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CONTENTS

WOMEN'S LEGAL HISTORY: A GLOBAL PERSPECTIVE

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This article examines the involvement of the Marquise de Brinvilliers, Catherine La Voisin, and the Marquise de Montespan, in the scandal "Affair of the Poisons," during the seventeenth century in France. Through such investigation, this article interrogates the discourse surrounding gender and crime in history, deepening the understanding of women's motivation to commit murder and the strategies they adopted. Moreover, the article examines how the legal system addressed women's crime, differentiated responses based on their class and social rank, and held women accountable for poisoning the country, thus failing to acknowledge the actual shortcomings of the French monarchy, the decline of Catholicism as well as women's constraints in the patriarchal society.

This article constitutes a preliminary report on cases involving women that appear in a manuscript authored by Chief Justice Peter King during the first seven years of his tenure as Chief Justice of the Court of Common Pleas in early eighteenth century England. While the 327 cases he reported in the manuscript run the gamut of the procedural and substantive matters that vexed early modern Englishmen, the cases isolated and discussed hereinafter are the fifty-five cases in which women were a party to the litigation observed. By so doing, isolating cases in which women appeared as litigants, we may catalog the legal issues that touched the lives of women during the period and discern the substantive law that these disputes generated. No sophisticated thesis on the legal position of women during the period can be teased from the cases. Rather, the cases allow historians to derive a more nuanced and textured understanding of the circumstances of women's participation in the early modern English legal order. Moreover, by observing the legal issues and the context in which they arose in cases that involved women

wished to become lawyers in other parts of the world. Yet, as Nancy Cott explained, although women's admission to the professions had been seen in earlier decades as part of the "cause" of women's equality, by the end of the nineteenth century, professional ideologies were beginning to create divisions between women professionals and the women's equality movement.

In this context, this paper focuses on the presentations of the four women participants in the Congress on Jurisprudence and Law Reform in 1893 as a "moment in time" to assess the extent to which they reveal this departure from concern with the women's equality movement and an increasing embrace of professional culture and ideology. Two of the women presenters were American: Mary Greene and Clara Foltz, and the other two included an English woman, Eliza Orme, and an Indian woman, Cornelia Sorabji. Significantly, neither Orme nor Sorabji had succeeded in gaining admission to the bar by 1893, although both had studied law in England. Notwithstanding these differences, the four papers presented at the Congress in 1893 tend to confirm that these women lawyers had already adopted an identity as members of the legal profession, and that their ties to the women's equality movements were becoming rather tenuous. In this way, the paper seeks to examine the competing identities of gender and professionalism among these women lawyers in the 1890s.

Edith Sampson was one of the leading black women lawyers in Chicago for over fifty years. She was admitted to the bar in 1927 and achieved a number of firsts in her career: the first black woman judge in Illinois, the first African American delegate to the United Nations, and the first African American appointed to the North Atlantic Treaty Organization. Sampson was also a pro-democracy, international spokesperson for the U.S. government during the Cold War, a position that earned her scorn from more radical African Americans, contributed to a misinterpretation of her activism, and resulted in her relative obscurity in the historical record. This paper reexamines the work of Edith Sampson by employing a critical race feminist analysis to her career. This new lens reveals that, rather than a marginal figure, Sampson's work was an important part of a gendered black activism that sought racial justice for women of color in the United States and around the world.

Understanding Sampson's career in this context connects the activism of African American women to the issues of race, racial justice, and international relations during the decades before and after the start of the Cold War. Sampson was part of a vibrant and dynamic African American women's civil rights network that employed a rich diversity of strategies, both domestic and transnational, to secure a gendered racial justice—one that included the concerns and position of black and brown women. Through an examination of Sampson's work as an attorney and a leader in Chicago and her international work, this article hopes to contribute to recent studies that are beginning to alter our understanding of the role African American women played in the domestic and international civil rights movement from the 1920s through the 1950s. This piece argues specifically that Edith Sampson, and her sister black women lawyers and activists, engaged in domestic and international activism to pressure the United States government and its citizens to end race discrimination as they worked to ensure that the growing civil rights movement in the U.S. included the advancement of the position, rights, and protections of African American women.

The New Deal, one of the greatest expansions of government in U.S. history, was a "lawyers' deal": it relied heavily on lawyers' skills and reflected lawyers' values. Was it exclusively a "male lawyers' deal"? This Essay argues that the New Deal offered important opportunities to women lawyers at a time when they were just beginning to graduate from law school in significant numbers. Agencies associated with social welfare policy, a traditionally "maternalist" enterprise, seem to

have been particularly hospitable. Through these agencies, women lawyers helped to administer, interpret, and create the law of a new era.

Using government records and archived personal papers, this Essay examines three under-studied women lawyers of the New Deal. Sue Shelton White, an outspoken feminist from Tennessee, came to the New Deal after a long career as a court reporter, political organizer, and senate staffer. Records of her time in government suggest the difference that gender, and specifically gendered opportunity structures, made to the work of a New Deal lawyer. Marie Remington Wing, a prominent politician and lawyer in her native Cleveland, joined the New Deal as the lead attorney in a regional office. Her biography encourages scholars to remember that just as the New Deal was national in scale, so too was its legal work. Regional outposts of the New Deal provided some women lawyers with a taste of the power that the men in Washington enjoyed. Bernice Lotwin Bernstein was in age, brains, and social networks the equivalent of one of Felix Frankfurter's "Happy Hotdogs." She joined the New Deal in 1933 and stayed for forty-five years, narrowly surviving a Cold War loyalty-security investigation. Her life offers a case study in the appeal, and the dangers, that government work held for women lawyers. Taken together, these three biographies suggest the need for sustained scholarly attention to the "Portias" of the New Deal.

Leading studies argue that Roe itself radicalized debate and marginalized antiabortion moderates, either by issuing a sweeping decision before adequate public support had developed or by framing the opinion in terms of moral absolutes. The polarization narrative on which leading studies rely obscures important actors and arguments that defined the antiabortion movement of the 1970s. First, contrary to what the polarization narrative suggests, self-identified moderates played a significant role in the mainstream antiabortion movement, shaping policies on issues like the treatment of unwed mothers or the Equal Rights Amendment. Working in organizations like Feminists for Life (FFL) or American Citizens Concerned for Life (ACCL), other activists also campaigned for what they defined to be alternatives to abortion: for example, laws prohibiting pregnancy discrimination or funding contraception or sex education. Roe did not undo these important opportunities for compromise. Ultimately, these advocates did lose influence in the movement. Their declining power, however, came as the result of a number of factors beyond Roe itself, including the rise of the Religious Right, the limited resources previously available to the antiabortion movement, and the Republican Party's endorsement of antiabortion goals.

This article offers new perspective on an increasingly rich scholarship on women of the Right. Current studies have not fully done justice to important "pro-woman" abortion opponents who defined themselves as feminists or sympathized with parts of the agenda set forth by the women's movement. These advocates offer reason to rethink the categories used to define women of the Right. To the extent that the history studied here offers an example, as this article suggests, we should not attribute so much of the polarization of the abortion debate to Roe itself. If Roe did not radicalize debate in the way that is conventionally thought, then should criticisms of the opinion's rationale, timing, or scope be reexamined? The history here makes more urgent a reconsideration of this question.

In 1945, American judges decided the first court cases involving assisted conception. The challenges posed by assisted reproductive technologies to law and society made national news then, and have continued to do so into the twenty-first century. This article considers the first technique of assisted conception, artificial insemination, from the late nineteenth century to 1945, the period in which doctors and their patients worked to transform it from a curiosity into an accepted medical technique, a transformation that also changed a largely clandestine medi-

cal practice into one of the most pressing medicolegal problems of the mid-twentieth century. Doctors and lawyers alike worried whether insemination using donor sperm was adultery by doctor, producing illegitimate offspring. Drawing upon the legal and scientific literatures, case law, popular sources and medical archives, I argue that insemination became identified in medicine and law as a pressing problem at mid-century after decades of quiet use because of the increasing success of the technique, increasing patient demand, and increasing use—three interrelated trends that led to increasing numbers of babies whose origins were "in the test tube." In examining the history of a medical procedure becoming a legal problem, I also trace the development of a medical practice in the face of legal uncertainty and the shifting control of the medical profession over assisted conception. I argue that doctors modified the way they treated patients in response to perceived social and legal condemnation of artificial insemination, keeping tight control over all aspects of the procedure, but that doctors' persistence in meeting patient demand for fertility treatments despite such condemnation helped make artificial insemination into a medicolegal problem. Once it became identified as a medicolegal problem, artificial insemination became the subject of a broad social discussion, in which medical voices did not receive automatic deference, and medical control was challenged.

STUDENT NOTES

In Lebron v. Gottlieb, decided in February of 2010, the Illinois Supreme Court struck down Public Act 94-677, finding that its cap on noneconomic damages violated the Illinois Constitution's separation of powers clause. The Court primarily relied upon the remittitur doctrine to come to its conclusion. This case comment addresses the Lebron decision and its rationale, particularly its focus on the remittitur doctrine. Additionally, this comment addresses the following concepts: 1) the background and history of attempts to limit common law liability in tort law in Illinois; 2) other jurisdictions' responses to statutory caps; 3) the Lebron majority's distinctions regarding the General Assembly; and 4) alternatives to the tort system of medical malpractice liability which might receive more attention after Lebron.

On March 15, 2011, William Melchert-Dinkel, a Minnesota nurse, was convicted of two counts of assisted suicide, based solely on things he said in emails and online chat rooms. This note examines whether cyber speech encouraging suicide, such as Melchert-Dinkel's, should be protected by the First Amendment. States have compelling interests in preserving life, preventing suicide, and protecting vulnerable persons from abuse, and the majority of them have assisted suicide statutes that could be applied to cyber-suicide speech. However, because cyber-suicide speech does not fit neatly into recognized categories of "low-value" or unprotected speech, punishment may be foreclosed by the First Amendment. Nevertheless, because counseling suicide was a felony at common law, speech encouraging suicide—including cyber-suicide speech—should be identified as a "traditional" category of unprotected speech. Alternatively, an assisted suicide statute as applied to cyber-suicide speech has a good chance of surviving strict scrutiny.

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Alexandra Molesky, B.A., J.D.
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Valerie R. Neymeyer-Tynkov, B.A., M.S., J.D.
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Mary Lou Norwell, B.S., J.D.
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WOMEN'S LEGAL HISTORY: A GLOBAL PERSPECTIVE

Felice Batlan
Symposium Editor

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FOREWORD

TRACEY JEAN BOISSEAU*

This review, like the scholarly symposium on which it is based, marks the establishment of a new field of gender studies: women's legal history.

I am especially gratified to see this issue published as well as a new gathering of women's legal scholars come together to share their work so soon following the conference held at the University of Akron this time of year in 2008. As I'm sure many of you have noticed, the last three years has witnessed an outpouring of scholarship on women's legal history.

Although key texts establishing a foundation for our work are several decades old now and include the research of such luminaries in this field as historians Linda Kerber and Joan Hoff, and feminist legal scholars such as Martha Fineman, Drucilla Cornell, Martha Minow, Patricia Williams, and Frances Olsen, until recently, their work often remained moored exclusively in *either* History journals and departments *or* law schools and reviews.

What we are seeing now is the confluence of two disciplines that should have been talking to each other for a long time now, but for the most part have only been talking past one another.

For the first time, historians have been reading the work of legal scholars and legal scholars have come to see historical research as relevant to their teaching and their thinking about the law. In no field is this happening as rapidly and with such pronounced effect as in the area of feminist studies. There are now multiple blogs, online archives, museum exhibits, listservs, publications, and of course conferences bringing feminist historians and feminist legal scholars together: what we are witnessing is the institutionalization of a new field.

The Symposium on Women's Legal History: A Global Perspective, held at the Chicago-Kent College of Law in October of 2011 represented a great leap forward in this process and brings an important dimension of global studies to what has been fairly parochial in its

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parameters. Much of what has been achieved in women's legal history scholarship has taken the nation-state—narrowly defined—as our unit of study. I include Tracy Thomas and my recent collection of essays, *Feminist Legal History* (New York University Press, 2011), in that category. In our volume the United States is our unnamed location; its national time span of slightly more than two centuries is our unsaid temporal frame. Given the fluid relationship between legal systems and the states they serve, this is not unexpected. One can see why legal studies might be one of the fields more wedded to the nation-state in that, apart from international law, law-making occurs within national borders.

But, the problem with taking this at face value is that we fail to appreciate exactly that fluid link between law-making and State formation. Inasmuch as the State remains the invisible fence hemming in our research, it often remains unproblematized and unaccounted for. An unquestioned assumption that the nation-state is our default unit of analysis does little to encourage us to analyze the State as a legal apparatus and encourages us to ignore an international context that necessarily impinges upon law-making and judicial decisions—even if only implicitly. Reading the law across national boundaries not only provides us with points of comparison but new viewpoints from which to perceive the operations of laws in societies in which we are enmeshed and therefore all too familiar. By rendering the law less natural and more strange, comparative legal studies serves the same purpose as historicization of the law—allowing us to see the law as made rather than simply inherited.

This is all the more true and germane for feminist legal studies and feminist scholars bent on unpacking the law and legal institutions to show how gender works on and through the law. As feminists we recognize that women's relationship to the State is and has long been a problem. If we feminist legal scholars do not, through a broadening of our vision, attempt to account for just how much, why, and with what implications for women, this is so we risk more than mere parochialism, we risk failing to account for the way women have been positioned outside of and antithetical to states and have been used by nation-states to shore up national hegemonies. We miss the forest for the trees.

By encouraging and valuing research such as that included in this special issue of the Chicago-Kent Law Review and first presented at the Symposium on Women's Legal History—Global Perspectives, we have

the privilege and opportunity to remedy much of the blinkered narrowness that has characterized women's legal scholarship in the past.

I congratulate those who helped to make this symposium and law review a reality.

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INTRODUCTION: MAKING HISTORY

FELICE BATLAN*

When I first entered NYU's doctoral program in history more than a decade ago, I did so hoping to study women's legal history. I feared, however, that such a field did not exist, and I did not know where to look for it. Certainly no courses were taught in it, and few scholars identified themselves as doing such work. This paucity surprised me as the fields of feminist legal theory, gender and women's history, and legal history were flourishing. Yet mainstream legal historians often focused on decisions of high courts, elite legal academics, and elite lawyers. By custom and often law, women had long been excluded from such positions. Thus, women's historical exclusion replicated itself in the production of legal history and the topics about which legal historians traditionally wrote.

Change, however, was occurring and a previous generation of scholars had begun laying a rich foundation. As early as 1986, Norma Basch in a review essay mapped this early historiography and optimistically looked to the future while recognizing that it was unlikely that anyone working in the field could agree "on what women's legal history is or ought to be."[1] In the last decade or so, scholars have produced work that is consciously identified as women's legal history or feminist legal history and which together knit themselves into a field that stands at the intersection of women's history and legal history. Women's legal history is intended to act as an anecdote to legal history narratives, which in the past have often ignored women, assumed a male universal subject, accepted that the law's treatment of women as so exceptional that it stood isolated from the "real" trajectory of legal history, or believed that women were so subjugated that they did not

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1. Norma Basch, *The Emerging Legal History of Women in the United States: Property, Divorce, and the Constitution*, 12 SIGNS 97, 99 (1986).

function as legal actors.[2] As I have said elsewhere, at its best women's legal history rethinks and revises the dominant paradigms of legal history and how law produced and reflected cultural and social norms. Women's legal history is not just the writing of women into the history of law. Rather it produces new histories and innovative modes of how we imagine, characterize, and locate law, rights, citizenship, the family, and the state. It thus challenges some traditional meta-narratives of law while producing others.[3]

Although scholars working on topics involving women's legal history often presented papers at more mainstream conferences of legal historians, legal scholars, and historians, such presentations and panels were often episodic and did not provide a space for extended discussion. This changed in an exciting way that was full of possibilities in 2008 when the University of Akron Law School held the first women's legal history conference. The conference was important for a number of reasons. It formally and visibly announced that there was such a field as women's legal history, and it legitimated that this field could be, at least in part, situated within a law school environment. In other words, it functioned as a cultural and symbolic marker. The publication of the symposium in the *Akron Law Review* further situated the field as part of legal scholarship and made the participants' writings available to a wide-audience.[4] Finally, emerging from the conference was the first anthology of women's history, *Feminist Legal History*.[5] The anthology in part was intended to make women's legal history more easily taught to law students, undergraduates, and graduate students. Yet the title *Feminist Legal History* sparked some controversy as well as excitement. What did it mean? Did it situate the authors as feminist? Did it indicate that the historical actors about which the authors wrote were feminists? Did it claim that the very project of writing women's legal history was part of a larger feminist agenda? At a panel on women's legal history at the 2011 Berkshire Conference of Women's History, some historians were particularly excited that that feminist legal history directly spoke to the present and specifically embraced the idea of creating a useable past. As historian Joan Scott writes about feminist history, the production of knowledge about the past is "a criti-

2. Felice Batlan, *The State of Women's Legal History*, *in* BLACKWELL COMPANION TO AMERICAN LEGAL HISTORY (Sally Hadden & Alfred Brophy eds., forthcoming 2013).

3. Felice Batlan, *Engendering Legal History*, 30 LAW & SOC. INQUIRY 823 (2005).

4. Tracy A. Thomas, 41 AKRON L. REV. 695 (2008).

5. FEMINIST LEGAL HISTORY: ESSAYS ON WOMEN AND THE LAW (Tracy A. Thomas & Tracey Jean Boisseau eds., NYU Press 2011).

cal operation that uses the past to disrupt the certainties of the present and so opens the way to imagining a different future."[6] In this sense, the articles here are part of feminist legal history, although many of them speak about historical actors who certainly were not feminists.

Immediately following Akron, participants in and organizers of that conference began thinking about staging a second conference. Thanks to the IIT Chicago-Kent Institute for Law and the Humanities and the *Chicago-Kent Law Review*, this second conference took place at the IIT Chicago-Kent College of Law in October 2011. I was the organizer of the conference, and a number of issues were important to me. All of the papers from the Akron conference and the essays in *Feminist Legal History* focused on U.S. law and history. This is entirely understandable as law is so closely related to the sovereign state and women's legal history remains a young field with so much local content still unexplored. The larger trend in history, however, has been to move away from the individual nation state and explore international and transnational trends, currents, and ideas.[7] Thus as a start, I hoped to put scholars working in different countries and legal systems in dialogue with one another to begin to explore how we can write a transnational women's legal history. I was also guided by the idea that panelists who presented papers at the Akron conference should not present articles at the Chicago-Kent conference. I wanted to ensure that these conferences could produce a continual stream of different voices, new works, diverse participants, and fresh conversations while simultaneously being intergenerational and putting scholars new to the field in conversation with those whose work has been foundational to the field.

When the call for conference papers went out, I was not confident that it would elicit many responses. I was shocked when I received proposals from dozens of scholars from around the world. It immediately became clear to me that our budget and time allocated for the conference would be an insurmountable barrier in making this a truly international conference. Yet our conference was a beginning and demonstrated that scholars on every continent are doing work on excavating, constructing, narrating, and re-narrating the multiple and often conflicted ways in which women have been legal actors across

6. JOAN WALLACH SCOTT, THE FANTASY OF FEMINIST HISTORY 34 (2011).

7. *See, e.g.,* THOMAS BENDER, THE LA PIETRA REPORT: A REPORT TO THE PROFESSION 50 (Organization of American Historians 2000), *available at* http://www.oah.org/activities/lapietra/final.html.

both time and national boundaries. It demonstrates that we still need such a truly international conference and as Tracey Jean Boissseau elaborates in her foreword, we must continue puzzling out the transnational themes of women's legal history.[8]

All of the articles in this volume confirmed some of the fundamental premises of women's legal history. First, throughout history women have been legal actors. Even in the most oppressive periods, women were seldom just passive objects of the law but rather in constricted space attempted to manipulate law and take advantage of legal processes. Thus, Lloyd Bonfield, analyzing the English Peter King manuscript reports of the 1720s–1730s, finds that women married and ununmarried were litigants both alone and with their husbands on wide-ranging legal matters including, property, commercial transactions, estates, defamation, and marriage. As he writes, "[women] were there."[9] Yet moving beyond finding the presence of women, which is of course a crucial and necessary first step, women's individual agency often played out in complicated ways benefiting the individual while confirming larger structures of hierarchy and domination. Women's legal history hones in on these tensions and contradictions, emphasizing how law and legal processes allowed some women to be agents while also constricting the agency of other women.[10]

A second fundamental tenet of women's legal history understands that law is not nor has it ever been neutral, self-contained, or apolitical. Law constitutes a discourse and acts on a symbolic level, but it also has real and material power. Law can function as a means of social control used to enforce gender norms and contributed to and shaped patriarchy and women's oppression. Simultaneously, law could empower some women and act as a privileged site of change. One of the fascinating elements that Susan Hinley's article hones in upon is how much the Pre-World War I international women's movement believed in the power of law to affect real on-the-ground change.[11]

These papers also illustrate the third tenet of women's legal history in that they historicize the role of women as legal actors and depart from any Whiggish notion of the continual progressive march of wom-

8. Tracey Jean Boisseau, *Foreword* to 87 CHI.-KENT L. REV. 331 (2012).

9. Lloyd Bonfield, *Finding Women in Early Modern English Courts: Evidence from Peter King's Manuscript Reports* 87 CHI.-KENT L. REV. 371, 390 (2012).

10. Batlan, *The State of Women's Legal History*, *in* BLACKWELL COMPANION TO AMERICAN LEGAL HISTORY, *supra* note 2.

11. Susan Hinely, *The Global 'Parliament of Mothers': History, the Revolutionary Tradition, and International Law in the Pre-War Women's Movement*, 87 CHI.-KENT L. REV. 439 (2012).

en gaining legal rights or a teleological history of feminism itself. For example, Carla Spivack argues that Lady Anne Clifford (1590–1676), who spent much of her life litigating for the estate left by her father to her brothers, was not an example of early feminism or an attempt at Clifford claiming gender equality. She cautions against using her as an example of "proto-feminism," arguing instead that her legal identity drew from earlier ideas of feudal property rights which saw rank and social hierarchy as at times more important than sex. Yet during Clifford's lifetime, such claims to property were becoming increasingly unavailable to women.[12] Likewise, Adetoun Ilumoka argues that Nigerian customary law in the nineteenth century may have allowed for more protection of women's property rights to land than do current constructions of Nigerian law.[13]

Yet even as we write women's legal history, the enterprise to some may feel old fashioned, as decades of women scholars have deconstructed the very category "woman" as too hegemonic and as an organizing category that assumes a unity of women's experience which elides race, class, nationality, sexuality, and a host of other things. Yet as Susan Hinely writes in her article, historically the category "woman" did have meaning and was indispensible to a "historical identity" that allowed for mobilization.[14] Likewise, in a myriad of ways too numerous to recount here, the law did and does recognize the category "woman" and distributed rights and obligations based upon it. "Legal recognition is a real and circular process. It recognizes the things that correspond to the definition it constructs."[15] Some of the most sophisticated legal histories of women simultaneously question the category "woman" while recognizing its tremendous, materially real, but changing importance, meanings, and constructions.

Although the symposium articles span space and time, significant methodological similarities exist. Most vividly the authors expand the sites where they look for law and draw upon sources that we do not always think of as legal sources. If we look only at high court legal decisions and luminous judges, jurists, and legislators, it is often too easy to say that women played a minimal role in the legal arena. Rather the

12. Carla Spivak, *Law, Land, Identity: The Case of Lady Anne Clifford*, 87 CHI.-KENT L. REV. 393 (2012).

13. Adetoun Ilumoka, *Globalization and the Re-Establishment of Women's Land Rights in Nigeria: The Role of Legal History*, 87 CHI.-KENT L. REV. 423 (2012).

14. Hinely, *supra* note 11, at 443.

15. Parveen Adams & Jeffrey Minson, *The 'Subject' of Feminism*, *in* THE WOMAN IN QUESTION: M/F 99 (Parveen Adams and Elizabeth Cowie eds, Cambridge 1990).

universe of what we consider legal sites must be creatively expanded.[16] When this occurs, not only do we find women as legal actors but it also presents a richer, more complicated and contested understanding of law.[17] Thus, Carla Spivack examines the diary and writings of Lady Anne Clifford. In addition to these written sources, Spivack also "reads" Clifford's building projects and the art that she commissioned for her estate as ways in which Clifford created and visibly enshrined her contested legal identity as a fully vested property owner. In a very different era, Kara Swanson sees the gynecologist's office and medical journals as sites of legal improvisation as doctors and patients discussed and engaged in artificial insemination. For both Barbara Babcock and Mary Jane Mossman, Chicago's 1893 World's fair, which has long been of interest to historians of popular culture, gender and women, and those exploring the making of race and whiteness, was also a site that provided a world stage for the first generation of women lawyers.[18] It is striking that so many of these articles do not center on court decisions as their primal focal point nor do they use the opinions of courts as privileged texts. Rather in their sources and in their subject, each of the articles in this volume are filled with creativity, reimaginings, and re-narrations.

Another commonality that was so evident at the conference was the role of passion and engagement and how they functioned on multiple levels.[19] Each of the presenters was clearly passionate about their subjects and had spent years finding their sources and weaving their texts. There was a palpable sense of excitement as new stories were told and connection was made between our historical actors and topics. But the actors whom we write about were also passionate and at

16. There is a great irony here. James Williard Hurst, often considered the grandfather of legal history, made this point early on pointing legal history towards social history. Yet Hurst entirely ignored women in his work. *See* JAMES WILLARD HURST, LAW AND THE CONDITIONS OF FREEDOM IN THE NINETEENTH CENTURY UNITED STATES (University of Wisconsin Press 1956). On this point regarding Hurst and the absence of women see Barbara Y. Welke, *Willard Hurst and the Archipelago of American Legal Historiography*, 18 LAW & HISTORY REV. 196 (2000).

17. Felice Batlan, *Florence Kelley and the Battle Against Laissez-Faire Constitutionalism* (Social Science Research Network, working paper, 2010), *available at* http://ssrn.com/abstract=1721725.

18. *See* GAIL BEDERMAN, MANLINESS AND CIVILIZATION: A CULTURAL HISTORY OF GENDER AND RACE IN THE UNITED STATES, 1880–1917 (University of Chicago Press 1995). On other world's fairs and gender see TRACEY JEAN BOISSEAU & ABIGAIL M. MARKWYN, GENDERING THE FAIR: HISTORIES OF WOMEN AND GENDER AT THE WORLD'S FAIRS (University of Illinois Press 2010).

19. In Barbara Young Welke's talk at the 2012 American History Association, "Telling Stories: A Meditation on Love, Loss, History and Who We Are," Welke called upon historians to be deeply and emotionally engaged with their work and to reveal their own and their historical actor's periods of grief and despair rather than searching for historical objectivity. *Available at* http://aha.confex.com/aha/2012/webprogram/Paper10299.html.

times difficult women. There are murderous French women turning to poisons to kill husbands and lovers, freedom fighters engaged in attempted assassinations, infertile women hoping to conceive, women who lose family land, women who spent their lives involved in litigation against family members, women who passionately wanted to become lawyers and sought careers dedicated to legal reform, and womwomen devoted to activism and social justice who often saw their hopes and dreams dashed. The authors write of such women vividly, passionately, and with compassion.

Although some of the articles focus on everyday events, two very different articles explore the relationship between gender, crime, violence, and the state honing in upon dramatic events. Benedetta Faedi Duramy examines three French women of different classes implicated in a poisoning scandal involving the court of Louis XIV. She uses these events to explore discourses involving the relationship between women, black magic, and murder, concluding that women used poison, closely associated with the black arts, to murder abusive husbands and to seek financial independence at a time when divorce was all but impossible.[20] These poisoning episodes, however, were not just private affairs, but rather the state interpreted them as a wide-spread threat to the well-being of the king and the body politic. Duramy creatively uses the stories of the accused, often given under torture, to analyze connections between the black arts, class, gender, law, religion and crime and refuses simply to dismiss the idea of magic and potions as superstitions and the faulty belief system of the Ancien Régime. At times, the reader is disoriented, unsure of what is "real" or imaginary, truth or make believe, causing us to reflect upon our own tenuous grasp of current-day reality.

In a very different context, Margaret Power examines a number of women in the Puerto Rican Nationalist Party in the 1950s who, in armed rebellion, fought for the independence of Puerto Rico against the U.S. and were imprisoned for lengthy sentences.[21] One of these women, Lolita Lebron, actually led an attack on the U.S. Capital building in D.C. Power poses the question of how the U.S. government responded to these women as "anti-colonial fighters and as women" at the height of the Cold War and intense gender conservativism. Like

20. Benedetta Faedi Duramy, *Woman and Poisons in 17th Century France*, 87 CHI.-KENT L. REV. 347 (2012).

21. Margaret Power, *Puerto Rican Women Nationalists vs. U.S. Colonialism: An Exploration of Their Conditions and Struggles in Jail and Court*, 87 CHI.-KENT L. REV. 463 (2012).

Duramy, Power explores the question of the use of torture and explains the conditions of confinement as these women experienced them. Power situates her article in the context of imperialism, anti-colonial struggle, and the Cold War. She also connects the past and the present as the issue of women freedom fighters (terrorists in the eyes of the U.S. government) are once again in newspaper headlines. Power further creates a story of continuities and connections between the past and the present as she conducts oral histories of these women, still devoted to Puerto Rican independence.

