, both of which incorporated the New Departure.[228] These arguments challenged the court's original use of coverture as grounds for denying her application and established grounds for an appeal to the United States Supreme Court, should the Illinois court once again deny her application.[229] The first claim was that the denial of her application based on her status as a married woman violated her United States citizenship rights set forth in the Equal Protection Clause of the Fourteenth Amendment and the Civil Rights Act.[230] Bradwell quoted the portion of the act that guaranteed all United States citizens the "full and equal benefit of all laws and proceedings for the security of persons and property," and asserted that this granted her "the right to exercise and follow the profession of an attorney-at law upon the same terms, conditions and restrictions as are applied to and imposed upon every other citizen of the State of Illinois, and none other."[231] Bradwell reasoned that because she had complied with all of the state requirements for admission to the bar, "it is contrary to the true . . . meaning of said amendment and said 'Civil Rights Bill,' for your petitioner to be refused a license to practice law, upon the sole ground of her 'married condition.'"[232]

Bradwell based her second claim on the Fourth Article of the United States Constitution, not the Fourteenth Amendment, but adapted the New Departure argument to this constitutional provision as well; she asserted that Illinois had violated the privileges and immunities of her *state* citizenship under the Fourth Article.[233] Because she had formerly been a citizen of Vermont, by virtue of being born there, Bradwell claimed that when she moved to Illinois, she was guaranteed the full privileges and immunities that were granted to every other citizen of that state.[234] Bradwell argued that one of these protected privileges was "the right to follow any professional pursuit under the laws . . . [including] a right to receive a license to practice law upon the same terms and conditions as the most favored citizen of the State of Illinois."[235] Bradwell claimed that even as a married woman, she was a full citizen, and therefore deserved equal treatment under the law.[236]

The Illinois Supreme Court employed classical legal reasoning in its denial of Bradwell's appeal, and drew on a mixture of natural law, common law (and its status regime), and positive law to support its decision.[237] In Sep-

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227 *See A Woman Cannot Practice Law or Hold any Office in Illinois*, *supra* note 164.
228 *See id.*
229 *See id.*
230 *See id.*
231 *Id.*
232 *Id.*
233 *See id.*
234 *See id.*
235 Gilliam, *supra* note 41, at 115.
236 *See* LINDA K. KERBER, NO CONSTITUTIONAL RIGHT TO BE LADIES: WOMEN AND THE OBLIGATIONS OF CITIZENSHIP 87-117 (1998).
237 *See In re* Bradwell, 55 Ill. 535 (1869).

tember of 1869, Chief Justice Charles B. Lawrence issued the opinion for the court ruling definitively that married or not, no woman could be admitted to the Illinois bar.[238] He explained that the court could "not admit any persons or class of persons [to the practice of law] who are not intended by the [l]egislature to be admitted, even though their exclusion is not expressly required by the statute."[239] The court first asserted that the legislature had established the bar's admission requirements with the dominant notions of gender that limited women's citizenship rights in mind and purposefully excluded them from participating in public office.[240] The court then explained that the positive law was based on the natural legal principle that women were not equal with men: "That God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply and execute the laws, was regarded as an almost axiomatic truth" when the legislature made the law governing the bar admission.[241] The court was keenly aware of the growing legal demands of the women's rights movement and their revolutionary potential.[242] It denounced the movement and the social upheaval that surely would follow:

> This step [granting Bradwell a law license], if taken by us, would mean that in the opinion of this tribunal, every civil office in this State may be filled by women—that it is in harmony with the spirit of the Constitution and laws that women should be made governors, judges and sheriffs. This we are not yet prepared to hold.[243]

Bradwell had always understood and intended that the issues in her case extended far beyond the right to practice law. Hence, she interpreted the court's decision as a denial of women's citizenship. "[W]hat the decision of the Supreme Court of the United States was in the Dred Scott case was to the rights of negroes as citizens of the United States, this decision[,]" charged Bradwell, "is to the political rights of women in Illinois—annihilation."[244] Through her case and the other legal reforms pressed by the developing women's law reform movement, Bradwell sought to establish women as autonomous individuals with full citizenship rights, privileges, and obligations. Bradwell decided to appeal the court's decision, thus continuing her attempt to secure women's civil right to work in their chosen field through the courts. But the court's dicta outlined an additional strategy with which women law reform activists were already experienced.[245] The court's suggestion that "[i]f the legislature shall choose to remove the existing barriers and authorize us to issue licenses equally to men and women we shall cheerfully obey," inspired Bradwell and other activists to also attempt to change the law.[246]

Bradwell first concentrated on her appeal, attempting to frame it in the broadest possible terms, casting the case as a women's rights issue. She sought a decision from the United States Supreme Court that would establish defini-

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238 *See id.* at 535-42.
239 *A Woman Cannot Practice Law or Hold any Office in Illinois*, *supra* note 164.
240 *See id.*
241 *Id. See also* Olsen, *supra* note 45, at 1524-25.
242 *See* Olsen, *supra* note 45, at 1524-25.
243 *A Woman Cannot Practice Law or Hold any Office in Illinois, supra* note 164.
244 *Id.*
245 *See id.*
246 *Id.*

tively that the Fourteenth Amendment and the Civil Rights Act confirmed woman's status as full citizens entitled to due process protections and equal rights, opening the way for married and single women in every state to become licensed attorneys and much more.[247] She hired United States Senator Matthew Carpenter to argue her case.[248] An eight-year veteran of the Supreme Court bar, Carpenter was a leading expert on constitutional issues, one of the most effective advocates of his day, and favored woman's suffrage.[249]

Carpenter based the appeal on the Privileges and Immunities Clause of the Fourteenth Amendment and thereby only partially complied with Bradwell's intentions. He cast the issue as "a question not of taste, propriety or politeness, but of civil right," and directly asserted that women were citizens.[250] "The [Fourteenth] [A]mendment declares," Carpenter wrote, "'all persons born and naturalized in the United States, etc., are citizens of the United States, and of the [s]tate wherein they reside.'"[251] "Of course," he explained, "women, as well as men, are included in this provision, and recognized as citizens."[252] Carpenter did not, however, present Bradwell's argument that the court's denial of her law license violated the Equal Protection Clause of the Fourteenth Amendment, and he distinguished suffrage from the right to work.[253] Carpenter stayed clear of arguments based on gender equality because of the Justices' outspoken opposition to woman suffrage.[254] Carpenter argued that the right to work in an occupation was a right of citizenship that the Fourteenth Amendment protected from state interference, but qualified that allowing women the civil right to practice law would not be grounds to give women the political right to vote.[255]

There is no record regarding Bradwell's reaction to Carpenter's strategy. Bradwell reprinted Carpenter's argument in its entirety in the *CLN* and refrained from commenting on his omission of a Fourteenth Amendment Equal Protection claim or his distinction between the right to work and the right to vote.[256] Although Bradwell clearly supported woman suffrage, her silence on his strategy may reveal one of the distinctions between an activist woman lawyer working within the system and the radical suffragists that used civil disobedience to challenge the system. Susan B. Anthony's widely studied use of the New Departure dramatically illustrates the difference.[257] After Anthony was arrested for attempting to vote, she defended herself by denouncing the male

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[247] *The XIV Amendment and Our Case*, *supra* note 200.
[248] Gilliam, *supra* note 41, at 116.
[249] *See id.*
[250] *Supreme Court of the United States*, CHI. LEGAL NEWS, Jan. 20, 1872, at 108.
[251] *Id.*
[252] *Id*.
[253] *See* Gilliam, *supra* note 41, at 120; *Supreme Court of the United States*, *supra* note 250.
[254] *See* Gilliam, *supra* note 41, at 120.
[255] *See* HOFF, *supra* note 41, at 168; Gilliam, *supra* note 41, at 120.
[256] *See Supreme Court of the United States, supra* note 250*; see also* Gilliam, *supra* note 41, at 119 (suggesting that Bradwell did not even see Carpenter's brief until after he submitted it).
[257] *See* ELLEN CAROL DUBOIS, *Outgrowing the Compact of the Fathers: Equal Rights, Woman Suffrage, and the United States Constitution, 1820-1878*, *in* WOMAN SUFFRAGE AND WOMEN'S RIGHTS, *supra* note 10, at 81, 100-05.

legal system; "[l]aws [are] made by men, under a government of men, interpreted by men and for the benefit of men[,]" Anthony told the court.[258] "The only chance women have for justice in this country is to violate the law, as I have done, and as I shall *continue* to do[.]"[259] As a lawyer, Bradwell employed a more conservative rights-claim strategy that required adherence to the court and a method of incremental change.

When the Supreme Court ruled against Bradwell, it also based its reasoning on the Privileges and Immunities Clause of the Fourteenth Amendment.[260] Following Carpenter's argument, the Court framed the issue as whether a state can set regulations that limit a citizen's right to work.[261] It considered Bradwell's case along with several cases from New Orleans involving the right of the state to control the slaughterhouse industry in that city.[262] Specifically, the Slaughterhouse cases asked the Supreme Court to decide if a state regulation that resulted in an infringement on the right of one or more citizens to pursue their occupation was a violation of the Privileges and Immunities Clause of the Fourteenth Amendment.[263] These two cases were the first opportunity for the court to interpret and apply the new Fourteenth Amendment.

At the heart of both cases was how to reconcile an individual's civil right to work with a state's right to regulate occupations within its borders.[264] At issue in the Slaughterhouse cases was a new law that prohibited all slaughtering in New Orleans except at one regulated facility.[265] Numerous slaughterhouses were closed as a result of this law, negatively affecting the livelihood of countless butchers.[266] Though these workers were exclusively men, like Bradwell, they argued that the state law was an infringement on their constitutionally protected right to work.[267] In both the Bradwell and the Slaughterhouse cases, the Court considered the larger implications of its decisions: a favorable ruling would make laboring men and women's right to work in their chosen field superior to a state's right to control who works in what occupation or profession within its borders.

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[258] *See Matilda Joslyn Gage to Editor*, LEAVENWORTH TIMES (Kansas), July 3, 1873, *available at* http://ecssba.rutgers.edu/docs/sbatrial.html.

[259] *Id.*

[260] *See* Gilliam, *supra* note 41, at 125-26; *see also* SMITH, *supra* note 92, at 339-41.

[261] Richard L. Aynes, Bradwell v. Illinois*: Chief Justice Chase's Dissent and the "Sphere of Women's Work*,*"* 59 LA. L. REV. 521, 525 (1999); DuBois, *Taking the Law into Our Own Hands*, *supra* note 24, at 32.

[262] Aynes, *supra* note 261, at 521-25; DuBois, *supra* note 24, at 32; Olsen, *supra* note 45, at 1526-27.

[263] *See generally* Richard L. Aynes, *Constricting the Law of Freedom: Justice Miller, the Fourteenth Amendment, and the* Slaughter-House *Cases*, 70 CHI.-KENT L. REV. 627 (1994); Michael Kent Curtis, *Resurrecting the Privileges or Immunities Clause and Revising the* Slaughter-House Cases *Without Exhuming* Lochner*: Individual Rights and the Fourteenth Amendment*, 38 B.C. L. REV. 1 (1996).

[264] *See* Olsen, *supra* note 45, at 1525-26; *see also* Aynes, *supra* note 261, at 524-25; DuBois, *supra* note 24, at 32.

[265] *See* WILLIAM J. NOVAK, THE PEOPLE'S WELFARE: LAW AND REGULATION IN NINETEENTH-CENTURY AMERICA 230 (1996).

[266] *See* RONALD M. LABBÉ & JONATHAN LURIE, THE SLAUGHTERHOUSE CASES: REGULATION, RECONSTRUCTION, AND THE FOURTEENTH AMENDMENT 185-87 (2003).

[267] *Id. See also* Aynes, *supra* note 261, at 524-25; DuBois, *supra* note 24, at 32; Olsen, *supra* note 45, at 1525-26.

Matthew Carpenter, who served as Bradwell's counsel and also represented the Slaughter-House Company in the Louisiana cases, argued that the Fourteenth Amendment did protect an individual's right to work, but distinguished factually between the two cases.[268] Carpenter argued in Bradwell's case that the right to work in one's chosen occupation was a privilege protected by the Fourteenth Amendment.[269] In the Slaughterhouse cases, however, Carpenter argued that the Louisiana law limiting the right to work was an acceptable use of the state's police power.[270] The Supreme Court considered these two cases together and announced the Louisiana case first.[271] Upholding the Louisiana law, it based its decision on its interpretation of the Privileges and Immunities Clause, saying that the state laws in question, which effectively regulated a citizen's right to pursue an occupation, did not violate the Fourteenth Amendment because they were a legitimate use of the state's power.[272] This ruling set up its decision in the Bradwell case, announced one day later, upholding the denial of Bradwell's application to practice law.[273]

The majority decision in Bradwell's case, supported by five of the nine Justices, based its ruling on constitutional grounds and abstained from any comment of the issue of women's rights.[274] Relying on the Fourteenth Amendment, the Court ruled that the right to practice law was not a right protected under its Privileges and Immunities Clause.[275] It left the regulation of licensing attorneys to each state.[276] The Court chose not to comment on the lower court's rationale that was based on a patriarchal interpretation of natural law.[277] The majority also avoided a ruling on the state's relationship to women, though its decision effectively upheld limitations imposed by state governments on women's rights, including women's right to work in their chosen occupation and suffrage.

Justice Bradley, joined by two other Justices (all three of whom dissented in the Slaughterhouse cases), concurred in the decision but rejected the majority reasoning in an attempt to use the case to explicitly define the relationship between women and the state.[278] Bradley argued, consistent with his position in the Slaughterhouse cases, that the Fourteenth Amendment created a new general rule making positive the natural right of a male citizen to pursue his

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[268] *See* Gilliam, *supra* note 41, at 118.

[269] *See* Rogers M. Smith, *"One United People": Second-Class Female Citizenship and the American Quest for Community*, 1 YALE J.L. & HUMAN. 229, 260 (1989).

[270] E. BRUCE THOMPSON, MATTHEW HALE CARPENTER, WEBSTER OF THE WEST 100-01 (1954).

[271] *See* Gilliam, *supra* note 41, at 125.

[272] *See* The Butchers' Benevolent Ass'n v. The Crescent City Live-Stock Landing & Slaughter-House Co. (The Slaughter-House Cases), 83 U.S. (16 Wall.) 36 (1872).

[273] *See* Gilliam, *supra* note 41, at 125.

[274] *See* Bradwell v. Illinois, 83 U.S. (16 Wall.) 130, 139 (1872); *see also* Olsen, *supra* note 45, at 1527.

[275] *Bradwell*, 83 U.S. (16 Wall.) at 139.

[276] *See* Olsen, *supra* note 45, at 1525-26; *see also* HOFF, *supra* note 41, at 165; Gilliam, *supra* note 41, at 122; Nadine Taub & Elizabeth M. Schneider, *Women's Subordination and the Role of Law*, *in* THE POLITICS OF LAW: A PROGRESSIVE CRITIQUE 328, 339-41 (David Kairys, ed., 1998).