Like Power, other authors as well situate issues of gender and law within a transnational environment deeply shaped by western imperialism. Moreover, they consciously link the past and the present, the local and the global. Adetoun Ilumoka examines the dispossession of women from land in Nigeria justified by the assertion of "customary law." Ilumoka restores historicity to customary law and demonstrates that it was never static but shaped by colonialism, migration, shifting status arrangements, changing concepts of the family, and labor arrangements. Thus, unlike its imagined past of continuities, its history is one of ruptures. Ilumoka begins to explore how in the nineteenth century customary law in specific contexts recognized women's rights to family land, and multiple women within individual contexts actively fought for such rights. As Ilumoka argues, normatively grounding customary law within specific historical contexts, including a long history of a globalized political economy, creates a multiplicity of strategies that can currently be used by lawyers arguing for women's property rights.[22]

Susan Hinely explores the transnational women's movement in the decade before World War I and argues that this movement's agenda, which included anti-colonialism, went far beyond calls for women's suffrage. Hinely re-narrates the movement as a broad based radical international human rights movement whose heroines belong next to male leaders such as Ghandi, King, and Mandela rather than tucked away and marginalized as women's suffrage leaders. Instead of the vision of first wave feminists as privileged white women, Hinely argues that the international women's movement was filled with radical women from around the world who spoke out and organized against capitalism, colonialism, the nation-state, and patriarchy. Within a wide range of women's global networks, which again connected the local

22. Ilumoka, *supra* note 13, at 436–37.

and the global, women became particularly involved in advocating for and creating international law.

A host of articles explore women lawyers and their relationship to the legal profession and first wave feminism. They further focus on how women lawyers fashioned their self-identities, how they were forced to improvise and innovate careers, and the important transnational dimensions of their lives. Mary Jane Mossman examines the role of women lawyers at the Congress of Jurisprudence and Law Reform held at the 1893 Chicago World's Fair and focuses upon the four women (two from the United States, one from the U.K., and one from India) who presented papers.[23] She analyzes the connection between these lawyers and the larger women's rights movement, exposing the tensions between gender, professional ideologies, and women lawyer's construction of their self-identities. Mossman concludes that at least some of these women consciously and strategically chose not to focus their conference papers on issues involving women's equality, understanding that the unstated condition to their speaking was "their conformity to emerging norms of legal professionalism."[24] Barbara Babcock discuses Clara Foltz's presentation at the same congress. There, Foltz articulated the need and called for the creation of a public defender's office. Babcock argues that Foltz's strategic choices were brilliant as she used sophisticated legal discourse that her audience of elite legal scholars and lawyers would appreciate. She thus publicized the concept of a public defender while demonstrating her legal acumen and hoping to advance her own difficult career. Indeed, Foltz would become the first public defender in Los Angeles. At a time when it was extremely difficult for women lawyers to earn a living, Foltz invented her own career. Mossman and Babcock are in a generative conversation with each other seeking to puzzle out the relationship between the first generation of women lawyers to the women's rights movement and the often constrained choices that they had to make.

Gwen Jordan examines the career of Edith Sampson, an African American attorney and patriot, often condemned for her State Department sponsored tours which touted the progress of U.S. race relationships during the Cold War.[25] Jordan argues that Sampson was not naïve regarding American racism but rather walked a tightrope recog-

23. Mary Jane Mossman, *Women Lawyers and Women's Equality: Reflections on Women Lawyers at the 1893 World's Columbian Exposition in Chicago*, 87 CHI.-KENT L. REV. 503 (2012).

24. *Id.* at 518.

25. Gwen Jordan, *Engendering the History of Race and International Relations: The Career of Edith Sampson, 1927–1978*, 87 CHI.-KENT L. REV. 521 (2012).

nizing and condemning pervasive racism while also acknowledging significant racial change and the promise of democracy. Jordan positions Sampson as an African American woman whose intertwined gender and race made her particularly concerned with the rights of other women of color internationally as well as locally. She used her position not only to reach out to women in newly de-colonized African countries but used such women's concerns to further pressure the U.S. to institute domestic racial reforms. Jordan implicitly asks us to view Sampson in the same light as Thurgood Marshall, whose international work, especially his work in Africa, has been duly celebrated by historians.[26]

Karen Tani helps us re-imagine the New Deal and its legal heroes. Legal scholars have long explored a host of celebrated male lawyers who created the new administrative state, and until now we have understood these lawyers to be all male. [27] Tani makes the exciting discovery that hundreds of women lawyers labored in New Deal agencies and participated in creating the administrative state. Moreover, some of these women stayed long after the heroes of the New Deal either left federal government or were appointed to the bench. Significantly, Tani suggests that such lawyers' presence should be of importance to legal historians for they point to the everydayness of law and how agencies functioned away from the limelight and those whom we deem (and who deemed themselves) legal luminaries. Focusing upon such lawyers, some who headed regional offices, also allows our focus to shift from Washington, D.C. to a more local level where federal programs were enacted. Yet Tani's article also exhibits a slight discomfort as she tries to fully articulate why her discovery should matter to legal historians. In other words, why is it historically important that these women existed? She thus subtly offers a challenge to all of us to more fully conceptualize how our narratives change more traditional stories of legal history.

Both Kara Swanson's and Mary Ziegler's articles discuss reproductive rights and add complexity and nuance to our understandings of this crucial and central topic. Swanson posits that in the post-World War II period, the most controversial issue regarding reproduction was not abortion but rather artificial insemination.[28] From the turn of

26. *See, e.g.,* MARY DUDZIAK, EXPORTING AMERICAN DREAMS: THURGOOD MARSHALL'S AFRICAN JOURNEY (Oxford University Press 2008).

27. Karen M. Tani, *Portia's Deal,* 87 CHI.-KENT L. REV. 549 (2012).

28. Kara W. Swanson, *Adultery by Doctor: Artificial Insemination, 1890–1945*, 87 CHI.-KENT L. REV. 591 (2012).

the century on, doctors, lawyers, and couples functioned in a legal gap in which there was a host of questions, including the very legality of the procedure itself. The article traces the ways in which medical, legal, and popular discourses framed the issue and how such answers reverberated in the ways in which doctors performed the procedure, which clients had access to it, and eventually how legislators created laws governing it. She thus historicizes this reproductive technology that some viewed as subversive for it detached biology and fatherhood while others viewed it as extending traditional conceptions of family and the importance of maternity. As Swanson writes, who controlled the use of such technologies—doctors, couples, legislatures, or courts—and what cultural, political, and legal significance such actors had would replicate and help construct the debate over abortion.

Mary Ziegler intervenes in the significant on-going debate among historians regarding whether Supreme Court decisions create public backlash and political polarization. Connecting high legal culture with grass roots activism, she argues that current day scholars who point to the polarizing effect of *Roe v. Wade*[29] miss that in the aftermath of the case a moderate feminist but anti-abortion position grew. Such activists were proponents of state sponsored child care, welfare, birth control, and anti-discrimination laws, attempting to eliminate the structural and economic need for women to have abortions. Yet these activists could not maintain this moderate position in the face of a growing conservative movement that explicitly opposed feminism. Thus, Ziegler historicizes the debate surrounding abortion and *Roe v. Wade*, arguing that the case itself did not produce immediate backlash and later backlash was part of a much larger and complex conservative movement.[30]

The collection of articles here of course only represents a small sampling of the work that is being produced in women's legal history. Recently one legal historian wrote that scholars working on women's legal history may be the "new insiders."[31] Yet I am uncomfortable with this label for perhaps women's legal history most always stands at the margins and intersections of multiple disciplines. At its best, women's legal history seeks to eliminate an inside and an outside. Whether we

29. 410 U.S. 113 (1973).

30. Mary Ziegler, *The Possibility of Compromise: Antiabortion Moderates after Roe v. Wade, 1973–1980*, 87 CHI.-KENT L. REV. 571 (2012).

31. Felicia Kornblauh, *Feminist Legal History: The New Insiders?,* LEGAL HISTORY BLOG (Dec. 22, 2011, 3:10 PM), http://legalhistoryblog.blogspot.com/2011/12/feminist-legal-history-new-insiders.html.

are inside or outside, peripheral or central, my call is for us to reach out and to situate our work within a global, international, and transnational context. In doing so, we must connect the local and the global while continuing to give voice to the many individual historical actors, who have so long been invisible, but who literally made history.

WOMEN AND POISONS IN 17TH CENTURY FRANCE

BENEDETTA FAEDI DURAMY*

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INTRODUCTION

During the late 1660s and the early 1670s, several mysterious deaths of influential members of the French nobility followed one after the other, leading to a scandal, better known as the "Affair of the Poisons," which involved prominent individuals at the royal court of Louis XIV in France. The King, who was concerned that the widespread use of the practice of poisoning could endanger his own safety and that of the royal family, appointed Nicolas de La Reynie, the Lieutenant General of the Paris Police, to oversee the investigation. In 1679, he also established a special tribunal, known as the *Chambre Ardente,* to prosecute the murders. The court ruled for over three years, issuing 319 subpoenas, arresting 194 individuals, and sentencing 36 of them to death.

This article examines the involvement of three women who were prominently implicated in the scandal: the Marquise de Brinvilliers, whose trial rocked the royal court of Louis XIV and whose decapitation

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engaged the public imagination; the sorceress Catherine La Voisin, who was prosecuted and burned alive for providing important members of the royal court with magic powders and venomous potions; and finally, the Marquise de Montespan, one of the favorite mistresses of Louis XIV, who allegedly purchased love powders from La Voisin and participated in black masses, but whose direct involvement in the scandal was never conclusively determined by the *Chambre Ardente*.

By investigating the implication of these three emblematic female characters in the Affairs of the Poisons, this article interrogates the discourse surrounding gender and crime in history, deepening the understanding of women's motivation to commit murder and the strategies they adopted. Moreover, the article examines how the legal system addressed women's crime, differentiated responses based on their class and social rank, and held women accountable for poisoning the country, thus failing to acknowledge the actual shortcomings of the French monarchy, the decline of Catholicism as well as women's constraints in the patriarchal society.

The remainder of the article is organized as follows. Part I describes the life and crimes committed by Marie-Madeleine Marguerite D'Aubray, Marquise de Brinvilliers, whose trial marked the true beginning of the Affair of the Poisons and the relevant investigations. Part II recounts the story of the sorceress Catherine Deshayes, Madame Montvoisin, known as La Voisin, whose arrest signaled the pivotal moment for the unfolding of the scandal and the identification of its affluent participants. Part III examines the institution and functioning of the *Chambre Ardente,* the special criminal commission established by Louis XIV to investigate and prosecute the relevant crimes and suspects. Part IV portrays the life, ambition, and involvement of Françoise Athénaïs de Rochechouart de Mortemart, Marquise de Montespan, in the Affair of the Poisons. Finally, Part V investigates the art of preparing venous and love potions in seventeenth century France, the celebration of black masses and magical rituals as well as the societal conditions of women and their subsequent motivations to poison.

I. MARIE-MADELEINE MARGUERITE D'AUBRAY, MARQUISE DE BRINVILLIERS*

Three years before the Affair of the Poisons officially began the trial of the famous serial poisoner, Marie-Madeleine Marguerite d'Aubray, Marquise de Brinvilliers, had already shocked the royal court of Louis XIV and engaged the public imagination. The highly-born Marie Madeleine Marguerite d'Aubray was the eldest of five children of

Antoine Dreux d'Aubray, who was Seigneur of Offemont and Villiers, Councillor of State, Master of Requests in 1638, Civil Lieutenant of the city of Paris in 1643, and Lieutenant General of the Mines of France.[1] Traditionally, her family had belonged to the legal group of magistracy, which retained much prestige and reputation in the contemporary French society.[2] In 1651, Marie Madeleine Marguerite d'Aubray married Antoine Gobelin, Marquis de Brinvilliers and Baron de Nourar, thus entering, at the age of only seventeen, the dissolute French aristocratic entourage. The marriage was most likely arranged between the high-ranking family d'Aubray and the wealthy Marquis de Brinvilliers, son of the former president of the French audit office.[3]

Marie Madeleine Marguerite d'Aubray was portrayed as "a woman of much attraction. Her skin was extraordinarily white. Her hair was very thick, and of the deepest nut-brown hue. Her eyes were blue. She was not tall, but exceedingly well formed. Her intelligence was above the average. In one respect her education had been good."[4] On the other hand, the Marquis de Brinvilliers was depicted as "a man without morals. Far worse, he was a man without strong personal character, weak as water and unstable as sand."[5] Within only a few years of marriage, the Marquise de Brinvilliers became accustomed to the libertine practices of the French aristocracy, especially since her husband was not much concerned about her, but rather indulged in his own debauchery and dissolute gambling.

In fact, she became the mistress of Gaudin de Sainte-Croix, an attractive young army officer of ill repute whom Marquis de Brinvilliers had met in 1659 when they were serving in the same regiment and with whom he had become a bosom friend ever since.[6] The affair between the two was initially tolerated by her husband until it collided with his financial interests. Indeed, following Gaudin de Sainte-Croix's advice, when Marie de Brinvilliers began to consider initiating legal

* For a short biography of Marquise de Brinvilliers, see Benedetta Faedi Duramy, *Brinvilliers, Marquise de*, *in* 2 WOMEN CRIMINALS: AN ENCYCLOPEDIA OF PEOPLE AND ISSUES, 333–335 (Vickie Jensen ed., ABC-CLIO, 2012).

1. HUGH STOKES, MADAME DE BRINVILLIERS AND HER TIMES 1630–1676, at 64 (1912). *See generally* ME HENRI-ROBERT, LES GRANDS PROCES DE L'HISTOIRE (2d ed. 1922); JAQUELINE HUAS, MADAME DE BRINVILLIERS, LA MARQUISE EMPOISONNEUSE (2004); JACQUES SAINT GERMAIN, MADAME DE BRINVILLIERS, LA MARQUISE AUX POISONS (1971); VIRGINIA VERNON, ENCHANTING LITTLE LADY: THE CRIMINAL LIFE OF THE MARQUISE OF BRINVILLIERS (1964).

2. STOKES, *supra* note 1, at 53.

3. *Id.* at 63.

4. *Id.* at 65.

5. *Id.* at 63.

6. GEORGES MONGRÉDIEN, MADAME DE MONTESPAN ET L'AFFAIRE DES POISONS 22–34 (1953).

action to separate her fortune from that of her husband, who was lavishly dissipating their joint patrimony, a public scandal unfolded. Concerned about a negative reputation for the entire d'Aubray family, initially two of her brothers and finally her father, Antoine Dreux d'Aubray, urged Marie de Brinvilliers to break off her relationship with Gaudin de Sainte-Croix. It is said that "as father [Dreux d'Aubray] implored [his daughter] to respect the honour of her family; as a magistrate he threatened her with every punishment at his command."[7]

In spite of this pressure from her family, Marie de Brinvilliers disdained complying with her father's demands and resolutely continued the liaison with Sainte-Croix. Her resistance finally led Dreux d'Aubray to extreme action in requesting the King to issue an order of arrest, or *lettre de cachet,* against Gaudin de Sainte-Croix. In 1663, the chevalier Gaudin de Sainte-Croix was publicly arrested in the name of the King and immediately transported to the fortress-prison of the Bastille in Paris. Such a public insult could not be forgiven by either the Marquise or her paramour. During his three months of custody, Gaudin de Sainte-Croix made the acquaintance of the Italian poisoner Exili, who had joined several royal households, had been accused of many crimes, and, thus, was feared by every European court at that time. Initiated into the practice of poisoning by his comrade, Gaudin de Sainte-Croix made practical use of his skill upon his release from prison.

Indeed, he soon became a masterful distiller and joined the lucrative business of poisons. Under his guidance, Marie de Brinvilliers began experimenting with lethal poisons testing them on her own servants and the patients of the Hotel de Dieu, the great public hospital. As one of the many ladies of the Parisian nobility who volunteered to visit the sick at the hospital, the Marquise de Brinvilliers was allowed to wander around the halls undisturbed. It is said that she bestowed sweets, biscuits, and wine on her unfortunate patients, who invariably died soon afterwards.[8] Still enraged with her own family and aspiring to appropriate the entire family fortune, she finally poisoned her father in 1666 and her two brothers in 1670. The crimes were not detected; the autopsies stated that Antoine Dreux d'Aubray had died of natural causes, and both his sons of "malignant humour."

However, in 1672, upon the mysterious death of Gaudin de Sainte-Croix that probably occurred during one if his lethal experiments, a

7. STOKES, *supra* note 1, at 78.
8. *Id.* at 138. *See also* FRANTZ FUNCK-BRENTANO, LE DRAME DES POISONS (1928).

casket containing incriminating letters and conclusive evidence against Marie de Brinvilliers was discovered by the police. She promptly fled to London and later to Holland. Finally, in 1675, she was arrested in a convent at Liége and transported back to France. During the trial, Marie de Brinvilliers was denied the aid of a legal counsel and, hence, stood alone in her own defense. The Marquise stubbornly refused to admit that she had poisoned her father and her two brothers, even when the court beseeched her: "You are now perhaps at the end of your life. I beg of you to reflect seriously over your wicked conduct, which has brought upon you not only the reproaches of your family, but even of those who participated in your evil life."[9]

In her defense speech, the Marquise de Brinvilliers proclaimed her innocence and accused her former lover, Gaudin de Sainte-Croix, of having deceived her "because, under a wise and good outward appearance, there was hidden one of the blackest and most detestable souls in the whole world."[10] Her defiant attitude upset the judges, who eventually found her guilty according to the following judgment:

> [S]he is condemned to make the "amende honorable" (or public penance) before the principal door of the cathedral church of Paris, where she will be taken in a tumbrel, with naked feet, a rope round her neck, and holding in her hands a lighted torch weighing two pounds. There, being on her knees, she will declare that wickedly, and from motives of vengeance, and in order to possess their property, she has poisoned her father and her two brothers, and attempted the life of her sister. From thence she will be conducted to the Place de Greve, to have her head cut off upon the scaffold. Her body will then be burnt, and the ashes thrown to the wind. Before execution she will be applied to the "question," ordinary and extraordinary, in order to compel her to reveal the names of her accomplices. Any goods she may have inherited through the deaths of her father, her brothers, and her sister, will be taken from her, and all property confiscated.[11]

Right before enduring the painful torture of water, the Marquise de Brinvilliers finally confessed to having poisoned her father and her two brothers as well as having attempted to poison her sister-in law and her husband several times. "Who would have believed it of this woman of highly respectable family, of a delicate little creature such as

9. STOKES, *supra* note 1, at 267.
10. *Id.* at 271.
11. *Id.* at 329–330.

this, with her apparently gentle disposition?" Nicolas Gabriel de La Reynie, newly appointed chief of the Paris police, wondered.[12]

Nevertheless, Madame de Brinvilliers admitted to having committed the utmost crimes "out of ambition for her family and her children,"[13] and to assure herself and her offspring the family fortune that her father had instead assigned entirely to his male successors. Therefore, intentioned to ensure that her children could receive the education and social ranking they deserved, the Marquise de Brinvilliers had resolutely decided to poison her father and brothers. One of her contemporaries reported her tenacious scheme to kill her father and her husband:

> It took her eight months to finish off her father. . . . To all his caresses and his affections, her only response was to double the dose. . . . She tried frequently to poison her husband, too, to be free to marry Sainte-Croix; but the latter, wanting no part of such a wicked woman, gave the husband counterpoison. . . . So that, after five or six doses of poison, and five or six doses of counterpoison—poisoned and then disempoisoned, batted back and forth between life and death, the poor man somehow managed to survive![14]

Despite her confession, Madame de Brinvilliers was not spared the water torture. "They must be planning to drown me in those vats!" she exclaimed: "as tiny as I am, I could never swallow such quantities!"[15] Her trial comprised twenty-two sessions over the period of two and a half months, at the end of which the only incontrovertible evidence against her was her own confession that she claimed had been composed in a state of fever delirium.[16] Marie de Brinvilliers was beheaded publicly and burned on a pile of wood on July 16, 1676. Considered to be a dissolute criminal until the day of her execution, she then became a martyr for the populace. One of her contemporaries noticed that at her decapitation "never has Paris seen such crowds of people. Never has the city been so aroused, so intent on a spectacle."[17] And yet, "the

12. FRANCES MOSSIKER, THE AFFAIR OF THE POISONS: LOUIS XIV, MADAME DE MONTESPAN, AND ONE OF HISTORY'S GREAT UNSOLVED MYSTERIES 143 (1969).

13. *Id.* at 144.

14. MARQUISE DE SÉVIGNÉ, LETTRES (Paris, 1862).

15. MOSSIKER, *supra* note 12, at 146.

16. *Id.* at 144–45.

* For a short biography of Catherine La Voisin, see 2 Benedetta Faedi Duramy, *Catherine La Voisin*, *in* 2 WOMEN CRIMINALS: AN ENCYCLOPEDIA OF PEOPLE AND ISSUES 507–508, (Vickie Jensen ed., ABC-CLIO, 2012).

17. MARQUISE DE SÉVIGNÉ, *supra* note 14

next day, the people went searching through the ashes for La Brinvilliers's bones."[18]

Her murder case revealed that poisoning was the obscure cause of many mysterious deaths that had occurred in the elite French society. In fact, just before her execution, she exclaimed: "Out of so many guilty people must I be the only one to be put to death? . . . [And yet] half the people in town are involved in this sort of thing, and I could ruin them if I were to talk."[19]

The Court of Paris was eager to discover the name of her accomplices and purveyors as well as the secret of the poisons and antidotes she had used. "It is in the public interest . . . that Mme de Brinvilliers's crimes end with her, and that she makes a declaration that will help us to prevent the continued use of poison," announced the President Lamoignon of the Paris Parlement.[20] However, she did not betray her accomplices and admitted only having used arsenic, vitriol, and venom of toad as poisons, and milk as antidote.[21] However, those to whom she alluded were later implicated in the larger scandal of the Affair of the Poisons, which affected the royal court of Louis XIV and involved some of his closest courtiers.

II. CATHERINE DESHAYES, MADAME MONTVOISIN, KNOWN AS LA VOISIN*

The death of the Marquise de Brinvilliers was followed by the arrest of several alchemists, counterfeiters, and poisoners, lending credence to her final admonition. Concerned that the spreading use of the practice of poisoning could endanger the safety of the royal family and the members of the royal court, King Louis XIV appointed Nicolas de La Reynie, the Lieutenant General of the Paris Police, to oversee the investigation.[22] In the laboratories of the arrested magicians and alchemists, the police found furnaces, forceps, and magical minerals, like sulfur and mercury, as well as lethal poisons such as arsenic, nitric acid, and mercuric chloride.[23] La Reynie soon discovered the unimaginable dark world of Parisian witchcraft, disclosing "vials, vats, jugs, jars, and pack-

18. *Id.*

19. ANNE SOMERSET, THE AFFAIR OF THE POISONS: MURDER, INFANTICIDE AND SATANISM AT THE COURT OF LOUIS XIV 40 (2003).

20. MOSSIKER, *supra* note 12, at 145.

21. *Id.* at 146.

22. LYNN WOOD MOLLENAUER, STRANGE REVELATIONS: MAGIC, POISON, AND SACRILEGE IN LOUIS XIV'S FRANCE 1 (2007).

23. MOSSIKER *supra* note 12, at 150.

ets, the crystals, potions, and potpourris",[24] and cauldrons with "deadly nightshade (belladonna), witches' thimble (digitalis), root mandragore (or mandrake, podophyllin), powder of cantharis, of toad and bat and viper, blobs of hanged-man's fat, nail clippings, bone splinters, specimens of human blood, excrement, urine, [and] semen."[25]

In 1679, the Affair of the Poisons unfolded dramatically with the arrest of the witch and serial poisoner Catherine Deshayes, Madame Montvoisin, known as La Voisin. Born in 1640 in France to a poor woman who was probably a sorceress herself, Catherine Deshayes was initiated into magic powers at an early age. She married Antoine Montvoisin, whose businesses in the silk trade and jewelry both led him into bankruptcy. As a result, her husband lapsed into heavy drinking and to violently venting his frustrations out on her. Having to support him and her numerous children, she probably turned into the criminal, but lucrative, business of abortion and the preparation of poisons.[26] Her marriage was so unhappy that she never made a secret of her intention to get rid of her husband; indeed, she made several unsuccessful attempts on his life. In any event, Madame Montvoisin engaged in many love affairs with other wizards and alchemists, among whom was Le Sage, who was later also dragged into the Affair of the Poisons.[27]

La Voisin was a high priestess of Christian congregations in Paris and a pious worshipper, who conceived her occult powers as a gift from God. Her clients, who primarily belonged to the French high society, were likely reassured by such a religious devotion to her magical practices. One of her contemporaries, the Marquis de la Reviere, noted that La Voisin "was full of delicious little secrets for the ladies . . . for which the gentlemen could be grateful . . . .[She] could make a lady's bosom more bountiful or her mouth more diminutive, and she knew just what to do for a nice girl who had gotten herself into trouble."[28]

Madame Montvoisin received her clients in a small room hidden at the back of the garden of her house located in Ville-Neuve, a secluded area in the northern outskirts of Paris.[29] During the late 1660s to the early 1670s, several mysterious deaths of influential members of the

24. *Id.* at 157.
25. *Id.*
26. WOOD MOLLENAUER, *supra* note 22, at 22.
27. SOMERSET, *supra* note 19, at 153.
28. MOSSIKER, *supra* note 12, at 177.
29. WOOD MOLLENAUER, *supra* note 22, at 21.

nobility followed one after the other. When in 1676 the Marquise de Brinvilliers, who was accused of having heartlessly poisoned her father and her two brothers, was finally arrested and then prosecuted, she revealed that most of the individuals she knew, "people of quality," were equally implicated in similar misdeeds.[30]

Catherine La Voisin was arrested on March 12, 1679 as she was coming out from Mass at her parish church, Notre-Dame de Bonne Nouvelle, in Paris. The search of her premises revealed all sorts of magic powders, venomous potions, sacrilegious objects, "*Grimoires* or black books (primers for Satanists and necromancers, the ABC's of Abracadabra), sacerdotal vestments and paraphernalia, a cross, incense, black tapers; a mysterious oven in a garden pavilion, redolent of evil, noxious fumes; fragments of human infants' bones in the ashes,"[31] as well as a long list of her clients. She was accused of having attempted to poison her husband several times at the instigation of her paramour, Le Sage, and of having performed abortions for a fee, burying the premature infants in her garden.

On March 17, 1679, when Le Sage was arrested as well, he provided Nicolas de La Reynie with detailed accounts of La Voisin's business of abortions, traffic in poisons, and her customers. He revealed that a small oven was hidden in her house "where the bones were burned if the infant body seemed too large to lay away in a garden grave."[32] She denied everything, clarifying that the oven was used to bake her "*petits pates*" (little pastries) and that "the only drugs to be found in her house were purgatives for her personal use and that of her family."[33] Further accusations against Madame Montvoisin came from other prisoners claiming that her secret "to empty" pregnant clients consisted of injecting lethal liquid with a syringe:

> —What's her secret to empty women or girls that are pregnant?
>
> —Yes, it's basically water, and everything depends on the way the syringe is used.
>
> —Until which stage of the pregnancy can she do it?
>
> —Any time, especially when they are persons of quality, who must preserve their honor and don't want to make it public. As long as she can feel the baby moving before using her remedy, she will make the baby come out and baptize her/him. Then, she herself brings the baby in a box to the gravedigger, to whom she gives a coin of thirty

30. MOSSIKER, *supra* note 12, at 145.
31. *Id.* at 179.
32. *Id.* at 185.
33. *Id.*

> cents, in order to bury her/him in a corner of the cemetery, without telling the priest or anyone else.[34]

La Sage also claimed that most of La Voisin's visitors belonged to the King's entourage, and even a maid of the Marquise de Montespan, one of the favorite mistresses of Louis XIV, had purchased love powders from her. Catherine La Voisin initially counterclaimed that "nothing but beauty balms and skin lotions" was procured for her clients.[35]

In response to the allegations against Madame de Montespan, the King solicited La Reynie "to continue the questioning of certain of the prisoners . . . [and] to proceed as speedily as possible with such interrogations, but to make the transcripts of these responses on separate folios, and to keep these folios apart from the official records of the rest of the investigation."[36] Indeed, the interrogations of La Sage and other informants containing allegations against the Marquise de Montespan were all scrupulously removed from the trial dossier, never handed over to the judges of the Chamber for their scrutiny, but instead delivered exclusively into the trustworthy hands of La Reynie.

Eventually, Catherine La Voisin admitted that some of her customers were indeed prominent figures of the nobility, but firmly denied ever having served the Marquise de Montespan or even meeting with her. During her last interrogation, when she was subjected to torture, she admitted that "Paris is full of this kind of thing and there is an infinite number of people engaged in this evil trade."[37] However, regarding her customers, she only confessed that "a great number of persons of every sort of rank and condition addressed themselves to her to seek the death of or to find the means to kill many people,"[38] but refused to utter further names. Catherine La Voisin was burned at the stake in 1680. Spectators at her execution reported that "five or six times, she pushed aside the straw, but finally the flames leaped up, enveloped her, and she was lost to sight. . . . So, there you have the death of Mme Voisin, notorious for her crimes and impiety."[39]

34. MONGRÉDIEN, *supra* note 6, at 45–46 (translated from French by the author).
35. MOSSIKER, *supra* note 12, at 185.
36. *Id.* at 186.
37. SOMERSET, *supra* note 19, at 231.
38. *Id.*
39. MOSSIKER, *supra* note 12, at 219.

III. THE *CHAMBRE ARDENTE*

The testimony of La Voisin and her accomplices revealed a clandestine conspiracy against the monarchy. The Lieutenant La Reynie recommended that the King establish a special commission to investigate and prosecute the cases. Despite the heavy cost of creating such a criminal tribunal and the potentially negative effects on the reputation of his court, Louis XIV agreed to this proposal and, in 1679, established the *Chambre Ardente*. Apparently, the King decided to create the special criminal commission to preclude a great backlog of criminal cases and a long delay in the investigation and prosecution of the perpetrators.[40] On the other hand, according to some historians, Louis XIV and his delegates resolved to appoint a special court to handle the cases in order to conceal the illicit activities of prominent members of the royal entourage.[41]

Thirteen magistrates from the Supreme Court of Paris were appointed to serve on the *Chambre Ardente.* They were responsible for investigating and prosecuting the individuals "accused of involvement in evil spells and composing, distributing, and administering poison."[42] It should be noted that, according to a criminal ordinance dated 1670, *magic* and *poisons* were considered to be capital offenses and were listed among the crimes under the direct jurisdiction of the royal magistrates, including treason, sacrilege, heresy, resistance to the orders of the king or his officials, unlawful assembly, counterfeiting, forgery, rape, and abortion.[43]

The new commission employed a clerk who was responsible for recording the meetings of the judges as well as the interrogations of the prisoners; some doctors and pharmacists to corroborate the evidence and provide medical reports; a general prosecutor, who was responsible for filing the complaints, pursuing the prosecution, and proposing the punishment; and, finally, some reporters, including La Reynie, who were to be in charge of leading the investigations and submitting relevant reports to the magistrates of the court. Historical accounts described the special commission as follows:

40. WOOD MOLLENAUER, *supra* note 22, at 23. *See also* GISÉLE CHAUTANT, CROYANCES ET CONDUITES MAGIQUES DANS LA FRANCE DU XVII ÉME SIÉCLE D'APRÉS L'AFFAIRE DES POISONS 22 (1998).

41. WOOD MOLLENAUER, *supra* note 22, at 23.

42. Lettre patentes du 7 avril 1679, *Archives de la Prefecture de Police,* 103–120.

43. *See* MARCEL MARION, *DICTIONNAIRE DES INSTITUTIONS DE LA FRANCE, AUX XVIIE-XVIIIE SIÉÇLES* (1984).

> The Chambre was a deluxe production in the genre of the seventeenth-century theater of justice. Its proceedings a state secret, its members sat in judgment in the basement of the Arsenal, the windows draped in black cloth, the only light provided by flaming torches. These torches lent the tribunal its unofficial name, the *Chambre* [*A*]*rdente*, or Burning Chamber.[44]

The commission followed the standard procedure, according to which La Reynie was responsible for identifying the suspects and then submitting a request for an express authorization by the King to proceed with the arrest. Once Louis XIV had signed the warrant, La Reynie could order the capture of the suspects and their detainment in the prisons of the Bastille, the Chatelet, or the fortress of Vincennes. Following the initial interrogations, an official preliminary investigation could be authorized by the general prosecutor, allowing La Reynie to conduct further interrogations of the suspects and the witnesses, cross-examinations, and collection of the evidence. Findings from such preliminary investigations were then reported to the magistrates of the *Chambre*, who would decide whether the suspects should be kept in custody or should be released.

If the accused was imprisoned, a second investigation was carried out by La Reynie. Upon its completion, the general prosecutor would release the indictment and the judges, in turn, would question the suspect and then issue the judgment. Their ruling was definitive, and only the King could change the sentence. The magistrates could dismiss the charges and liberate the accused or release the suspect without dropping all of the charges. Alternatively, the magistrates could also set the accused free but still leave the case open should new evidence be presented. Finally, in case of conviction, the judges could fine, banish, or sentence the defendant to death as well as ban her or him from holding office, testifying in court, or writing a will.

If the defendant was found guilty of a capital crime, the judges could command that the convicted should be subjected to torture before the execution in order to obtain a confession or ascertain the names of any accomplices. According to royal laws, in capital offenses, prisoners could undergo torture even before a guilty verdict had been reached in the case of serious suspicion, or proximate or half-proof of guilt.[45] Written evidence, the testimony of two witnesses, and the testimony of one eyewitness to the crime amounted to proximate or half-evidence. The confession of the accused obtained under torture com-

44. WOOD MOLLENAUER, *supra* note 22, at 24.
45. *Id.* at 25.

bined with a proximate or half-proof constituted conclusive evidence of guilt. Thus, torture was administered to corroborate evidence, and "to know the truth from [the accused's] mouth."[46]

However, according to the criminal ordinance dated 1670, a prisoner could be tortured only once, unless further evidence was presented, for no more than eighty-five minutes. Under torture, the accused could not be asked any leading questions, and his/her confession should have been freely confirmed again within the following twenty-four hours. Suspects could be subjected to ordinary torture or extraordinary torture. The two primary methods that could be used were the boot torture and the water torture, which have been described as follows:

> In the [boot torture], the prisoner's feet and legs were placed in a wooden mold and "coins" or wedges (four for the ordinary and four more for the extraordinary) were driven into the sides of the boot, causing the mold to tighten and crush the prisoner's bones. In the [water torture], the prisoner was stretched naked over a short stool placed in the small of the back, hands and feet tied and pulled in opposite directions. He or she was then forced to swallow four *coquemards* (a *coquemard* was roughly three pints) of water, which distended the stomach almost to bursting and nearly drowned the prisoner. For the extraordinary, the prisoner was bent backward over an even higher stool, causing greater distension of the stomach, and forced to drink four more jugs of water.[47]

La Reynie and the new commission were fully entrusted by Louis XIV to discover the intricacy of the poisons' traffic, regardless of the rank and prestige of the people implicated. In his personal notes, La Reynie described the clear command that both the judges and himself received from the King:

> His Majesty desires that for the public good we penetrate as deeply as is possible for us into the unhappy commerce of the poisons in order to root it out, if that were possible; he commanded us to exercise scrupulous justice, without any regard to person, condition, or sex, and His Majesty told us this in such clear and vivid terms, and at the same time with such good will, that it is impossible to doubt his intentions in this regard.[48]

On the other hand, members of the nobility resisted the activities of the special commission protesting that

> [t]here is no excuse for that Chamber's impudence in issuing warrants with so little justification against officers of the Crown. . . . This

46. *Id.*
47. *Id.* at 26.
48. *Id.* at 36.

> scandalous affair must be horrifying all Europe, and those who read of it in history books a hundred years from now will surely pity the victims of such baseless accusations.[49]

By 1680, the cases brought before the *Chambre Ardente* included not only the traffic of poisons and the mysterious deaths allegedly related, but also cases of sacrilege, witchcraft, and profanation. Indeed, also under such charges, La Voisin was interrogated one last time on February 22nd. She was subjected to the torment of the boot torture in the hope of extorting her confession about her delivery of powders and venous potions to prominent members of the royal court, including Madame de Montespan. Like the Marquise de Brinvilliers, Catherine La Voisin denied the charges and only

> [f]or the sake of clearing her conscience, she would state that a large number of persons of all sorts and conditions had come to ask her help in killing off a large number of other persons . . . and that it is debauchery which is at the root of all this evil.[50]

As in the case of La Voisin, during the seventeenth century in France only a few prisoners who endured the agonies of torture ended up confessing their crimes, thus showing the ineffectiveness of such means to extract truth or corroborate evidence.[51]

The *Chambre Ardente* was dissolved on July 21, 1682 after having ruled for over three years with one interruption of about seven months between September 30, 1680 and May 19, 1681. The special criminal commission charged 442 individuals, issued 319 arrest warrants, pronounced 104 judgments, including 36 sentences to death, 5 to life imprisonment, 23 to banishment, numerous releases from prison, and several decisions of imprisonment in monasteries or hospitals.[52] About 60 accused individuals, who could not be judged for reason of State, were incarcerated for life in Belle-Ile, Salces, Salins, and other fortresses.[53]

49. MOSSIKER, *supra* note 12, at 205.

50. *Id.* at 216.

51. WOOD MOLLENAUER, *supra* note 22, at 26.

52. ARLETTE LEBIGRE, 1679–1682, L'AFFAIRE DES POISONS 165 (2001).

* For a short biography of Marquise de Montespan, see Benedetta Faedi Duramy, *Montespan, Marquise de*, *in* 2 WOMEN CRIMINALS: AN ENCYCLOPEDIA OF PEOPLE AND ISSUES 542–544, (Vickie Jensen ed., ABC-CLIO, 2012).

53. *Id.*

IV. FRANÇOISE ATHÉNAÏS DE ROCHECHOUART DE MORTEMART, MARQUISE DE MONTESPAN*

Françoise Athénaïs de Rochechouart de Mortemart, Marquise de Montespan was one of the favorite mistresses of Louis XIV, King of France, who became personally involved in the disgraceful scandal of the Affair of the Poisons that brought many poisoning cases to justice. Born on October 5, 1640 in the Château de Lussac, she belonged to one of the oldest and most illustrious families in France. Her father was the Marquis de Lussac, Segneur de Vivonne, Duc de Mortemart, Prince de Tonnay-Charente, First Gentleman of the King's bedchamber, Chevalier of the Order of the Holy Ghost, and a councilor of State, who held several prestigious appointments at the royal court of Louis XIII; her mother was a lady-in-waiting to Queen Anne of Austria.[54] Françoise Athénaïs studied at the Convent of Sainte Marie at Saintes and, in 1661, joined the royal court as a maid of honor to the King's sister-in-law, Princess Henrietta Anne of England, who had recently married the Duc d'Orleans.

Her sovereign beauty was recounted by Primi Visconti, the Comte de Saint-Mayol, in his memoirs: "She was of medium height and well proportioned. . . . Her hair was blond, and her eyes were azure blue. Her nose aquiline but exquisitely formed, her mouth small and vermilion red; her teeth exceedingly beautiful—in sum, her face was sheer perfection!"[55]

Others, however, expressed some reservations, describing her as "[a] consummate beauty and yet, somehow, for some reason, not entirely appealing."[56] Motivated by her ambition and high aspirations, Françoise Athénaïs soon set her eyes on Louis XIV: "She had designs on the King's heart, and started laying her plans from the day she came to court,"[57] as another courtesan noted. As a matter of fact, she was not exceptional because "every woman in the realm was born with the ambition to become the King's mistress!"[58]

However, in 1663, Françoise Athénaïs agreed to marry Louis Henri de Pardaillan de Gondrin, Marquis de Montespan, who was the younger brother of her previous fiancé, who had tragically died in a

54. MOSSIKER, *supra* note 12, at 39. *See also* JEAN-CHRISTIAN PETITFILS, MADAME DE MONTESPAN, (1988).

55. PRIMI VISCONTI, MEMOIRS SUR LA COUR DE LOUIS XIV, Paris 2009.

56. MOSSIKER, *supra* note 12, at 42.

57. *Id.* at 45.

58. VISCONTI, *supra* note 55.

duel the year before. The groom was actually unable to bring any fortune or prestige to his bride. Of noble and ancient lineage, the Montespan family owned numerous estates and castles throughout the outskirts of the French countryside, but the revenues from the lands were insufficient to afford the maintenance costs of the properties and support the extravagant lifestyle of the Montespans.[59] Therefore, the newlywed couple was soon burdened by the Marquis's debts, including promissory notes as well as pledges on jewelry and other assets to secure the mortgages at exorbitant interest rates. The marriage eventually fell apart after the birth of their second child.

Deluded by the lack of ambition and the churlishness of her husband**,** Françoise Athénaïs de Montespan longed to return to the royal house and attain her previous goals. When in 1665, she was finally summoned to court again as one of the ladies in waiting to the Queen, Marie Thérèse, she left her family behind without much regret. As soon as she arrived at court, her singular focus was to gain the attention of the young monarch, Louis XIV, at first with little success though. Primi Visconti, indeed, recounted that

> [b]eautiful as she was, and witty, quick at repartee and banter, she had not at first appealed to the King. He even went to so far, one day, at table with Monsier his brother, as to jest about her efforts to attract him. "She tries hard," he is supposed to have said, "but I am not interested."[60]

Similarly, another courtesan later recounted: "The King couldn't stand Mme de Montespan, at first, and reproached Monsieur and the Queen for keeping her constantly in their company, although later on he fell madly in love with the lady."[61]

Indeed, within only one year upon her return to court, Françoise Athénaïs de Montespan's strong ambition was appeased. She managed to gain Louis XIV's affections, by availing herself of the concurrent pregnancies of both the Queen and his favorite paramour, Louise de La Vallière. Her acute strategy to conquer the King was reported by another courtier, the Marquis de La Fare:

> Mme de Montespan had begun to think about him and was shrewd enough to do two things at the same time: first, she gave the Queen an extraordinary impression of her virtuousness by taking Communion in her company every week; secondly, she insinuated herself so successfully into the good graces of La Vallière that she was con-

59. MOSSIKER, *supra* note 12, at 47.
60. VISCONTI, *supra* note 55.
61. MOSSIKER, *supra* note 12, at 50.

> stantly to be seen in her company. By these means, she contrived to be constantly in the King's immediate entourage, and she exerted every effort to please him, in which she succeeded very well, being bountifully endowed with wit and charm, in contrast to La Vallière, who was sadly lacking in these qualities.[62]

By the end of 1666, the Duc D'Enghien, Prince of the Condé family, reported by letter to the Queen of Poland that "[the King] has apparently taken a fancy to [Madame de Montespan] and, to tell the truth, she would well merit such an interest, for it is impossible to have more wit and beauty than she!"[63]

The first adulterous encounter between Louis XIV and the Marquise de Montespan occurred during an expedition to the battlefields in Flanders against the precepts of Françoise Athénaïs's catholic education and practice. Their passionate relationship unfolded rapidly as the King begun to visit "Mme de Montespan, every day . . . in private, going to see her in her room which was located directly above the Queen's."[64] Another courtesan reported that Louis XIV "was in remarkable high spirits," and that Madame de Montespan "was the gayest company imaginable when she went out driving with the royal pair . . . constantly bantering and laughing with the King."[65] Meanwhile, after several regrettable attempts to gain financial benefits from the relationship between the King and Françoise Athénaïs, the Marquis de Montespan, was ultimately confined to his estates in the countryside, far from the royal court and the company of his wife.

Their separation was finally regularized in 1670, when Madame de Montespan petitioned the Chatelet Court of Paris to obtain "separate maintenance" and domicile from her husband as well as "to recover her dowry from out of community property holdings—on the grounds of cruelty and improvidence."[66] The Court ruled in favor of the Marquise de Montespan, ordering her husband to return the dowry and pay his wife an annual alimony. In practice, though, having legally obtained her freedom, the Marquise arranged that both the dowry and the alimony were to be secured for their children. Indeed, contemporary accounts reported that

> [i]t had never been her intention . . . in this separation which she had sought, to bring about the ruin of the house of . . . her husband; nor

62. MARQUIS DE LA FARE, MÉMOIRES ET REFLEXIONS SUR LES PRINCIPAUX EVÉNEMENTS DU RÉGNE DE LOUIS XIV (Paris, 1884).

63. MOSSIKER, *supra* note 12, at 53.

64. *Id.* at 63.

65. *Id.* at 64.

66. *Id.* at 85.

> to prejudice the interests of their children. On the contrary, she desired to contribute insofar as possible to the luster of the house of Montespan, and to ensure that the education of the aforementioned children be of a standard consistent with their rank and station.[67]

However, neither of their children saw much of their mother. Indeed, her daughter died at only ten years old, and her son lamented having never had the pleasure to see his mother until he was fourteen.

On the other hand, during her long liaison with Louis XIV, she bore him eight children, who were legitimized and, hence, integrated into the royal lineage. Acting as an enlightened patroness of the arts and surrounding herself with her protégés, among them Racine, Moliére, and La Fontaine, Françoise Athénaïs de Montespan gained so much influence and respect at the royal house that she was often referred to as "the King's second wife," or even "the real Queen of France." Indeed, she was recognized by members of the French nobility to have "uncommon qualities, grandeur of soul and loftiness of spirit. . . . She thought beyond the present . . . [and] considered the opinion of posterity, as well."[68] In addition to her taste and passion for the arts, some contemporaries argued that Madame de Montespan had the fervent ambition to govern and exercise political influence in the affairs of the monarchy.[69]

In 1671, Louise de La Vallière, who remained, at least nominally, the "Favorite" mistress of the King, fell inexplicably ill. Regaining consciousness after a few days, she opened her eyes and saw by her bedside "doctors on one side . . . priests on the other; the ones, despairing of [her] life; the others, of [her] soul."[70] She was believed to have been mysteriously poisoned. Two sorcerers, who were on trial at that time before the court of Chatelet, indicated that Françoise Athénaïs de Montespan was responsible for the crime. The case was never made public, and any suspicion on the Marquise de Montespan was rapidly dismissed and forgotten. However, after the successful prosecution of the Marquise de Brinvilliers in 1676, who was held accountable for having ruthlessly poisoned her father and her two brothers, the practice of poisoning was finally acknowledged to be a deadly tool widely employed by the high-ranking society, and, thus, a clear threat to the security of the royal family. Indeed, during her trial, the Marquise de Brinvilliers revealed that "[h]alf the people I know—people of quali-

67. *Id.* at 93.
68. *Id.* at 97.
69. 10 MÉMOIRES DE SAINT SIMON (Paris, Librairie Hachette et Cie. 1893).
70. *Id.* at 81.

ty—are involved in this same kind of thing . . . and I could drag them all down along with me, should I decide to talk."[71]

After the decapitation of the Marquise de Brinvilliers, many arrests for the same crime followed one after the other. Among the prisoners doomed to capital punishment was the sorceress La Voisin. During her trial, she revealed that many of her clients belonged to the upper echelons of the French nobility. Upon her death, other witches who were imprisoned at Vincennes, and particularly, her daughter, Marie Montvoisin, claimed that Françoise Athénaïs de Montespan had regularly visited La Voisin to purchase her "magic powders." Marie Montvoisin explicitly accused the Marquise de Montespan of having used such potions to retain the King's love, recalling that "[e]very time . . . she feared the good graces of the king were diminishing, she advised my mother of it so she could bring a remedy. My mother therefore said Masses over these powders destined for the King. They were powders for love."[72]

Marie Montvoisin further accused Françoise Athénaïs de Montespan of having participated in the black Masses held in 1667 and 1668 intended to invoke Satan's help to obtain the King's favor and affection. She reported that three to four newborn infants had been sacrificed on behalf of the Marquise de Montespan's demands. The priest who had performed the Masses, who was also imprisoned, confirmed such accusations, recounting that, during the black ceremonies, the Marquise de Montespan recited the following:

> I ask for the friendship of the King . . . [and] that the Queen should be sterile and that the King should leave her table and her bed for me; that I should obtain of him all that I ask for myself . . . ; that the King should leave La Vallière and look at her no more, and that, the Queen being repudiated, I can marry the King.[73]

Further allegations that the Marquise de Montespan had conspired to poison Louis XIV were also made. However, the *Chambre Ardente* never conclusively ruled on the direct involvement of Françoise Athénaïs de Montespan in the Affair of the Poisons. In 1691, no longer a favorite of the King, she retired to the convent of the *Filles de Saint Joseph* in Paris, where she lived out her final years in solitude and pain. The Marquise de Montespan died in 1707 taking the unsolved mysteries with her.

71. MOSSIKER, *supra* note 12, at 145.

72. LISA HILTON, ATHÉNAÏS: THE LIFE OF LOUIS XIV'S MISTRESS, THE REAL QUEEN OF FRANCE 205 (2002).

73. *Id.* at 208.

V. POISONS, BLACK MAGIC, AND WOMEN'S AGENCY

The art of the poisons was believed to have originated in Italy and then emigrated to France. Allegedly, when Caterina de Medici married King Henry II of France in 1533, she brought the Italian Renaissance pharmacopoeia of venoms and necromancy to her new realm.[74] Apparently, during her reign, she further encouraged the study and practice of occult sciences and black magic, supporting astrologers, necromancers, and researchers in toxicology. Due to the difficulties to detect venous substances in cadavers during autopsy, at that time, poisons represented a frightening lethal tool that surpassed common human knowledge and circumvented existing legal remedies. The impossibility of determining satisfactorily whether poison was the cause of death meant that many crimes went unpunished and culpable poisoners enjoyed immunity.

For instance, with arsenic, the most common poison used during the sixteenth and seventeenth centuries, which was described as white as sugar, flavorless, and odorless, "the poisoner could avoid arousing suspicion in the naïve medical faculty, and the victim was usually declared to have succumbed to a wasting illness."[75] The other common poison at the time was "acqua toffana" or "eau de cymbalaire," a simple variation of arsenic with the addition of cantharides saturated with alcohol.[76] Labeled as rat poison, arsenic was very easy to buy in any French grocery store. As a powder, it was administered with food, mixed with sauces and other condiments. As a liquid—its far more toxic form—it was instead infused in wine.[77]

The venous potions used in France during the sixteenth and seventeenth centuries were essentially prepared by killing an animal with a dose of arsenic and distilling its liquids, thus combining the virulence of the poison with the putrefied compounds of the carcass. Under torture, the Marquise de Brinvilliers also confessed to having manufactured her drugs with arsenic, sulfuric acid, and liquids from decomposed animal remains. A diagnosis of the symptoms of poisoning eluded the contemporary medical knowledge. Indeed, the famous surgeon Jean Devaux admitted, "[t]he method of guarding oneself from being poisoned is very difficult to state. The wicked poisoners and per-

74. MOSSIKER, *supra* note 12, at 133. *See also* STOKES, *supra* note 1, at 118.
75. MOSSIKER, *supra* note 12, at 134.
76. STOKES, *supra* note 1, at 121.
77. *Id.* at 122.

fumers, who secretly manufacture the poisons, carry on their betrayals and crimes so subtly that they deceive the most expert men."[78]

At that time, the only way to investigate whether the victim had been poisoned or not was to administer the residues of the suspicious food and drink to a bird or other domestic animal.[79] The death of the beast was taken to be conclusive evidence that the crime had been committed by the suspect. Alternatively, if the beast did not succumb, the investigation of the case was dropped. The lack of knowledge about toxic substances and their effects was also due to the reticence of doctors and scientists to divulge information related to the preparation of venous potions used in previous centuries. The famous French surgeon Ambroise Paré in fact declared, "I do not wish to put my hand to the pen to write about them in order to assist the malicious intent of traitors, of the wicked generally, of perfumers, executioners, and poisoners."[80]

Sorcerers and magicians who manufactured venous potions lived primarily in the suburbs of Paris, thereby escaping government control and law enforcement. Such communities, including that of Ville-Nueve, where La Voisin resided, enjoyed affordable houses with walled backyards, where their residents could operate undisturbed.[81] However, their fame and poisonous activities were well known to their peers, neighbors as well as courtiers and distinguished members of Parisian society. In fact, the interrogations conducted by La Reynie revealed how interconnected and powerful poisoners, necromancers, and sorceresses were. They relied on one another for their supply of venoms as well as for client referrals, depending on whether customers required poisons, love powders, or other kinds of services, like abortion. They seemed to run their businesses quite professionally, demanding that their clients signed receipts promising payment in return for their services.[82]

In order to add incantation or evil spells to their potions and request supernatural favors for their customers, sorceresses hired priests to celebrate magical rituals or black masses. For instance, as the daughter of La Voisin testified, Madame de Montespan also participated in sacrilegious masses to retain the graces of the King or cast diabol-

78. *Id.* at 123.
79. MOSSIKER, *supra* note 12, at 134.
80. STOKES, *supra* note 1, at 117.
81. WOOD MOLLENAUER, *supra* note 22, at 72.
82. *Id.* at 73.

ic spells on her rivals. In her interrogations, contained in the notebook of La Reynie, she gave a detailed description of some of these ceremonies:

> An altar had been set up in my mother's bedroom . . . the cross in place, the candles lit. . . . A lady was stretched out, stark naked, on a mattress, her legs dangling off one end of it, her head hanging down on the other, propped up on a pillow which had been placed on an upended chair. . . . A linen cloth was folded on her stomach . . . the chalice reposed on her groin. . . . Madame de Montespan arrived at ten in evening, and did not leave until midnight. . . . At [another] one of Madame de Montespan's Masses, I saw my mother bring in an infant . . . obviously premature . . . and place it in a basin over which [the priest] slit its throat, draining the blood into the chalice . . . where he consecrated the blood and the wafer . . . speaking the names of Madame de Montespan and the King at the moment of the offertory. . . . The body of the infant was incinerated in the garden oven, and the entrails taken the next day by my mother . . . for distillation, along with the blood and the consecrated Host . . . all of which was then poured into a glass vial which Madame de Montespan came by, later, to pick up and take away.[83]

To be sure, black masses represented unorthodox deviations from the practices and sacraments of the Catholic Church. Obviously, the distinctions between witchcraft, superstition, and religious doctrines were still very confused during the seventeenth century in France.[84] For instance, sorceresses and magicians used crosses and amulets to protect themselves and to ensure the health and prosperity of their clients. According to their magical manuals, religious formulas had to be invoked to assure safety and to escape punishment. Sorceresses taught similar invocations calling upon the power of holy spirits for auspices and victory to their own customers.

The coexistence of both the sacred and the profane in such formulas reveals how blurred the distinction between religious and superstitious practices was at the time. To be sure, the Catholic Church had already campaigned against the sin of superstition and idolatry in the fifteenth century, identifying magical practices, fetish ornaments and fortune-telling cards as forms and objects of desecration. Catholic theologians warned that "those who give credit to dreams, divination, fortune-telling, and such superstitious illusions" were acting in breach of the law of God.[85] Thus, under the Church's commandment "those who are involved with magic and divination or who place their trust in di-

83. MOSSIKER, *supra* note 12, at 233–234.
84. WOOD MOLLENAUER, *supra* note 22, at 77.
85. *Id.* at 79.

viners commit a horrible crime and are excommunicated."[86] On the other hand, the Affair of the Poisons represented a secular effort to eradicate the French magic underworld that intended to corrupt and destroy Christianity.

As a matter of fact, at the time, women often resorted to poisons, love powders, and black magic to put an end to domestic abuse and financial dependence. The physical and verbal assaults perpetrated against spouses were often hidden behind closed doors and by the privacy accorded to family matters. Violence against women and children was regularly employed by men in the household to control them and correct their faults. Since the fifth century in Europe, harsh punishment and severe reprisals were encouraged either "by word or blow" to any disobedient spouse to re-establish domestic peace.[87] Spousal correction was not to be performed based on the love of power, but rather as a supreme sense of duty. Intertwined with the feudal doctrine of *coverture,*[88] which restricted women's legal and economic agency under the protection and cover of their husbands, spousal correction eventually encompassed intimate abuse and an imbalance in gender relationships.

Thus, many women used love magic to obtain financial security and "to have in plain power sure, the spirit, the heart, and the goods"[89] of their husbands. Love potions were often a combination of menstrual blood, the aphrodisiac Spanish fly and natural herbs, like verbena. If the love spells turned out to be inadequate to achieve their goals, women subsequently resorted to venous potions and black rituals. Some of them aimed at remarrying for love, being aware that a second marriage could not be celebrated without ending the previous one. Even for female members of aristocracy and wealthy powerful families, the chances of being granted a divorce were very slim. Moreover, even if women were accorded a divorce, they typically would have been forbidden to marry again.[90]

Therefore, poisoning their husbands seemed to be a viable way for women to end unhappy and abusive marriages as well as to regain

86. *Id.*

87. ESTELLE B. FREEDMAN, NO TURNING BACK, THE HISTORY OF FEMINISM AND THE FUTURE OF WOMEN 293 (2002) (citing SAINT AUGUSTINE, 2 THE CITY OF GOD 325 (Marcus Dods ed., Edinburgh, T. & T. Clark 1871)).

88. BONNIE ANDERSON & JUDITH ZINSSER, 1 A HISTORY OF THEIR OWN: WOMEN IN EUROPE FROM PREHISTORY TO PRESENT 338 (1988).

89. WOOD MOLLENAUER, *supra* note 22, at 86.

90. *Id.* at 90.

control of household finances and patrimonies. Considering the unequal and subservient conditions women endured during the seventeenth century in France, both legally and financially, it is not surprising that poison became a weapon that was widely employed to exercise their agency against paternal and spousal authority and abuse. In such a scenario, the Affair of Poisons ultimately unveiled the French underworld of sacrilegious magic, premeditated crimes of passion and women's resistance to patriarchy and social subordination.

CONCLUSION

The investigation of the Affair of the Poisons uncovered a magical underworld in the royal court of Louis XIV and, more generally, in the French aristocracy during the seventeenth century. This article has presented an analysis of the scandal by examining the lives, marriages, trial documents and the different motivations of the Marquise de Brinvilliers, La Voisin, and Madame de Montespan to use poisons and engage in criminal activities, respectively.

The article also investigated the French legal system's responses to such crimes based on the class and social rank of the women implicated in the commerce of the poisons and black magic. Finally, the article reflects on what the Affair of the Poisons ultimately meant in terms of the defects of the French monarchy, the tensions within its body politic, the decadence of the customs and morals of Catholicism, and the decisions women made to engage in poisoning as a means of resisting patriarchy, domestic abuse, and financial and legal subordination.

FINDING WOMEN IN EARLY MODERN ENGLISH COURTS: EVIDENCE FROM PETER KING'S MANUSCRIPT REPORTS

LLOYD BONFIELD*

INTRODUCTION

This article constitutes a preliminary report, that is to say, initial reflections on cases involving women, on a work in progress: the preparation of an edition of Peter King's Common Pleas manuscript (hereafter "King manuscript") reports to be published by the Selden Society.[1] Before undertaking the "search" for women in early modern English courts, a cursory word about the larger project is in order. The Selden Society volume will reproduce the text of the entire body of the 327 cases reported in considerable detail in the King manuscript.[2] The cases therein run the gamut of the procedural and substantive matters that vexed early modern Englishmen. Many of the cases are actions in contract and debt, that arise out of a variety of business transactions: bankruptcies, arbitrations, maritime insurance policies and stock transfers. Another group concerns disputes over interests in land. To be sure, other decidedly more mundane and even idiosyncratic concerns that also troubled the court appear in King's case extracts. The best example of the latter was a dispute over the terms of a wager lodged in 1703 over whether the Archduke Charles of Austria would become King of Spain; the legal issues that ensued from the bet are painstakingly illuminated and analyzed in the King manuscript.[3]

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1. The edition of the manuscript will be authored by Lloyd Bonfield and L. R. Poos.

2. In this article all cases referenced by name are included in the King Manuscript, *infra* note 3. I shall give explicit manuscript page references only to the cases discussed in detail.