[277] *See Bradwell*, 83 U.S. (16 Wall.) at 137-38.

[278] *See id.* at 140-42; Gilliam, *supra* note 41, at 126-27; Olsen, *supra* note 45, at 1528-29.

chosen occupation.[279] Therefore, Bradley implied, as he had asserted in the Slaughterhouse cases, a state could not interfere with that right without due process of law.[280] Through Bradwell's case, Bradley sought to establish that women were exempt from this rule. Justice Bradley rested his decision on women's gendered status, invoking the principles of both natural law and the common law that separated men and women into different spheres.[281] Women had no right to practice law, he reasoned, as the law fell completely within man's sphere.[282]

The Bradwell majority's silence on issues of natural law and common law, and the fact that its opinion allowed for individual state legislatures to pass laws that would give women the right to practice law, represented the early stages of a transition in the dominant gender ideology.[283] Beyond the Court, there was some evidence that a growing number of men in the legal community also rejected Bradley's invocation of women's limitations based on their gender status and embraced instead a new role for women that conformed to the principles of American liberalism.[284] When the majority opinion by Justice Miller was read in open court, those in attendance received the decision somberly and silently.[285] In contrast, when Justice Bradley's concurring opinion was read, the lawyers in the courtroom openly expressed their amusement.[286] The discourse opposing the separate sphere ideology had become sufficiently pervasive that Bradley's attempt to require all women to be only wife and mother elicited ridicule.[287] Over the next two decades, aspiring women lawyers continued in a joint effort with activist men to advance women's rights claims, opening the legal profession to women one state at a time.

B. Developing Networks to Advance Women's Law Reforms

In the second half of the nineteenth century, many of the women's rights activists who sought a law license created networks with activist male lawyers to advance their rights claims and continued to employ the ideology of sociological jurisprudence to support their cause.[288] Their strategy, to become official actors within the legal system, necessitated that they work with men,[289] but most of the coalitions were built on mutual respect and the pursuit of a common

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[279] *See Bradwell*, 83 U.S. (16 Wall.) at 140-41; *see also* Gilliam, *supra* note 41, at 126-27.
[280] The Butchers' Benevolent Ass'n v. The Crescent City Live-Stock Landing & Slaughter-House Co. (The Slaughter-House Cases), 83 U.S. (16 Wall.) 36, 506 (1872) (Bradley, J., dissenting).
[281] *See Bradwell*, 83 U.S. (16 Wall.) at 140-42; Gilliam, *supra* note 41, at 126-27; Olsen, *supra* note 45, at 1528; Taub & Schneider, *supra* note 276, at 339-42.
[282] *See Bradwell*, 83 U.S. (16 Wall.) at 141; Gilliam, *supra* note 41, at 127.
[283] *See* DRACHMAN, SISTERS IN LAW, *supra* note 42, at 24.
[284] *See* SULLIVAN, *supra* note 11, at 139 (arguing that Bradley's concurrence overstated the prejudice against women by 1873).
[285] *See* ERNEST SUTHERLAND BATES, THE STORY OF THE SUPREME COURT 192-93 (1936); Gilliam, *supra* note 41, at 125.
[286] *See* BATES, *supra* note 285, at 192-93; Gilliam, *supra* note 41, at 125.
[287] *See* Gilliam, *supra* note 41, at 126.
[288] *See infra* notes 289-99.
[289] *See* Grossberg, *supra* note 171, at 137 (describing the male make-up and character of the legal profession).

goal. The networks developed locally at first, growing into a national movement by the late nineteenth century.[290] Myra Bradwell, who was a leader in both her local network and the national effort, fostered the development of the movement through the *CLN*. She championed women's efforts to become lawyers and to secure other civil and political rights, as she praised their male advocates and documented their legal arguments that asked judges and legislatures to change and interpret the law in light of the new social position of women.

The network of law activists developed in Illinois while the United States Supreme Court was deliberating Bradwell's appeal.[291] The network included Myra Bradwell and her husband, James Bradwell, Catharine Waite and her husband, Charles Waite, Ada Kepley and her husband, Henry Kepley, William Lathrop, and Alta Hulett.[292] All of the men were licensed lawyers and all of the women were studied in the law.[293] Ada Kepley was the only woman of the group that had attended law school.[294] Kepley graduated from the original University of Chicago law department on June 30, 1870,[295] the first woman in the country to earn a Bachelor of Laws degree.[296] After she passed the state bar exam, despite the backing of the dean and many of the faculty, State's Attorney Charles H. Reed refused Kepley's application for her law license.[297] Reed cited the Illinois Supreme Court's decision in the Bradwell case as the

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[290] *See infra* Part III.A.

[291] *See* Olsen, *supra* note 45, at 1529-31.

[292] *See* MORELLO, *supra* note 41, at 49. For information on Alta Hulett, see JON W. LUNDIN, ROCKFORD: AN ILLUSTRATED HISTORY 17 (1989); 6 CHARLES D. MOSHER, CENTENNIAL HISTORICAL ALBUMS OF BIOGRAPHIES OF THE CHICAGO BAR 49 (1876); Gwen Hoerr McNamee, *Hulett, Alta May*, *in* WOMEN BUILDING CHICAGO 1790-1990, *supra* note 44, at 412, 412-14; Charlotte Adelman, *A History of Women Lawyers*, ILL. B.J., May 1986, at 424, 425; E. Boyton, *Woman's Kingdom*, CHI. INTER OCEAN, Mar. 31, 1877, at 6.

[293] MORELLO, *supra* note 41, at 49; McNamee, *supra* note 292, at 412-14.

[294] *See* 3 HISTORY OF WOMAN SUFFRAGE , *supra* note 71, at 572-75 (describing that Hulett, like Bradwell read law in a law office and Ada Kepley attended University of Chicago law school); MORELLO, *supra* note 41, at 49.

[295] The first University of Chicago Law School was established in 1859. In response to the pressure of Myra Bradwell, the law department agreed to admit women. In 1870 Ada Kepley was the law school's first woman graduate and the first woman to graduate from any law school in the country. In 1873 that law school merged with Northwestern University's newly formed law school and took the name "The Union College of Law of the Chicago University and the Northwestern University." The law school continued to admit women and became well known for its support of women in the profession. In 1891, the merger between the two universities ended and the Union College of Law became Northwestern University Law School. The University of Chicago did not open its own law school again until 1902. FRANK ELLSWORTH, LAW ON THE MIDWAY: THE FOUNDING OF THE UNIVERSITY OF CHICAGO LAW SCHOOL 12-14, 17, 127 (1977); THOMAS WAKEFIELD GOODSPEED, A HISTORY OF THE UNIVERSITY OF CHICAGO 14-21 (1916); Robinson, *supra* note 164, at 10, 13-14.

[296] *See Commencement Exercises of the University of Chicago*, CHI. LEGAL NEWS, July 2, 1870, at 320 (explaining that Kepley, together with Richard A. Dawson, who simultaneously became the first black man to earn a law degree in Illinois, graduated from the University of Chicago Law Department in a class that included twenty-seven white men). Dawson, along with the white men in their class who passed the bar examination, received his law license becoming the second African American admitted to the Illinois bar. *Id.*

[297] *See id.*

reason for his denial.[298] Kepley understood Reed's decision as a limitation on women's rights, explaining, "Women might be cooks, wash women, floor scrubbers and do any sort of menial labor at that time, but they were barred from the so called learned professions."[299]

These activists began exploring alternative avenues, apart from the Illinois Supreme Court, to secure a woman's right to pursue her occupation of choice. Bradwell used the *CLN* to raise the possibility of adding a provision in the new state constitution.[300] Delegates at the constitutional convention, who were on the verge of adopting a new state constitution, had recently voted against a proposal to include a provision that would have specifically excluded women from practicing law.[301] Though Bradwell argued that their decision represented the true will of the people, and reported that the majority had come to support the advancement of women's rights and their admittance into the profession, the delegates rejected her proposed provision establishing women's right to practice law.[302] Ada Kepley sought out a local judge in her hometown of Effingham, Illinois, to establish her right to pursue a legal career.[303] Judge Decius admitted Kepley to practice law in his court, defying the state supreme court, by employing the developing sociological jurisprudence reasoning.[304] He asserted that "the motion [to admit Kepley] was proper and in accord with the spirit of the age."[305] He explained, "if it was the unanimous sense of the Bar, [I] do not feel at liberty to deny the motion."[306] However, because state law made it a crime for anyone to practice law in the state without a license, Kepley refrained from practicing.[307]

The network's most organized and concerted effort to secure women's right to work in their chosen field was a law reform campaign. They drew on their earlier work to secure the married women's property acts and the growing support for women's right to practice law from judges, practitioners, and journalists throughout the country. Rather than seek a limited measure that would allow a select group of women entrance to the legal profession, these activists determined to use language that would support the right of all women to work, expanding their opportunities to engage in any field.[308] They considered the bill as another right included in the larger women's law reform effort. The law they drafted in the fall of 1871, "AN ACT to secure to all persons freedom in the selection of an occupation, profession, or employment," proposed, "[that]

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[298] *See id.*

[299] MORELLO, *supra* note 41, at 49; Peggy Pulliam, *Effingham's Fighting Female*, *in* EFFINGHAM COUNTY ILLINOIS—PAST AND PRESENT 299, 300 (Hilda Engbring Feldhake ed., 1968).

[300] *See Commencement Exercises of the University of Chicago*, *supra* note 296; *see also The Constitutional Convention*, CHI. LEGAL NEWS, Jan. 15, 1870, at 124.

[301] *See The Constitutional Convention*, *supra* note 300; *see also Summary of Events: Illinois*, 5 AM. L. REV. 167, 168 (1870).

[302] *See The Constitutional Convention*, *supra* note 300.

[303] *See Mrs. Kepley in Judge Decius' Court*, CHI. LEGAL NEWS, Nov. 19, 1870, at 60.

[304] *Id.*

[305] *Id.*

[306] *Id.*

[307] *See id.*; *see also* MORELLO, *supra* note 41, at 49-50.

[308] *See* Olsen, *supra* note 45, at 1529; *see also* Gilliam, *supra* note 41, at 128.

no person shall be precluded or debarred from any occupation, profession or employment . . . on account of sex."[309]

The network's core activists next engaged in a strenuous campaign to ensure the bill's passage. Myra Bradwell used the *CLN* to support the campaign to enact the proposed legislation.[310] Alta Hulett traveled throughout the state delivering a lecture in support of the measure entitled "Justice versus the Supreme Court" that criticized the Illinois Supreme Court for its decision barring women from the practice of law, demanded the equality of the sexes, called for an end to discrimination based on sex, and argued that Illinois law should support women's right to work.[311] "Women have a right to enter upon any honorable calling or profession that she could fit herself for," Hulett explained, positing, "Man had no right by unjust laws or by sentimental pretences, to circumscribe the field of labor or usefulness of woman."[312] The crowds, hesitant at first, cheered Hulett by the end of her address.[313] She also argued her case to the joint judiciary committee of the House and Senate.[314]

Members of the Illinois Legislature were persuaded to grant women the right to practice law and the right to work in most fields, but they reserved certain exceptions, signaling their continued rejection of the larger issue of women's full equality with men. Women could not use the law to secure entrance to the military, engage in the burgeoning and dangerous business of road construction, or secure the right to serve on juries.[315] The insistence on women's exclusion from the military was particularly strong in the years following the Civil War, where women had contributed to military efforts in a myriad of ways, including dressing as men and serving on the front lines.[316] Although both the Union and the Confederate Armies used women who volunteered their services for the war effort, they refused to grant women any official position or pay and dismissed those who fought when they discovered their sex.[317] None of the women promoting this legislation commented publicly on this exclusionary clause or on women's exclusion from working on road construction.

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[309] PUBLIC LAWS OF THE STATE OF ILLINOIS 578 (1872).

[310] *See The Chicago Legal News*, *supra* note 96, at 642-44 (describing the *News* had a national readership and was recognized by both the United States District Court for the Northern District of Illinois and by the United States Circuit Court as an authority in the publication of court decisions and legal notifications); *Shall Women have the Legal Right to Follow any Trade, Business or Profession?*, CHI. LEGAL NEWS. Dec. 16, 1871, at 68.

[311] *See Miss Alta M. Hulett's Lecture*, ROCKFORD J., Dec. 2, 1871, at 2; *Miss Alta M. Hulett's Lecture*, ROCKFORD REG., Dec. 2, 1871, at 1; *Miss Hulett's Lecture*, ROCKFORD GAZETTE, Nov. 30, 1871, at 1.

[312] *Miss Hulett's Lecture*, *supra* note 311.

[313] *See id.*

[314] *See Alta M. Hulett* (unpublished biographical sketch, on file with Grace H. Harte, Series III of the Mary Earhart Dillon Collection, 1890-1945, Schlesinger Library, Radcliffe Institute, Harvard University).

[315] PUBLIC LAWS OF THE STATE OF ILLINOIS 578 (1872).

[316] *See* KERBER, *supra* note 236, at 262-63.

[317] *See id.* at 244, 263.

Many and varied women's rights activists did campaign for women's right to serve on juries, including these legal women.[318] But they supported the bill with the exceptions, understanding that they would have to secure women's civil and political rights incrementally. They also believed that if the bill passed, it would provide a way for women to advocate for law reforms from inside the legal system.[319] They argued that women's presence in the courtroom, both as lawyers and jurors, was essential to influence the way women's rights were interpreted and to ensure that women's rights were enforced.[320] Though the Illinois Legislature did not pass a law allowing women to serve on juries until 1939; in 1872, it was willing to allow women to enter the legal profession.[321]

The resistance to the advancement of women's rights persisted even as the bill was enacted into law. It took several votes and much debate before the legislature passed the bill by the required majority.[322] Governor Palmer, who had declined Myra Bradwell's application for appointment at Notary Public just over two years earlier on the grounds of coverture, signed the bill into law.[323] The Illinois Supreme Court responded by simultaneously increasing the standards for securing a law license. The court adopted an order requiring all candidates for the bar complete two years of legal studies, doubling the previous one-year requirement.[324]

The law activists had diverse individual responses to the new laws, but as a movement, they capitalized on the reform. Bradwell refused to reapply for admission on principle.[325] She believed the Illinois Supreme Court had erred in its decision and that it should admit her to the practice based on her original application.[326] Ada Kepley delayed reapplying for her license until 1881.[327] Although she did assist her husband in his law practice, Kepley's primary focus for almost a decade was woman suffrage and temperance reform.[328] Hulett moved to Chicago, studied law for an additional year, and in 1873, re-applied for her law license.[329] She was required to take a second bar examination, which she passed, receiving the highest score of all twenty-eight applicants.[330]

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[318] *See generally* Holly J. McCammon et al., *Becoming Full Citizens: The U.S. Women's Jury Rights Campaigns, the Pace of Reform, and Strategic Adaptation*, 113 AM. J. SOC. 1104, 1111 (2008); Gretchen Ritter, *Jury Service and Women's Citizenship before and after the Nineteenth Amendment*, 20 LAW & HIST. REV. 479, 481 (2002).

[319] *See* Harte, *supra* note 159, at 145.

[320] PROTECTIVE AGENCY FOR WOMEN AND CHILDREN, SEVENTH ANNUAL REPORT 8 (1893) (explaining Attorney Charlotte Holt later explicitly articulated the importance of having women as lawyers, judges, and observers in the courtroom).

[321] *See* ILL. REV. STAT. ch. 78, §§1, 25 (1939).

[322] *See Liberty of Pursuit Triumphant in Illinois*, CHI. LEGAL NEWS, Mar. 23, 1872, at 245.

[323] *See* Boyton, *supra* note 292; John M. Palmer, *A Married Woman Cannot be Appointed a Notary in Illinois*, CHI. LEGAL NEWS, Jan. 1, 1870, at 109.

[324] *See Admission to the Bar*, 6 AM. L. REV. 369, 369 (1871).

[325] *See* Gilliam, *supra* note 41, at 128.

[326] *See Funeral of Myra Bradwell*, CHI. LEGAL NEWS, Feb. 24, 1894, at 208.

[327] *See* DRACHMAN, WOMEN LAWYERS, *supra* note 42, at 236.

[328] *See id.*

[329] *See* Martin, *supra* note 164, at 79.

[330] *See* Boyton, *supra* note 292, at 6; *Students Admitted to the Bar in the Supreme Court*, CHI. TRIB., June 7, 1873, at 3.

On June 4, 1873, two days after her nineteenth birthday, Alta Hulett became the first licensed woman lawyer in Illinois.[331]

Illinois was the first state to pass such an enabling statute, but it was not the only place where women were seeking to become lawyers and gain their full citizenship rights.[332] Bradwell used the *CLN* to create a network among rights activists across the country to gain support for those white women and black women and men who were aspiring to be lawyers, officeholders, jurors, and voters.[333] She also used her paper to criticize courts that continued to limit their rights. In 1870 for example, Bradwell reported on a judicial ruling that excluded black men from serving on a jury in Alton, Illinois.[334] She argued that the exclusion violated the new Amendments and federal laws.[335] The following year, she celebrated the ruling of the Wyoming (Territory) Supreme Court when it ruled that the Fourteenth Amendment established that "[w]omen are persons . . . entitled to all the privileges of citizenship," including the right to vote and to sit on juries.[336] Bradwell especially reported on the efforts of women and minority men to secure a law license.[337]

The United States Supreme Court's decision in Bradwell's case resulted in women and African American men fighting to enter the legal profession state by state.[338] Bradwell reported these efforts in the *CLN* to inform activists across the country of events in other states and to facilitate the development of a national movement. She publicized cases where courts admitted the applicant without objection, including Charlotte Ray's 1872 admission in the District of Columbia, the first African American woman to secure a law license in the country.[339] In cases where a court denied admission, Bradwell published the arguments made by the applicants and their supporters.[340] The cases of Lavinia Goodell, who applied for a license to practice law before the Wisconsin Supreme Court in 1875, and Belva Lockwood, who applied to practice before the United States Supreme Court in 1876, are two dramatic examples of women

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331 *See* FRIEDMAN, *supra* note 42, at 134; *see also* Martin, *supra* note 164, at 79.

332 DRACHMAN, SISTERS IN LAW, *supra* note 42, at 6.

333 *See generally* Goddard, *supra* note 44, at 112-14.

334 *See Colored Jurors*, CHI. LEGAL NEWS, Oct. 8, 1870, at 12.

335 *See id.*

336 *Women as Citizens and Jurors*, CHI. LEGAL NEWS, Aug. 26, 1871, at 381.

337 *See infra* note 341.

338 *See generally* SMITH, JR., *supra* note 187.

339 *See* Dorothy Thomas, *Ray, Charlotte E.*, *in* 2 NOTABLE AMERICAN WOMEN, *supra* note 44, at 121, 121; *see also A Woman Admitted to the Bar in Missouri*, CHI. LEGAL NEWS, Apr. 3, 1870, at 212 (announcing the admission of Lemma Barkalow to the Missouri bar); *Women Admitted to the Bar in Utah*, CHI. LEGAL NEWS, Oct. 5, 1872, at 17 (describing the admission of Phoebe Couzins and Georgie Snow to the Utah bar); *Women As Lawyers in Maine*, CHI. LEGAL NEWS, Oct. 26, 1872, at 54 (describing the admission of Clara Hapgood Nash to the Maine bar); *Women Lawyers*, CHI. LEGAL NEWS, June 25, 1881, at 340 (discussing the admission of Nettie Cronise Lutes and her sister Florence Cronise to the Ohio bar).

340 *See, e.g.*, *A Woman Cannot Be Admitted to the Bar in Massachusetts*, CHI. LEGAL NEWS, Nov. 12, 1881, at 69 (detailing Leila Robinson's application, arguments, and denial to the Massachusetts bar); *A Woman Cannot Practice Law in Minnesota*, CHI. LEGAL NEWS, Oct. 14, 1876, at 31 (describing the Minnesota court's denial of Martha Angle Dorsett's application to practice law); *see also A Woman Refused Admission to the Bar in Pa.*, CHI. LEGAL NEWS, Mar. 15, 1884, at 215 (discussing Carrie Kilgore's application and denial to the Pennsylvania court and Judge Pierce's dissent).

who benefited from and enhanced the developing women's law reform network.[341]

Both cases illustrate how the law reform network and the sociological jurisprudence arguments were developing. Goodell wrote her own briefs employing arguments that included a mix of classical legal reasoning and the new sociological jurisprudence reasoning.[342] She argued, like Bradwell, that because the new Wisconsin licensing regulations were passed in 1867 and 1870, "when progressive ideas concerning the enlargement of the sphere of wom[e]n's industries were more widely known and adopted," the legislature intended that women would be eligible for admission.[343] She asserted that it "may reasonably be presumed to have been within the minds of the legislators" that women could be admitted.[344] Goodell also specifically invoked Bradwell's case and the Illinois Supreme Court's rationale denying Bradwell's license.[345] Distinguishing herself as an unmarried woman, Goodell claimed that married or not, the Wisconsin legislature had overturned the common law prohibitions against women's right to own property, enter into contracts, and control her own wages, all prohibitions that the Illinois court used to justify deny Bradwell's admission.[346]

Goodell, like the other rights claims activists, advocated for the transition of gender norms in a period of social ambivalence over the nature and role of women.[347] She addressed the issue directly in her brief, drawing on the two dominant arguments used by women's rights activists: that women were equal in intelligence and ability to men, and that her natural gender attributes, nurture and compassion, would enhance her ability to practice law.[348] Goodell argued that "[Woman's] peculiar delicacy, refinement, and conscientiousness" were not barriers to women's participation in the profession, but rather, were "desirable [and] necessary in promoting the 'proper administration of justice in our courts.'"[349] Simultaneously she argued that, because women comprised half of the population, the only way to ensure them justice was to ensure that they be represented by members of their own class.[350]

The two cases embodied the battle between those justices and legislators who were trying to maintain a social order based on status, and its attendant separate gendered spheres, and those law reform activists that advocated a new social order based on their conception of American liberalism, and its gender-

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341 *See, e.g.*, *Mrs. Lockwood's Case*, CHI. LEGAL NEWS, Nov. 16, 1878, at 70 (explaining Lockwood wrote a letter to Bradwell pledging to finish the fight Bradwell started to allow women to practice law and asking for her help in her application to practice law in Maryland). Bradwell published Lockwood's letter and the details of her case and committed to support her. *Id. See infra* for Bradwell's support of Goodell's application to practice law in Wisconsin and Lockwood's application to practice law before the United States Supreme Court.

342 *See supra* notes 183-86.

343 *Can a Woman Practice Law in Wisconsin?*, CHI. LEGAL NEWS, Jan. 1, 1876, at 116.

344 *Id.*

345 *See id.*

346 *See id.*

347 *See* Cleary, *supra* note 42, at 243.

348 *See* DRACHMAN, WOMEN LAWYERS, *supra* note 42, at 22-23.

349 *Can a Woman Practice Law in Wisconsin?*, *supra* note 343.

350 *See id.*

neutral construction of citizenship rights. Bradwell published many of the arguments of those involved, as well as expressions of public opinion, openly advocating the position of the activists. In Goodell's case, she printed Chief Justice Ryan's opinion denying Goodell's application, along with a reprint of an article from the *Wisconsin State Journal* and an editorial by attorney Ole Mosness criticizing the court's decision.[351] Chief Justice Ryan claimed that Wisconsin law did not provide for women's admission to the bar, and following Supreme Court Justice Bradley's concurrence in Bradwell, asserted that engaging in the practice of law was against women's nature.[352] The Wisconsin press however, called the decisions unjust and predicted that, "[t]here will be very decided dissenting opinions expressed by members of the bar and by the people."[353] The *Journal* contended that if practicing law would place women's purity in danger, "it would be better to reconstruct the court and bar, than to exclude women."[354]

Bradwell also highlighted the sociological jurisprudence arguments of Lockwood, and her supporters, which occurred at the federal level.[355] In 1876, Belva Lockwood, a licensed and practicing attorney in the District of Columbia, persuaded attorney Albert Riddle to petition for her admission to practice law before the United States Supreme Court.[356] Chief Justice Morrison R. Waite denied her application, asserting that history and the court rules established only men could practice before the highest court.[357] Lockwood responded in accord with the new sociological jurisprudence, that "it was the glory of each generation to make its own precedents."[358] She also determined to change the court rules.

Lockwood and her supporters used sociological jurisprudence arguments in support of the new law she drafted to allow women to be admitted to practice

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[351] *See Miss Goodell's Application Denied*, CHI. LEGAL NEWS, Mar. 4, 1876, at 191 (reprinting the Wisconsin State Journal article); *see also Mr. Mosness on Judge Ryan's Opinion*, CHI. LEGAL NEWS, May 13, 1876, at 271 (printing letter by Mosness to Bradwell arguing that the Chief Justice of the Wisconsin court's "prejudice against women in the practice of law" influenced him to "disregard the plain provision of the statute").

[352] *See In re* Goodell, 39 Wis. 232, 244-45 (1875); *see also Supreme Court of Wisconsin*, CHI. LEGAL NEWS, Mar. 11, 1876, at 196.

[353] Cleary, *supra* note 42, at 261 (citation omitted).

[354] *Miss Goodell's Application Denied*, *supra* note 351. In 1877 with the support of every lawyer in her county, Goodell secured a law that prohibited sex as ground for denying a law license. *See* Cleary, *supra* note 42, at 265.

[355] *See Shall Women Be Admitted to Practice Law in the Federal Courts?*, CHI. LEGAL NEWS, Mar. 23, 1878, at 215; *Shall Women Be Admitted to the Bar?*, CHI. LEGAL NEWS, Mar. 30, 1878, at 224; *The Admission of Women to the Bar*, CHI. LEGAL NEWS, Feb.15, 1879, at 180; *Women as Lawyers*, CHI. LEGAL NEWS, May 11, 1878, at 271; *Women's Right to Practice in the U.S. Courts*, CHI. LEGAL NEWS, Feb. 10, 1877, at 169.

[356] *See* MORELLO, *supra* note 41, at 31, 33.

[357] *See* DRACHMAN, SISTERS IN LAW, *supra* note 42, at 27; 6 CHARLES FAIRMAN, RECONSTRUCTION AND REUNION 1864-88 PART ONE, at 1366 (1971); MORELLO, *supra* note 41, at 33.; *see also* Jill Norgren, *Before it Was Merely Difficult: Belva Lockwood's Life in Law and Politics*, 23 J. SUPREME CT. HIST. 16, 29 (1999); Lee Ann Potter, *A Bill to Relieve Certain Legal Disabilities of Women*, SOC. EDUC., Mar. 2002, at 117, 119.

[358] FRANCES A. COOK, WOMEN'S LEGAL HISTORY BIOGRAPHY PROJECT, BELVA ANN LOCKWOOD: FOR PEACE, JUSTICE, AND PRESIDENT, (1997), http://womenslegalhistory.stanford.edu/papers/LockwoodB-Cook97.pdf.

law before the United States Supreme Court on the same terms as men. By 1878, with the help of Representative John Montgomery Glover, Lockwood had secured the passage of her bill in the House of Representatives.[359] She then submitted a brief in support of the bill to the Senate, asserting that the legislature could and should admit women because the current social conditions required it.[360] "This country is one that has not hesitated when the necessity has arisen to make precedents . . . ," she wrote, "[t]he more extended practice and the more extended public opinion [supporting women lawyers] . . . has already been accomplished. Ah! That very opinion . . . [is] asking you for that special act now so nearly consummated, which shall open this door of labor to women."[361] Lockwood next summoned the assistance of California Senator Aaron Sargent to win the support of the Senate.[362]

Sargent invoked both the principles of liberalism and the developing sociological jurisprudence arguments in his multiple addresses to Congress promoting the legislation. He asked members to support the bill and end all prohibitions on women based on their sex, insisting that women were citizens with "the same right to life, liberty and the pursuit of happiness and employment, commensurate with her capacities, as any man has."[363] As evidence, he listed a number of powerful and accomplished women from history and the current day, including queens, authors, actors, doctors, and lawyers.[364] He later cited the trend among state legislatures to pass laws prohibiting the use of sex to exclude women from the bar and the broad national trend toward the social advancement of women, noting "[i]t is generally recognized that women are taking themselves a wider sphere of action and filling it well."[365] Finally, he offered two petitions supporting the bill—the first signed by one hundred and sixty lawyers from the District of Columbia and the second signed by lawyers from New York.[366] The bill passed thirty-nine to twenty in February 1879.[367]

Throughout the 1880s, the dominant male bar increasingly accepted the activists' campaigns and their sociological jurisprudence arguments for women's rights. Although some state courts continued to resist, one by one, state and local bars admitted women.[368] Carrie Burnham Kilgore's application in Pennsylvania illustrates the transition that was taking place both in the law