3. LLOYD BONFIELD AND L.R. POOS, PETER KING'S COMMON PLEAS REPORTS (forthcoming) (manuscript at 195–98) (on file with authors) [hereinafter King Manuscript].

While ultimately a fuller disquisition upon the cases King noted will be produced as an introduction to the Selden volume, the agenda here, consistent with the conference mandate, is rather narrower. Instead of considering the entire body of cases King noted and upon which he expounded upon at times at great length, I shall ferret out for detailed discussion only those actions that involved women as parties. By so doing, isolating cases in which women appeared as litigants, we may catalog the legal issues that touched the lives of women during the period and discern the substantive law that these disputes generated.

Like its ambit, the analysis of even the more limited array of cases considered in this article is modest: it is to inform rather than to argue. No sophisticated thesis on the legal position of women during the period teased from the cases will be proffered. My goal is simply to bring to the fore hitherto unprinted cases. That said, I believe that the cases will permit both the author and the reader to achieve a more nuanced and textured understanding of the circumstances of women's participation in the early modern English legal order. Moreover, by observing the legal issues and the context in which they arose in cases that involved women therein, we may relate the narratives illuminated in the cases to the broader role of women as participants in the economy and society during the earlier years of Britain's commercial revolution.

The article is comprised of four parts. It begins with a brief discussion of the life of the manuscript's author, Peter King, and this biography is then followed by a cursory description of the manuscript source. Thereafter, in Part III, a survey of the types of cases reported in the King manuscript ensues. Finally, I shall hone in on the ones, fifty-five in all, in which women are present as parties to the Common Pleas litigation. After a very brief outline of the writs used to commence the actions and an illumination of the legal issues raised in cases that are included in the King manuscript, I shall turn to cases that I regard as gender-specific, those actions which raise issues that are largely related to the legal, social, and economic position of women.

I. A BRIEF SUMMARY OF THE LIFE OF PETER KING[4]

Peter King was born in Exeter in 1669, the son of a prosperous grocer. While his legal career spanned the greater part of four decades,

4. I have relied heavily on 4 JOHN LORD CAMPBELL, THE LIVES OF THE LORD CHANCELLORS AND KEEPERS OF THE GREAT SEAL OF ENGLAND, FROM THE EARLIEST TIMES TILL THE REIGN OF KING GEORGE IV, at 567–647 (London, A. Spottiswoode 1846). For a useful summary, see David Lemmings, *Entry on Peter King*, *in* OXFORD DICTIONARY OF NATIONAL BIOGRAPHY (2004).

King may have been originally destined for the dissenting clergy; his first published work, *An Enquiry into the Constitution, Discipline, Unity & Worship of the Primitive Church*,[5] was an inquest into the organization of the early Christian church in which he argued that its governance combined elements of Presbyterianism, as well as the episcopacy. Shortly after its publication, however, King may have had second thoughts on clerical life and embarked on a legal career. He was admitted to the Middle Temple in October of 1694 and called to the bar in June of 1698. While the law remained his vocation, his religious interests and writings continued. King was an early member of the Society for the Propagation of the Gospel in Foreign Parts, founded in 1701, and in 1702 he published *The History of the Apostles Creed: With Critical Observations on its Several Articles*.[6]

Regardless of this dabble into religious matters, King's destiny lay with the law and with its near-relation, politics. Regarding the latter exercise, King appears to have been influenced early in his career by John Locke, his mother's first cousin.[7] Under Locke's tutelage, he entered a circle of Whig politicians led by John Lord Somers. The result of Whig patronage was election in 1711 to a seat in Parliament for Bere Alston, a Devon borough. During his early years in Parliament, King figured prominently amongst country Whigs and was regarded as a driving force behind the notorious trial of Dr Henry Sacheverell in 1709 and 1710.[8]

During the same period, King commenced what was to become a successful career in the law. His practice began on the western circuit; by 1702, however, printed reports demonstrate an active practice at Westminster where he was appearing regularly in King's Bench, both on behalf of private individuals and in pleas of the crown. In July 1705, he received his first judicial appointment, Recorder of Glastonbury, a dignity that might have not been unexpected since it was through his efforts in Parliament that the town had received a royal charter of in-

5. PETER KING, AN ENQUIRY INTO THE CONSTITUTION, DISCIPLINE, UNITY & WORSHIP OF THE PRIMITIVE CHURCH (London, anon. 1691).

6. PETER KING, THE HISTORY OF THE APOSTLES CREED: WITH CRITICAL OBSERVATIONS ON ITS SEVERAL ARTICLES (London, W.B. 1702).

7. The relationship was ongoing until Locke's death in 1704. The pair corresponded with some frequency and Campbell has reproduced a selection of their exchanges in his book, THE LIVES OF THE LORD CHANCELLORS. CAMPBELL, *supra* note 4, at 570–83. According to a letter reproduced therein, King claimed to having been executor of Locke's will, and to having received a legacy of £4,500. He also informed his cousin Peter Stratton that Locke's land descended to both of them equally as co-heirs. *See id.* at 583.

8. *See id.* at 586–87.

corporation that same year. Three years later, in 1708, he resigned the Glastonbury post to take up a similar position in London.[9]

Given his Whig associations, it should come as no surprise that both King's political career and his advancement to the bench were stymied by his opposition to Queen Anne's government during the Tory interlude in the latter years of her reign (circa 1710–1714). King's opposition to the Harley government was reported to be vocal, in particular with respect to the heated controversy over lax Admiralty administration.

Not surprisingly, King's fortunes improved with the Hanoverian succession in 1714. When George I made his first journey to London, King gave a speech of welcome to him on behalf of the corporation. Shortly thereafter, judicial preferment followed; when Lord Cowper was returned to the post of Lord Chancellor for a second time in 1714, he nominated King to serve as Lord Chief Justice of Common Pleas. On October 27, 1714, King replaced the disgraced Lord Trevor. Although the King manuscript ends abruptly in 1722, the last entry noting the retirement of Justice John Blencowe (which occurred in June 1722),[10] King remained on the Common Pleas until 1725.

High regard for both King's legal skill and his political acumen can be demonstrated by the fact that when Lord Chancellor Macclesfield was impeached for corruption in May 1725, King was chosen to conduct what turned out to be a thirteen day trial in the Lords that followed. The appointment of King may have been considered a rather odd selection, because though Lord Chief Justice of Common Pleas, King was still a commoner. His role required him to act as Speaker of the House of Lords, but, as a commoner, was nevertheless not permitted actually to speak in the Lords. Regardless of this limitation, King's efforts led to a conviction, and the skill with which he conducted the delicate matter earned him both a peerage and the woolsack; four days after the sentence was pronounced, Peter King was made Baron King of Ockham, and on June 1, 1725, he was appointed Lord Chancellor.

The conventional wisdom on King's chancellorship, if one may so regard Lord Campbell as representative thereof, is that King's considerable legal reputation developed during his tenure in Common Pleas declined after he became Lord Chancellor.[11] As we have observed, King spent nearly two decades in the common law. King had not practiced in

9. *Id.* at 586.
10. King Manuscript, *supra* note 3, at 234.
11. *See* CAMPBELL, *supra* note 4, at 612–14.

the Court of Chancery, and accordingly, his understanding of equity procedure and doctrine must have been rather limited. Accordingly, his impact in Chancery was more in the area of administration than in its jurisprudence.[12] His tenure in office closed in 1733 when, after having suffered a stroke, he resolved to resign. He retired to his estate at Ockham in Surrey where he died on July 22, 1734.

II. THE MANUSCRIPT REPORTS

There are at least two extant manuscripts of King's manuscript case reports. One found its way across the Atlantic to the Harvard Law Library;[13] the other remains in the mother country, housed in the Strong Room of the library of Lincoln's Inn.[14] The same 327 cases appear in both manuscripts, and they are set forth in similar sequence. Indeed the near-identical wording of each of the entries suggests that one manuscript was probably a copy of another (or that were both copies of a now-lost or unlocated manuscript). That either of the manuscripts was actually penned by King cannot be demonstrated, although the Lincoln's Inn bound document notes that it is "Lord King's Reports." Indeed, the work may not come from a single hand, because the penmanship changes in the course of each manuscript. But it is very likely that the reports themselves originated with King, because there is the occasional use of the first person therein; for example, it is noted in one notation that "the cause was tried . . . before me."[15] Although some cases are from assizes over which he presided,[16] others are controversies heard in the Guildhall,[17] gaol delivery at Newgate heard at the Old Bailey,[18] and a few report sittings with other members of the bench on important individual cases[19] and appeals.[20] Most of the reported cases, however, came before the Common Pleas.

12. *See id.* at 617, 638–42.

13. The manuscript, deposited in the Harvard Law School Library, is catalogued as HLS MS 1086.

14. The manuscript, deposited in the Lincoln's Inn Library, is catalogued as Lincoln's Inn Library Hill MS 80. My thanks to Mr. Guy Holborn and his staff for facilitating the use of the manuscript in the Library.

15. Barnardston v. Chapman and Smith, King Manuscript, *supra* note 3, at 9.

16. Two examples will suffice. He tried the case of *Thomas Crouch v. Barbara Raines* at the Hertford Assizes on a writ of cousinage after an issue was discussed in Common Pleas, *id.* at 61–62, and also *Francis Powell, clerk v. William Bull et alii at the Chelmsford*, *id.* at 109–111.

17. The marine insurance case of *Depaiba v. Ludlow*, *id.* at 175–182.

18. The cases were a burglary case, *The King v. Smith*, *id.* at 67–69, and forgery cases *Dominus Rex v. Biggs* and *Dominus Rex v. Dawson*, *id.* at 69–73.

19. The treason trial styles in the Reports as *Francia Case*, *id.* at 73–74.

Finally, a word of justification in both selecting a long-forgotten document for editing and publication, and also in writing an article based upon a single source of law: King's reports are worthy of study as an important source for case law during the period for at least two reasons. The first is simply dearth: there are relatively few printed law reports for the first half of the eighteenth century in England.[21] But more significantly, both the depth and breadth, the analytical quality of King's efforts are extraordinarily high. A perusal of the cases King redacted reveals that frequently the author was not content merely to report the barebones of the case: facts, issue, holding, and justification. Like Sir Edward Coke a century or so earlier, King fancied himself as an historian and as a legal theorist, and in his discourse on many of the cases, he did not feel constrained from roaming beyond the confines of the case to explore the distillation of logic that was the common law. Finally, the manuscript outlived its author by more than a century. Marginalia in the Lincoln's Inn notebook and references to cases decided long after King's death demonstrate that the manuscript was perused well into the nineteenth century.[22]

Perhaps his most interesting ramble through the history and policy of English law came in a marine insurance case, and may serve as an example of the intellectual caliber of the work. The question presented in this case dealt with whether an insured party had to prove that he sustained an actual loss in order to be reimbursed under the terms of a marine insurance policy. Not content merely to resolve the immediate question, King's consideration of the issue commenced with a disquisition on the origins of insurance and the foundation of the Royal Exchange in the City of London by Sir Thomas Gresham in the mid-sixteenth century. When marine insurance policies were first issued, King noted, a policyholder had to prove his ownership interest in goods in a lost shipment in order to collect on a policy. King then proceeded to explain how the increase in both the quantity of shipping and the magnitude of the losses suffered by maritime interests at-

20. An example of an appeal is the case of *William Christian v. John Corrin* in which a committee of the Privy Council considered whether an appeal lies to the King in council from a decree from the Isle of Man. *Id.* at 66–67.

21. *See* James Oldham, *Underreported and Underrated: The Court of Common Pleas in the Eighteenth Century*, *in* LAW AS CULTURE AND CULTURE AS LAW: ESSAYS IN HONOR OF JOHN PHILLIP REID 119 (Hendrik Hartog & William E. Nelson eds., 2000).

22. For example, in the margin of the King Manuscript, *supra* note 3, there are numerous notations to Charles Viner's A GENERAL ABRIDGEMENT OF LAW AND EQUITY (London, 1741). The volume in the Hale Collection in Lincoln's Inn has manuscript notations which refer to cases in the King Manuscript.

tributed to wars in the late seventeenth century rendered it difficult for merchants to ascertain whether their own goods were aboard a ship that was lost. These circumstances led to the creation of policies that paid 'interest or no,' an alteration, incidentally, that he regarded as dubious policy.

III. A BRIEF SKETCH OF THE CASES REPORTED

Before considering in detail cases involving women, a brief description of the broader body of Common Pleas cases reported by the King manuscript is necessary in order to place those involving women discussed hereafter in the broader context of the totality of litigation observed in the entire King manuscript. In the early eighteenth century, the writ system that had developed over the previous six centuries continued to direct litigation in the royal courts: the forms of action, which we have been told, reputedly, by F. W. Maitland rule us from their graves, were not as yet moribund.[23] In most, though not all, of the cases he reported, King noted the writ that the plaintiff selected to commence the action. In other entries, mense process, the oft-times unending struggle to bring the opposing party into court, was at issue. In many of these cases, however, the original writ laid can be inferred from the extant facts reported. In a more than a few cases, however, no conclusion can be drawn from the reports.[24]

Variety characterizes the forms of action employed to commence cases noted in the King manuscript.[25] Trespass writs predominate in the King manuscript (146 of 327 or 44.6 percent), largely actions on the case (86 of 327 or 26.3 percent). Many lawsuits deal with disputed business transactions. The actions on the case are frequently in assumpsit, and the second largest number of cases are laid in debt (39 of 327 or 11.9 percent) resulting from a loan or other transaction.[26] Litigation dealing with real property is also prominent, largely taking the form of trespass to land (20 of 327 or 6.1 percent) and ejectment (21 of 327 or 6.4 percent), amongst others.[27] Again what is striking about the cases in King's manuscript is not so much the narrow focus of each individual case, but rather the breadth of subject matter that

23. F. W. MAITLAND, THE FORMS OF ACTION AT COMMON LAW 1 (A. H. Chayton & W. J. Whittaker eds., Syndics of the Cambridge University Press 1971) (1909).

24. Sixty-two entries or about one in eight cases (nineteen percent).

25. A full tabulation is not permitted given space constraint. It will accompany the Selden Society edition, and is currently available from the author.

26. There are also cases in account (1) and covenant (6).

27. Cases were laid in dower (3), entry (2), and waste (1).

was addressed in the lawsuits in the Common Pleas during King's tenure.

The extracts from cases in the King manuscript indicate that there was very little controversy in the Common Pleas over the appropriateness of the original writ employed to resolve the legal dispute reported. In only few cases was the form of action selected in issue. One detailed case from the King manuscript can be reported as an example.[28] It was noted in a report that plaintiff, Marriot, was convicted by a justice of the peace, one Mr. Digby, for five offenses against statutes prohibiting coursing in the forests with greyhounds. For each offense, Marriot was fined £5, half to be paid to the informer, and half given to the poor of the parish of Mansfield. Because Marriot on demand did not satisfy the judgment against him, the constable of Mansfield by warrant issued by the same justice of the peace seized his goods. In order to have the goods restored, Marriot subsequently brought an action in replevin in the county court against Digby, the justice of the peace, and the case was subsequently removed to Common Pleas. The defendant Digby, after two rules were entered to allow him more time to plead, challenged the action in replevin on the grounds that the writ was unavailable to a person whose goods had been taken upon the execution of a judgment. According to the defendant's plea, trespass rather than replevin was the correct form of action to controvert such executions. To hold otherwise, defendant maintained, would enable parties to easily defeat all convictions. The court, however, was unmoved, citing precedents to the contrary in cases that dealt with goods taken on summary convictions. In addition, the report also noted that the defendant had been allowed two rules to enlarge his time for pleading. According to the court, that was the juncture, if at all, at which the issue should have been raised.[29]

The appropriateness of writs aside, it was, however, more common in the King manuscript to find discussion regarding clerical errors in the writs, and variances between them and the pleadings than it was to discern controversy over the mis-selection of the appropriate form of action. In cases in which variance was cited, the court does not always appear consistent in resolving perceived defects. For example, in one case, a variance between the date that a trespass was alleged in the writ, and the one noted in the declaration was proffered as grounds to dismiss an action, but instead leave was granted to plaintiff to amend

28. King Manuscript, *supra* note 3, at 53–54.
29. Richard and John Marriot v. Rowland Shan et alii, *id.* at 54.

the writ.[30] On the other hand, an incorrect place name in a writ in action on the case for disturbance of a right to common was deemed fatal to the action.[31] These cases aside, erroneous entries in the court record were also the cause of numerous controversies. Cases of misprision by a clerk, rather than a miscue by a party to the action, came before the court and were corrected, but those generated by the parties themselves were often, though not always, amended.[32]

If the selection of writs was not frequently opposed, at least in the cases reported in the King manuscript, the vagaries of pleading and process vexed the court with considerable frequency. Sixty-nine cases, or about one in five, dealt with process: the tortuous path followed by a party in order to bring the opposing party or parties into court, or to have a judgment already entered enforced.

A similar number of entries in the King manuscript raised pleading issues. There is little doubt that pleading remained an arcane art in the early eighteenth century, and provided traps for both the unwary and the cautious lawyer. Thus it would not be unexpected to discover that a very large percentage of reported cases arose, and were resolved upon, what appear to be narrow pleading issues. The scenario is generally as follows: the plaintiff or defendant demurs to a plea by the other party, and the King manuscript notes generally the party's supporting arguments; the proffered objections and argument of counsel considered; and the court determines whether to enter judgment on the demurrer, or allow the case to continue, ultimately to be resolved on the merits.

It is not always apparent where and how a distinction between proper and improper pleas was drawn. Entries in the King manuscript abound in which the court seemed to regard a wide array of objections lodged by opposing parties as purely technical, in modern terms, "harmless error," and allowed the cases to proceed to judgment.[33] In others cases, however, the court was not so indulgent, and judgment was entered against the errant pleader, or the case was otherwise dismissed with directions that the plaintiff might bring his action again if

30. Johnson v. Wells, *id.* at 15.

31. Cook v. Bingham, *id.* at 14.

32. An example is the *Earl of Stafford's Case* where a recovery styled him vicecomes (Viscount) instead of comes (Count or Earl). *Id.* at 226. In one case, a new summons was authorized because the existing documents were destroyed because rain came into the office of the *custos brevium* in the case of *Atterbury, demandant v. Price, tenant v. John Wentworth, vouchee*, *id.* at 100.

33. *See, e.g.*, Edmunds v. Powell, *id.* at 111–12.

he so chose, and plead it properly.[34] One of the more perplexing issues confronted in analyzing this body of cases is to understand the line drawn between the two: the cases that are allowed to proceed with a pleading flaw overlooked as harmless error; and those in which the error directs the disposition of the case. A full discussion of this issue is a task for another day, but some hint will emerge from a discussion of the cases discussed hereafter.

Most cases, then, dealt with other matters. The variety is bewildering, and a preliminary count is set out in the Appendix. Finally, it must be noted that not all the reports involved litigation. Other matters that commanded King's attention during the period covered by the reports were noted in the manuscript. For example, King reported that the judges met "Before the Summer Assizes" at Sergeants Inn to discuss the method by which the newly adopted statute on the transportation of convicts (4 Geo c. 1) should be implemented.[35] The part of the statute that evoked the most discussion was how to dispose of convicts if no "Contractor" was present at the time of conviction. In that event, it was decided that the presiding judge should appoint a person to make a contract with "proper Psons," and that the individual so empowered should report back at the next assize for the same county on his efforts. The court also discussed the issue of the performance bonds to be taken from the contractors. Two bonds were required: one to the court, and the other to the "Associates on the Crown side." The sum of £200, jointly and severally, was deemed a sufficient sum, though it was agreed that the presiding judge should have the latitude to alter the amount required "according to Circumstances."[36]

Other entries in the King manuscript note the Common Pleas' supervisory duties. For example, an attachment was issued against the goalor of Ilchester for having allowed a defendant in a case before the court to escape.[37] Another entry allows us to observe the court disciplining individuals. Two parties were arrested, on what grounds, it is not clear from the report, but apparently when they were bailed they gave fictitious names. Two other men came into court at the appointed time under the proffered false names to answer the charges. When the scam was discovered, all four fled. They were apprehended, confessed,

34. *See, e.g.*, Bagnell v. Moore, *id.* at 193–94.
35. *Id.* at 137–38.
36. *Id.* at 138.
37. Bonner v. Langham, *id.* at 6.

and were all committed to spend an hour in the pillory on the last day of term with "a Paper over their Heads, Bail by false Names."[38]

Some cases in the King manuscript came before the court as matters ancillary to an existing case. For example, witnesses in litigation might claim immunity from arrest on their way to and from court. In a particularly well-noted case in the King manuscript, one Lee, a witness in an action in ejectment, was arrested by the bailiff on his way home from court or so he alleged. He insisted upon privilege "in laying the Matter by Motion before the Court." He further charged that the arrest was by "Connivance of one of the Attorney's in the case," and asked for his costs, a request which was granted. No action was taken against the bailiff, because at the moment of apprehension, Lee did not produce "the Ticket of the Spa to verify his Allegation of being Subpaend a Witness."[39]

IV. WOMEN IN THE COURT OF COMMON PLEAS

Turing now to our more specific agenda, women in the King manuscript, about 17 percent of the cases (55 out of 327) extracted by King involved women as parties. Table 1 indicates the alarming equality in the distribution: the mix between women who appeared as plaintiffs or defendants was nearly identical, and only slightly more women parties sued or were sued in their own name than were women who were joined with their husbands.[40]

Table 1: Woman Appearing as Parties: King's Reports

N=62

Plaintiff		***Defendant***	
Woman	**Married Couple**	**Woman**	**Married Couple**
18	**14**	**16**	**14**

38. Hodgeson v Mosely, *id.* at 210.

39. Frost v. Lee, *id.* at 115.

40. Although fifty-five cases involved women, the number of women appearing as a party (sixty-two) exceeded that number because in some cases both plaintiff and defendant were women.

As Table 2 indicates, the fifty-five cases involving women as parties in the King manuscript were brought to the court via a variety of forms of action. While a significant number of cases (about one in five) involved rights in land, most litigation involved personal actions on the case or in debt. A comparison between the percentages of writs employed in all cases reported in the King manuscript and those with women as parties do not reveal striking differences. However, as we shall see, there were a robust number of cases involving defamation noted in the King manuscript that were either brought as actions on the case in the Common Pleas or pending in church courts for which writs of prohibition were sought in Common Pleas.

Table 2: Woman Appearing as Parties: Forms of Action

N=55

Writ	**N**	**%**
Case	**17**	**30.9**
Debt	**11**	**20**
Trespass Assault	**3**	**5.5**
Trespass Land	**3**	**5.5**
Fine	**2**	**3.6**
Dower	**3**	**5.5**
Deceit	**1**	**1.8**
Cousinage	**1**	**1.8**
Homine Replegiando	**1**	**1.8**
Prohibition	**6**	**10.9**
Error	**1**	**1.8**
Appeal	**3**	**5.5**
Trover	**1**	**1.8**
Unknown	**2**	**3.6**
Totals	**55**	**100**

Before turning to the substance of some of the cases involving women in the King manuscript, another set of numbers is in order. Table 3 indicates that a variety of particular subject matters that came before the court in the fifty-five cases that involved women as par-

ties.[41] While about slightly more than one in ten of the cases that came before the Court with women as parties raised procedural issues, most produced substantive questions of applicable law. Many of the issues mooted were not gender specific, that is they did not directly address matters particular to women. For example, the largest number of cases in our data set (15 or 21.4 percent) involved a woman who sued or was sued as an executrix or administratrix of their late husband's estate either on their own or joined by her current husband. The involvement of these women in litigation in most of the cases did not involve gender specific issues; their appearance can be attributed to the propensity of men, which I have noted elsewhere, to select wives as executices of their estates. [42] The same could be said about most of the cases that involve promissory notes, debt, rights in land and the proper calculation of damages. Yet, perhaps oddly, gender differences were at work, albeit clandestinely: all of the cases involving testamentary matters have a woman as a party; there is no case in the collection involving estate administration in which parties were exclusively men.

Other cases, however, did raise what one might regard as gender-specific issues. Space constraints permits a discussion of only three subject matter areas in the law in which women were parties in such cases: defamation, marriage cases, and issues that fall under the legal rubric baron and feme.

Table 3: Woman Appearing as Parties: Subject Matter

N=70

Subject Matter	N	%
Estate Administration	**15**	**21.4**
Baron and Feme	**9**	**12.9**
Promissory Note	**4**	**5.7**
Defamation	**8**	**11.4**
Guardianship	**2**	**2.9**
Case	**1**	**1.4**
Damages	**2**	**2.9**
Pleading	**8**	**11.4**
Marriage	**4**	**5.7**

41. Because some of the cases in King's manuscript involving women raised more than a single issue, seventy entries are noted in Table 3 from the fifty-five cases involving women.

42. I have made this point, the presence of women in court, in my study of probate litigation. LLOYD BONFIELD, DEVISING, DYING AND DISPUTE: PROBATE LITIGATION IN EARLY MODERN ENGLAND (United Kingdom, Ashgate 2012).

Land	**4**	**5.7**
Trespass Assault	**2**	**2.9**
Debt	**1**	**1.4**
Procedural	**10**	**14.3**
Total	**70**	**100.3**

Perhaps the most interesting of these gender-specific cases were the ones that dealt with defamation. Of course, men defamed men, and some cases in the manuscript so illustrate. For example, John Palmer, a serge maker and soap baylor, alleged in an action on the case that one Pullen had related to others that Palmer's financial circumstances were dire: "doth John Palmer of Bradninch owe you any money; if so now is your time to look sharp for the bailiffs have seized all his goods and are about to sell them in the public market;" "doth John Palmer of Bradninch owe you any money; if so now is your time to look after it, for he is torn abroad and his landlord has seized all that he hath;" "doth John Palmer owe you any money; if so now is your time to look after it, for he is broken and run away."[43] In at least half of the defamation cases in the King manuscript, women can be identified as the speakers, while in the other half, the Christian name of the party is not given and it is not possible to determine from the report whether the alleged speaker was a woman.

The cases involving defamation extracted in the King manuscript came to Common Pleas in one of two procedural guises: actions on the case in defamation, and writs of prohibition. In the former, plaintiff sued for damages in the Common Pleas, while in the latter plaintiff sought to terminate a proceeding commenced in an ecclesiastical court. What made the defamation cases noted in the King manuscript in which women were involved gender-specific is that with a lone exception all the controversies involved statements describing feminine sexual incontinence. Of seven cases that did have sexual overtones, four involved women being called a "whore," generally with further literary embellishment.[44] Regarding the other cases, in one the speaker refrained from the "w" word, but uttered the following about the defendant: "that she went into Fleet Street and picked up a man and brought him to her house and carried him upstairs and suffered him to throw

43. Palmer v. Pullen, King Manuscript, *supra* note 3, at 55.

44. Davy v. Jones, *id.* at 51; John Wills and Susan uxor v. Richard Wills and Mary uxor, *id.* at 136; Dalton v. Barret, *id.* at 221; and Watts v. Blackerby, *id.* at 236.

or lay upon her, etc."[45] While to the modern reader that recitation might appear close enough, the failure to use the word "whore" was fatal. The court discharged the writ on the grounds that for an action on the case to be brought in London it was necessary for the "express calling a woman [a whore] and not to words from whence she may be collected to be so." Of the other two defamation cases, Nancy Pope was accused of bearing a "bastard"; and it was charged that the married Sarah Haddock was "as familiar with. . . [her bondsman]. . . as any man."[46]

A second group of cases noted in the King manuscript involving women as parties and touched what I have called gender-specific issues dealt with marriage. Three were brought by women against men with whom they alleged that they had entered into mutual promises to marry, while the fourth case was an action by a husband and wife in which both sought a prohibition from a prosecution in a church court for marrying within the Levitical degrees.[47] In the latter case, the prohibition was discharged on the grounds that, while marrying a wife's niece was not expressly prohibited in scripture, it was nevertheless within the general understanding of the ambit of the ecclesiastical ban.

The three breach of promise cases noted in the King manuscript were variations on the same theme, a disappointed bride suing a reluctant groom, but they raised decidedly different legal issues. In one case, a man promised to marry a woman after the death of his father, an event that had since occurred, but instead of marrying the plaintiff, it was alleged that he had married another. The disappointed bride brought an action on the case for breach of promise. While the man contended that the promise was not valid because it was founded upon on a contingency of death, the court did not find the promise invalid on the grounds alleged and both the verdict for the plaintiff was upheld and the award of damages in the amount of £300 sustained in denying a motion in arrest of verdict.[48] In a second case, a man married another woman allegedly in disregard of alleged mutual promises to marry each other and not another. When the disappointed bride brought an action against the alleged promisor and prevailed, the errant groom attempted to set aside a general verdict for the plaintiff and damages in the amount of £1000 in a motion in arrest of judgment on the grounds

45. Notter Allen and Dorothy uxor v. Catherine Steward, *id.* at 40.
46. Pope v. Corbet, id. at 136; and Sarah Haddock v. Jefferson, *id.* at 235.
47. Ellerton et uxor v. Gastrell, *id*. at 190.
48. Elizabeth Corke v. John Baker, *id.* at 77.

that there was no consideration for his promise. The court disagreed; it found consideration for his promise on the grounds that her mutual promise limited her "liberty which she would otherwise have to prefer herself in marriage." The contract to marry was therefore binding, and the man, having broken his promise by marrying another, the damages assessed were an appropriate remedy.[49] A final case can be offered that involved mutual promises to marry which the plaintiff, another disappointed bride, alleged that defendant recalcitrant groom broke.[50] The man argued that the alleged promise to marry was not in writing, and was therefore unenforceable under Section 4 of the Statute of Frauds.[51] The court, however, found that the statute had not been interpreted to apply to contracts to marry[52], but rather to agreements made upon consideration of marriage, "something collateral to the marriage." Thus parol evidence of the actual verbal exchange could be admitted to prove the undertaking to marry.