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[359] *See* MORELLO, *supra* note 41, at 34; *see also Mrs. Lockwood's Victory*, CHI. LEGAL NEWS, Mar. 2, 1878, at 191; *Women's Right to Practice in the U.S. Courts*, *supra* note 355.
[360] *See Shall Women Be Admitted to the Bar?*, *supra* note 355.
[361] *Id.*
[362] *See* MORELLO, *supra* note 41, at 34; *Mrs. Lockwood's Victory*, *supra* note 359.
[363] *Women as Lawyers*, *supra* note 355. Throughout Sargent's political and legal career, he was a champion of women's rights. A close friend of Susan B. Anthony's, in 1878 he introduced the "Anthony Amendment" to Congress, the woman suffrage amendment that was ultimately enacted as the nineteenth amendment in 1920. FLEXNER & FITZPATRICK, *supra* note 87, at 165.
[364] *See Women as Lawyers*, *supra* note 355.
[365] *The Admission of Women to the Bar*, *supra* note 355.
[366] *See id.*
[367] *See id.*
[368] *See, e.g.*, *Superior Court of Errors, Conn.*, CHI. LEGAL NEWS, Oct. 21, 1882, at 54 (discussing the court decision and admission of Mary Hall to the Connecticut bar); *Women Lawyers*, *supra* note 339 (discussing the admission of Nettie Cronise Lutes and her sister Florence Cronise to the Ohio bar).

and ideology. In 1874, Judge Biddle and the Pennsylvania board of examiners refused to even let Kilgore sit for the bar exam.[369] Twelve years later, in 1886, Kilgore overcame Biddle, and those like him, who were still overtly clinging to divisions based on gender status and the limitations of coverture.[370]

Her fight wasn't easy. In 1884, ten years after her application to take the bar exam, Kilgore applied to practice law before all four of the Common Court of Pleas (CCP) in Pennsylvania.[371] Only No. 4 admitted her.[372] Judge Biddle, in CCP No. 1, once again voiced his objection to women working in the public sphere.[373] This time however, Kilgore had support. First, Justice Pierce filed a dissent, arguing the tenants of liberalism and the changed social circumstances, which permitted women to hold offices and operate in the public sphere, required women be allowed to practice law.[374] Next, Kilgore persuaded the Pennsylvania legislature to prohibit sex as a barrier for admission to practice law.[375] Finally, in 1886, the Pennsylvania Supreme Court admitted Kilgore to its bar.[376] Kilgore then returned to CCP No. 1 and demanded Judge Biddle admit her.[377] With "deep disgust," Biddle acquiesced.[378]

During the fifteen years since Bradwell had first articulated the sociological jurisprudence arguments for why women could be lawyers, the sociological evidence to support her arguments had grown considerably. When Bradwell criticized Biddle and the Pennsylvania Common Court of Pleas for its 1884 ruling, she accused them of maintaining a backward position in a time when even the United States Supreme Court had advanced its position on the rights of women.[379] "We well remember when the question of admitting women to the bar was presented to the Supreme Court of the United States, for the first time by writ of error," Bradwell wrote.[380] "But time, an act of Congress, and public opinion have changed the decisions of the Supreme Court of the United States, and now women are admitted to the bar of that august tribunal upon the same terms as men."[381] The law activists could not change the minds of judges like Biddle, but they were slowly, incrementally, able to use the law to overcome them.

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[369] *See* Elizabeth K. Maurer, *The Sphere of Carrie Burnham Kilgore*, 65 TEMP. L. REV. 827, 833 (1992).

[370] *See id.* at 847.

[371] *See id.* at 842-44.

[372] *See id.* at 844-46.

[373] *See id.* at 844.

[374] *See id.* at 844; *Court of Common Please, No. I, Pennsylvania: Mrs. Kilgore Refused Admission to the Bar*, CHI. LEGAL NEWS, Mar. 22, 1884, at 217.

[375] *See* Maurer, *supra* note 369, at 847.

[376] *See id.*

[377] *See id.* at 848.

[378] *Id.* (citing *A Disgusted Judge: Mrs. Kilgore Admitted to Practice Law in a Hostile Court*, N.Y. TIMES, May 23, 1886, at 1).

[379] *See A Woman Refused Admission to the Bar in Pa.*, *supra* note 340.

[380] *Id.*

[381] *Id.*

Despite these advances, working within the established government institutions allowed severe limitations on women's rights to remain in place.[382] The law activists, consequently, worked to develop a larger network of support to advance their law reform campaigns.[383] Through the 1880s, women lawyers often practiced in isolation from each other. The isolation occurred because except in places like Chicago and New York, there were only one or two women lawyers admitted in most states.[384] Even with their male advocates, their small and diffused numbers did not engender them with sufficient power to enact their broader law reform agenda. By the end of the decade, therefore, women lawyers increasingly looked to nongovernmental organizations to generate the support they needed to secure women's legal equality.

III. WOMEN LAWYERS AND NGOS

In the late 1880s, women lawyers joined with other women's rights activists in an effort to use their social capital as political power to support their law reform agenda. They did so by first formalizing their own networks. Building on Bradwell's work, women lawyers began to collect and publish information on themselves and their work, and then came together—both physically and virtually—forming networks that amplified their voices.[385] Simultaneously, women lawyers joined other local, national, and transnational women's rights associations. They educated the membership on women's legal rights and disabilities, set a course of action, mobilized the members to support their agenda, and then translated their collective energy into a new form of nongovernmental power.[386] Finally, they acted as brokers of this new power, creating pathways for formerly marginalized women to influence governance. These efforts enhanced law activists' campaigns to incrementally secure women's rights through law reforms.

A. Women Lawyers' Networks and Women's Associations

As their numbers increased, women lawyers wanted to know about each other, in part, to dispel persistent, popular arguments that they did not exist.[387] They also wanted to draw support from each other and share strategies on how to overcome the pervasive gender discrimination within the legal profession.[388] Finally, they wanted to develop a critical mass to support their law reform strategy and secure women's legal equality.[389] Although not all women law-

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[382] *See generally* CATHERINE WAUGH MCCULLOCH, ILLINOIS LAWS CONCERNING WOMEN (1907) (outlining the rights women gained through law reforms, but also describing the difficulties of enforcing those rights and the inequality of rights that persisted).

[383] *See* DRACHMAN, SISTERS IN LAW, *supra* note 42, at 70-71.

[384] *See generally* Robinson, *supra* note 164.

[385] *See* KECK & SIKKINK, *supra* note 47, at 45-46.

[386] *See id.* at 55; *Infra* Part III.A.

[387] *See* Robinson, *supra* note 164, at 10.

[388] *See* DRACHMAN, WOMEN LAWYERS, *supra* note 42, at 11-14.

[389] Myra Bradwell's publications in her *Chicago Legal News* on women's rights issues, and especially the work and efforts of women's lawyers in particular, are the most dramatic examples of efforts to create a critical mass of support for women's rights. *See* Goddard, *supra* note 44, at 112-14 (asserting that Bradwell used her *Chicago Legal News* to gain

yers were law activists, during the nineteenth century, most supported their efforts to secure women's civil and political rights.

In the 1880s, a number of women lawyers joined Myra Bradwell's efforts to gather and disseminate information on legal issues affecting women and on every female attorney in the United States and beyond. For example, in 1886, Catherine Waite, a long-time activist and colleague of Bradwell's, founded a new legal magazine, the *Chicago Law Times*, that she used to promote the cause of women's rights and the cause and work of women lawyers.[390] In 1887, Waite published an article by Ellen Martin, a Chicago lawyer, that documented the numbers and status of women lawyers throughout the country.[391] Martin lamented that women lawyers were "widely scattered," but used their existence and experiences as evidence that male lawyers were no longer opposed to women's admission and practice in the profession.[392] Through the next decade and into the twentieth century, women lawyers continued to count, list, and celebrate their growing numbers.[393]

There were others that exaggerated the import and influence of women lawyers with an aim towards bringing them together. For example, in 1888, Ada Bittenbender, a lawyer in Nebraska, wrote about the accomplishments of women lawyers and their milestones in the United States and throughout the world.[394] She posited that women lawyers had moved beyond the fight for admission and had secured positions of power within the legal system.[395] She also highlighted the two newly established women lawyer associations: the Equity Club and the Women's Inter-National Bar Association.[396] Without an overt appeal, Bittenbender (who was a member of both)[397] encouraged the others to join together.

The Equity Club was one of the first formal organizations of women lawyers.[398] Founded in 1886 by seven women students and graduates of the University of Michigan Law School, the Club served as a centralized correspondence for women lawyers locally, nationally, and transnationally.[399] As Virginia Drachman explains, the Club gave women lawyers and law students a means to "transcend the geographic distance that separated them and to

professional and popular support for women's equality through law reforms); *see also* Ada M. Bittenbender, *Woman in Law*, 2 CHI. L. TIMES 301, 305 (1888) (discussing that the purposes of the Woman's International Bar Association included "disseminat[ing] knowledge concerning women's legal status [and] secur[ing] better legal conditions for women").

390 *See* DRACHMAN, WOMEN LAWYERS, *supra* note 42, at 270.

391 *See generally* Martin, *supra* note 164.

392 *Id.* at 86-87; *see also* MORELLO, *supra* note 41, at 37-38.

393 *Can Women Practice Law?*, 1 L. STUDENT'S HELPER 102, 102-103 (1893); *see also* INEZ HAYNES IRWIN, ANGELS AND AMAZONS: A HUNDRED YEARS OF AMERICAN WOMEN 172-80 (1933); Robinson, *supra* note 164, at 10; Edith Prouty, *Women in the Law: Their Past, Present and Future*, WOMAN'S J., Apr. 22, 1876.

394 *See generally* Bittenbender, *supra* note 389.

395 *See id.* at 309.

396 *See id.* at 305.

397 *See id. See generally* DRACHMAN, WOMEN LAWYERS, *supra* note 42, at 135, 205.

398 *See* DRACHMAN, SISTERS IN LAW *supra* note 42, at 66.

399 *See* DRACHMAN, WOMEN LAWYERS, *supra* note 42, at 1; Bittenbender, *supra* note 389, at 305.

build a community of women."[400] They also began to form their own committees within larger women's associations, including within one of the first transnational women's associations, the International Council of Women (ICW).[401]

The ICW was the formalization of a movement initiated in the early 1880s by women suffragists in Great Britain, France, and the United States, most prominently Elizabeth Cady Stanton and Susan B. Anthony, with a goal to join together women in the campaign for political equality.[402] To meet that end, the U. S. National Woman Suffrage Association in 1888 sponsored an international woman's conference in Washington, D. C.[403] Catharine Waugh (McCulloch), a newly admitted woman lawyer from Illinois and a longtime women's rights activist, shared information about the meeting with other women lawyers through a letter to the Equity Club.[404] Waugh sought to situate it within the living history of the women's rights movement:

> All the good women, the brilliant, the philanthropic, the noted that we had ever heard of seemed to be there, except those that were dead, and as for them, I do believe those dear old saints who worked so hard, long years ago, were present in spirit, looking down on us with great joy, that their daughters had so nearly approached their long hoped for goal.[405]

The women at the conference established the International Council of Women, an entity intended to be a parent organization to National Councils that it hoped women would establish in their individual countries.[406]

The ICW immediately invoked law as its primary strategy to secure women's emancipation.[407] Ardent suffragists and radical activists, as Leila Rupp explains, criticized the ICW for maintaining this conservative approach to attain women's rights.[408] But its lawyer members believed it could affect root change for women. At its founding conference ICW members discussed women's legal inequality as a wrong "common to all races and nations."[409] The consensus of the Council was that the best course to alleviate these wrongs was for women themselves to establish laws and oversee their implementation.[410] The ICW's lawyer members quickly helped the organization develop an agenda of transnational law reform.

At the inaugural meeting, some of the lawyer attendees formed the Woman's Inter-National Bar Association (WIBA), establishing a foundation for a nongovernmental network that would create new avenues of influence for

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[400] DRACHMAN, WOMEN LAWYERS, *supra* note 42, at 2.

[401] *See* LEILA J. RUPP, WORLDS OF WOMEN: THE MAKING OF AN INTERNATIONAL WOMEN'S MOVEMENT 15 (1997).

[402] *See id.*

[403] *See id.*

[404] *See* DRACHMAN, WOMEN LAWYERS, *supra* note 42, at 133-37.

[405] *Id.* at 134.

[406] *See* RUPP, *supra* note 401, at 15.

[407] *See id.*

[408] *See id.* at 19.

[409] Leila J. Rupp, *Constructing Internationalism: The Case of Transnational Women's Organizations, 1888-1945*, 99 AM. HIST. REV. 1571, 1585 (1994).

[410] *See* WOMEN IN A CHANGING WORLD: THE DYNAMIC STORY OF THE INTERNATIONAL COUNCIL OF WOMEN SINCE 1888, at 22-23 (1966).

women.[411] The WIBA delegates established an agenda with four broad goals by the end of the conference.[412] The first two, to "open law schools to women" and "to remove all disabilities to admission of women to the bar, and to secure their eligibility to the bench[,]" were intended to increase women's presence and standing within the legal profession.[413] The second two goals, "[t]o disseminate knowledge concerning woman's legal *status*" and "secure better legal conditions for women," sought to use information about women's legal inequality to effect reforms in the social and legal rights of all women.[414] The intent of the WIBA was to use this international forum to pressure national governments to reform their own laws, systems, and institutions.[415] As Keck and Sikkink explain, transnational advocacy networks provided "alternative channels of communication [for v]oices that are suppressed in their own societies . . . [and] can project and amplify their concerns into an international arena, which in turn can echo back into their own countries."[416]

During the 1890s, law activists increasingly used the strategy of information politics, the method of reporting facts and motivating action—through local, national, and transnational advocacy networks.[417] They continued to publish articles about women lawyers with aims to increase their network, advance public awareness of their growing numbers and status, and win support for their cause.[418] One of these articles reported the results of a study by Leila Robinson, a Massachusetts lawyer who tried for twelve years, to locate every woman lawyer in the United States.[419] Robinson explained that her project was necessary to overcome the prevalent misleading information that women lawyers were as real as "sea-serpents."[420] She attempted to unite women lawyers together in their cause by describing them, and herself, as "[s]isters in . . . law."[421] Additionally, in 1893 through a variety of forums that all converged at the World's Columbian Exposition in Chicago, women lawyers attempted to use their networks and information politics to influence reform and advance women's rights.[422]

B. Women Lawyers and the World's Columbian Exposition

During the World's Columbian Exposition,[423] transnational advocacy networks of women lawyers advocated for women's legal equality in three separate venues. The first involved women lawyers working with other women

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411 *See* DRACHMAN, WOMEN LAWYERS, *supra* note 42, at 135-36.
412 *See id.* at 132-33; Bittenbender, *supra* note 389, at 305.
413 DRACHMAN, WOMEN LAWYERS, *supra* note 42, at 132.
414 *Id.* at 133.
415 *See* WOMEN IN A CHANGING WORLD, *supra* note 410, at 3.
416 KECK & SIKKINK, *supra* note 47, at x.
417 *See id.* at 45-46.
418 *See* Bittenbender, *supra* note 389, at 305; Goddard, *supra* note 44, at 112-14. *See generally* Robinson, *supra* note 164.
419 *See* Robinson, *supra* note 164, at 10.
420 *Id.*
421 *Id.*
422 *See infra* Part III.B.
423 *See generally* Robert W. Rydell, *World's Columbian Exposition*, *in* THE ENCYCLOPEDIA OF CHICAGO, 898, 898-902 (James R. Grossman et al. eds., 2004).

professionals to advance women's position within the learned professions and to garner support for their law reform strategy to secure full emancipation and equality for all women.[424] The second venue involved women lawyers working within the single-sex ICW to use the social capital of the Council and its members to create a new form of power and influence for women to secure equal rights across the globe.[425] The third venue involved women lawyers working within the established legal and political institutions, representing women's interests and serving as a bridge to provide other activists an avenue into those institutions.[426] This three-tiered strategy modeled the approach law activists followed throughout the twentieth century.

The first of the three organized activities was a separatist conference.[427] It evolved out of the protests Myra Bradwell led in the fall of 1889 against the exclusion of women from the organizational activities of the Exposition.[428] Over 2000 women, including many of the women lawyers and doctors in Chicago, joined Bradwell in her demand that a Women's Department be created to ensure the inclusion of women's work at the Exposition.[429] But during the campaign to establish a Women's Department, the women activists split into two factions.[430] One faction, led by Bertha Palmer, wanted to create a women's exposition that would focus only on women's industries, artistic endeavors, and charities.[431] The second faction, comprised of women professionals and equal rights activists, wanted to use the exposition to highlight all of women's achievements and political aspirations.[432]

The women professionals and activists organized as the Queen Isabella Association (QIA) (honoring the woman who made Columbus' voyage possible) and engaged in extensive campaigns to ensure all of women's accomplishments and their political agenda would be included in the fair.[433] They even published a journal to advance their position.[434] But Palmer's faction won control of the Board of Lady Managers,[435] and in 1892, officially declined the QIA's application for space on the fairgrounds.[436] In response, the QIA secured a clubhouse two blocks from the fairgrounds, established separate medical and law departments, and prepared to provide a forum during the Exposition for professional women and women's rights campaigns.[437]

The QIA law department used the opportunity to advance the development of a national network of women lawyers. It sponsored a conference specifi-

[424] *See* JEANNE MADELINE WEIMANN, THE FAIR WOMEN 28 (1981).
[425] *See* THE WORLD'S CONGRESS OF REPRESENTATIVE WOMEN, at xix-xxiv (May Wright Sewall ed., 1894).
[426] *See Women in the Law Reform Congress*, CHI. LEGAL NEWS, Aug. 12, 1893, at 435.
[427] *See* WEIMANN, *supra* note 424, at 26-27.
[428] *See id.*
[429] *See id.* at 27.
[430] *See infra* notes 431-32.
[431] *See also* WEIMANN, *supra* note 424, at 30. *See generally* Margo Hobbs Thompson, *Palmer, Bertha Honoré*, *in* WOMEN BUILDING CHICAGO, *supra* note 44, at 661, 661-62.
[432] *See* WEIMANN, *supra* note 424, at 28-30, 58.
[433] *See id.* at 30.
[434] *See id.* at 59-60.
[435] *See id.* at 40-43.
[436] *See id.* at 66.
[437] *See id.* at 67.

cally for women lawyers that occurred during the Exposition.[438] The goals for the conference were twofold: to provide a forum to promote camaraderie among women lawyers and to advance their political agenda.[439] The lawyers acknowledged that they had a different agenda from many women's associations, yet, they sought to ensure that they would not be excluded from future important events or organizations.[440] "[Women lawyers] should have some kind of organization," Ellen Martin, the chair of the law department, explained, "so that they could control their representation in the general organizations of women."[441]

For three days in August 1893, women lawyers strengthened their network and crystallized their mission for women's equality through law reform.[442] Fifteen of the most prominent women lawyers from the United States spoke on a variety of legal topics.[443] Their themes focused on campaigns to attain political equality, efforts to challenge laws that excluded or limited the rights of women, and strategies to enhance their work as lawyers in the profession.[444] They also recounted the history of women's efforts to enter into the legal profession.[445] The women wanted to ensure that their fight to break through gender barriers over the past twenty years was recorded and remembered by future generations as they continued the fight.[446] The presenters included Arabella Mansfield, Ada Kepley, and Carrie Burnham Kilgore.[447] Ellen Martin delivered Myra Bradwell's address, as Bradwell was too ill with cancer to attend.[448] The law department ended its conference by founding the National League of Women Lawyers, an organization intended to provide United States women lawyers a means of helping one another in their legal practice.[449]

The second activity women lawyers organized occurred under the official auspices of the Exposition.[450] The Women's Auxiliary invited the National Council of Women (NCW), the United States branch of the ICW, to hold the ICW's first quinquennial meeting as part of the Exposition.[451] The stated

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438 *See Legal Department Queen Isabella Association*, QUEEN ISABELLA J. 4 (1892); *see also Women Lawyers at the Isabella Club House*, CHI. LEGAL NEWS, Aug. 12, 1893, at 451. *See generally* Program, Queen Isabella Association Law Department Meeting of Women Lawyers, August 3rd, 4th and 5th, 1893, *in* Queen Isabella Association Papers (on file with the Chicago History Museum) [hereinafter Program, Queen Isabella Association].

439 *See Women Lawyers at the Isabella Club House*, *supra* note 438.

440 *See generally id.*

441 *Id.*

442 *See id.*

443 *See generally* Program, Queen Isabella Association, *supra* note 438.

444 *See Women Lawyers at the Isabella Club House*, *supra* note 438.

445 *See id.*

446 *See generally id.*

447 *See* Program, Queen Isabella Association, *supra* note 438.

448 *See* James B. Bradwell, *Women Lawyers of Illinois*, CHI. LEGAL NEWS, June 2, 1900, at 339. The other speakers in this session included an introduction by Ohio lawyer Florence Cronise, and a speech *Women Lawyers in Ancient Times* by Massachusetts lawyer Mary A. Green. *See* Program, Queen Isabella Association, *supra* note 438. Thirty women lawyers attended the meeting. *Women Lawyers of Illinois*, *supra*; *see also* Program, Queen Isabella Association, *supra* note 438.

449 *See Women Lawyers at the Isabella Club House*, *supra* note 438.

450 *See* THE WORLD'S CONGRESS OF REPRESENTATIVE WOMEN, *supra* note 425, at xix.

451 *See id.*

objective of the weeklong conference, "Congress of Representative Women," was to provide a forum where "the progress of women, in all lands and in all departments of human progress," could be presented.[452] One of its main themes was the need for legal reforms at local and national levels to grant women political rights in a movement toward political equality.[453] The NCW President, May Wright Sewall, used the forum to promote her vision of cohesive gender equality, "not for divided womanhood as against a separate manhood, but a new march for a unified, harmonious, onstepping humanity[.]"[454]

Sewell's remarks exemplified the strategy of the Congress: ICW members, both activists and lawyers, attempted to use the international forum to identify central values and reframe the debates, with the hope that their pressure for reform would reflect back into their individual countries.[455] For example, Florence Fenwick Miller, a member of the Woman's Franchise League of England, identified goals that her organization had in common with the other organizations represented.[456] She described the Franchise League's law reform campaigns to secure women's equal treatment and rights in divorce actions, equality in the intestate inheritance of property, and the parliamentary vote.[457] Miller sought to unite the international audience in support of those campaigns, urging: "Let us take a firm ground on equality, and see that the laws between men and women shall be made equal."[458] Miller further emphasized the need for international pressure to change national laws because there was little support for the campaigns at home.[459] J. Ellen Foster, a lawyer in Washington, D.C., also advocated for equality of rights by focusing on values men and women shared.[460] Foster minimized the differences between the sexes and instead emphasized the ideals of liberty and the commonality of humanity.[461]

Women lawyers also participated in the Congress of Women events that were sponsored by the Woman's Auxiliary (and not part of the ICW), further disseminating information on the growing numbers of women lawyers throughout the world, their work, and the critical role they played in the efforts to secure rights and justice for women.[462] Ada Bittenbender contributed an article to *The National Exposition Souvenir* documenting the long history of women learned in the law and the challenges and accomplishments of women lawyers to her current day.[463] Charlotte Holt delivered an address on women's rights and on the role of women and their place in the profession at a congress in the

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[452] *Id.* at xxii.
[453] *See id.*
[454] *Id.* at 18.
[455] *See* KECK & SIKKINK, *supra* note 47, at x.
[456] *See* THE WORLD'S CONGRESS OF REPRESENTATIVE WOMEN, *supra* note 425, at 20-22.
[457] *See id.* New York activist Lillie Devereux Blake and Kansan Eugenia T. St. John similarly discussed rights claims efforts in their states. *See id.* at 430-32, 445.
[458] *Id.* at 424. This quote is from a second address Miller gave at the Congress entitled *Work of the Franchise League*. *Id.* at 420.
[459] *See id.* at 20-22.
[460] *See id.* at 439-45.
[461] *See id.*
[462] *See* WEIMANN, *supra* note 424, at 545 (illustrating the series of small congresses that were organized by Mary Eagle and held in the Woman's Building in May 1893).
[463] Ada M. Bittenbender, *Women in Law*, *in* THE NATIONAL EXPOSITION SOUVENIR: WHAT AMERICA OWES TO WOMEN 390, 390 (Lydia Hoyt Farmer ed., 1893).

Woman's Building.[464] Holt, who had devoted the previous seven years to running a women's legal aid society in Chicago, urged that the greatest quality a woman could possess was "the spirit of justice."[465] Holt also proposed that the efforts and accomplishments of women lawyers be judged not by the male standard of measuring monetary reward or prestige, but by the daily work that a woman lawyer does.[466]

The third organized activity of women lawyers during the 1893 Exposition involved a direct intervention with the male bar. As their own conference illustrated, the issues of advancing women's social and legal position were intricately intertwined with their goal of advancing women's position within the legal profession. Within the women's movement, from the local level to the international, women lawyers continued to lead rights claims campaigns to secure women's full emancipation as they continued to fight to establish themselves as respected members of the bar.[467] Their work to both mobilize women's rights activists and reach and influence legal and political institutions depended on their integration into the system. Women lawyers, therefore, demanded that they be included in the Exposition's official Congress on Jurisprudence and Law Reform.[468]

The women lawyers infiltrated the Law Congress in stages with the critical help of key male supporters, including Myra Bradwell's husband. James Bradwell was one of the eighteen men who comprised the auxiliary in charge of determining the composition of the Congress.[469] Myra Bradwell served as chair of the committee, while their daughter Bessie Bradwell Helmer, who was also a lawyer, served as vice chair, and Catharine Waugh McCulloch served as a member.[470] The women's law committee rejected the idea of holding a separate women's congress on law reform and demanded that they be included in the official law congress.[471] Myra Bradwell explained that though a separate women's congress would have allowed them more control of their program, "after mature deliberation, the woman's committee concluded that the interests of women in the profession of law would be best conserved by a joint congress."[472] After lengthy debate, the joint committee invited thirty-five men and four women to present papers at the four-day Congress.[473]

The women's committee used the Congress to project the voices and concerns of the transnational women's rights networks into the international public arena. They invited Eliza Orme, a lawyer from England, Cornelia Sorabji, a lawyer from India, and Mary Greene and Clara Foltz, both lawyers from the

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[464] *See* Charlotte C. Holt, *The Woman Who Has Come*, *in* THE CONGRESS OF WOMEN 190, 190-92 (Mary Kavanaugh Oldham Eagle ed., 1894).

[465] *Id.* at 192.

[466] *See id.* at 191.

[467] *See* DRACHMAN, WOMEN LAWYERS, *supra* note 42, at 21.

[468] *See Women in the Law Reform Congress*, *supra* note 426.

[469] *See The Courts*, CHI. LEGAL NEWS, Aug. 12, 1893, at 427.

[470] *See id.*

[471] *See Women in the Law Reform Congress*, *supra* note 426.

[472] *Id.*

[473] *See id.*; *see also World's Congress on Jurisprudence and Law Reform*, CHI. LEGAL NEWS, Aug. 5, 1893, at 425 (listing the revised program of speakers).

United States, to present papers at the law reform congress.[474] Each presenter discussed their country's laws and social customs that restricted women's right to work, control their wages, and participate in governance.[475] Each also advocated for law reforms that would secure women's full emancipation and ensure them equal rights and treatment before the law.[476] The committee and the speakers used the international forum to disseminate information about the injustices in individual countries and their reform efforts to advance women's rights and secure women's equality.

In many ways, the World's Columbian Exposition marked the passing of leadership of the women's law reform movement in Illinois from Myra Bradwell to Catharine Waugh McCulloch. Ellen Carol DuBois perceptively identified the strategic similarity between Bradwell's 1870 New Departure arguments and Catharine McCulloch's 1913 argument that the United States Constitution allowed the Illinois legislature to grant women the vote in presidential elections.[477] But DuBois incorrectly assessed that the incidents stood in isolation from each other.[478] By shifting the focus from the woman suffrage movement to the campaigns of law activists, this Article reveals the continuity between the two events.[479] From the 1860s to the 1890s, Myra Bradwell and a cadre of law activists insisted that women were citizens, entitled to full citizenship rights and obligations. They employed a strategy of law reform to incrementally secure women's rights in an effort to secure women's legal equality. Catharine Waugh McCulloch led that effort into the middle of the twentieth century, perpetuating the model law activists employed through the rest of the century.

IV. A Brief Survey of the Legacy of the Women's Law Reform Movement

In the last decade of the nineteenth century, Catharine Waugh McCulloch and a select group of women lawyers emerged as the next leaders of the law reform movement. As the new century ushered in a new generation of women lawyers, the law activists carried the movement forward. Although women remained a very small percentage of the legal profession until the last quarter of the twentieth century, their numbers increased dramatically from their beginnings, especially in industrialized, urban centers, such as Chicago.[480] The reform efforts of nineteenth-century activists that secured women's civil right to work and own property allowed some of the new women lawyers—and

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[474] *See World's Congress on Jurisprudence and Law Reform*, *supra* note 473; *see also* Barbara Allen Babcock, *Women Defenders in the West*, 1 Nev. L.J. 1, 18 (2001).
[475] *See The Courts*, *supra* note 469.
[476] *See id.*
[477] *See* DuBois, *supra* note 24, at 34, 39 n.52; *see also* Buechler, *supra* note 90, at 176-78 (describing McCulloch's role as a leader in the Illinois suffrage movement and her authorship of the Illinois woman suffrage bill enacted in 1913).
[478] *See* DuBois, *supra* note 24, at 34.
[479] *See supra* note 477.
[480] *See* Drachman, Sisters in Law, *supra* note 42, at 253 tbl.2; Bar None: 125 Years of Women Lawyers in Illinois 32-33 (Gwen Hoerr McNamee ed., 1998) (listing the first 101 women lawyers in Illinois by 1900).

many more as the century progressed—to concentrate on their careers, rather than engage in reform activities. But because the legal and political systems continued to systematically discriminate against women,[481] even the most dedicated practitioner supported the work of the activists and the advancement of women's social, civil, and political rights.