Finally, we turn to cases in which issues relating to coverture were raised and resolved in the Court of Common Pleas during the period covered by King's manuscript. As historians of pre-modern England will attest, whether of they are of the legal or social and economic stripe, the mysteries of the law of coverture, that curious English juridical construct, is not an easy topic into which to wade. Some indication of the investment required to familiarize oneself with the learning on the subject during our period can be surmised by glancing at the shear girth of a contemporary treatment on the subject aptly titled *Baron and Feme*, a learned treatise which runs to 485 pages excluding the index.[53] The nine cases which were actually litigated and appear in the King manuscript can, of course, only scratch the surface of myriad of issues that were raised by the doctrine in the early eigthteenth century; nevertheless the controversies presented are illustrative some of the timely matters that coverture raised during our period.

The most frequent issue that the Common Pleas faced relating to coverture dealt with matters relating to the joinder of a husband to claims involving a married woman when the latter appeared as a party to litigation. As a general matter, the husband of a married woman in

49. Ann Goddard v. William Strode, *id.* at 158.

50. Hopkins v. Mayton, *id.* at 220–21.

51. Statute of Frauds, 1677, 29 Car. 2 c. 3 § 4 (Eng.).

52. Admitting that there was a case to the contrary which the court "held not be law." Hopkins v. Mayton, King manuscript, *supra* note 3, at 220.

53. BARON AND FEME: A TREATISE OF LAW AND EQUITY CONCERNING HUSBANDS AND WIVES (London, 3d ed., 1738).

the cases in the King manuscript brought an action in his name *et uxor* on a cause of action that arose from an obligation owed to the spouse, even in circumstances in which the transaction had occurred prior to marriage. Thus, for example, in a case in which a married woman held a bond *dum sola* and the defendant had failed to tender a quarterly payment to her, an action of debt was brought by husband *et uxor*.[54] Yet, as might be expected, a case brought against husband and wife was not regarded as having the same party defendant as a case brought exclusively against the husband. In one case in the King manuscript, plaintiff brought an action in Kent against the defendant, an attorney, for fees. Upon delivering a declaration against defendant, it was the practice of the court to allow plaintiff by "usage" to bring other actions that he wished to pursue against defendant in that court. While, under that practice, the court allowed an action in trover against the husband alone, it refused to allow a separate one in covenant brought by the plaintiff against both husband and wife. The latter action was quite simply viewed as a suit as between different parties.[55] In another case, the court confirmed existing practice that coverture did not generally preclude married women from suing or being sued in the church courts. Prohibition was sought by baron and feme in the Common Pleas on the grounds that the husband was not joined in an action for a legacy with interest that was lodged in the Archbishop of York's court. The attention of Common Pleas was directed to the fact that the action was one that included interest, and therefore it might be brought in a temporal jurisdiction. However, the judges were unprepared to regard that fact as dispositive of the gravamen of the action before them. Plaintiff commenced his action in Common Pleas to require the church court to dismiss an existing action on the ground the husband was not joined in a church court. The court was unprepared to interfere with existing practice by sanctioning a derogation from the "usage of the spiritual court to sue *feme coverts* by themselves."[56]

Cases noted in King's manuscript produced other interesting wrinkles on the necessity of joinder of husband to a case brought by a married woman. Although a more detailed exploration of doctrine must be undertaken to be certain, the Common Pleas may not have always been averse to bending the rules to allow cases to proceed to judgment. In an action of trespass assault and battery and conver-

54. Herne et uxor v. Sir John Holland, King Manuscript, *supra* note 3, at 76.
55. John Tasker v. Thomas Underhill et idem et Elizabeth uxor v. eundem, *id.* at 204.
56. Wood ex uxor v. Roosby, *id.* at 18.

sion,[57] both husband and wife and another party were joined as defendants. In a motion in arrest of judgment for the plaintiff, it was claimed by the defendant that if a married woman was joined in this manner, she might well be answering for the trespass of her husband. The court dismissed the argument based on coverture by simply noting that in a joint trespass the act of which plaintiff complains is one "of everyone." Regardless of whether the parties were married, therefore, his (husband's) trespass would also be that of hers (wife's). As to the second issue raised in the case, that of conversion, the court seemed prepared to overlook the coverture dilemma on the grounds that conversion was merely added to the underlying cause of trespass as an "aggravation" of the trespass.[58] Likewise, when an action was brought by a husband and wife for trespass, breaking and entering, it was also argued in a motion in arrest of judgment brought by plaintiff that the joinder of the wife was improper because the action should have been brought exclusively by the husband. The court declined on the grounds that a verdict by the jury must have assumed that the parties were joint tenants, and given that supposition, joinder was proper. Finally, in an action in trespass for assault brought against husband and wife, the wife pleaded that she acted in self-defense. Verdict for the plaintiff followed, and defendant moved to arrest the verdict on the grounds that the plaintiff's replication alleged that both husband and wife made the assault and that neither had such cause: that is, that the assault was in self-defense. Thus the defendant argued that plaintiff's response was a discontinuance, because it was the wife who pleaded self-defense and the replication was phrased in such a way so as to imply that both spouses had pleaded self-defense. The court dismissed the defendants' argument and focused on the issue in the plaintiff's cause of action, the wife's trespass, and considered the wife's plea as sufficient to place self-defense in issue. That the jury found for the plaintiff simply meant that they found her plea false, which is what the plaintiff had stated in the replication.[59]

I want to close with two cases that raise the implications of coverture, and ones that illustrate married women in roles as commercial actors, both working with and without their husbands. One can be presented straightforwardly; the other is more complex, and requires

57. The declaration was specifically for breaking and entering the close, treading on grass and grain, and carry away apples. Pullen v. Palmer and Melony, his wife, and Amos Palmer, *id.* at 62.

58. *Id*.

59. Benjamin Joseph v. John and Margaret Gregory, *id.* at 64.

more elaboration. In the first, a woman, one Sarah Maddocks, brought an action as endorsee for payment on a note against Robert Gardner. However, the note at issue was written by Gardner's wife, Joyce. The defendant claimed that he was not obligated to pay under the terms of the note. His assertion was based on the fact that he was not bound to pay on the note as an endorsee, because it was not a note within the 3 and 4 A. c. 8 (1704). That act, he claimed, extended only to promissory notes made by individuals and by their servants entrusted by them to do so. The court held for the plaintiff. The court noted that the declaration claimed the wife was entrusted to receive and to make payments on behalf of her husband, and though the making of promissory notes was not specifically mentioned in the plea, it held that the jury verdict for the plaintiff must have assumed so and therefore considered the note within the statute.[60]

In a second case, Margaret Gregory was sued by one Benjamin Joseph with her husband, John, joined. According to the report of the case, Margaret Gregory previously had been sued by the same plaintiff as a *feme sole*, presumably because, since she operated a shop in Taunton, he did not realize that she was married, her husband living in the East Indies. But when she pleaded coverture to abate the plea, the plaintiff discontinued his action. The plaintiff then moved to outlaw both husband and wife and seized his goods. When she moved to set aside the outlawry as irregular, her husband "beyond the seas," the Court refused unless she would put in bail, which she was unprepared to do. This tangle proved unnecessary because her husband by this time was in fact already dead. But given the difficulties with communication from the East Indies, it took approximately eight months for the sad news about her husband's demise to be brought to her attention. When she learned of his death, she took up administration of his goods, and had the outlawry set aside in the prothonotary's office because of the plaintiff's error: outlawing a man already deceased. The plaintiff moved to set aside the reversal, and ultimately the Common Pleas decided that the plaintiff ought to be able to contest the reversal. The court thought that the action should be stayed until it had the wisdom of the Attorney General on the statute, after which time it would give judgment. While consultation may have occurred, the case, sadly, disappears from the manuscript.

60. Sarah Maddocks v. Robert Gardiner, *id.* at 75–76.

CONCLUSION

My research based upon the entries in the King Manuscript is at a formative rather than a conclusory phase; but conclude, at least in some fashion, we must. My goal here has been modest: to present cases exhumed from King's manuscript involving women. Ultimately, these cases in Common Pleas must be correlated with other contemporary cases and treatises literature to present a more definitive picture of the common law at the Hanovarian succession and beyond. Suffice it to say, that even at this early stage in digesting the cases noted by King, "commercial cases," and in particular these "new" types of business-related cases, found their way to the Court of Common Pleas. In these cases, as well as numerous others that King noted, the court was in the process of updating a body of common law. This process of "modernization" was, like this paper, a work in progress. At the same time, the law seemed constrained by the nuances of pleading from moving forward more expeditiously. The court was wont to resolve a case on the pleadings, thereby avoiding a decision on the merits.

As to women in the court, two points can be made by way of conclusion. The first is the important one: *they were there*. Women, married or otherwise, were legal actors in English courts. To be sure, their presence pales in comparison with those of their male counterparts, but present they nevertheless were, actively engaging in litigation in the Common Pleas. Second, and perhaps closely related to the first, is that women, perhaps defamation cases aside, can be seen through the lens of litigation in Common Pleas because they were economic actors. Many of the cases extracted in the King manuscript arise because women were engaged in commercial tasks in concert with their husbands, and even where necessity dictated, without them. Then as now, it is economic activity that is a primary factor that prompts the sort of disputes that end up in the courts.

APPENDIX: SUBJECT MATTER IN CASES IN KING MANUSCRIPT[61]

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Pleading 69
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Arbitration 6
Promissory Notes 20
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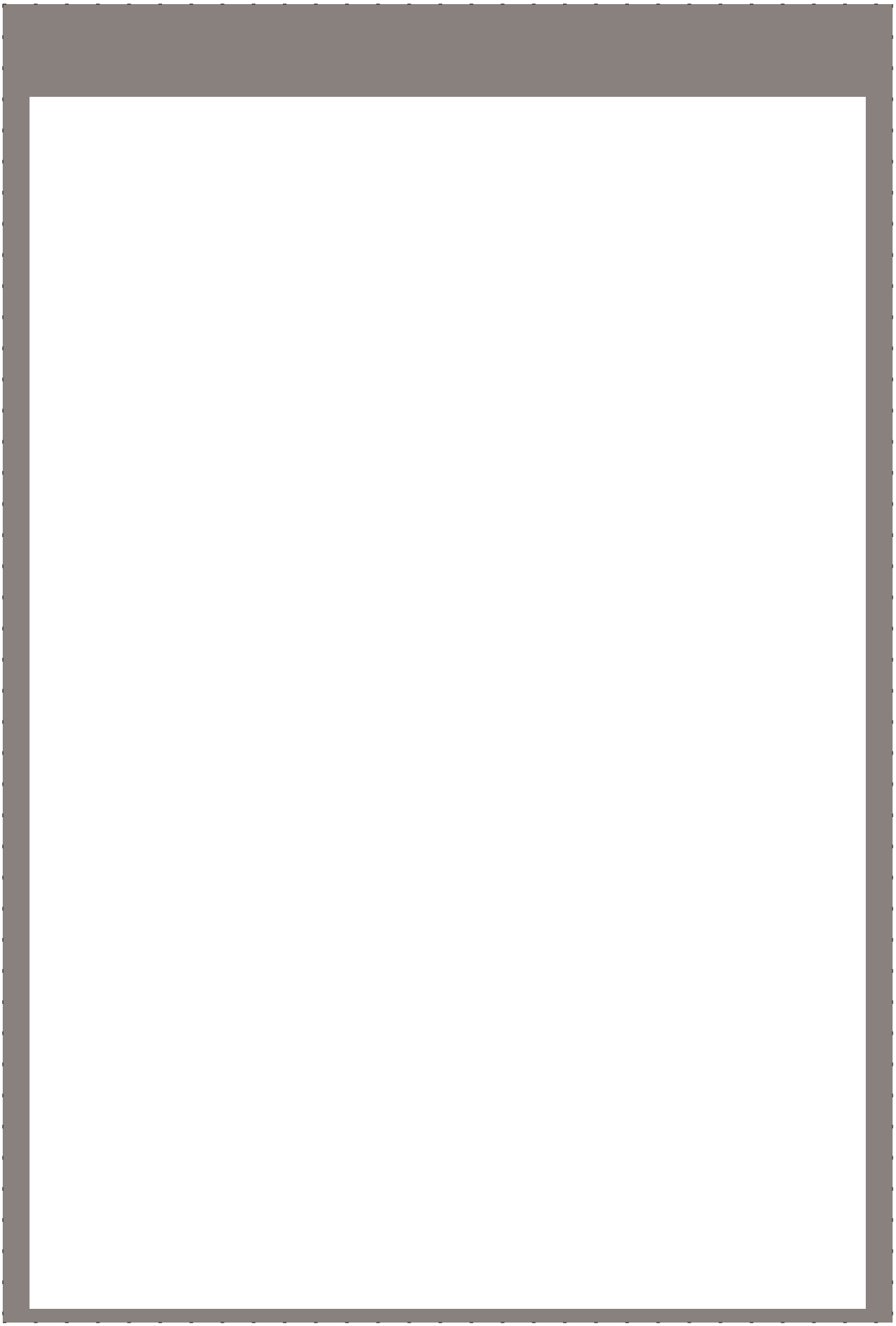
Bankruptcy 7
Stock Transfers 3
Maritime Insurance 7
Other Commercial 11
Contract 13
Debts 64
Testamentary 15
Baron and Feme 8
Marriage 6
Infancy 6
Real Property 31
Rent 2
Waste 1
Common Rights 3
Custom 9
Court costs 12
Attorneys 3
Arrests 8
Habeas Corpus 2
Criminal 3
Treason 1
Eco Reg/Apprentice 2
Defamation 22
Church related (advowson, tithes) 4
Recusancy 2

61. The categorization of cases offered herein is tentative. A fuller breakdown of the cases will be part of the Introduction to the Selden volume.



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LAW, LAND, IDENTITY: THE CASE OF LADY ANNE CLIFFORD

CARLA SPIVACK*

INTRODUCTION

This article presents a case study from seventeenth century England to illustrate the connection between fully-vested ownership in property and full civic personhood for women. Lady Anne Clifford (1590–1676) spent most of her adult life litigating her rights to ancestral lands her father had willed to his brother rather than to her. Clifford's life and writings[1] make clear that the property rights she fought for and won granted her an identity not fully constrained by her culture's gender norms.[2] These rights allowed her to take her place in the web of mutual rights and obligations attendant on fully-vested property holding, and thus allowed her to take her place in civil society as a full person, a subject who acted rather than an object who was acted upon. The texts through which Clifford constructed her identi-

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1. Clifford left diaries, autobiographies and family histories; her diary is one of the earliest of the genre by an Englishwoman. *See generally* Mary Chan & Nancy E. Wright, *Marriage, Identity and the Pursuit of Property in Seventeenth Century England: The Cases of Anne Clifford and Elizabeth Wiseman*, *in* WOMEN,. PROPERTY AND THE LETTERS OF THE LAW IN EARLY MODERN ENGLAND 162, 163–64 (Nancy E. Wright et al. eds., 2004) (applying Margaret Radin's analysis of alienable and inalienable forms of property to Clifford and Wiseman, arguing that deprivation of estates they considered theirs affected their sense of identity); BARBARA KIEFER LEWALSKI, *Claiming Patrimony and Constructing a Self: Anne Clifford and Her Diary*, *in* WRITING WOMEN IN JACOBEAN ENGLAND 125 (1993); Paul Salzman, *Early Modern (Aristocratic) Women and Textual Property*, *in* WOMEN, PROPERTY AND THE LETTERS OF THE LAW IN EARLY MODERN ENGLAND *supra*, at 282 (asserting that Clifford's diary and autobiographies, though ostensibly private, were in fact designed for a particular audience to support her "claim to her estates and titles"); Mihoko Suzuki, *Anne Clifford and the Gendering of History*, 30 CLIO 195, 198 (2001) (asserting that Clifford "stands as a counterexample to the dominant ideology of early modern historiography that largely regarded women not as agents of history, but rather as chaste transmitters of genealogical succession or unruly obstacles to the unfolding of male-centered history").

2. For gender norms in the period, see generally SUZANNE W. HULL, CHASTE SILENT & OBEDIENT: ENGLISH BOOKS FOR WOMEN 1475–1640 (1982) (collecting prescriptive literature for women on proper roles and behavior).

ty—her diaries and autobiography, her building projects, and the art works and monuments she commissioned—show how her fully-vested property rights gave her a sense of full civic personhood, embedded as a subject in history and in the society of her day.[3]

Scholars have read Clifford's works as expressing an early feminism, a challenge to patriarchal systems of land transmission, but such readings are anachronistic. Indeed, the truth of the matter is much more interesting: rather than claiming gender equality, Clifford saw her property rights as granting her equality under the norms of her day *despite* her gender. It is only after taking both legal and physical possession of her lands that Clifford begins to assert her rights as a woman. In fact, Clifford's writing itself is anachronistic: she constituted her identity through forms of property ownership that derived from an earlier feudal period and were becoming increasingly unavailable for women during Clifford's lifetime. Absolute property ownership granted her a sense of identity based on recognition as a subject embedded in a network of rights and obligations, a system ultimately traceable to the Norman feudalism brought to England by Clifford's ancestors. It was a system in which women as well as men could carry out feudal obligations because of their ancestry and place in the feudal order, which in turn stemmed from land ownership. Rank could be as important as sex in locating one in the social hierarchy. This understanding of the real nature of Clifford's claims leads to a crucial insight about property rights and the status of women: fully-vested ownership created for Clifford the basis for full civic personhood, and that in turn allowed her to assert her gender-based rights.

Part One of this article outlines Anne Clifford's life. Part Two explains the legal background for Clifford's litigation, showing that it took place in the context of declining female inheritance and declining female participation in the public sphere. Part Three discusses Clifford's writings, arguing that her property interests allowed her to construct a sense of identity apart from her culture's gender-based prescriptions. Part Four analyzes Clifford's self-construction as it is reflected in the many buildings, monuments and self portraits she designed and commissioned, also arguing that they reveal a sense of identity empowered by fully vested property ownership to transcend some of the limita-

3. For a discussion of the psychoanalysis of property law and property ownership, see generally JEANNE LORRAINE SCHROEDER, THE VESTAL AND THE FASCES: HEGEL, LACAN, PROPERTY, AND THE FEMININE (1998).

tions her culture imposed on her sex. I conclude by suggesting that Clifford's example has implications for today, in respect to the many ways women's access to property is still systemically limited to less than fully vested rights.

I. CLIFFORD'S LIFE

Lady Anne Clifford, Countess of Pembroke, Dorset and Montgomery was born on the cusp of the century, in 1590, and died in 1676.[4] Descended from one of the most prominent families of the era, Clifford, the daughter of George, Third Earl of Cumberland (1558–1605) and Margaret Russell (1550–1616),[5] spent most of her life fighting to regain family lands that her father had willed to his brother and his brother's male heirs instead of to her.[6] Eventually, when her uncle's male line died out, she won her battle, inheriting the estates in 1643, in the midst of the Civil War. On her death, on March 21, 1676, Clifford left her estates to her daughter Lady Thanet, and to her granddaughter. Clifford wrote at least three autobiographical tracts at different stages in her life, all intended, at least in part, to justify her legal and moral claim to her inheritance.

Her father, George Clifford, Third Earl of Cumberland (hereafter "George"), courtier, explorer, battleship captain[7] and Queen's Champion, was descended from a line of Barons and Earls that traced its roots

4. The bulk of writing about Clifford has come from humanities scholars, and, while often incisive, it lacks understanding of the legal issues and theoretical debates about property law necessary to analyze the material. Bringing both cultural and legal expertise to bear, I show how Clifford's legal battles shape a sense of identity neither proto-feminist nor reactionary: one unique to its time and place, but liberating for today. The literature on Anne Clifford includes: Chan & Wright, *supra* note 1, at 162–63 (applying Margaret Radin's analysis of alienable and inalienable forms of property to Clifford and Wiseman, arguing that deprivation of estates they considered theirs affected their sense of identity); LEWALSKI, *supra* note 1; Salzman, *supra* note 1, at 282 (asserting that Clifford's diary and autobiographies, though ostensibly private, were in fact designed for a particular audience to support her "claim to her estates and titles"); Suzuki, *supra* note 1 (asserting that Clifford "stands as a counterexample to the dominant ideology of early modern historiography that largely regarded women not as agents of history but rather as chaste transmitters of genealogical succession or unruly obstacles to the unfolding of male-centered history"). Studies of Clifford as an early modern landholding woman include: Anastasia B. Crosswhite, Note, *Women and Land: Aristocratic Ownership of Property in Early Modern England*, 77 N.Y.U. L. REV. 1119 (2002).

5. Biographies include: MARTIN RIVINGTON HOLMES, PROUD NORTHERN LADY: LADY ANNE CLIFFORD 1590–1676 (1975); RICHARD T. SPENCE, LADY ANNE CLIFFORD (1997); GEORGE C. WILLIAMSON, LADY ANNE CLIFFORD (S. R. Publishers Ltd., 2d ed. 1967).

6. For a discussion of estate planning in this period, see generally A. W. B. SIMPSON, A HISTORY OF THE LAND LAW (2d ed. 1986); Lloyd Bonfield, *Marriage, Property and the 'Affective Family,'* 1 LAW & HIST. REV. 297 (1983); LLOYD BONFIELD, MARRIAGE SETTLEMENTS, 1601–1740 (1983).

7. HOLMES, *supra* note 5,, at 2.

to pre-Conquest England.[8] Countess Margaret, her mother, was the youngest daughter of the Earl of Bedford, who had been one of Elizabeth I's Privy Councilors.[9] Anne's two marriages, to Richard Sackville, Third Earl of Dorset and then to Phillip Herbert, Fourth Earl of Pembroke, consolidated her status as a high-ranking peer.[10] Even at fifteen months, she had become the legal heiress of her father's estates: her brother Lord Francis died a few weeks before her birth, and her other brother, Lord Robert, died shortly thereafter.[11] In his will of 1598, however, George left his large estates in Westmorland and Yorkshire to Francis, his brother, providing for Anne as a daughter rather than as heir.[12] This devise struck a blow to Clifford's identity: as we will see in her Diary, she saw herself from an early age as a landed heiress, born into a dense network of social duties and rights; her father's will constituted her as a daughter, defined only by her private familial relation. In effect, the portion George left her was a dowry, an inheritance that constituted her as a valuable object a suitor might desire. The inheritance of the estate, on the other hand, would have made her a subject, recognized by other subjects in the social order.

As it happened, the Earl had to resort to some legal maneuvering to effect his chosen disposition. His estates had been granted by a Charter of Edward II, which specified that they were entailed to the heirs general, which meant the land had to pass to the closest direct heir, whether that person was male or female. (The other possibility, that the lands pass only to the heirs male, would have allowed George to bypass Clifford.) This preference for the direct female heir over the transversal male was, in fact, the common law rule, which dated from the Norman Conquest.[13] George, wishing to dispose of his lands as he saw fit, set out to break this entail, that is, to eliminate the requirement that the land pass to a direct female heir—who would be Clifford—over a transversal male—the Earl's brother. In 1591, Earl George and his lawyers initiated a procedure called a "fine and recovery," involving

8. SPENCE, *supra* note 5, at 1.

9. *Id.*

10. *Id.*

11. THE DIARIES OF LADY ANNE CLIFFORD 1 (D.J.H. Clifford ed., 1990) [hereinafter CLIFFORD DIARIES]. Anne was very clear about what these deaths meant for her: "ever after that time I continewed to bee the onely Child of my parents, nor had they any other Daughter but myself." *Id.*

12. CLIFFORD DIARIES, *supra* note 11, at 2. The Earl George's estates were considerable by the time of his death: they comprised a large part of northwest England, as well as several county seats in the south and two properties in London. *Id.* The total acreage was around 90,000. Chan & Wright, *supra* note 1, at 164.

13. EILEEN SPRING, LAW, LAND & FAMILY: ARISTOCRATIC INHERITANCE IN ENGLAND, 1300 TO 1800, at 9 (1993).

a fictitious sale and return of the land in the Court of Common Pleas.[14] This procedure should have eliminated—"broken"—the entail through the legal fiction that the lands were reconveyed back to the Earl in fee simple—i.e., free of restrictions. Relying on this legal maneuver, George proceeded to settle his lands away from his oldest daughter and on his surviving son Robert.[15] When Robert died later that year, George made his brother Francis his heir.[16]

Unfortunately, there was a flaw in all of this, which the Earl's lawyers overlooked, but which Countess Margaret, Clifford's mother (or, rather, her lawyers), eventually discovered. George's barring of the entail turned out to have been ineffective under 32 Henry VIII c. 36, which stipulated that a fine and recovery was inoperative if the reversion of the land was still vested in the crown;[17] as it happened, the reversion of Clifford's estates was in fact still vested in the crown because, by limiting ways the land could pass, King Edward had not granted the Cliffords a fee simple but had retained an interest in it.[18] Based on this statute, then, Anne had a strong argument that the barring of the entail had been invalid, and that, under the original charter, the land should have passed to her, the heir general, as specified in the charter.[19]

George may have had reasons for his disposition other than mere preference for the male line, although Clifford herself implies in her biography of him—written after she came into possession of her lands—that this was the reason, explaining that he "gave away all his lands to his brother and his heirs males [sic] for the preservation of his

14. SPENCE, *supra* note 5, at 42.

15. *Id.*

16. *Id.*

17. After the Act declares all fines and recoveries to be binding, it lists exceptions, among them, in paragraph 4, that those of lands "the reversion wherof at the tyme of the same fyne or fynes so levied being in our said Souveraine Lorde his heires or successours." Thexposition of the Statute of Fines, 32 Hen. 8, c. 36, §4 (1540) (Eng.).

18. SPENCE, *supra* note 5, at 42–43. It seems unlikely that Earl's lawyers failed to notice the reversion; it probably simply never occurred to them that it was vested in the King. During this period, it was common for ancient reversions to attach to land, often unbeknownst to the present grantee. "[A] grantee might take land in good faith believing it to be freely alienable as the equivalent of a fee simple only to discover subsequently that the land had been entailed several generations back, that the lineal descendants of a prior grantee had died out, and that now a valid claim might be asserted by the heirs of the reversioner or remainderman under the original grant." George L. Haskins, *Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule Against Perpetuities*, 126 U. PA. L. REV. 19, 28 (1977).

19. In overlooking this issue, the Earl's lawyers were undoubtedly at fault, although decades later, Anne's lawyer, Sir Matthew Hale, blamed George, who, he claimed, "as is the use of persons of plentiful estates," had examined the documentary record only as far back as his father's will, which did not disclose the reversion. SPENCE, *supra* note 5, at 43.

name and house."[20] However, from the George's perspective, the devise might have made sense. As he grew older, he accrued more and more debt as a result of his losses at privateering and his efforts to gain favor at court, and had sold or leased large swaths of his estates to pay it off. He approached death still owing large sums, and may have felt that the only way to pay the amounts owed and to maintain what was left of the estate was to consolidate it with that of Francis, who could then use the combined income from the two properties to remove the debt.[21] Indeed, paying off these debts burdened Francis and his son Henry for the rest of their lives; the estate was cleared only sixty years after George's death.[22] The truth is hard to locate. George faced the dilemma of many English aristocrats of the time: he wanted to pass along his estate intact, and hopefully even augmented and improved, to the next generation. On the other hand, he also wanted—and needed—to use it for marriage portions and for cash to pay off debts.[23]

Ultimately, her father's will left Anne £15,000 as a marriage portion, to be doled out in installments: £3,000 within two years of his death, £3,000 a year later, £4,000 a year after that, and the final £5,000 after her twenty-first birthday.[24] The payments, however, were conditioned on her not contesting the devise to Francis, which she, having chosen her mother as guardian, promptly did.[25] Despite the problems with Anne's inheritance, she had many suitors; on February 25, 1609, she married Richard Sackville, grandson of the Earl of Dorset.[26]

Dorset, like Anne's father, had debts and needed money. As a courtier, his success depended on impressing court and king with lavish dress, entertaining, and games, the latter often involving gambling.[27]

20. ANNE CLIFFORD, LIFE OF HER FATHER 11.

21. HOLMES, *supra* note 5, at 5. There was an ethical dimension to this: in borrowing money for his ventures, George had implicated his sureties, fellow nobles whose estates would also be at risk if he failed to make good on his loans. SPENCE, *supra* note 5, at 6.

22. SPENCE, *supra* note 5, at 6.

23. LAWRENCE STONE & AND JEANNE C. FAWTIER STONE, AN OPEN ELITE? ENGLAND 1540–1880, at 69–70 (1984).

24. SPENCE, *supra* note 5, at 19.

25. *Id.*

26. CLIFFORD DIARIES, *supra* note 11, at 15. The originals of Clifford's description of the wedding have been lost, but were transcribed in 1727 and are now in the British Library. She writes: "The 25th day of February in 1609, I was married to my first Lord, Richard Sackville, then but Lord Buckhurst, in my mother's house in her own chamber in Augustine Fryers in London, which was part of a chappell there formerly, she being then present at my marriage." *Id.*

27. Anne records at one point that "there was . . . Cock Fighting at the Court where my Lord's Cocks did fight against the King's, altho' this business was somewhat Chargeable [expensive] to my Lord, yet it brought him into great grace and favor with the King as he useth him very kindly and speaketh very often to him than to other man." SPENCE, *supra* note 5, at 19. The need to spend lavishly in the hopes of obtaining royal favor—in the form of monopolies or licenses over import-

Earning the King's favor was the route to riches: the King could grant his favorites lands and titles, lucrative posts, and licenses for monopolies on a wide variety of goods.[28] But, as Anne's father had discovered before him, Dorset was learning that striving for favorite status was a costly gamble. Ready cash appealed to him much more than his wife's cold and distant—and heavily mortgaged—Northern estates. The dispute over the lands ultimately fractured Anne's marriage. Dorset had no interest in the estates other than as a means to receive a large sum of cash from Earl Francis in settlement of the dispute; indeed, Francis, with the King's backing, offered just this in return for Anne's consent to desist in her efforts. She refused, and her rejection of the offer severely strained her relationship with her husband.