This section briefly outlines the legacy of the women's law reform movement. It argues that the three-prong strategy law activists developed in the nineteenth century formed the model twentieth-century law activists implemented in their continued efforts for legal equality. This strategy involved: 1) the enactment of positive laws and the development of new modes of judicial interpretation; 2) the continued infiltration and influence of women in the legal profession; and 3) the collaboration of law activists with local, national, and international NGOs to enhance their voice within the systems of governance. The core of these strategies persisted as each generation modified and adjusted their efforts based on new social and political exigencies. By the end of the twentieth century, the movement nearly secured women's formal equality, but women's substantive equality remained elusive.

A. Legacy of Positive Law and Judicial Interpretation Campaigns

Catharine Waugh McCulloch advocated for the enactment of a plethora of positive laws during her fifty-year tenure as a leader in the law reform movement.[482] Like her predecessors, she believed that through the enactment of positive laws, women would secure legal and substantive equality.[483] McCulloch earned her law license in 1886 and worked with many of the founders of the law reform movement, including Catharine Waite and Myra Bradwell.[484] But McCulloch was a generation younger than the pioneers. She did not have to fight to attend law school or to receive her law license, yet she did struggle to earn a living in her chosen profession.[485] She therefore continued the movement, but adapted it, allowing it to transition into the new age.

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[481] *See* DRACHMAN, SISTERS IN LAW, *supra* note 42, at 215-24 (arguing that experiences of sex discrimination discouraged women lawyers who had hoped they would succeed in the profession because of their merit).

[482] *See id.* at 253 (outlining McCulloch's legislative efforts for women's guardianship rights, raising the age of consent, and woman suffrage); Mary Linehan, *McCulloch, Catharine Gouger Waugh*, *in* WOMEN BUILDING CHICAGO, *supra* note 44, at 560, 560-62 (outlining McCulloch's efforts for woman suffrage, mother's custody rights, and raising the age of consent).

[483] *See* Linehan, *supra* note 482, at 560-62; *see also* CATHARINE WAUGH MCCULLOCH, CHRONOLOGY OF THE WOMAN'S RIGHTS MOVEMENT IN ILLINOIS 1-4 (1912) (detailing the legislative enactments that were moving women towards legal equality).

[484] *See* DRACHMAN, WOMEN LAWYERS, *supra* note 42, at 251-53 (for description of McCulloch's law school and graduation and her relationship with Catharine Waite); *The Courts*, *supra* note 469 (documenting that Bradwell and McCulloch worked together on the Committee of the Woman's Branch of the World's Congress Auxiliary on Jurisprudence and Law); *see also* Catharine Waugh McCulloch McCulloch, *Myra Bradwell* 7 (unpublished biographical sketch, on file with Grace H. Harte, Series III of the Mary Earhart Dillon Collection, 1890-1945, Schlesinger Library, Radcliffe Institute, Harvard University) (noting that she and Mary Ahrens were "two of [Bradwell's] sister lawyers" who sat on the committee of the Chicago Bar Association formed to honor Myra Bradwell after her death).

[485] *See* Linehan, *supra* note 482, at 560.

The Progressive Era had spawned a diverse group of reformers engaged in overlapping and sometimes contradictory efforts.[486] McCulloch and the other law activists sought to use the social and political capital of these groups to enact and enforce positive laws that advanced the rights of women.[487] They continued the strategy of infiltrating these various associations and developed an educational component. They determined to both educate a broad base of women on their legal rights and to inform and persuade men and women to support their reforms.[488] The Chicago Woman's Club (CWC), the most prestigious and powerful woman's club in the city, was one of the first of the groups they infiltrated.[489]

The law activists persuaded the CWC to establish the Chicago Political Equality League (CPEL) as an affiliate association.[490] Its purpose, "to promote the study of political science and government and foster and extend the political rights and privileges of women," enabled the activists to pursue their dual objectives of education and law reform.[491] They gave free public lectures and held courses on women's legal rights and practical legal matters.[492] They also advocated a wide-range of positive laws that sought women's equal right to suffrage, education, divorce, and compensation.[493] Their efforts won the support of a vast number of club women throughout the city.[494]

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[486] *See, e.g.*, KEYSSAR, *supra* note 142, at 202-03 (arguing that in the first decades of the twentieth century there emerged a mass movement of diverse groups that converged to support woman suffrage).

[487] *See, e.g.*, Grace Wilbur Trout, *Early League History*, *in* CHICAGO POLITICAL EQUALITY LEAGUE ANNUAL 1895-1911, 58-59 (1911) (describing the work of McCulloch, lawyer Charlotte Holt, and lawyer Ellen Martin in persuading the Chicago Woman's Club to assist in founding the Chicago Political Equality League and the establishment of its Legislative Committee).

[488] For example, in 1877 Bradwell joined with a number of women and men already working for social and legal reforms, most prominently Frances Willard, the leader of the Illinois Women's Christian Temperance Union (WCTU), and Elizabeth Boyton Harbert, president of the IWSA, to found the Illinois Social Science Association (ISSA). The objective of the ISSA was to identify social problems and develop social and legal reforms to address those problems. The women's rights activists within the mixed-sex organization persuaded the organization to support reforms that advanced women's rights, including woman suffrage. *See* BUECHLER, *supra* note 90, at 122-23.

[489] *See id.* at 163.

[490] *See* Trout, *supra* note 487, at 58.

[491] *Id.* at 58-59.

[492] *See id.*

[493] *See Legal Status of Women—Questions to Be Answered at the February Meeting*, *in* CHICAGO POLITICAL EQUALITY LEAGUE ANNUAL, *supra* note 487, 9-11; *see also* BUECHLER, *supra* note 90, at 162-66; MCCULLOCH, *supra* note 483, at 1-4 (listing the law reforms Illinois women's rights activists secured including: the first married women's property act (1861); the second, which allowed a married woman to control her own wages (1869); the third, which abolished curtesy and established a dower right for each spouse (1874); women's right to work in all occupations and professions (1872); women's right to hold school offices (1873); women's right to be Notaries Public (1875); a raise in the age a girl was deemed competent to consent to sexual intercourse from ten to fourteen years (1887); the right to vote in school elections (1891); a prohibition on child labor (1891); right to joint guardianship of children (1901); and a second raise in the age of consent to sixteen years (1905)).

[494] *See* Trout, *supra* note 487, at 58-62.

Law activists in Illinois and throughout the country also established their own institutions. In 1911, the New York City Women Lawyers' Club (established in 1899) transformed itself into the National Association of Women Lawyers.[495] It published the *Women Lawyers' Journal* (*WLJ*) and urged women lawyers in other cities to join.[496] The *WLJ* enhanced the efforts of the *Chicago Legal News*, by both disseminating information on women lawyers throughout the world and reporting on legal issues affecting women.[497] Women lawyers in other cities began to form local associations and joined the NAWL as affiliates.[498] In 1914, nine women lawyers in Chicago established the Women's Bar Association of Illinois (WBAI).[499] Its two-fold mission, like its parent organization, was to advance the interests of women lawyers and the women's law reform movement.[500]

Catharine Waugh McCulloch became president of the WBAI in 1916 during its formative years.[501] She held the office for four years, shaping the association in the law activist tradition.[502] The WBAI maintained its own active law reform agenda, which initially included the Nineteenth Amendment, a Public Defender League for Girls (to protect the rights of girls who were subject to the Morals court), women jury service, and the eight-hour day.[503] It supported women's campaigns for judicial and political, elected and appointed offices.[504] The WBAI worked with other associations to advance women's rights as its members also worked inside other local and national associations.[505]

The League of Women Voters was one of these associations.[506] After women secured full suffrage through the Nineteenth Amendment in 1920, the National American Woman Suffrage Association (NAWSA) became the National League of Women Voters (NLWV) to ensure that women capitalized on their right to vote and continued to advance law reforms.[507] Women lawyers joined NLWV and its local branches and immediately established its Committee on Uniform Laws Concerning Women, to advance a law reform

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495 *See* Selma Moidel Smith, *A Century of Achievement: The Centennial of the National Association of Women Lawyers*, 85 WOMEN LAW. J. 18 (1999).

496 *See id.* at 19.

497 *See* A. Florence Joyce, "*How We Started*", *in* 75 YEAR HISTORY OF NATIONAL ASSOCIATION OF WOMEN LAWYERS 1899-1974, at 13, 15 (Mary H. Zimmerman ed., 1975).

498 *See id.* at 13-14.

499 *See* Adelman, *supra* note 292, at 425.

500 *See id.*; Laura Miller Derry, *Historiette of NAWL*, *in* 75 YEAR HISTORY, *supra* note 497, at 23, 23.

501 *See* CHARLOTTE ADELMAN, WBAI 75: THE FIRST 75 YEARS 13 (1992).

502 *Catharine Waugh McCulloch* 5 (unpublished biographical sketch, on file with Grace H. Harte, Series III of the Mary Earhart Dillon Collection, 1890-1945, Schlesinger Library, Radcliffe Institute, Harvard University).

503 *See* Adelman, *supra* note 292, at 425-26.

504 *See id.* at 426-27.

505 *See* Grace H. Harte, *A Momentous Victory*, 25 WOMEN LAW. J. 54, 54 (1939) (describing the way the WBAI worked with the Federation of Women's Clubs, League of Women Voters, Parent-Teachers Congress, and the Business and Professional Women club on the issue of women jury service).

506 *Id.*

507 *See* BUECHLER, *supra* note 90, at 182.

agenda.[508] McCulloch chaired the national committee and set a legislative platform for state chapters to pursue issues that included: equal guardianship rights, higher age of consent laws, the right for woman to control her own wages and property, and women's jury service.[509] In Illinois, the LWV's local branches worked with the WBAI to finally secure women's jury service in 1939.[510]

Both the WBAI and the NAWL were initially ambivalent on the issues that divided the women's rights movement during this time. There was a well-documented split between the advocates of protective labor legislation enacted to ease the physical and financial abuse of working women and children, and the advocates of the 1923 Equal Rights Amendment (ERA), proposed to establish women's formal legal equality with men.[511] Law activists consistently advocated for women's substantive equality.[512] During the early part of the twentieth century, they supported the protective labor legislation laws without repudiating the concept of equal rights.[513] By the late 1930s, after the enactment of the Fair Labor Standards Act (1938), law activists began to argue that protective labor legislation was no longer necessary.[514] Some supported Alice Paul's 1923 ERA, while others argued for an alternative Equal Rights Amendment, hoping it would secure substantive equality for women.[515] But regardless of their position on the ERA, they continued to work together for other law reforms to advance women's rights.[516]

The law reforms for which NAWL, its state branches, and other law activists advocated throughout the second half of the twentieth century continued the work of their predecessors. They focused much of their efforts on women's

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[508] *See* Paul S. Boyer, *McCulloch, Catharine Gouger Waugh*, *in* 2 NOTABLE AMERICAN WOMEN, *supra* note 44, at 459.

[509] *See* Letter from Catharine Waugh McCulloch to Mary Sumner Boyd (June 1, 1920) (on file with Catharine Waugh McCulloch, Series VI of the Mary Earhart Dillon Collection, 1869-1945, Schlesinger Library, Radcliffe Institute, Harvard University).

[510] *See* Harte, *supra* note 505, at 54 (arguing that the Women's Bar Association of Illinois (WBAI) was the leader in the women jury bill campaign).

[511] *See* CYNTHIA HARRISON, ON ACCOUNT OF SEX: THE POLITICS OF WOMEN'S ISSUES 1945-1968, at 9-11 (1988); *see also* Becker, *supra* note 17, at 210.

[512] *See, e.g.*, Smith, *supra* note 495, at 20 (arguing that NAWL members fought for "equality of justice for women").

[513] *See* Presidents Report, Women's Bar Association of Illinois (1936-37), Papers Box 7 file 3 (discussing WBAI's rejection of NAWL's position in favor of the ERA).

[514] *See generally* Smith, *supra* note 495, at 21-22 (arguing that NAWL opposed protective labor legislation as early as 1927 and throughout the 1930s); Helen Hunt West, Nat'l Ass'n of Women Lawyers, Speech Given before the Resolutions Committee–Democratic Party Chicago, Illinois (July 12, 1940) (arguing that the proposed Equal Rights Amendment will protect women workers).

[515] *See* Presidents Report, *supra* note 513 (discussing WBAI's rejection of NAWL's position in favor of the ERA); *see also* Grace H. Harte, *Notes of the Women's Bar Association*, CHI. DAILY L. BULL., Feb. 11, 1941 (outlining her proposed alternative ERA, which she modeled after the English Sex Discrimination Act). This was distinct from the Taft-Wadsworth Bill proposed by ERA opponents in 1947. *See also* HARRISON, *supra* note 511, at 26-29 (explaining the Taft-Wadsworth bill).

[516] Grace H. Harte, *Notes of the Women's Bar Association*, CHI. DAILY L. BULL., Apr. 22, 1941 (noting that members of the WBAI were elected as officers in the NWLA and that they continued to work on law reforms regarding women's rights in marriage and divorce.).

rights in marriage and work. NAWL, in particular, fought for new divorce laws that vastly expanded the grounds for divorce, abolishing the necessity of fault.[517] It worked through the American Bar Association (ABA) for almost a quarter century to create the Uniform Marriage and Divorce Act.[518] NAWL also joined the fight for the enactment of the 1963 Equal Pay Act, which prohibited employers from paying women less than men because of their sex, and Title VII of the 1964 Civil Rights Act, which banned sex discrimination by employers with more than twenty-five employees.[519] One of its past presidents, Marguerite Rawalt, became a leader in securing women's legal equality, a federal effort that laid the foundation for the second wave of the women's movement.[520]

In the 1960s, a small group of law activists led a renewed campaign to secure women's legal equality through federal statutes, United States constitutional provisions, and federal judicial decisions. Three lawyers, Rawalt, Pauli Murray, and Esther Peterson, a labor activist, were at the core of this effort.[521] They served together on the Presidential Commission on the Status of Women's (PCSW) and Committee on Civil and Political Rights.[522] Rawalt advocated using the legislature and the enactment of the ERA as the best means to secure legal equality.[523] Murray advocated using the courts and a judicial reinterpretation of the Fourteenth Amendment.[524] They both supported Title VII and worked together for its enactment and for its subsequent enforcement by the Equal Employment Opportunity Commission (EEOC).[525]

By the 1970s there was a unified women's rights movement committed to the law reform strategy.[526] Most activists who had previously opposed the ERA changed their position.[527] Law activists who had been divided over whether to pursue women's equality through the ERA or the Fourteenth Amendment agreed to pursue both.[528] During this era, feminists established a number of new organizations, including the National Organization of Women (NOW).[529] This organization, like many others, quickly established a law reform agenda and soon supported the ERA and a strategy of litigation based on the Equal Protection Clause of the Fourteenth Amendment.[530] The Women's Liberation movement was underway.

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[517] *See* HARRISON, *supra* note 511, at 28.
[518] *See id.*
[519] *See id.*; Becker, *supra* note 17, at 233-35; *see also* Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-1 to -16 (2006).
[520] *See* Becker, *supra* note 17, at 210, 216; Smith, *supra* note 495, at 28.
[521] *See* Becker, *supra* note 17, at 216.
[522] *See id.* at 216, 221-22.
[523] *See id.* at 218-19.
[524] *See id.* at 222.
[525] *See id.* at 234-35.
[526] *See id.* at 210.
[527] See *id.* at 211-51, for a detailed account of the transformation. *But see id.* at 241-42 (describing how some radical feminists, who refused to oppose the ERA, nonetheless maintained that it would not result in substantive equality).
[528] *See* Serena Mayeri, *Constitutional Choices: Legal Feminism and the Historical Dynamics of Change*, 92 CAL. L. REV. 755, 758 (2004).
[529] *See* HARRISON, *supra* note 511, at 192.
[530] *See* Mayeri, *supra* note 528, at 785-92, 794-96.

The account of women's law reform activities from the 1970s through the end of the twentieth century is much more familiar. State legislatures and Congress enacted an abundance of laws intended to achieve formal and legal equality.[531] In some cases, the Supreme Court applied the Equal Protection Clause to strike down laws that discriminated on the basis of sex.[532] But Supreme Court Justices disagreed on the level of scrutiny the Court should apply in such cases, and the strategy failed to yield the legal equality law activists hoped it would.[533] Most scholars assess that during the last quarter of the twentieth century, the legal content of equality became "formalistic, exclusive, and impoverished," privileging white, upper-class women over working-class women and women of color.[534] Others suggest, even with the changes, the law remained "male," continuing to discriminate against all women.[535] Law activists therefore sustained their attempts to influence judicial interpretation through many avenues, including increasing women's influence within the profession and placing women into judicial positions.[536]

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[531] See Leslie W. Gladstone, *Women's Issues in Congress: Selected Legislation 1832-1998*, *in* WOMEN AND WOMEN'S ISSUES IN CONGRESS 1832-2000, at 11-106 (Janet V. Lewis ed., 2001), for a list and description of federal laws that granted women rights through the nineteenth and twentieth centuries.

[532] *See, e.g.*, Frontiero v. Richardson, 411 U.S. 677, 690-91 (1973) (finding that denial of housing and medical benefits to the families of female military officers was an equal protection violation); Reed v. Reed, 404 U.S. 71, 76 (1971) (finding that a statute that required a preference for a male administrator for a decedent's estate was an equal protection violation); *see also* Ruth Bader Ginsburg, *Constitutional Adjudication in the United States as a Means of Advancing the Equal Stature of Men and Women Under the Law*, 26 HOFSTRA L. REV. 263, 267-68 (1997).

[533] *See* United States v. Virginia, 518 U.S. 515, 531 (1996) (applying a stronger "skeptical scrutiny" standard); Craig v. Boren, 429 U.S. 190, 218 (1976) (Rehnquist, J., dissenting) (noting the majority introduced intermediate scrutiny as a midpoint between strict scrutiny and a rational basis standard); Mayeri, *supra* note 528, at 827-34 (arguing the feminist strategy to use the Equal Protection Clause to secure equality and the Court's interpretation of that clause limited the content of the equality); *see also* Reva B. Siegel, *Text in Contest: Gender and the Constitution from a Social Movement Perspective*, 150 U. PA. L. REV. 297, 297-307 (2001) (arguing that although the ERA was never ratified, the amendment, nonetheless, influenced the judges to interpret the Fourteenth Amendment in a frame of formal equality rather than a substantive one).

[534] Mayeri, *supra* note 528, at 759.

[535] *See generally* MARTHA ALBERTSON FINEMAN, THE ILLUSION OF EQUALITY: THE RHETORIC AND REALITY OF DIVORCE REFORM (1991); CATHARINE A. MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN: A CASE OF SEX DISCRIMINATION (1979); Leslie Bender, *Is Tort Law Male?: Foreseeability Analysis and Property Managers' Liability for Third Party Rapes of Residents*, 69 CHI.-KENT L. REV. 313 (1993); Sarah E. Burns, *Is the Law Male?: The Role of Experts*, 69 CHI.-KENT L. REV. 389 (1993); Sylvia A. Law & Patricia Hennessey, *Is the Law Male?: The Case of Family Law*, 69 CHI.-KENT L. REV. 345 (1993); Dorothy E. Roberts, *Rape, Violence, and Women's Autonomy*, 69 CHI.-KENT L. REV. 359 (1993); Lynn Hecht Schafran, *Is the Law Male?: Let Me Count the Ways*, 69 CHI.-KENT L. REV. 397 (1993); Lynn Hecht Schafran, *Is the Law Male?*, TRIAL, Aug. 1995, at 18, 18-20.

[536] *See, e.g.*, Smith, *supra* note 495, at 31-33 (celebrating NAWL efforts in the second half of the twentieth century to promote women lawyers to the bench and celebrating NAWL efforts at increasing the role of women lawyers in the ABA).

B. Legacy of Women Lawyers Professional Advancement Campaigns

Throughout the twentieth century, women lawyers continued nineteenth-century efforts to advance women's stature within the legal profession. Although they were able to found their own organizations, they nonetheless worked to infiltrate male professional associations as well as the judiciary.[537] From the movement's beginnings, the goal was to transform systems of governance to operate on a principle of equality, not to establish separate women's systems.[538] Activist men were, and remained, critical members of the coalition, but the women members believed they needed to be insiders themselves to advance their agenda.[539] Women therefore worked to increase their standing within the bar and to win election to judicial and political seats.[540]

During the first decades of the twentieth century, women lawyers employed several tactics to work their way inside. First, they continued the nineteenth-century strategy of information politics. For example, Bessie Bradwell Helmer took over for her mother's business and continued to edit and publish the *Chicago Legal News* until 1925.[541] In the mid-1930s, Grace Harte, a leader within the WBAI, began writing a weekly column in the *Chicago Daily Law Bulletin*, the primary legal newspaper of the Chicago bar, on women's legal issues and the activities of the WBAI.[542] Women lawyers also attempted to join the mainstream, male bar associations as individuals and collectively.[543]

At both the local and national level, these associations discriminated in their membership, either in rules or in practice, based on sex, race, religion, and ethnicity. Although neither the Chicago Bar Association nor the American Bar Association ever explicitly excluded women from its membership, in practice, each only admitted small numbers of women through the first half of the twentieth century and each relegated those to the periphery.[544] The ABA House of Delegates was comprised of state and local bar associations but excluded women's bar associations.[545] The WBAI fought for and finally won a seat in the ABA's House of Delegates during World War II.[546] But the male strangle-

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[537] *See id.*

[538] *See* Harte, *supra* note 159, at 141; *see also The XIV Amendment and Our Case*, *supra* note 200.

[539] EPSTEIN, *supra* note 41, at 247 (arguing that legal professional associations are critical to the operation and direction of the legal profession).

[540] *See* MORELLO, *supra* note 41, at 194-217 (describing women lawyers' efforts to establish themselves within major law firms); *id.* at 218-47 (describing women lawyers' efforts to win judicial positions).

[541] *See* Thomas, *supra* note 44, at 225.

[542] 75 YEAR HISTORY, *supra* note 497, at 86.

[543] *See* Derry, *supra* note 500, at 23-24; *Highlights of the Year 1942-43*, *in* 75 YEAR HISTORY, *supra* note 497, at 108, 108.

[544] *See* EPSTEIN, *supra* note 41, at 248 (asserting that the ABA admitted three black men by mistake in 1912 and subsequently changed the rules to exclude all blacks until the 1940s); Beatrice A. Clephane, *Women Have Won Recognition in the American Bar Association: With Statistics to Prove It*, 25 WOMEN LAW. J. 57 (1939).

[545] *See Highlights of the Year 1942-43*, *supra* note 543, at 108.

[546] *See* Derry, *supra* note 500, at 23; *Highlights of the Year 1942-43*, *supra* note 543, at 108.

hold on the ABA was commanding, and women did not gain significant power in the association until the 1980s.

In 1986, law activists persuaded the ABA House of Delegates to adopt the goal: "To Promote Full and Equal Participation in the Profession by Minorities and Women."[547] The following year, it created the ABA Commission on Women in the Profession with a mission to "assess the status of women in the legal profession, identify barriers to advancement, and recommend to the ABA actions to address problems identified."[548] Hillary Rodham Clinton served as its first chair and immediately launched a study on the status of women lawyers.[549] The investigation found that "although women have made significant advancements in gaining access to the practice of law . . . opportunities in the legal profession remain less available to women, at all levels, than to their male colleagues."[550]

The Commission report sparked a number of state and local bar associations to conduct their own studies of women's status in the profession.[551] Most found similar incidents of discrimination.[552] Bar associations passed a flurry of initiatives and resolutions that alleviated most of the overt discrimination women lawyers and law students had reported, but subsequent studies in 1995 and 2003 found that insidious forms of discrimination remained for all women, and particularly for women of color.[553] These reports acknowledged there had been "incremental progress," but noted that barriers to women's equality, "reinforced by entrenched attitudes[,]" persisted.[554] Their findings imply what radical feminists and some legal scholars have suggested, that neither law reforms nor time will secure women's substantive equality.[555]

Law activists' efforts to infiltrate the judiciary followed a similar path. Initially, isolated victories occurred.[556] In Illinois, for example, Catharine Waugh McCulloch was elected Justice of the Peace in Evanston (1907-1913) and appointed master in chancery in the Cook County Superior Court (1917-1925).[557] In 1923, Mary Bartelme was the first woman elected to the Circuit Court of Cook County.[558] Florence Allen accomplished two firsts. In 1922, in

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547 Smith, *supra* note 495, at 32.

548 ABA COMM'N ON WOMEN IN THE PROFESSION, COMMISSION BROCHURE 2 (2008-2009); http://www.abanet.org/women/CWP_brochure_2008-09.pdf.

549 *See id.*

550 ABA COMM'N ON WOMEN IN THE PROFESSION, REPORT TO THE HOUSE OF DELEGATES 2 (1988).

551 *See, e.g.*, Norma J. Wikler, *Water on Stone: A Perspective on the Movement to Eliminate Gender Bias in the Courts*, CT. REV., Fall 1989, at 6, 6.

552 *See generally* Barbara Allen Babcock, *Introduction: Gender Bias in the Courts and Civic and Legal Education*, 45 STAN. L. REV. 2143 (1993).

553 *See* ABA COMM'N ON WOMEN IN THE PROFESSION, UNFINISHED BUSINESS: OVERCOMING THE SISYPHUS FACTOR (1995); *see also* ABA COMM'N ON WOMEN IN THE PROFESSION, CHARTING OUR PROGRESS: THE STATUS OF WOMEN IN THE PROFESSION TODAY 4 (2006).

554 CHARTING OUR PROGRESS, *supra* note 553, at 4.

555 *See supra* note 15.

556 *See* Larry Berkson, *Women on the Bench: A Brief History*, 65 JUDICATURE 286, 287, 290-92 (1982).

557 Linehan, *supra* note 482, at 561-62.

558 Gwen Hoerr McNamee, *Bartelme, Mary Margaret*, *in* WOMEN BUILDING CHICAGO, *supra* note 44, at 66, 68.

Ohio, she became the first woman elected to a state supreme court.[559] In 1934, President Franklin D. Roosevelt appointed her to the Sixth Circuit Court of Appeals, where she became the first woman judge sitting in a federal court of appeals.[560] Forty-seven years later, President Ronald Reagan appointed Sandra Day O'Connor as the first woman Supreme Court Justice.[561]

In each of these elections and appointments, law activists used their networks to support women candidates.[562] Each victory was celebrated as a significant advance, and law activists believed that these changes in the face of the judiciary would lead to a fundamental transformation in the legal systems.[563] But, at the end of the twentieth century, although more women had entered the judiciary, and even as a second woman had been appointed to the United States Supreme Court,[564] the transformation had not occurred.[565] Law activists' networks, nonetheless, continued to flourish, locally, nationally, and internationally.[566]

C. Legacy of Campaigns through NGOs

From the first international meeting of women's rights activists in 1888 through the twenty-first century, women lawyers have attempted to use NGOs to advance their law reform strategy. Twentieth-century law activists adapted and employed the model established by the nineteenth-century activists: exposing and disseminating information on the legal wrongs affecting women; motivating governments to act to correct the legal wrongs to women; and expanding the ways that women could participate in governance.[567] The International Council of Women held quinquennial meetings through the first half of the twentieth century.[568] Its Committee on Laws regarding the Legal Position of Women consistently collected and publicized information on women's legal

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[559] MORELLO, *supra* note 41, at 234.

[560] DRACHMAN, SISTERS IN LAW, *supra* note 42, at 207.

[561] *See* Gil Troy, *Why Ronald Reagan Picked Sandra Day O'Connor—And Why George W. Bush Might Want to Follow His Example*, HNN, July 1, 2005, http://hnn.us/articles/12821.html (arguing that Reagan appointed O'Connor because, although she supported the ERA, she was not an activist).

[562] *See* Beverly Blair Cook, *Allen, Florence Ellinwood*, *in* NOTABLE AMERICAN WOMEN: THE MODERN PERIOD 11, 12 (Barbara Sicherman et al. eds., 1980); McNamee, *supra* note 558, at 68.

[563] *See* Barbara Palmer, *"To Do Justly": The Integration of Women into the American Judiciary*, 34 PS: POL. SCI. & POL. 235, 237 (2001) (arguing that their research consistently shows that "female judges tend to be the strongest supporters of women's rights claims, regardless of their ideology").

[564] President Bill Clinton appointed Ruth Bader Ginsburg to the Supreme Court in 1993. *See* The Supreme Court Historical Soc'y, Timeline of the Court, Ruth Bader Ginsburg, http://www.supremecourthistory.org/history/supremecourthistory_history_current_ginsburg (last visited June 26, 2009).

[565] *See* REPORT TO THE HOUSE OF DELEGATES, *supra* note 550, at 6; *see also* CHARTING OUR PROGRESS, *supra* note 553, at 5.

[566] *See infra* Part IV.C.

[567] *See generally* KECK & SIKKINK, *supra* note 47, at 16-18, 39-41.