On November 3, 1606, Margaret Russell, Anne Clifford's mother, initiated a claim on Anne's behalf for the estates and the titles that went with them. For the next eleven years, the two women together fought legal battles for the land; when Margaret Russell died in 1616, Anne continued to maintain her right to the inheritance, refusing to sign away her reversion in return for cash settlements or even to recognize decisions as binding, despite intense pressure from both her husbands, many powerful men, and even King James I himself. Clifford's case was first heard in the Court of Common Pleas, where the four judges decided against her,[29] but Anne, having declined to be a party to the suit, refused to accept the judgment or sign the award. Dorset then approached King James, who formally asked the parties if they would agree to abide by whatever judgment he reached. Lord Cumberland, Francis, and Dorset all consented, but Clifford refused. In December of 1619, Clifford had an audience with the King in which his Majesty formally requested that she and the other parties to the legal dispute over Clifford's lands submit to his judgment in the matter. Clifford refused, declaring that "I would never agree to it without

ed goods—was a source of anxiety, stress, and debt for many courtiers. The dependent position of Renaissance couriers in this regard is most aptly and fully expressed in Baldesar Castiglione's *The Book of the Courtier*, translated into English by Sir Thomas Hoby in 1576. Castiglione's courtier "perceive[s] what his Prince likes and . . . bend[s] himself to this." BALDESAR CASTIGLIONE, THE BOOK OF THE COURTIER 110–11 (Charles S. Singleton trans., Anchor Books 1959) (1576).

28. The ruler's power to hand out monopolies on various luxury goods created an important source of income for those courtiers lucky enough to receive one. For a discussion of a particular example, see M.B. DONALD, ELIZABETHAN MONOPOLIES: THE HISTORY OF THE COMPANY OF MINERAL AND BATTERY WORKS FROM 1565 TO 1604 (1961). Indeed, it may have been distress at Queen Elizabeth's refusal to renew the Earl of Essex's monopoly on sweet wines and his resulting financial desperation that contributed to his motivation for his failed 1603 rebellion. SUSAN FRYE, ELIZABETH I: THE COMPETITION FOR REPRESENTATION 135–39 (1993).

29. The Earl of Cumberlands Case, (1220–1865) 145 Eng. Rep. 281.

Westmorland," at which "the King grew in a great Chaffe."[30] Still in the King's presence, she allegedly tore up a letter from the King requiring her to consent to his decision.[31] At this, those present, according to Anne, feared that the King would "do me some public disgrace," and Clifford's husband ordered the door unlocked and "went out with me and persuaded me much to yield to the King."[32]

The King's decision was, in Anne's words, "as ill for me as possible."[33] His award ignored the illegality of the barred entail, and decreed that Lady Anne and Dorset should convey the lands to Cumberland with various remainders in return for £20,000, to be paid to Dorset in installments.[34] The King further stipulated that if Anne, after her husband's death,[35] should disrupt her uncle's quiet enjoyment of the estates with more lawsuits, she should lose the £15,000 left her in her father's will and have to pay back to her uncle the £20,000.[36]

Anne's mother's death, for a time, changed things. Up until this point, one of Dorset's money-making schemes had been the offer to

30. CLIFFORD DIARIES, *supra* note 11, at 47.

31. WILLIAMSON, *supra* note 5, at 108.

32. Clifford was not the first aristocratic woman to harangue the King in his own court: in 1606, despite King James I's efforts to persuade her to settle out of court, Lady Elizabeth Russell brought suit in Star Chamber to recover certain lands to which she laid claim. According to the account in Hawarde's Reports of Star Chamber Cases, the Judges questioned her right to the lands, and moved to adjourn for lunch, "but the Ladye, interruptinge them, desyred to be hearde, & after many denyalls by the Courte, vyolentlye [and] with great audacitie beganne large discourse, [and] woulde not by any meanes be stayed nor interrupted, but wente one for the space of halfe an howre or more." TIM STRETTON, WOMEN WAGING LAW IN ELIZABETHAN ENGLAND 54–55 (1998).

33. WILLIAMSON, *supra* note 5, at 119.

34. *Id.* at 119–20.

35. As long as her husband lived, she was a *femme covert*, a married woman, barred from bringing actions in her own name in most courts. T.E., *The Lawes Resolutions of Womens Rights: or, The Lawes Provision for Woemen* 205 (1632), *in* 1 THE EARLY MODERN ENGLISHWOMAN: A FACSIMILE LIBRARY OF ESSENTIAL WORKS: SERIES III (Betty S. Travitsky & Anne L. Prescott eds., 2005); *see also* 1 THE EARLY MODERN ENGLISHWOMAN: A FACSIMILE LIBRARY OF ESSENTIAL WORKS: SERIES III, *supra*, at xxiv (explaining that "having lost her independent agency, the *femme covert* could no longer . . . sue or be sued in a common-law court").

36. HOLMES, *supra* note 5, at 87. Anne's intransigence, however, did strain her relationship with her husband: she received a letter from him a month later "by which I perceived how my Lord was clean out with me, [and] how much my Enemies have wrought against me." CLIFFORD DIARIES, *supra* note 11, at 48. As another expression of his displeasure at this time—and perhaps to free up lands to use as security for loans—Dorset next cancelled Anne's jointure: "my jointure he had made upon me last June when I went into the North, [and] by these proceedings I may see how much my Lord is offended with me, and that my enemies have the upper hand of me." *Id.* at 56. Dorset's anger and retaliation against her caused her great distress: On Whit Sunday of June 1617, she reports, "we all went to church, but my eyes were so blubbered with weeping that I could scarce look up." *Id.* at 57. On another occasion, she recalls "weeping the most part of the day seeing my enemies had the upper hand of me;" again, "[I was] melancholy [and] sad to see things go so ill with me, [and] fearing my Lord would give all his land away from the Child [their daughter, Countess Margaret]." *Id.* at 59.

arrange, for a price, the ultimate transfer of the lands to the Cliffords; now that Anne's mother's death had automatically returned the lands to the estate, Francis could just move in as the rightful heir.[37] Dorset quickly changed his position, now insisting on his wife's rights in the property and informing the world that he would be taking possession of it her name.[38] For Lady Anne, this "was a thing I little expected, but gave me much contentment."[39] Taking physical possession, however, was of limited help to Dorset, because his real goal was to dispose of the lands for money, and everyone knew they were not his to sell. He thus set about pressuring Anne to deed them to him unconditionally, which she refused to do; finally she assigned a deed conveying them to him if she should die without issue.[40] This preserved her daughter's rights, while giving Dorset some expectation in the estates, which he might be able to use to raise money for himself. This echoes an important aspect of full property rights: the ability to pass property to one's heirs. For Clifford, this right linked her to the generational chain that was so important to her identity: as heir of her father and ancestor to her children, she had a place as an acting subject in history and this identity arose from her rights in land.

Over the next few years, Anne bore a son who died at five months, and another daughter, Isabella; in 1624 Dorset died.[41] In 1630, she married again, this time to Phillip Herbert, Earl of Pembroke, a widower and favorite of the King.[42] The marriage was not happy: Pembroke was famous for his quarrelsome nature and numerous affairs, although the two shared an interest in art and architecture which they put to use in redecorating and building Pembroke's castles.[43] In 1650, Pembroke died.[44] Francis, Earl of Cumberland, died in 1641, leaving the estates in the hands of his son, now the Fifth Earl of Cumberland.[45] If he had been

37. HOLMES, *supra* note 5, at 56.

38. *Id.*

39. CLIFFORD DIARIES, *supra* note 11, at 37.

40. In June 1616, Clifford writes: "I passed (by fine before my Lord Hubbard) the Inheritance of Westmorland to my Lord if I had no heirs of my own Body." *Id.* at 38.

41. HOLMES, *supra* note 5, at 124 (supposedly of a "surfeit of potatoes").

42. CLIFFORD DIARIES, *supra* note 11, at 90, 96.

43. HOLMES, *supra* note 5, at 126–27.

44. Clifford writes, "the three and twentieth of Januarie following dyed my second Lord, Phillipp Herbert, Earl of Pembroke and Montgomerie in his lodgeings at the Cockpitt nere Whitehall in London." CLIFFORD DIARIES, *supra* note 11, at 105.

45. After the fact, Clifford writes: "The 21st daie of January 1641 dyed my uncle Francis Earl of Cumberland when he was neare 80 & 2 yeares, in Skipton Castel in Craven. His onlie child Henry, Lord Clifford who succeeded him in ye earldom lived but 2 yeares & some twenty daies after him." *Id.* at 94. She adds with satisfaction, a quote from the Book of Job: "Is there not an appointed time to man on earth? Are not his days also like the days of a hireling?" *Id.*

as long lived as his father, or had had male heirs, Anne would have lost all hope of regaining possession of her inheritance. As it happened, however, he died in 1643 with no male heir, and, after 38 years, the estates were finally hers.[46] This victory may have felt hollow: the Civil War was raging and the long journey north was impossible at that time; perhaps to celebrate while she bided her time, she commissioned the great Clifford family triptych discussed below.[47] Finally, in July 1649, she left London for the north to take possession of her estates.[48] From then until her death in 1676, she engaged in a massive program of building and rebuilding her castles and lands, establishing almshouses and hospitals, and managing her holdings.[49] When she died, she left Westmorland to her elder daughter, Margaret, now the Dowager Lady Thanet, and Skipton to the daughter of her younger daughter, Isabella, Isabella having died in 1661.

II. THE LEGAL CONTEXT

Anne's battles over her land perfectly encapsulate a historical trend: Eileen Spring has shown that female heiresses in England steadily lost ground in inheritance between the thirteenth and the eighteenth century.[50] As far back as the thirteenth century, Bracton wrote "in the matter of succession the male sex must always be preferred to the female,"[51] but Clifford also found authority for the common law maxim that a daughter was to be preferred over a collateral male heir. In The *Lawes Resolution of Women's Rights,* a quirky legal manual for women published in 1632 by an author known only as "T.E.," Clifford read that:

> A female may be preferred in succession before a male by the time wherein she cometh: as a daughter or daughter's daughter in the right line is preferred before a brother in the transversall line, and

46. *Id.* at 95. The Earldom, which could only pass to male heirs, became extinct at his death. *Id.*

47. HOLMES, *supra* note 5, at 133.

48. CLIFFORD DIARIES, *supra* note 11, at 100.

49. *Id.* at 101–02. This was still during the Restoration, and her friends warned her that her massive reconstruction projects might well arouse the wrath of Lord Protector Cromwell. She replied: "Let him [Cromwell] destroy my Castles if he will, as often as he levels them I will rebuild them, so long as he leaves me a shilling in my pocket." *Id.* at 101.

50. SPRING, *supra* note 13, at 27. Other major studies of women and inheritance in this period include: Amy Louise Erickson, Women and Property in Early Modern England (examining the day to day experience of women in relation to inheritance in this period) (2004); SUSAN STAVES, MARRIED WOMEN'S SEPARATE PROPERTY IN ENGLAND, 1660–1833 (1990) (emphasizing women's access and lack thereof to separate real property).

51. 2 BRACTON ON THE LAWS AND CUSTOMS OF ENGLAND 190 (Samuel E. Thorne trans., 1968).

> that as well in the common generall taile, as in fee simple . . . also a woman shall bee preferred *propter jus sanguinis* . . . land discended must alwaies goe to heires of the blood of the first purchaser, and the case may bee such that a female shall cary away inheritance from a male.[52]

Thus, both views appeared in the legal sources.

As Eileen Spring has shown, however, the common law practice of preferring a lineal female to a transversal male was giving way over the sixteenth and seventeenth centuries.[53] By means of uses, landowners cut the rate of female inheritance in this period to less than a third of what it would have been if the common law rules had been followed. Clifford's position perfectly illustrates Eileen Spring's thesis that seventeenth century aristocrats used alternatives to the common law to divert inheritances away from potential female heiresses.[54] Clifford's writings show us this shift had implications beyond the mere depletion of landed assets in female hands: the loss of fully vested property rights meant that women were less and less able to assert themselves—and be seen—as rights-bearing persons in civil society, able to act as subjects in the public sphere regardless of their gender.

In this light, it is important that Clifford's commitment to her lands stemmed from her aristocratic identity, that is, from her relationship to her ancestors, her lands and her titles, all of which factored at least as much as her gender in her identity. The fundamental organizing principle of the early modern aristocracy was "continuity of house," the desire to pass on undamaged to future generations the five components of the estate: the seat (the residence itself), the land, family heirlooms (records, deeds, portraits, plate and jewels),[55] the family name and the hereditary title.[56] The passage of these elements of the estate was in effect the ingrained prime directive of aristocrats of this time, and Clifford partook of it no less than a male heir. Whatever arguments she made about gender were subsidiary to this agenda made as a means to effectuate it. Having this inner "prime directive"—having

52. T.E., *supra* note 35, at 9–10. Inheritance law in England differed according to one's social status: among the aristocracy, primogeniture had come to predominate by this point, although there was, as Clifford insisted, authority for preferring direct female inheritance over lateral male inheritance. BARBARA A. HANAWALT, THE WEALTH OF WIVES 65 (2007). Under borough law, on the other hand, which controlled inheritance by citizens of London, all children, male and female, divided the decedent's estate equally. *Id.* at 68.

53. *See generally* SPRING, *supra* note 13.

54. *Id.*

55. For a discussion of the role and legal status of heirlooms in this period, see Carla Spivack, *The Woman Will Be Out: A New Look at the Law in Hamlet*, 20 YALE J.L. & THE HUMAN. 31, 43 (2008).

56. STONE & STONE, *supra* note 23, at 72.

fully vested rights in property so she could pass it on to her heirs—allowed her to see herself in ways that were not fully determined by her gender. It allowed her to see herself—and be seen by others—as a rights-bearing subject in society. The next section shows how, from the time she was very young, Clifford used autobiographical writing to construct this fully vested self.[57]

III. CLIFFORD'S WRITINGS

Clifford composed three types of autobiographical text over the course of her life: diaries, of which the years 1616, 1617 and 1619, and 1676 survive;[58] annual summaries, of which 1603 and 1650 through 1675 remain; and biographies of her parents and an autobiography, of which 1652 and 1653 survive. The autobiography, called *Life of Me*, chronicles her life from conception to 1650, after which her annual summaries take over. In addition, Clifford also compiled so-called "Great Books" with the aid of an antiquarian, which recorded her family history and genealogy.[59]

57. SCHROEDER, *supra* note 3.

58. THE DIARY OF ANNE CLIFFORD 1616–1619, at 1,14 (Katherine O. Acheson ed., 1995) [hereinafter CLIFFORD, DIARY 1616–1619].

59. Salzman, *supra* note 1, at 282. These volumes exist only in the original at the Cumbria Record Office. Scholars have read Clifford's self-expression as resistance to patriarchy, or as an "unsettling of gender" because she insists on her status as heiress to her ancestral estates and title, a position generally claimed by and associated with men. Such interpretations, though appealing, are both anachronistic and theoretically flawed. First, they read backwards from today's notions of gender and class, rather than working forward from early modern concepts. Second, such readings assume that an autobiographer can step outside of his or her culture and fashion an identity at odds with it. Such readings partake of the fallacies of "outsider scholarship" discussed by Anne Coughlin in regard to the writings of Patricia Williams, Jerome Culp and Richard Delgado: they assume that an author can escape the premises of the discourse in which he or she writes. *See* Anne. M. Coughlin, *Regulating the Self: Autobiographical Performances In Outsider Scholarship*, 81 VA. L. REV. 1229 (1995). To the contrary, as Coughlin and others have shown, the culture in which the author lives and the discourse in which she writes shape the identity the text can present. Coughlin has argued, with respect to "outsider scholars," that "autobiography does not provide a way for the self to step outside of liberal culture . . . Rather, [it] is embedded in precisely the same cultural practices . . . that outsiders suggest their autobiographical acts elude." *Id.* at 1251. This is not the end of the story, however. In challenging these feminist readings of Clifford, I do make a point about the limits of resistance and the inescapability of the shaping effects of discourse on identity. Employing the same fallacies that Coughlin critiques, feminist scholars, in both law and the humanities, have seen Clifford's writings as allowing her to step outside of her culture and shape a feminist sensibility out of step with its time. Such readings ignore the role of culture and discourse—including legal discourse—in shaping identity. But I counter the implicit pessimism of such a reading by also showing ways in which liberation is possible even within an established discursive framework, a possibility Clifford's writings express. Clifford's writings reveal the possibility of liberation in her insistence on being recognized as a legal subject through the inheritance of her estate and the reciprocal rights and duties it conferred.

Clifford's writings blur the line between public and private. Although Clifford wrote diaries, a genre we tend to think of as private, and family chronicles, a form we might think of as being limited to family readers, it seems clear that these texts had a wider intended audience.[60] As this article shows, that audience has continued to exist into the twenty-first century.[61] Clifford's Great Books are clearly family chronicles, created in a presentation format, to preserve for future generations Clifford's sense of herself as heiress.[62]

Clifford's various writings reveal the strength of her sense of identity in many ways. She seems to have intended her diary as a record of her struggle over her inheritance ultimately to be incorporated into the chronicles of her life.[63] For example, although the text of the diary itself is a running commentary on private family matters, the wide margins on both sides of the original text contain remarks that she added later that contextualize the personal story in the diary by adding events in the wider world that were taking place at the same time.[64] By so writing, she embedded her personal narrative in a wider historical record, as she embedded her life in the context of her ancestry and her inheritance. Both narratives justify her role and place in the world—and in her estates—as an aristocratic heiress with all the rights and duties attendant thereon. As I show next, Clifford's writings reveal the process of achieving this place in the public sphere as they record her battles for her estates in diary form, then in historical narrative, and finally, autobiography.

A. Clifford's Diary

Clifford's diary begins with a single entry for the year 1603, the year of Elizabeth I's death. The early part of the year as the population awaited the Queen's imminent passing—Elizabeth died in March—was a time of great anxiety for the whole country. London especially was abuzz with rumors and fears about possible civil strife at the Queen's death: on March 22, two days after Elizabeth died, Clifford's aunt

60. Salzman, *supra* note 1, at 281–82 (observing that Clifford "had a strong sense of audience, and that Clifford, while not searching for a wholly public audience, was indeed writing for set of readers").

61. *Id.* at 282. *See also* MARGARET EZELL, THE PATRIARCH'S WIFE: LITERARY EVIDENCE AND THE HISTORY OF THE FAMILY (1987) (discussing the importance of manuscript circulation among early modern women writers).

62. Salzman, *supra* note 1, at 282.

63. LEWALSKI, *supra* note 1, at 141.

64. *Id.*

warned her and her mother "to remove to Austin Friars her House [i.e., out of the city] for fear of some Commotions, then God in His Mercy did deliver us from it."[65] Shortly thereafter, however, the Privy Council proclaimed James VI of Scotland King James I of England, "with great joy and triumph . . . This peaceable coming in of the King was unexpected of all parts of the people."[66]

The succession was a time of personal change and disruption for Clifford as well. She was thirteen in 1603, aware of her ancestry and status, and aware of threats to these parts of her identity. The Queen's death, for example, robbed her of a position at court; she tells us that "if Queen Elizabeth had lived, my Aunt Warwick [one of the Queen's Ladies in Waiting] intended to prefer me to be of the Privy Chamber, for at that time there was as much hope and expectation of me as of any other young Ladie whatsoever." She also chafed at being deemed too young to participate in the state ceremonies surrounding the royal funeral. When the Queen's body was carried in procession to Westminster for burial, Clifford's mother and aunt were among the mourners accompanying it, but she "was not allowed to be one because I was not high enough, which did much trouble me then, but yet I stood in the Church at Westminster to see the Solemnities performed."[67] She feels the call of her aristocratic lineage to join the processions and ceremonies, but that call is thwarted by her age and size. She was not "high" enough: not tall enough to be seen and recognized in procession of her peers, and not yet "high" enough in rank to be seen and recognized figuratively as well. Her inheritance and the public recognition it would bring would give her this added height.

A few paragraphs later, Clifford assuages her anxiety about her identity—for the time being, at least. She recounts a quarrel between her father and Lord Burleigh, Elizabeth I's Secretary of State, as to who should carry the Sword of State in King James' progress from Scotland to London, reporting that "it was adjudged on my Father's side because it was an office by inheritance," adding "and so [it] lineally descended to me."[68] Here she resolves the contradiction between the adult de-

65. CLIFFORD DIARIES, *supra* note 11, at 21.

66. *Id.*

67. *Id.* at 22. The discomfort and disjointedness of all the changes of the day are vividly embodied in the sudden lack of cleanliness at court: when Anne and her mother travelled to Theobalds, a lodge on the border of Middlesex, to see the new King, "we all saw a great change between the fashion of the Court as it is now and that in the Queen's time, for we were all lousy for sitting in the chamber of Sir Thomas Erskine." *Id.*

68. *Id.*

mands of her ancestral role and her youth by re-identifying herself as the lineal descendant who would in future inherit the honors and titles of her father, regardless of her gender. This new formulation serves to paper over and explain the previously disturbing contradictions: she is at the moment too young to fulfill her adult role, but by the same token, she is the lineal descendant who will grow by right into that role. This is the first of many episodes recorded in the Diary when Clifford's sense of rights-bearing personhood is threatened and she reasserts it by reference to her lineage and land. Here, she does so by claiming the right to a position that would publicly affirm her place in the aristocratic order—again, regardless of her gender.

We hear Clifford's assertion of her personhood again in an entry about her temporarily taking possession, after her mother's death, of her mother's jointure lands. She journeys north to take charge and plunges into battle through her tenants against the competing claims of her uncle's tenants:

> Upon the 17th [of July 1616] I rid into Whingfield Park, [and] there I willed the tenants that were carrying of hay . . . that they should keep the money in their own Hands till it were known who had a right to it.
>
> Upon the 25th I signed a Warrant for the killing of a Stag . . . being the 1st I ever had signed of that kind.
>
> Upon the 29th I sent my Folks into the Park to make Hay where they being interrupted by my Unkle Cumberland's people, 2 of my Unkle's people were hurt . . . whereupon complaint was made to the Judges . . . [and] a Warrant sent forth for the apprehending of all my Folks that were in the Field at that time, to put in surety to appear at the . . . Assizes.[69]

Here, Clifford's servants literally come to blows with her uncle's servants over her rights in the lands in response to Clifford's self assertion as landlord. She "wills" the tenants to keep the money they owed for the communal hay until her and her uncle's relative rights over it had been determined; she signs a warrant for the killing of a stag—the stag being the property of the lord. Cliffords' identity as heiress and estate head is dominant here: she protects her tenants' rights, allocates the resources of the estate, and has her underlings take sides in both physical and legal battles on her behalf. This is the same Clifford who would carry the sword of state in coronation processions, and stand in mourning at royal funerals, occupying her place in the civic order. The-

69. *Id.* at 39.

se were all parts of the role of the heir to the estate, regardless of gender.

Throughout her diary, Clifford locates herself across single moments in time and across historical time as well. This placing of herself in the historical moment is related to her struggle for her lands and the identity they conferred on her. For example, she tells us that news of Queen Elizabeth's death "was delivered to my Mother [and] me in the same chamber where afterwards I was married."[70] The footnote she added later embeds her more deeply in both time and place: "I was at Q. Elizabeth's death 13 years [and] 2 months old, [and] Mr. R. Sackville was 14, he being then at Dorset House with his Grandfather [and] that great family. At the death of this worthy Queen my Mother [and] I lay at Austin Friars in the same chamber."[71] A few days later she tells us that "my Aunt of Warwick, my Mother [and] I . . . lay at Dr. Challoners . . . which house my G. Father of Bedford used to lie much at."[72] At other times, she mentions a historical event in the main narrative and uses a footnote to locate herself in relation to it: at one point she tells us she saw the Spanish Ambassador who "was then new come to England about the Peace," while her marginal note narrates the course of her travels at that time.[73] Later, she writes that she spent New Year's of 1616 privately in her chamber, but her marginal note, added later, reconnects her isolation to the public sphere: "the 1st day Sir Geo. Villiers was made Master of the Horse [and] my Lord of Worcester Privy Seal."[74] Similarly, she writes of November 1, 1615, "I rose by times in the morning and went up to the Pagan Tower [at Appleby?] to my prayers [and] saw the sun rise. Upon the 4th I sat in the Drawing Chamber all the day at my work."[75] The marginal note she added later places this private memory in its public context:

> Upon the 4th Prince Charles was created Prince of Wales in the Great Hall at Whitehall where he had been created Duke of York about 13 years before. There was banners and running at the ring, but it was not half so great a Pomp as was at the creation of Prince Henry. Not long after this Lord Chancellor was created Viscount Brakely and my Lord Knollys, Viscount Wallingford. My Lord Cork was displaced, and Montague made Lord Chief Justice in his stead.[76]

70. *Id.* at 21.
71. *Id.*
72. *Id.* at 24.
73. *Id.* at 26.
74. *Id.* at 28.
75. *Id.* at 41.
76. *Id*.

By putting herself in a public and historical context, Clifford asserts her civic personhood in public and private, past, present and future. It is her sense of her property rights that gives her a sense of location in history, in the public sphere as well as the private.

As the dispute between Anne and her husband intensified, Clifford continued to assert her sense of self. An entry from February 1616—a time when they were at odds about her estate—reflects this conflict. It reads:

> Upon the 26th going from Litchfield to Croxall [and] about a mile from Croxall, my Lord [and] I parted, he returning to Litchfield [and] I going into Derby. I came to my Lodgings with a Heavy Heart considering how many things stood between my Lord [and] I. I had in my Company 10 persons and 13 horses.[77]

The last line, oddly, it seems, breaks off an emotional account of the distressing parting with her husband to provide a count of household retainers and horses. What this break reveals, however, is the reassertion of her status as rights-bearing subject in the face of a threat. It reconnects her to her retinue and, through their presence, to her independent identity.

A similar instance occurs in April 1615, when Dorset, in London, sent an order to Anne, at her mother's Manchester estate, that all his servants and horses were to return to him immediately, without her. This was probably an attempt on his part to effect a separation: by removing his servants, he effected a clean division of households.[78] Anne's reaction was to draft a document as a public record to assert that she was not sending his servants back to him of her own will, an act which might have led to charges that she had deserted the marriage and taken refuge with her mother.[79] The "paper" reads as follows:

> 1st April 1616. A memoranda that I, Anne, Countess of Dorset, sole daughter and heir to George, late Earl of Cumberland, doth take witness of all these gentlemen present, that I both desire and offer myself to go up to London with my men and horses, but they, having received a contrary commandment from my Lord, my husband, will by no means consent nor permit me to go with them. Now my desire is that all the world may know that this stay of mine proceeds only from my husband's command, contrary to my consent or agreement, whereof I have gotten these names underwritten to testify the same.[80]

77. *Id.* at 30.
78. CLIFFORD, DIARY 1616–1619, *supra* note 58, at 145 n.2.
79. *Id.*
80. CLIFFORD, DIARIES, *supra* note 11, at 16–17 n.26.

Forced to obey her husband, Anne nevertheless reasserts her autonomy by identifying herself as Lady Dorset—i.e., a wife—but also as her father's heir—indeed, "sole heir," a phrase that reasserts her claim to the inheritance despite her gender, as set out by the common law. The document does not merely protect her in relation to her husband, it asserts an identity separate from his and linked to her father's bloodline, an identity that existed in the public and civic world even while her identity as Dorset's wife resonated only in private, in coverture. The voice that describes her actions as "contrary to my consent or agreement" is the voice of a rights-bearing subject who is being denied recognition.

Clifford's repeated linking of bodies to places also played a significant role in steadying her sense of her identity, and offers further evidence of how her connection to her property created her sense of self. When her mother died, Clifford's grief was augmented by the stipulation in her mother's will that her body should not be buried at Skipton, the family seat, which Anne took "as a sign that I should be dispossessed of the Inheritance."[81] Burial in the heart of the family's holdings was an important part of the continuity of aristocratic identity in early modern England, and Clifford's concern with it underlines the connection she felt between body and place. The identification between body and land involved the living as well as the dead: when Clifford's former tutor, Samuel Daniel, who was also a playwright, wrote a masque to celebrate Prince Henry's creation as Prince of Wales in which the court ladies were dressed to represent the river nymphs of England, he cast Anne Clifford as the nymph of Aire, the river flowing past her birthplace at Skipton Castle.[82] This identification with her lands expresses her claim to possessing that which will allow her to be recognized as a rights-bearing subject: her lands are the material expression of that status.

B. The Great Books

Clifford composed the "Great Books," as she called them, her family chronicles, after she took possession of her lands. Having come into possession of her estates, she continues to narrate herself into history, building her civic identity as she rebuilds her castles. The first two volumes compile her genealogy as a way of placing her into her fami-

81. *Id.* at 36.

82. SAMUEL DANIEL, SELECTED POETRY AND A DEFENSE OF RHYME (Geoffrey G. Hiller & Peter L. Groves eds., 1998).

ly's history, while the third volume turns to her own life. These works use Clifford's family tree as a way of buttressing her claim to her property: the first two volumes build the tree limb by limb, and the third lodges her in its branches. Interestingly, the third volume, which summarizes the years 1650 to 1675 with endless accounts of visits by children, grandchildren, and other relatives, with detailed explanations of how each one is related to Clifford, is written in the third person. It seems likely, as Salzman argues, that the records were intended as a "public statement" reiterating Clifford's rights and claims of ownership.[83] In fact, the Great Books did circulate within controlled boundaries as a statement of Clifford's lineage and rights to her inheritance: her lawyer, Matthew Hale, kept a copy at Lincoln's Inn, and her grandson, Thomas, Earl of Thanet, used them two generations later in asserting his claim to the title of Lord Clifford.[84]

In the first book, called "The Claim and Title of Lady Anne Clifford to the Baronies of Westmorland and Vescy with pedigrees, documents and precedents relative thereto,"[85] Clifford assembles from the documents her mother had collected her own legal record to confirm her claim to her estate.[86] It is here for the first time that she explicitly takes on the issue of her gender and the role it may have played in depriving her of her inheritance. The date on the title page places the manuscript in the year 1650, the year after she finally took possession. The title page contains the following:

> The Title of the Lady Anne Clifford sole daughter and heire generall to the late right hon[ora]ble George Earl of Cumberland Lo[rd] Clifford Westmerland & Vescy to ye stile and title of the said other baronies . . . The said lady tendreth and [unreadable] groundeth the same upon the ancient [laws and customs] of this Realme of England . . . with the customs and usage of other Realmes and Dominions adjoining thereunto wheare Women are capable of Foedalls [i.e., feudal rights and obligations] . . ."[87]

The table of contents designates folio 6:10 to folio 10:9 as providing "allegations of the usuall Customs of this and other Countries . . . with other reasons for proofe that such titles and dignities have and ought to descend to the Females being next heires and to their issue."[88]

83. Salzman, *supra* note 1, at 284.

84. *Id.* at 285.