[568] *See* WOMEN IN A CHANGING WORLD, *supra* note 410, at 349 app. 10 (listing the ICW meetings from 1888 to 1963). From 1888 to 1934, the ICW met roughly every five years. From 1936 to 1963, it met just about every three years, except during World War II. The ICW suspended meetings after 1938 until 1947.

inequality and advocated laws and policies that would advance women's position on a wide range of issues, including: "affiliation orders for illegitimate children; women's right of guardianship; marriage and divorce laws; the removal of sex disqualification; [and] the payment of alimony when the debtor had left the country."[569] Law activists supplemented these activities with law reform efforts through international bar associations and government institutions.[570]

The first of these activities began in the interwar years. In 1938, Dorothy Kenyon, a New York City attorney, became the United States representative to the League of Nations Committee for the Study of the Status of Women.[571] She was one of seven lawyers, from as many nations, responsible for studying women's legal status internationally.[572] World War II made completion of their work impossible, but after the War, law activists continued their efforts through a number of other organizations. NAWL became members of both the Inter-American Bar Association and the International Association of Women Lawyers.[573] In 1946, NAWL and ICW participated in the establishment of the United Nations and debates over the content of its charter, which ultimately included a resolution to promote and encourage "respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion[.]"[574] They also supported Kenyon as the United States delegate to the United Nations Commission on the Status of Women (CSW) in 1946.[575]

The establishment of the CSW was controversial however. Some women's rights activists believed that women's issues should not be separated, but should instead be addressed by the commission on Human Rights, since women were human beings.[576] They explained, "segregation was the one thing which women had always fought against (whether in the kitchen, in purdah or behind the veil)."[577] Proponents of a special commission for women's issues didn't disagree, but asserted that the disabilities women faced were "so varied, subtle, and complex" that they required special consideration or they risked being overlooked.[578] Kenyon understood both sides of the debate and promised "to develop a program of work and recommendations calculated to make women's rights come alive."[579]

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[569] *See id.* at 178-81.

[570] *See infra* notes 571-79.

[571] *See* Susan M. Hartmann, *Kenyon, Dorothy*, *in* NOTABLE AMERICAN WOMEN: THE MODERN PERIOD, *supra* note 562, at 395, 396.

[572] *See id.*

[573] *See* Derry, *supra* note 500, at 23-24.

[574] U.N. Charter art. 1, para. 3.; s*ee also* RUPP, *supra* note 401, at 222-23.

[575] *See* WOMEN IN A CHANGING WORLD, *supra* note 410, at 179 (documenting the ICW's commitment to the CSW); Smith, *supra* note 495, at 24 (describing Kenyon's appointment to the CSW as evidence of NAWL's commitment to women throughout the world).

[576] *See* Dorothy Kenyon, *United Nations Commission on Status of Women*, 33 WOMEN LAW. J. 37, 38 (1947).

[577] *Id.*

[578] *Id.*

[579] *Id.* at 39-40, 43 (arguing that the CSW committee went beyond the League of Nations' work as it investigated not just the laws that affected women, but also the ways the laws were applied and the influence of custom).

Kenyon sat on the CSW for four years (1946-1950) and attempted to use her position to advance the argument that women's issues were human issues.[580] Kenyon was a committed law activist who believed, like the founders of the women's rights movement, that "women are people, that they are human beings with human rights like every other human being[.]"[581] She used the CSW as an investigative tool, adapting the strategy of information politics. The Commission gathered information from every member nation on the laws and customs that affected women's interests and on the way those laws and customs were applied.[582] She also used the CSW as a "watchdog" of other United Nations (U.N.) commissions, to ensure that they were including women's interests as human interests.[583] She explained:

> We are, if you like, the spark plug of women's interests everywhere. Thus, and thus only, can we make sure that women will not be discriminated against, that they will be given full opportunity to participate in the work of the world and that they will never again be segregated.[584]

For the rest of the twentieth century, women's rights and law activists from around the globe worked through the CSW to advance women's equality and women's rights.[585] Their primary strategies included information politics and law reforms. For fifteen years, the CSW gathered and disseminated information on the political and legal status of women and drafted international laws to advance women's rights.[586] In 1952, the General Assembly adopted the first of these laws, the Convention on the Political Rights of Women, which established and protected women's equal political rights, including the right to vote and hold office.[587] During the 1950s and 1960s, the CSW also secured a number of laws to end women's discrimination and protect their rights in marriage and in the workplace.[588] Their efforts culminated in 1979 with the adoption of the Convention for the Elimination of all forms of Discrimination against Women (CEDAW), which some describe this as the "international women's bill of rights."[589]

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[580] *See* Hartmann, *supra* note 571, at 396.

[581] Kenyon, *supra* note 576, at 38.

[582] *See id.* at 40-42 (describing the information was gathered from studies and reports conducted by member countries on the legal status of women in their countries and a plan for regional conferences conducted by the Commission).

[583] *See id.* at 43.

[584] *Id.*

[585] *See* Short History of the Commission on the Status of Women, http://www.un.org/womenwatch/daw/CSW60YRS/CSWbriefhistory.pdf (last visited June 26, 2009). The U.N. Commission on Human Rights initially established the CSW as a sub-commission. *Id.* at 1-2. During its first few months, the Economic and Social Council (ECOSOC) granted some feminists requests to transform the sub-commission to a full commission. *Id.* Other feminists opposed, distinguishing and separating women's issues from general human rights issues. *See* RUPP, *supra* note 401, at 223-24.

[586] *See* Short History of the Commission on the Status of Women, *supra* note 585, at 4-5.

[587] *See id.* at 5.

[588] *See id.* at 5-6.

[589] *Id.* at 7-8, 10 (explaining CEDAW began as a Declaration, adopted by the General Assembly in 1967). It was elevated to a convention in order to make the measure legally binding. *Id.* at 10.

For the last quarter of the twentieth century, a small group of law activists once again led the next wave of the international women's movement.[590] They operated through international committees and the United Nations.[591] This wave began with the International Women's Year and the first U.N. World Conference on Women (1975), and was followed by the U.N.'s Decade for Women (1976-1985) and two more U.N. world conferences (Copenhagen 1980, Nairobi 1985).[592] These events focused on strengthening and enforcing women's rights through international law, particularly CEDAW.[593] Near the end of the decade, CSW began to focus on ending violence against women and drafted the Declaration for the Elimination of Violence against Women, which the General Assembly adopted in 1993.[594] CSW continued to employ law reform as a strategy, but reframed the issues as human rights, rather than women's rights.[595]

The decision to characterize women's rights as human rights was once again controversial. Opponents, primarily feminist law professors, asserted, like their predecessors, that this decision would misguidedly shift the focus from complex power inequalities to a simplified goal of possessive individualism.[596] Proponents argued that casting women's rights as human rights exposed harms that were otherwise unseen or dismissed when perceived as issues only affecting women.[597] This time, those in favor of the human rights strategy prevailed. They espoused the theory at three successive conferences: (1) in Toronto (1992), "Linking Hands for Changing Laws – Women's Rights as Human Rights Around the World;" (2) in Vienna as part of the Conference on Human Rights (1993); and (3) in Beijing (1995).[598] The primary focus of these meetings was once again to develop strategies to effect reforms in

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590 *See* A. Riles, *The Virtual Sociality of Rights: The Case of 'Women's Rights are Human Rights'*, *in* TRANSNATIONAL LEGAL PROCESSES 420, 422, 425 (Michael Likosky ed., 2002) (arguing that the group included Charlotte Bunch, Director of the Center for Global Women's Leadership, Anne Walker, Director of International Tribune Center, and Bella Abzug, President of Women's Environment and Development Organization). *See also* RUPP, *supra* note 401, at 224-25; Short History of the Commission on the Status of Women, *supra* note 585, at 9 –12.

591 *See* Short History of the Commission on the Status of Women, *supra* note 585, at 9.

592 *See id.* at 8-9, 11-12.

593 *See id.* at 9-13.

594 *See id.* at 13-14.

595 *See id.* at 13-15.

596 *See* Riles, *supra* note 590, at 420-35.

597 Charlotte Bunch, *Organizing for Women's Human Rights Globally*, *in* OURS BY RIGHT: WOMEN'S RIGHTS AS HUMAN RIGHTS 141, 141-149 (Joanna Kerr ed., 1993). *See also* Charlotte Bunch, Samantha Frost & Niamh Reilly, *Making the Global Local: International Networking for Women's Rights*, *in* 1 WOMEN AND INTERNATIONAL HUMAN RIGHTS LAW 91, 91-113 (Kelly D. Askin & Dorean M. Koenig eds., 1999).

598 *See* Joanna Kerr, *The Context and the Goal*, *in* OURS BY RIGHT, *supra* note 597, at 3, 6-8 (describing the presentation of the argument that women's rights are human rights at the "Linking Hands" conference in Toronto, Canada in 1992); *see also* Arvonne S. Fraser, *Becoming Human: The Origins and Development of Women's Human Rights*, 21 HUM. RTS. Q. 853, 903-04 (1999) (arguing that women's rights as human rights was prominent theme at the 1993 World Conference on Human Rights in Vienna and at the 1995 UN World Conference on Women in Beijing).

women's rights across the globe.[599] They sought to make "governments—their laws, policies and actions—accountable to women."[600] The activists acknowledged that they had to create laws to establish women's rights, to ensure that the laws were interpreted and enforced, and they also recognized the work of "feminist lawyers" in pursuing those ends.[601]

Hilary Rodham Clinton's address to the Women's Plenary Session in Beijing was the capstone of the campaign.[602] She asked the transnational advocacy network of women and human rights activists to continue in the effort to secure social, civil, and political rights for women.[603] She emphasized women's need for "access to education, health care, jobs and credit [and] the chance [for women] to enjoy basic legal and human rights and to participate fully in the political life of" their country.[604] She further acknowledged the network's power, through activities including the conference, to "compel governments and peoples everywhere to listen, look and face the world's most pressing problems . . . and to give voice to women everywhere whose experiences go unnoticed, whose words go unheard."[605] At the end of the conference, the CSW enacted the Beijing Declaration and a Platform for Action, which incorporated its previous law reforms and determined to establish women's legal and substantive equality.[606]

The women's rights campaigns of the nineteenth and twentieth centuries have yielded limited, incremental rights for women in the United States and many countries throughout the world but have still failed to secure women's substantive equality. Women's rights activists have always been aware of the limitations of their results of their campaigns, but have persisted, maintaining a core belief in their liberating power. As early as 1906, Catharine Waugh McCulloch acknowledged both that "the horrified protests of thousands of wronged women have gradually brought some changes in [the] law," and that "they are not sufficiently far reaching."[607] The contrast is exemplified in the 2007 presidential campaign of Hilary Rodham Clinton. A lawyer, senator, and presidential candidate, she represented the gains of the women's rights movement. But her 1995 speech and her twenty-first-century agenda exposed the legal inequalities that continue.

CONCLUSION

Throughout the nineteenth century, a component of the women's rights movement implemented a strategy of law reform to secure women's legal equality. This faction was connected yet distinguishable from other factions

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599 *See* Kerr, *supra* note 598, at 6.
600 *Id.*
601 *Id.*
602 Hillary Rodham Clinton, Women's Rights are Human Rights (Sept. 5, 1995) (transcript *available at* http://www.americanrhetoric.com/speeches/PDFFiles/Hillary%20Clinton%20-%20Womens%20Rights.pdf).
603 *Id.* at 3-5.
604 *Id.* at 1.
605 *Id.* at 2.
606 *See* Short History of the Commission on the Status of Women, *supra* note 585, at 15.
607 MCCULLOCH, *supra* note 382, at 5.

within the movement, because its leaders maintained a democratic vision of society based on principles of liberty and equality. The faction emerged in the years after the Civil War, as the leaders of the antebellum movement divided over issues of principle and strategy. It was led by a cadre of women lawyers who attempted to use the law to abolish the extant status regime and replace it with a system of individual rights. They believed that such a system would secure women's substantive equality.

The law activists operated from two positions in their campaigns to win women's legal equality. They worked within the dominant systems of governance, where they created new forms of legal reasoning to influence the enactment, interpretation, and enforcement of positive laws. Simultaneously, they worked within nongovernmental organizations where they created new methods of information politics to influence legal and political institutions. Their efforts secured civil and political rights for women incrementally.[608] They also formed the basis of the law reform movement that continued through the twentieth century.

The campaigns to secure women's legal equality endured for two centuries. They were most effective when large social movements supported them.[609] But, even in periods where there was little outside support, a small group of law activists steadfastly implemented law reform strategies. The law activists believed that securing women's legal equality was the most effective means to securing women's substantive equality, but they understood that it mattered how the law was changed. Beginning in the late nineteenth century and through the twentieth century, law activists increasingly debated how to shape laws and influence judicial interpretation in a system that maintained differences based on status.[610] They understood that establishing formal equality in a system that maintained race and gender hierarchies would not, alone, result in substantive equality.[611] They also understood that law reforms that accommodated status differences offered relief at the price of perpetuating the status hierarchy. Yet as they balanced the costs and benefits of each approach and worked toward an accord, they nonetheless continued their law reform strategy.

Each generation faced unique and particular circumstances that influenced the way they conceptualized and addressed women's inequality, but there were continuities in both the actors and the strategies. The leaders of each preceding generation mentored the leaders of the next, who then continued the unfinished campaigns. The 1870s New Departure arguments and the law reform movement that followed formed the roots of the 1970s arguments for a judicial reinterpretation of the Fourteenth Amendment. Those efforts and their

608 *See* MCCULLOCH, *supra* note 483, at 1-4. (listing the law reform advances in Illinois 1855 to 1913).

609 *See* HARRISON, *supra* note 511, at xii (arguing that in the two decades after World War II, a small group of women's rights activists laid the foundation for the second wave of feminism and the policy changes enacted in the late 1960s that enhanced women's rights).

610 *See* Mayeri, *supra* note 528, at 757 (arguing that in the 1960s and 1970s legal feminists debated and then united over a dual strategy of constitutional amendment and reinterpretation of the Fourteenth Amendment to secure sex equality).

611 *See, e.g.*, MCCULLOCH, *supra* note 382, at 5 (arguing that the law reforms secured for women did not in practice secure women's legal equality).

consequences now influence the strategies of law activists in the twenty-first century. Similarly, the transnational advocacy network's law reform campaigns of 1890s established the foundation of the United Nations women's international rights campaigns of the 1980s and beyond. The movement's aim to achieve women's legal equality persists, but substantive equality remains elusive.[612] By the end of the twentieth century the women's local and national efforts neared a formal, legal equality, and they affected important advances in women's international right. But significant substantive inequalities remained.[613]

The dissonance between formal equality and substantive equality lies at the root of American law and American society. Changes in legal statutes, and even constitutional provisions, have transformed but not abolished the systems' underlying status regime. Rather, the legal system has adapted to and manipulated those changes in order to maintain the status regime. The history of the law reform movement calls into question whether the continued application of the law reform strategy will ever secure substantive equality. If the answer is no, then law activists must ask whether they should abandon the goal, or implement alternative, radical strategies.

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[612] *See* Mayeri, *supra* note 528, at 758-60.

[613] *See* Becker, *supra* note 17, at 253 (listing among women's inequalities: the wage gap, sex-segregated jobs, the second-shift, domestic violence, sexual abuse, credibility, religious and sports participation, and political office); *see also* Mayeri, *supra* note 528, at 757-58.