85. 1 ANNE CLIFFORD, GREAT BOOKS, CLAIM AND TITLE (also part of the Hothfield Manuscripts, on file with the Cumbria Record Office, Kendal Archive Center) [hereinafter CLIFFORD, GREAT BOOKS].

86. CLIFFORD DIARIES, *supra* note 11, at xii.

87. CLIFFORD, GREAT BOOKS, *supra* note 85.

88. *Id.* Clifford claimed both the land and titles her father had held. These were potentially separate claims: land and titles could descend apart from each other, and the descent of titles, like

Folio 11 to Folio 19, we learn a few paragraphs later, will give us "Sundrie examples and presidents [precedents] of such as have been Barons of this Realme in the right of their wives, mothers, Grandmothers, and Great-Grandmothers w[hi]ch have been lineall & next heires to Barons summoned by writs to the Parliament."[89]

For the substance of her argument, Clifford gathers law, history and logic to cement her case. In doing so, she lays claim to full participation in civil society, for the first time, as a woman. One of the arguments against women inheriting titles was that they were not equipped to advise the King, and therefore would be useless when summoned to Parliament for this purpose. Having shown that women did inherit titles, however, Clifford declares it "absurd that the dignities should be transferred to the heire female for the original Occasion [?] was for advise and counsell in the Parliament a place denied to that sex it is enforced."[90] In other words, it makes no sense to say that women cannot give counsel—and indeed enter Parliament—because we now know that they did inherit the offices that required them to do so. Moreover, "though man in his sex be more excellent than Woman, yet in qualitie we see often Women excel Men therefore no reason to bar them of their rights especially when no detriment thereon ensueth to the Commonwealth as in this case it doth not."[91]

Significantly, it is now that she is in possession of her lands that Clifford makes the legal case that her gender should not be an impediment to her inheritance—that is, to her full civic personhood. Her dia-

that of land, depended on the wording of the letters patent that had granted them in the first place. The wording determined whether the titles passed in tail male or in tail general, the latter of which would allow them to pass to a daughter. While the Earldom of Cumberland had been created in such a way that it descended only through the male line, the Baronies of Clifford, Westmorland and Vescy had not: they had been created by writ and thus constituted fees simple, which could pass to female heirs. Shortly after George died, the Countess Margaret hired a researcher to compile evidence as to Anne's right to inherit the Baronies—i.e., the titles. Clifford's claim to these titles also conflicted with her gender. Objections to female inheritance of titles arose from the notion that it was absurd to expect women to fulfill the baronial role advising the King in Parliament, a body from which women were excluded, and that women were unable to perform the military duties required of barons. As for the requirement of knight service, Anne argued, women holding titles could perform military duties through brothers, husbands and sons, as was, in fact, allowed by law. And with respect to giving counsel, while she conceded that "man in his sex be more excellent than woman, yet in quality wee see often women excell men." *Id.*
What is important to understand is that her claims to her land and the titles were inextricably linked for Clifford and for her culture: having full possession of her ancestral lands embedded her in the web of duties and rights that in turn allowed her to be recognized as a legal subject. Fully-vested rights work the same way for women—and everyone—in civil society today.

89. CLIFFORD, GREAT BOOKS, *supra* note 85.

90. *Id.* at 9.

91. *Id.*

ries, though they are full of her experiences and disappointments as she litigated her cause, and replete with expressions of her distress at losing case after case, contain no arguments about the role of her gender in the affair. Now, however, she addresses directly and robustly the idea of her gender as an impediment to her status. She is able to do this now because the possession of her lands and the recognition of her civic personhood that came with it allowed her to assert her place as a woman in the public realm. This is an important insight because it suggests that what enabled Clifford to address the gender issues was the fully vested ownership of her property, and that the process was not the other way around—that is, it was not assertions of gender-based rights that gave her the psychic wherewithal to fight for her estates, but rather, the fight for her estates that positioned her to discuss gender.

The Great Books also contain biographies of Clifford's parents in which she refers to herself in the third person: narrating her birth, she writes:

> Their third and youngest child, who was their only daughter, the Lady Anne Clifford, was born in Skypton Castle in Craven, the 30th day of January, being Fryday, in 1590, as the year begins on New Year's Day. And she was christened in the church there, the 22nd of the month following; which lady continued to be their only child to her parents eve after the death of her brother, Robert, Lord Clifford, at whose death she was a year and four months old.92

In contrast to the first person "I" of the Diaries, which expresses a personal, private construction of selfhood in progress, the third person of the Great Books seems to reflect a fully-formed historical self which can now be expressed in relation to the lives of her parents—that is, as the historical continuation of their line. The historical self is a third person self because it can now be spoken about as part of a history that is greater—"higher" if we recall the thirteen year old Clifford's complaint—than the private self. Clifford attained this historical self through acquiring full rights to her lands: she is now a fully recognized subject and part of history because she can leave her mark on her property (as I discuss infra) and give it to her descendants. Having attained these rights, she can now see herself as a part of history, a player in the public sphere her private "I" can write about from a distance.

92. ANNE CLIFFORD, THE LIVES OF LADY ANNE CLIFFORD, COUNTESS OF DORSET, PEMBROKE AND MONTGOMERY AND OF HER PARENTS, SUMMARIZED BY HERSELF 5 (1916) (on file as part of the Harley Manuscripts, British Library).

C. Life of Me

Clifford's autobiography, *Life of Me*, which comes after the *Lives* of her parents in the Great Books, constructs her identity along diachronic lines, as a continuation of her family line, spinning the generations into a single thread. She returns here to the first person, telling us that she was born "sole Daughter and Heir to my Illustrious Father," George Clifford, Earl of Cumberland, and Lady Margaret Russell.[93] Having written the history from which she emerged, she can now speak as herself. She even records, on her mother's authority, the date and place of her conception—"the Lord Wharton's house in Channell Row in Westminster"—to reinforce the notion of her legitimacy (at this point in her life) as her father's only surviving child.[94] As if to emphasize the fact that her family lines both came together in herself, she relates that "never was there child more equally resembling both father and mother than myself."[95]

> About eight o'clock at night into the chamber where I then lay, and wherein I was born into the world, and I then kissed them all with much joy and comfort, it being the first time that I saw my Daughter at Thanet, or these four younger Sonnes of hers in Skipton Castle, or in Craven, for it was the first time they had ever come into Craven. Holmes.[96]

Clifford's movement toward reclaiming her inheritance re-embeds her in this network to the extent that her removal from it had disrupted it: retracing a journey to visit her daughters, she observes "so as those counties where my mother lived as a stranger and pilgrim and in some discontents are now the settled abode and habitation of both her grandchildren."[97] When she finally arrives at Skipton Castle, she says "I was never in any part of that castle since I was nine or ten weeks old."[98] We may also recall that it was at that castle when she was eight weeks old that her father saw her for the first time, in a sense recognizing her as part of his lineage.

Again, from 1660:

> I did remove from thence to Barden Tower which was the first time that I did ever lye [there], having lately repaired it to my great cost and charges, when it was then a most ruinated, decayed place. For

93. LEWALSKI, *supra* note 1, at 126.

94. ANNE CLIFFORD, *Life of Me, in* THE LIVES OF LADY ANNE CLIFFORD, COUNTESS OF DORSET, PEMBROKE AND MONTGOMERY AND OF HER PARENTS, SUMMARIZED BY HERSELF, *supra* note 92, at 33.

95. *Id.* at 35.

96. *Id.*at 160.

97. *Id.* at 53.

98. *Id.* at 53.

> my mother had never lain in it since she was with child with me, nor my father in a good while, neither did my uncle of Cumberland, or my cosin his son ever lye in it, after they came to the estate in Craven.[99]

After she repairs another of her castles, this one in Brough, she remarks with satisfaction "it was so well repaired by me that *** I lay there for three nights together, which none of my ancestors had done in 149 years before till now."[100] After she has her castle of Pendragon in Westmoreland repaired, she "lay there for three nights together, which none of my ancestors had done since Idonea de Veteripont lay in it, who dyed the 8th of Edward the 3d without issue."[101] And so on:

> [I]t being a strange and miraculous Providence of God, that I should at this great age of 73 come to lye again in the same chamber where I had not layn since I was a child of eight weeks old . . . .[102]

> [T]his being the first time that either he or any grandchild of mine ever lay in that castle of mine, which was lately repaired by me.[103]

> I came up through the great Chamber and Painted Chamber and the little passage room into my own chamber, where I formerly used to lye, and where my noble father was born and where my blessed mother dyed.[104]

Clifford now uses this identification with property to revise a metaphor of coverture from *The Lawes Resolution of Womens Rights*. *The Lawes Resolution* explains:

> When a small brooke or little river incorporateth with Rhodanus, Humber, or the Thames, the poore Rivulet loseth her name, it is carried and recarried with new associate, it beareth no sway, it possesseth nothing during coverture. A woman as soone as she is married is called covert, in Latine nupta, that is, vailed, as it were, clouded and overshadowed.[105]

Now, in *Life of Me*, Clifford writes:

> [A] wise man that knew the insides of my fortune would often say that I lived in both these my lords' great familys as the river of Roan or Rodamus runs through the lake of Geneva without mingling any part of its streams with that lake; for I gave myself wholly to retiredness, as much as I could, in both those great families, and made good books and virtuous thoughts my companions . . .[106]

99. *Id.* at 88.
100. *Id.* at 89.
101. *Id.* at 89.
102. *Id.* at 103.
103. *Id.* at 103.
104. *Id.* at 147.
105. T.E., *supra* note 35, at 124–25.
106. ANNE CLIFFORD, LIFE OF ME, *supra* note 94, at 40.

As we recall, the poet Samuel Daniel had identified Clifford in one of his court masques with a river that flowed past her birthplace, Skipton. It seem significant, therefore, that she uses this connection much later in life to assert her resistance to the legal anonymity of marriage. It makes clear how much her separate identity flowed, so to speak, from her connection to her family's lands and to her legal rights, giving her a place to stand outside of her marital status as well as her culture's prescriptions for women.[107]

IV. SELF PORTRAIT AND MONUMENTS

Once in possession of her lands, Clifford set about "enjoying" them—that is, leaving her mark on them—in a big way, commissioning numerous portraits and monuments to commemorate herself as full owner. For example in 1646, she commissioned a portrait of herself and her family, called the Appleby Portrait, to commemorate her accession to her titles and estates; it now hangs in Appleby Castle in Westmorland.[108] The work is a triptych that shows Clifford at three stages of her life: *in utero* in the middle panel,[109] at age fifteen when she believed she had legally inherited her father's estates, and at age fifty-six, when she came into physical possession. There is no known precedent for this type of portrait—i.e., the three stages of life in the

107. It is also worthy of note that Clifford put these sentiments into the mouth of a man, presumably a close acquaintance, who knew her story from the "inside." Although scholars have speculated about this man's identity, there is some logic for the conclusion that Clifford simply displaced her own sentiments in this way. Having a male express these thoughts may have added legitimacy by expressing them in a voice of authority. Perhaps, too, at some level, Anne Clifford was echoing another male voice of authority: that of her childhood tutor, Daniel, who acknowledged her connection to her birthplace.

108. For discussions of this portrait, see Alice T. Friedman, *Constructing an Identity in Prose, Plaster and Paint: Lady Anne Clifford as Writer and Patron of the Arts*, *in* 5 ASHGATE CRITICAL ESSAYS ON WOMEN WRITERS IN ENGLAND, 1550–1700: ANNE CLIFFORD AND LUCY HUTCHINSON,103 (Mihoko Suzuki ed., 2009); Mary Ellen Lamb, *The Agency of the Split Subject: Lady Anne Clifford and the Uses of Reading*, *in* 22 ENGLISH LITERARY RENAISSANCE 347, 350–54 (1992); LEWALSKI, *supra* note 1; Graham Parry, *The Great Picture of Lady Anne Clifford*, *in* ART AND PATRONAGE IN THE CAROLINE COURTS 202 (David Howarth ed., 1993). The triptych is now at Appleby Castle in Westmoreland. *See* Friedman, *supra* at 106. It is actually made of copies of earlier paintings of Clifford and her family and may have been painted by Jan van Belkamp, a copyist who had been the keeper of Charles I's pictures since 1640. Susan Wiseman, *Knowing Her Place: Anne Clifford and the Politics of Retreat*, *in* 5 ASHGATE CRITICAL ESSAYS ON WOMEN WRITERS IN ENGLAND, 1550–1700: ANNE CLIFFORD AND LUCY HUTCHINSON, *supra*, at 179, 190, 210.

109. The older brother in the middle panel holds an inscription that describes the mother as "conceived with Child the first of May, Ano Dom 1589, with hir onely daughter the Lady Anne Clifford, whoe was borne the 30th of January following, in Skipton Castle in Craven, in Yorkshir, shee afterwards being the onely Child of hir Parents and is now Countess of Pembroke." *See* Friedman, *supra* note 108, at 109. Graham Parry also notes, "she has an embryonic existence in the painting." Parry, *supra* note 108, at 121, 127.

three panels—in English art, and it seems likely that Clifford designed it herself.[110] It shows similarities, however, to a dynastic portrait of Henry VIII and his family from the mid-1540s: Henry's triptych shows the King with Jane Seymour and their son, Edward, in the middle section, Princes Mary in the left and Princess Elizabeth at the right, in the same position in this triptych as Anne Clifford in hers.[111] This placement suggests an identification with Elizabeth, as an example of female succession, but what does so even more poignantly is that in Clifford's triptych, the female line has taken over all three panels: she is in her mother's womb in the middle, a young girl on the left and a mature heiress on the right. This triple depiction of herself across a period of time is a way of insisting on her visibility in the public sphere and her role in it which began even before her birth. As a public, civic person, she exists in history and has an impact on it.

Finally, Clifford's self portrait in the Appleby triptych is worth comparing to the famous Rainbow Portrait of Queen Elizabeth. Probably painted about 1600 by Isaac Oliver, it depicts Elizabeth in a gown decorated with English wildflowers and a cloak embroidered with pictures of eyes and ears, holding in her right hand a rainbow beneath an inscription reading "No rainbow without the sun." Clearly, one aspect of the symbolism is that the Queen is the sun, the source of light, to be reflected by those around her, as the rainbow reminds us. The thumb of the Queen's left hand is tucked into the folds of her cloak, while her fingers are gently intertwined with the material in what Louis Montrose has called "masturbatory self-sufficiency." The symbols in this portrait, the rainbow and the enfolded hand, although dramatically different from the symbolism of the Appleby painting, communicate a similar message: both depict a female who is not only self-contained, but who is the origin from which the forces of life emanate. Elizabeth appears as the source of light in which everything else is made visible; Clifford's triptych presents her as the fountainhead of her ancestral line, both carrying it on and regenerating it. Present in all three panels, Clifford stands at the beginning and end of the historical continuum: her fetal presence in the middle panel unites her legal possession, as she saw it, at the age of fifteen on the left, with her physical possession on the left. Both portraits depict females who are subjects of history, not its objects.

110. *See* Friedman, *supra* note 108, at 106.

111. ROY STRONG, GLORIANA: THE PORTRAITS OF QUEEN ELIZABETH I 49–51 (1987).

Clifford also engaged in massive building and restoration projects on her estates, all of which contributed to the material manifestation of her identity.[112] She rebuilt her five castles—Skipton, Appleby, Brough, Brougham and Pendragon—and built numerous churches, almshouses and monuments on her estates as well. She had each building inscribed with her inherited titles, her claims to the land on which it stood, and her role in building it. These projects were a way of imprinting herself on the land and they underline the basis of her identification with it. They also are material embodiments of her right to "enjoy" it in the legal sense, to shape it, change it, mark it—a right flowing from, and expressing, absolute ownership.

Clifford's chosen architectural style was out of date, and intentionally so: she rejected the new style of Inigo Jones popular at the Jacobean Court in favor of the Gothic style of an earlier time. Critics have puzzled over this choice, and one has suggested that she "wanted her buildings to look out-of-date; these ancient architectural foundations were meant to prove her own ancestral ones."[113] I add another reason: the Gothic style hearkened back to a time when her legal claims arose, when the claims of daughters to inherit titles and estates were less anomalous, and when women holding titles and performing feudal duties was not as unheard of as in Clifford's day.

Clifford's inscriptions on her buildings underscore her physical identification with the land. The engraving on Barden Tower is representative:

> This Barden Tower was Repayred
> By the Ladie Anne Clifford Counte
> Sse Dowager of Pembroke Dorsett
> And Montgomery Baronness Clifford
> Westermerland and Vessie Lady of the
> Honor of Skipton in Craven and High

112. For a discussion of Clifford's building and its relationship to the construction of her identity, see Anne M. Meyers, *Construction Sites: The Architecture of Anne Clifford's Diaries*, *in* 5 ASHGATE CRITICAL ESSAYS ON WOMEN WRITERS IN ENGLAND, 1550–1700: ANNE CLIFFORD AND LUCY HUTCHINSON *supra* note 108, at 219, 220 (arguing that Clifford's writings and monuments need to be read as cross referencing each other as a unified project to "create a record of legal ownership which did not exist solely on paper but was authoritatively inscribed on the properties themselves"). *See also* Thomas Cocke, *Classical or Gothic? Lady Anne Clifford Reconsidered, in* COUNTRY LIFE 167 (1980) (giving an art historical interpretation of Clifford's architecture); John Charlton, *The Lady Anne Clifford (1590–1676)*, *in* ANCIENT MONUMENTS AND THEIR INTERPRETATION 310 (M.R. Apted et al. eds., 1977) (describing Clifford's autocratic attitude toward the total rebuilding of her Northern properties). Clifford's biographers also describe her building projects in great detail. *See* sources cited *supra* note 5.

113. Meyers, *supra* note 112, at 220.

Sheriffesse by Inheritance of the
Countie of Westmerland in the Yeares
1658 and 1659 After itt Had Layne
RuinUous Ever Since About 1539 When
Her mother then Lay in itt and was
GreatE With Child With Her till
Nowe That Itt Was Repayred By
The Sayd Lady Isa[iah] Chap. 58 Ver. 12
Gods Name Be Praised[114]

This inscribing of her ownership also expresses the enjoyment of her property. Clifford took enormous pleasure in literally carving her mark in stone on her creations, leaving her mark, emphasizing the fact that her rebuilt castles, churches, almshouses and monuments were her way of taking possession of and shaping her land. Every building and every inscription commemorated her right to the property, both literally, by stating it, and symbolically, by standing on it, a silent materialization of Clifford's subjective self. When she exercised her right to pass the estates on to her daughters, Clifford partook of the final stage of property possession, alienation—here, in the form of a testamentary devise.

V. CLIFFORD'S FUNERAL SERMON

I conclude my discussion of Clifford by looking at her funeral sermon, turning from her own writing to a text written about her by one of her contemporaries. Preached by Bishop Edward Rainbow in 1676, it praised Clifford as the Wise Woman of Proverbs who "buildeth her house." On its face, this seems appropriate: as discussed, Clifford built not one house, but many great castles, monuments, churches and almshouses. But the Wise Woman of Proverbs is a domestic creature whose part, according to Rainbow, "will be most within the house: while the husband is "more commonly abroad." Indeed, Rainbow continues, a woman "abroad is out of her territories; she is as a ruler out of his jurisdiction." To build, for the virtuous woman, he concludes, is to maintain the family, the children and the servants. Bishop Rainbow thus revises Clifford's massive estate construction and governance as housekeeping. This is a striking revision, given recent scholarship about her significant political presence in the North as challenging to the landed Restoration gentry. Moreover, Rainbow isolates her from

114. *Id.* at 223.

her lineage in a way counter to Clifford's lifelong self-representation. He acknowledges that "her blood flowed from the veins of three anciently ennobled families," but goes on to insist that he will praise her only for "what was purely her own Atchievements," as is appropriate when praising noble women. By cutting her off from her ancestry in this way, Rainbow undermines the identity Clifford had struggled throughout her life to maintain: he cuts her off from a selfhood embedded in a network of legal rights and obligations that she inherited from her ancestry and isolates her "within the house." This is exactly the trend of the time with respect to women: as they lost rights to inheritance and property, they also lost access to public roles. Clifford's story offers a case study of the connection between these two trends and what they meant for women's identity.

Toward the end of the sermon, Rainbow tells us "[n]one disliked what she did, or was, because she was like herself in all things: *sibi constans, semper eadem*, the Great, Wise Queen's motto." The "great, wise Queen" was Elizabeth I, and her motto, *semper eadem* referred to her self referentiality and self sufficiency—that is, her status as rights bearing subject. Clifford's funeral sermon shows that her lifetime spanned a period when an autonomous discourse, at least for aristocratic women, was giving way as their claims to land were being undermined. Clifford was able to resist this trend, for herself at least, by tirelessly litigating her rights and then by enjoying her lands with a vengeance, indelibly marking them with her name.

CONCLUSION: PROPERTY AND GENDER TODAY

None of the foregoing is meant to express nostalgia for a time when life expectancy was thirty-five, twenty percent of mothers died in childbirth, and women were derided as a source of "shame to the body, and danger to the soule."[115] This was no "Golden Age of equality between men and women.[116] I do, however, believe that Clifford's story sheds light on the link between property rights and gender. It shows how women's access to absolute property ownership is linked to their

115. JOSEPH SWETNAM, THE ARRAIGNMENT OF LEWD, IDLE, FROWARD, AND UNCONSTANT WOMEN 16 (The Cicero Press 1989) (1615). As Patricia Crawford remarks of the period from 1500–1750, "it is fascinating to observe that although the *reasons* for women's necessary subordination might change, the axiomatic inferiority of women remained." Patricia Crawford, *From the Woman's View: Pre-Industrial England, 1500–1750*, *in* EXPLORING WOMEN'S PAST 63 (Patricia Crawford ed., 1984).

116. STRETTON, *supra* note 32, at 22 (noting that women in England have traditionally enjoyed "fewer rights, fewer privileges, less wealth, less influence in spheres of power and less control over domestic affairs, than English men").

full civic personhood, and reveals it in what Peter Laslett famously called one of the "voices we have lost." Neither proto-feminist nor ahead of its time, Clifford's voice throws into sharp relief what earlier social forms can sometimes teach.

Clifford's resistance to the tide of law and history failed to preserve the estates for future generations of women: a descendant of Clifford's first husband, Vita Sackville West, most famously the model for the androgynous heroine of Virginia Woolf's *Orlando*, grew up at Knole House, part of Clifford's estate in Kent, but lost it when the laws of primogeniture prevented her inheritance. To her great grief, it passed to her mother's cousin, who turned it over to the National Trust in 1946. About this transfer, Vita wrote "the signing . . . nearly broke my heart, putting my signature to what I regarded as a betrayal of all the tradition of my ancestors and the house I loved." Clifford's story sheds light on what such losses mean beyond the realm of sentiment.

The struggle to re-forge the ink between property rights and personhood continues today. Women who litigate their right to marital property in fee simple rather than in the form of life estates, for example, continue this struggle for civic personhood. As this article has shown, these struggles are not about financial worth alone; rather, they express the striving for material expression of full civic status that absolute possession confers.

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GLOBALIZATION AND THE RE-ESTABLISHMENT OF WOMEN'S LAND RIGHTS IN NIGERIA: THE ROLE OF LEGAL HISTORY

ADETOUN ILUMOKA*

INTRODUCTION

Today in Nigeria, as in most parts of Africa, women constitute a significant portion of active farmers and craftspersons involved in food and cash crop production and processing; they also shoulder disproportionate burdens of responsibility for providing care to family members. Yet their control over the land on which they live and work—a vital resource—is often precarious. Proclaimed limited legal rights deemed "customary," "land grabbing"[1] by in-laws in the wake of the demise of husbands and fathers, and expropriation by the state continue to deprive them of secure access to shelter and livelihoods as they struggle to fight this dispossession with the tools they have at their disposal.[2] What are the origins of this dispossession and who are its agents? What strategies have been employed to combat it and how can they be improved? Proceeding from a presumption that responsibilities for land-based activities should be matched by rights of access and control, this paper examines how feminist legal history and theory can contribute to reestablishing women's land rights in Nigeria and elsewhere. To understand the genesis of colonial and current patriarchal ideas and practices relating to women's land rights, we need to explore the social context and some of the significant historical events that determined access to land in this area.

The country currently known as Nigeria is located in the West African sub-region and comprises over two-hundred indigenous nations, ethnicities, and language groups. Many of these groups have long histories of trading with one another. Some formed parts of the large empires and kingdoms that have existed in the area since the eighth

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1. A term commonly used to refer to the practice of appropriation of property belonging to a deceased man by his male relatives often based on the claim that they are traditionally entitled to inherit such property if he has no male children or if they are too young to manage it.

2. The widows' rights campaign and lobby in Nigeria between 1995 and 2005 is an excellent example of the adoption of a multi-pronged approach to addressing a specific issue.

century AD, while some lived in relative isolation as smaller units.[3] As a result, patterns of social organization in the area varied considerably depending on systems of production and patterns of trade.

The famous Trans-Saharan trade, and efforts to control the various sections of it, stimulated the formation of, and determined the fortunes of, large kingdoms that developed in the area between the eighth and nineteenth centuries.[4] The advent of European explorers and traders on the West African coast in the fifteenth century heralded important changes that some scholars have termed the first phase of globalization.

In this paper, I use the term globalization to refer to the process of international economic and social integration, which dates back to the fifteenth century and is characterized by production linkages that created trans-continental production units or systems. While international trade relations, like the Trans-Saharan trade, were nothing new, new patterns and systems developed between the fifteenth and nineteenth centuries. In this period, slave labor from Africa produced raw materials for Europe's budding industries on South and North American plantations.[5] Mass-produced industrial goods were then exported around the world in expanding and increasingly integrated networks that culminated in the establishment of colonies in Africa, Asia, North America, and South America. West Africa during the first phase of globalization, between the sixteenth and nineteenth centuries, was mainly a source of slave labor.[6] In the second phase, from the late nineteenth to the early twentieth century, the slave trade was abolished and there was a decisive shift to trade in agricultural products and minerals. By the nineteenth century, large scale production of cash crops, such as kolanuts and palm oil, by hired or slave labor, was already a feature of farming in Southern Nigeria alongside the usual subsistence farming. As a result, although landholders were predominantly families and communities, some individuals connected to powerful families engaged in

3. For a concise account of this early history see BASIL DAVIDSON, WEST AFRICA BEFORE THE COLONIAL ERA: A HISTORY TO 1850 (1998). *See also* Akin Mabogunje, *The Land and Peoples of West Africa, in* 1 HISTORY OF WEST AFRICA 30 (J.F. Ade-Ajayi & Michael Crowder eds., Columbia University press 1972).

4. Mabogunje, *supra* note 3.

5. Slave labor was also used within West Africa. For example, in the plantations established by the Portuguese in Sao Tome and other islands in the fifteenth and sixteenth centuries. A.F.C. Ryder, *Portuguese and Dutch in West Africa before 1800, in* A THOUSAND YEARS OF WEST AFRICAN HISTORY 217, 223 (Ade-Ajayi & Espie eds., Humanities Press 1972) (1965).

6. Although the internal and external trade in other goods such as ivory, gold, kolanut, peppers, guns, and palm oil continued alongside.

commercial farming and claimed large tracts of land for that purpose within communities.

I. THE ESTABLISHMENT OF COLONIAL INSTITUTIONS AND THE LEGAL SYSTEM IN NIGERIA

After three centuries of trade interactions between the peoples of this part of West Africa and Europeans, the area was colonized by European nations so they could establish greater control over production and trading activities. The British, in competition with the French and Portuguese, established their authority over Nigeria through the port and Kingdom of Lagos, which became a colony in 1861. The shift in the balance of political power from indigenous authorities to the British was a gradual one, effected through superior military force and the gradual introduction of new political, economic, legal, religious, and educational institutions and with the collaboration of local elites. The need to lower costs and make the colonies pay their way was a recurring theme in British colonial administration in the late nineteenth and early twentieth centuries and led to the adoption of what was later termed "Indirect Rule" by Lord Lugard.[7] Under this system of administration, the British utilized existing local institutions to govern, theoretically interfering with them as little as possible. However, where they could not secure the cooperation of local rulers, they used the threat of military force to subdue them or deposed and replaced them with more cooperative persons. In this way, "traditional" institutions of governance and personnel retained their visibility and relevance in the early years of colonial rule.

One of the first acts of the new colonial government in Lagos in the first quarter of 1862 was to establish new courts.[8] These courts were an important means of exercising jurisdiction over natives in disputes between Europeans and natives as well as disputes exclusively between natives. The corollaries of indirect rule in the sphere of law were: the recognition of native law and custom of the different ethnic groups in Nigeria and the continued operation of traditional systems of dispute resolution—supervised by British officials, or new native courts established by the colonial administration. In matters involving

7. Lugard was a British Military Officer who served for several years in the area and eventually became the first Governor General of Nigeria in 1914.

8. These were the Police Magistrates Court, the Slave Court, and the Commercial Courts, which dealt largely with issues considered a priority—Crime and Debt. *See* OMONIYI ADEWOYE, THE JUDICIAL SYSTEM IN SOUTHERN NIGERIA 1854–1954 (1977).

natives and land matters, these new courts ascertained and applied native law and custom. This was done through a process of taking evidence from expert witnesses who were from, or knowledgeable about, the area in question. Native law was thus a matter of fact to be proven in court. The legislation recognizing this "customary law"[9] typically provided that

> [n]othing in this Ordinance shall deprive the Supreme Court of the right to observe and enforce the observance, or shall deprive any person of the benefit of any law or custom existing in the said Colony and Territories subject to its jurisdiction, such law or custom not being repugnant to natural justice, equity, and good conscience, nor incompatible either directly or by necessary implication with any enenactment of the Colonial Legislature existing at the commencement of this Ordinance, or which may afterwards come into operation. Such laws and customs shall be deemed applicable in causes and matters where the parties thereto are natives of the said Colony or Territories, and particularly, but without derogating from their application in other cases, in causes and matters relating to marriage and to the tenure and transfer of real and personal property and to inheritance and testamentary dispositions, and also in causes and matters between natives and Europeans where it may appear to the Court that substantial injustice would be done to either party by a strict adherence to the rules of English law.[10]

The supervisory role of the new colonial courts thus gave them important powers over interpretation of native law and custom. Over the course of one century, in a time of tremendous flux, contradictory accounts of custom and de-contextualized statements of it gave the courts the power to determine what customs were applicable.

It is within this context that we will examine two cases that exemplify gender struggles over land and that gave rise to considerable commentary in the first decades of the twentieth century, when new ideas on law and legal institutions were being established. The first is a landmark case from Lagos involving a family that represents, to some extent, the new indigenous elite in that town, while the second is a case from Epe, a Yoruba town about 70km from Lagos.

9. I use the terms 'native law and custom,' and 'customary law,' which is the more modern label, interchangeably.

10. The Supreme Court Ordinance 1876 (1908), Cap. (3), § 19 (Nigeria).

II. COLONIAL TRANSFORMATIONS: THE EMERGING COMMON LAW ON WOMEN'S RIGHTS TO LANDED PROPERTY IN SOUTH WESTERN NIGERIA 1861–1931

The case of *Lewis v. Bankole*[11] is considered to be the *locus classicus* on the nature of family property and the rights of women to inherit and acquire beneficial interests in it under Yoruba native law and custom. The material facts of the case are as follows: Chief Mabinuori died intestate in 1874 leaving five sons and seven daughters. In his lifetime he had lived with his wives and some of his children on a large piece of land, on which he built a main dwelling and two smaller dwellings for his wives. This was the main family compound. On another piece of land he owned, he had built two houses, one for his eldest daughter and another for his eldest son, in which they lived with their families. On his death, his eldest son, Fagbemi, became the head of the family and acted as such, despite having an older sister. Fagbemi was an affluent trader in his lifetime and passed on his wealth to his son who took on the role of family head on his father's death.

By 1882, all the sons of Mabinuori were dead and his eldest son's son, Ben Dawodu, claimed headship of the family and dealt with parts of the family compound without consulting or rendering account to the family. This included renting out shops constructed by his father or grandfather in the family compound to European trading firms. Ben Dawodu's actions were called into question by his aunts and the rents from the shops were redistributed more equitably. On his death in 1900, two of his aunts, Mabinuori's daughters, took over the management of the land, receiving rents from the shops. In 1905 they entered into an agreement to lease one of the stores on the land to a European firm. Another grandson of Mabinuori's, James Dawodu, objected, and in the absence of an accepted head of the family, the dispute escalated. As a result, this action was filed in court by a group of the deceased's grandchildren, who were at odds with their aunts, who lived in the main family compound.

The plaintiffs sought a declaration that they were entitled, as grandchildren of the deceased, in conjunction with the defendants, to the family compound and that the family compound was the family property of the deceased.[12]

11. [1908] 1 NLR 81 (Nigeria).
12. *Id.* at 82.

The court was called upon to decide two main issues: (1) Who was the head of the family and, therefore, had significant decision-making power in the family as well as responsibility for dispute resolution? Because the eldest persons in the family were female, the issue of whether women could be heads of families was specifically addressed; and (2) Who had rights to inherit family property and what was the nature of those rights under native law and custom?

The plaintiffs, comprising mainly a group of grandchildren, claimed that the property was family property, jointly owned by all members of the family, to which they should have access and user rights. On the recommendation of the initial trial judge, attempts were made to settle this family dispute out of court by electing a head of the family with the advice of some Lagos chiefs. The plaintiffs refused to accept the advice of the chiefs and the authority of their aunts.

The trial court found for the defendants on the grounds that the plaintiffs had acquiesced for a long time to the treatment of the various properties as separate property belonging to individuals in the family and not the family collectively. Acting Chief Justice Speed expressed the following view:

> I have no doubt that the plaintiffs have native law and custom on their side. I mean native law and custom as it was understood and possibly applied 40 years ago, but I decline to say that it is existing native law and if it is I am confident that it is my duty to decide that it is repugnant to the principles of equity and to refuse to enforce it.[13]

The appeals court overturned this decision on the grounds that it was against the weight of evidence, which clearly demonstrated that the properties in question were understood and treated by all concerned as family property. The justices decided that the main issue in the case was which rules were applicable to family property among the Yoruba. Therefore, they ordered that the case be remitted back to the trial court to take evidence on the applicable native law. As was usual in these cases, the trial court then called on expert witnesses, or assessors, to give evidence on the applicable rules. The court could then take a decision based on the weight of the evidence before it. Six prominent white cap chiefs[14] from Lagos were called in this case and agreed with

13. *Id.* at 86.

14. These were a class of chiefs in Lagos so called because of their mode of dress. They were acknowledged as the descendants of the first settlers in the area and were the heads of the major landowning families in the Kingdom of Lagos.

each other for the most part, with slight differences of opinion on specific points.

The Lagos chiefs called as expert witnesses were of the view that the eldest son or *Dawodu* should take over the father's compound as head of the family. Yet, when asked who should have authority over joint property and facilities in the compound (such as a well for water) following partition, they unanimously agreed that it should be the eldest child—in this case, a daughter. Later, in his judgment, referring to the totality of the evidence before him, the judge distinguished between who succeeded to the headship of a chief's family and who succeeded to the headship of other families. This may explain, in part, the seeming discrepancy in the opinions of the chiefs.

In response to further questions put to them by the court, the chiefs agreed that family property is held and used in common under the leadership of the eldest child but that where there were intractable conflicts in the family, the property could, and should, be divided up in equal shares between all the children, *whether male or female*.

Based on the evidence given in the case and the opinions of the expert witnesses and assessors, the Court declared and endorsed a number of rules pertaining to family property among the Yoruba in Lagos:

1. Under native law and custom, the *Dawodu*, or eldest surviving son of the deceased, takes over the headship of the family, but on *his* death, the eldest surviving child, whether male or female, is next in succession.
2. Family property does not imply equal entitlement of every single individual member of the family to occupation and use as equal owners or stakeholders. The family consists of branches designated by the children of a founder. The different branches of the deceased's family are represented per stirpes on the family council with each branch having one vote. There is no general right to build on any unoccupied part of the family property, nor is there a general right of ingress and egress to the property. The head of the family and the family council confers such rights.
3. Family property can be partitioned in the event of intractable conflict within the family.
4. Under strict native law, family property cannot be sold but it can be leased in consultation with, and with the consent of, all

members of the family council on which each branch of the family is equally represented.

The court, however, in strong dicta expressed the view that it had the power to order the sale of family property, including the family house, contrary to strict native law and custom, where it was of the view that such a sale would be advantageous to the family or the property is incapable of partition.[15] The court indicated that this could be done by taking a decision on whether native law and custom is contrary to Section 19 of the Supreme Court Ordinance earlier referred to by Justice Speed.[16]

III. BACKGROUND AND CONTEXT OF THE CASE

This case was filed in 1905, about forty years after Lagos was officially declared a British colony and as the impacts of the establishment of British administration in the area on the value of land were beginning to be felt. In the sphere of trade, commissioned agents of European trading firms occupied a strategic position in the international import and export trade that was taking place. The related service sector, which provided accommodations, food and clothing to these settlers, was also a sector in which Africans made fortunes. The case of *Lewis v Bankole* is thus an excellent illustration of some of these changes.

Mabinuori was formerly a slave, or domestic, who, through his loyalty to the King of Lagos, had acquired strategically located properties on Lagos Island, formerly occupied by Oshodi, who was loyal to the deposed King and exiled with him. He obtained Crown Grants for his properties between 1851 and 1868, thus establishing individual ownership or entitlement in a system that just a few decades earlier would have defined him as a tenant on the land, holding it subject to the rights of the King or the acknowledged landholding family in the area. He was able to take advantage of changes in Lagos, before and after the Treaty of Cession, when Crown Grants were made by the King and later colonial governors, and presumed to confer individual and absolute title to land. He built his wealth, which he could then pass on by virtue of his status as founder of a family. His son, Fagbemi, with his support, also took advantage of new trading opportunities in the town and built up his own wealth. He had the means to repair and improve the family

15. Lewis v. Bankole, [1908] 1 NLR 81, 103 (Nigeria).
16. The Supreme Court Ordinance 1876 at § 19.

property and to shoulder various financial responsibilities in the family when called upon to do so. He thus succeeded his father as head of the family with no dispute, even though he was not the eldest child.

Several historians have noted the importance of access to credit as a means for capital accumulation in this period, and that women had fewer opportunities of gaining such access, which skewed patterns of gender representation in various occupations, as well as access to wealth.[17] Fagbemi's son, a grandchild of Mabinuori, with access to his father's wealth, claimed the position of head of the family even when he had much older aunts and siblings. The fact that grandchildren in this case challenged the authority of their aunts demonstrates the internal politics of the family and the shift in the basis of authority from age to wealth. The expert witnesses supported Fagbemi's headship of the family, but were unable to justify it passing to a grandchild and affirmed the pattern of succession to headship being based on age, *not* sex. Yet, it was unclear why age was not used in the first instance, in which case Fagbemi's older sister should have been head of the family.

Before this case, which commenced in 1905, several women had gone to court to challenge erosions of their rights to property in their individual capacity as well as on behalf of their families. Major landmark cases in this period involved women. For example, in *Ajose v. Efunde*,[18] two women claimed property as inherited from their male relatives, said to have been slaves, or domestics, of a local landowning chief. The women were challenging the permanence of local institutions of slavery in this early colonial period, as Mabinuori did with greater success later. This case, although the main issue did not relate to the sex of the parties, indicates the sense of indignation and active assertions of entitlement that led to the legal actions being brought.

Several scholars and commentators agree that Lagos, as colonial headquarters, was a place of rapid transition as a result of significant migration.[19] These scholars sometimes attribute the evolution of certain rules, which they deem unusual, to this peculiarity. For example, G.B.A. Coker—a legal scholar and a judge of the Supreme Court of Nigeria, who wrote one of the most influential books on Family Property Among the Yoruba in the 1960s, had this to say in his book:

17. Kristin Mann, *Women, Landed Property and the Accumulation of Wealth in Early Colonial Lagos*, 16 SIGNS, 682, 692–93 (1991).

18. A. Berriedale Keith & Smalman Smith, *Tribal Ownership of Land*, 1 J. ROYAL AFR. SOC'Y, 455, 455–61 (1902) (reporting judgment rendered in 1892).

19. G. B. A. COKER, FAMILY PROPERTY AMONG THE YORUBAS (2nd ed. 1966); T.O. ELIAS, NIGERIAN LAND LAW AND CUSTOM (1951).

> The steps by which the female members of the family have come to be recognised as fully entitled as the male members to participate in the enjoyment of rights and interests in family property have been gradual. The evidence there is points to the fact that in the olden days, and according to strict native law and custom, women have no rights whatsoever in the family property. As Combe CJ said: "In early times the rights of the daughters were not the same as those of the sons, and I should be very much surprised to find that native custom of Lagos has so far changed that it is now recognised by natives that daughters have the same rights as sons in the land of their fathers.[20]

One may ask to what evidence he refers and what constitutes "strict native law and custom" in two centuries of tremendous flux in this area.

Another case, emanating from outside Lagos but still within a Yoruba sub-group in Epe,[21] demonstrates that these changes and challenges were not confined to Lagos. In *Saka Agoro v. Barikisu Osi Epe and Adisatu Morenikeji*,[22] family property belonging to Sunmonu Agoro had been administered by the eldest of his five children, Saka, as head of the family for twenty-five years. Saka had sold some of the property without the consent of the family and without rendering account to them. Adisatu Morenikeji, one of his sisters, lodged a complaint with the local headman of the community, the Baale, and his council asking them to compel Saka to account for the proceeds of sale and sought a partition of the rest of the property between the children. Saka appeared before the Baale and Council and surrendered some of the proceeds of sale to them, which they divided amongst the remaining children. They also divided up some of the family land for distribution to the children. Adisatu then sold her portion to Barikisu Osi Epe. Saka sought to set aside the sale on the grounds that he was the head of the family and that he did not consent to the partition. The case was heard by Mr. Justice A. R. Pennington, who found in favor of the plaintiff. In his judgment, he noted that the defendant, Adisatu Morenikeji, "had no rights of inheritance in her father's property she only had a right to live in the property."[23]

The defendants appealed to the Full Court with Pennington sitting once again with Mr. Justice Combe and Mr. Justice van der Meulen. The majority found in favor of the defendants on the grounds that the

20. *Id.* at 179–80.

21. A town about 70km from Lagos today; at the time in question, it was at least three days' journey by local boats.

22. Supreme Court Suit No. 324 [1920] (July 1922) NLJ 3.

23. *Id.* at 6.

judgment of the trial court was against the weight of evidence. The defendants had called four witnesses, who testified that the plaintiff was present at the partitioning of the family land and that he had received his share. The plaintiff adduced no counter evidence to support his claim that he had objected to the partition of the family property instead of acquiescing to it as the defendants claimed he had done. Justice Combe expressed his view: "That Native Law and Custom permits of the partition of family land when all the members of the family consent to the partition there is no doubt whatever."[24] On the question of Adisatu's rights of inheritance in her father's property, the judge merely noted that the defendants questioned whether this was a correct statement of native law and custom, but that it was irrelevant to the determination of the appeal. The sole question on appeal was whether or not the plaintiff had consented to the division of the family property.

Mr. Justice Pennington, in his dissenting opinion, justified his earlier findings, revealing in his judgment that the Baale and members of his Council had visited him before and during the trial seeking to influence his judgment. As a result, he had no confidence in their impartiality and decided the case in favor of the plaintiff.

What is most interesting about this case is the commentary and discussion it provoked in Lagos, especially within the legal profession, on the rights of women to inherit property. A partial record of this debate is given in a lengthy discussion published in one of the first law journals in the country from July to October of 1922. Although the appeals court did not think it necessary to deal with the issue of women's rights directly, the defendants' pleadings clearly stated their disagreement with the statement that native law and custom does not allow women to share in partitioned family property. The editor of the *Nigerian Law Journal*, Adegbesin Folarin, agreed with them and went on to write a stinging critique of the judgments of Mr. Justice Pennington:

> the portion of Mr Justice Pennington's judgement in the Divisional Court in the case of Saka Agoro versus Busura Osi Epe and Adisatu Morenike reported in our last issue which reads: "Adisatu Morenikeji had no right of inheritance in her father's property, she only had the right to live in the property" impelled a dispensation with all formality and punctiliousness. This doctrine so industriously propounded time after time by Mr Justice Pennington whenever any action relating to women's rights to property comes before the Court is not only listened to with bewilderment by the native community

24. *Id.*

> owing to its exoticism but it is tremblingly apprehended that if it is allowed to be imbibed by the male sex of this clime its germination will have no other result but the pernicious severance of the sacred tie which binds a family together. . .25

Folarin goes on to argue that native law and custom recognizes equality of rights between male and female children. Citing a number of examples, including that of Madam Tinubu of Lagos, as evidence of the recognition of female children as heads of households in Yorubaland, he notes that headship does not derogate from the right of members of the family to participate in decision making by a majority vote. He comments on the misuse of the property by the elder brother, and purported head of the family in this case, and the recognition by the Baale's council (as the court of first instance) of the justice of the defendants' claims, which were clearly motivated by indignation at the brother's behavior.26 This editorial triggered a response in the next issue of the journal from another lawyer, Olayimika Alakija, who, in a lengthy article citing various authorities, including *Lewis v Bankole*, supported the position of Mr. Justice Pennington on the issue of women's rights to property as well as on the broader issue of the nature of family property and the powers of the male head of the family to manage it.27 In a rejoinder, the editor of the Nigerian Law Journal analyzed the cases cited by Mr. Alakija, giving reasons for his disagreement with the author. This triggered a response jointly authored by Mr. Alakija and Mr. Justice Pennington and a final rejoinder by the editor in the October and November issues of the journal.

Yet, two years later in 1924, it was still being stated as a settled principle of native law that "Females cannot inherit land, they can only have the right to stay in the house. A female has no right to bring her husband to live in the family house, but she does not lose her right to return to it by marriage. Her children have the right."28 As was pointed out in the appeal of this case and by commentators such as Coker thereafter, given the nature of family property and the general rule that it was inalienable and not to be partitioned, the right of residence of all members of the family was in a sense a right of inheritance. Once that rule regarding alienability and partitioning started to change, females had the right to consent to alienation and to share in the pro-

25. (Aug. 1922) NLJ 2–3.

26. *Id.* at 4.

27. (Sept. 1922) NLJ 2–3.

28. Lopez v. Lopez [1924] 5 NLR 50, 53 (Nigeria) (the court referencing and agreeing with the evidence of assessors in the earlier nineteenth century case of Omoniregun v Sadatu (unreported)).

ceeds of sale, as well as the right to a share of the partition, as was established in the Agoro case.

Coker notes that the only difference between males and females in relation to family property is that males can bring their wives to live in the family compound/house, but that females are not entitled to bring their husbands to live there.29.

These cases and many others demonstrate that it was not unusual for women to challenge attempts by male relatives to monopolize or misuse family property. They also demonstrate how various interest groups, with their different understandings and status or power in society, participated in the restatement of customary law in Southwestern Nigeria in the late nineteenth and early twentieth centuries and which views came to be dominant. Female litigants, their male supporters, and some lawyers and judges in the colonial courts were all participants in the restatement of customary law, but the processes underpinning the definition, recognition and continuation of specific laws and customs were skewed against women. Many assertions of entitlement did not get to court but were trumped early on in the process of assertion. Females were rarely given voice as expert witnesses, assessors, or lawyers, nor did they sit on the benches of native or colonial courts. Most of the early and influential legal scholars were also men, largely because of their privileged access to colonial education.

The legal discourse on family property that emerged in this period also neglects the instances where women were the source of family property and the issue of the entitlement of their daughters to inherit was not raised. It fails to address changing definitions of the family and relations within it, which are the inextricable building blocks of the political structure. This discourse does not, therefore, overtly acknowledge that patterns of family property holding are a reflection of emerging patterns of economic activity and land use in the shift from labor intensive subsistence and cash crop production to capitalist agriculture and mining and the new system of administration that supported this shift.30

The extent of the impact of the restatement of customary law on women's rights and position in many African societies has not been sufficiently investigated by feminist and legal scholars and practitio-

29. COKER, *supra* note 19, at 181.

30. Important aspects of this shift were the emergence of a service sector attuned to the needs of new trading and state institutions and a *rentier* class which derived income from the sale and renting of property.

ners. As a result, they are still grappling with which strategies to adopt in their advocacy. In doing so, they use modern tools, which seem to advance the cause of women. These modern tools are, however, often still the "Master's Tools" and the failure to assert their agency and refashion them to suit the task at hand makes that task unnecessarily strenuous and the work teams weak.[31]

IV. REVISITING AND UNDERSTANDING LOCAL HUMAN RIGHTS STRUGGLES

The evidence from these cases is that women felt a sense of entitlement to live in or return to their fathers' houses and to inherit property equally with their brothers as members of a family, based on custom and law in these communities. The clear, and even forceful, acknowledgement of this right by chiefs, brothers and commentators in the late nineteenth and early twentieth centuries in disputes and court cases is an important statement of native law and custom. The various justifications advanced for rules restated by expert witnesses, who were invariably male chiefs and who were most likely to have a vested interest in supporting the development of male privilege and power, were not analyzed with regard to the historical context of the evolution of the rules or the justice of the situation. In taking personal and legal action, the women of this period were asserting their human rights and adopting a rights-based approach to social change and development. This was however, not an approach concretely supported by the patterns of economic and social change at this time, nor was it necessarily endorsed by the courts in their restatements of the law.

CONCLUSION

Today, with the benefit of knowledge of legal history, groups involved in advocacy for women's rights to land need not parrot these erroneous or historically specific conceptions of native law and custom, juxtaposing them to modern constitutions and international conventions on human rights. There is no single rights-based approach to social change and development. Informed and incisive analyses of the

31. This is evident in the relatively recent case of Mojekwu v. Ejikeme, [2000] 5 NWLR 403 (Nigeria). In this case, the daughters of the deceased challenged the idea that women could not inherit real property and that it should have been passed on, instead, to the closest male relative in line. They won on appeal and the judge ruled that the relevant native law and custom was repugnant to natural justice, equity and good conscience.

evolution and operation of laws and legal institutions need to be advanced by feminist lawyers and scholars at both a local and a global level and popularized amongst the legal profession—particularly judges. The local should strengthen the global and the global should not negate the local. Equality and egalitarianism are not new concepts in many societies, and substantive issues of justice need to be confronted by women as active and informed participants and agents of social change. As my analysis of these two cases has shown, the arena of land law and rights was a contested space in the early colonial period. Women and so-called slaves were actively involved in these contests and challenged their designation as second class citizens, seizing opportunities presented by economic and political changes to assert and maintain entitlements.

In the face of the current onslaught of neo-liberal policies and laws relating to land tenure in Africa, there is much that we can learn from this period in these and similar case studies. The nineteenth and early twentieth century women who challenged redefinitions of their rights of access to and control of land were forerunners in the fight for women's land rights and human rights. Their legacy should be understood and improved upon as an important part of the development of a local culture of human rights in Nigeria and elsewhere. Their struggle represents resistance to what one scholar has termed socio-cryonics—a freezing of culture in historical space and time characteristic of colonialism in Africa[32]—and the negation of women's agency in modern society.

32. OLUFEMI TAIWO, HOW COLONIALISM PREEMPTED MODERNITY IN AFRICA 11 (2010).

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THE GLOBAL "PARLIAMENT OF MOTHERS": HISTORY, THE REVOLUTIONARY TRADITION, AND INTERNATIONAL LAW IN THE PRE-WAR WOMEN'S MOVEMENT

SUSAN HINELY*

INTRODUCTION

Of the numerous transnational political movements that marked the years before the First World War, the largest by far was the women's movement, a broad-based collection of reformers and revolutionaries, divided by class and race to be sure, but united in their transnational identity as enfranchised citizens of no state. Speaking in London to the Fifth Congress of the International Women's Suffrage Alliance, Carrie Chapman Catt explained that though "diligently and persistently we work each in our own land," the international women's movement "has lifted us above the sordid struggle of each nation."

> We have been baptized in that spirit of the Twentieth Century which the world calls Internationalism. . . . Our task will not be fulfilled until the women of the world have been rescued from those discriminations and injustices which in every land are visited upon them by law and custom. 1

In spite of the enormous size and range of the movement and the continuing resonance of many of its slogans and ambitions, this mass uprising has been reduced in popular memory to the "suffrage movement," a single-issue campaign waged by privileged Victorian women that ended in victory with postwar enfranchisement. Cast as a foregone development in the march of electoral expansion, the movement ranks obligatory but marginal mention in survey texts and its heroes are missing from the usual parade of freedom champions: there is no place

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1. International Women's Suffrage Alliance, *Report of the Fifth Conference* (1909), The Women's Library at London Metropolitan University [hereinafter TWL].

for Anthony in the globally recognized line of emancipators that runs from Jefferson to Lincoln, Gandhi, King, and Mandela.[2]

Mainstream academic history has done little to dislodge this stubborn popular stereotype of the elite, socially conservative, historically superfluous, and fatally dull suffrage movement. While feminist historians have offered sophisticated analyses of the culture and politics of the suffrage campaigns, and have produced an even richer body of work on women's philanthropic, economic and cultural activities in this period, these studies, like the movement itself, tend to get relegated into a women or gender "field" separate from the core narratives of democracy and the revolutionary tradition; stories about women's suffrage freedom fighters are treated as categorically different from the celebrated liberation struggles of African Americans or colonized nations.[3] Indeed, the academy has produced a widely absorbed narrative that turns these heroes into villains, a line of analysis that highlights the racism within the movement and shows how women suffragists served to legitimate imperial rule. Outside of feminist scholarly circles, Elizabeth Cady Stanton is as likely to be remembered for her infamous reference to "Sambo" in the debates over the Fourteenth Amendment as she is for her advocacy of interracial marriage and her radical critique of both capitalism and Christianity.[4] Antoinette Burton's groundbreaking work on the imbricated discourses of feminism and imperialism in the British women's suffrage movement has spawned a narrative that has become dislodged from the nuances of

2. *See, e.g.*, FELIPE FERNÁNDEZ-ARMESTO, THE WORLD: A BRIEF HISTORY, VOLUME TWO: SINCE 1300 (2008); James A. Henretta et al., *America's History* (6th ed. 2008) (devoting a thirty-page chapter to Jacksonian democracy and a total of three pages in three different subsections to the movement for women's political emancipation). The leaders of the movement have little cultural or commercial charisma, and with the possible exception of Alice Paul, whose memory was resuscitated by Hilary Swank in a slick 2004 HBO dramatization "Iron Jawed Angels," they are all subsumed in an anonymous stereotype of the fussy, middle-aged, and sanctimonious suffragette, a popular image first cultivated by anti-suffragists in what must be one of the most successful media campaigns in political history. *See* LISA TICKNOR, THE SPECTACLE OF WOMEN: IMAGERY OF THE SUFFRAGE CAMPAIGN, 1907–14 (1988). Note, as just one of many examples of the unmarketability of suffrage stories, that Ken Burns's marvelous film about Anthony and Cady Stanton, *Not For Ourselves Alone: The Story of Susan B. Anthony and Elizabeth Cady Stanton* (PBS 1999), is routinely downplayed or omitted from advertisements and other listings of his highly successful documentaries. *See, e.g.*, www.shoppbs.org.

3. Note that this pallid image of the suffrage movement was first drawn by second wave feminist historians whose political culture distanced them from the "bourgeois" suffragists and drew them towards figures and movements they perceived to be working class and more revolutionary. *See, e.g.*, *What is Liberation? in* WOMEN: A JOURNAL OF LIBERATION (1970), *reprinted in* THE COLUMBIA DOCUMENTARY HISTORY OF AMERICAN WOMEN SINCE 1941, at 223 (Harriet Sigerman ed., 2003).

4. *See, e.g.*, Henretta et al., *supra* note 2, at 469.

her original text and that has converged with an earlier scholarly story that dates the origin of racism in the European overseas empires with the arrival of white women in the mid-nineteenth century.[5]

Recent studies of the three to four decades before the First World War, however, offer fresh non-ideological ways to think about the radical movements of this period and suggest that both the academy and the public might be ready see the pre-war women's movement in new ways. Often labeled as "global histories," these studies highlight the ways that new technologies in communication and transport produced complex confluences of people and ideas, creating a rich cultural brew that isn't easily organized into conventional ideological categories.[6] At their best, these histories break through national and racial boundaries to illuminate political aspirations, revolutionary alliances and utopian dreams that were generated in this first stage of contemporary globalization by groups that cut across the categories historians conventionally employ. This new scholarship from historians appears to be developing independently from an equally promising trend of recent studies of this period offered by legal theorists.[7] Citing some of the same technological and economic developments highlighted by the historians, these legal scholars see pre-war global culture as the critical seed bed for contemporary international law, especially in its configuration of the doctrine of state sovereignty. Like the historians, the legal theorists describe complex imperial encounters which, they argue, produced a body of international law that has cultural inequality built into its foundation. These two separate though related trends offer

5. ANTOINETTE BURTON, BURDENS OF HISTORY: BRITISH FEMINISTS, INDIAN WOMEN AND IMPERIAL CULTURE, 1865–1915 (1994). In no way does Burton's work support the earlier thesis, but her descriptions of suffragists' racist and imperial rhetoric resonated among those scholars already conditioned to receive and absorb these images by the claims made in the earlier work. These descriptions became those that were remembered and passed on in traditional academic communities. An unscientific survey of American and European mainstream political history conferences, seminars and course syllabi suggests that this imperialist image still appears in treatments of the women's suffrage movement, in those uncommon instances when the movement appears at all.

6. *See* BENEDICT ANDERSON, UNDER THREE FLAGS: ANARCHISM AND THE ANTI-COLONIAL IMAGINATION (2005); LEELA GANDHI, AFFECTIVE COMMUNITIES: ANTICOLONIAL THOUGHT, FIN-DE-SIÈCLE RADICALISM, AND THE POLITICS OF FRIENDSHIP (2006); ILHAM KHURI-MAKDISI, THE EASTERN MEDITERRANEAN AND THE MAKING OF GLOBAL RADICALISM, 1860–1914 (2010); MARILYN LAKE & HENRY REYNOLDS, DRAWING THE GLOBAL COLOUR LINE: WHITE MEN'S COUNTRIES AND THE INTERNATIONAL CHALLENGE OF RACIAL EQUALITY (2008); EREZ MANELA, THE WILSONIAN MOMENT: SELF-DETERMINATION AND THE INTERNATIONAL ORIGINS OF ANTICOLONIAL NATIONALISMS (2007). *See also* MARY LOUISE ROBERTS, DISRUPTIVE ACTS: THE NEW WOMAN IN FIN-DE-SIÈCLE FRANCE (2002).

7. *See, e.g.*, ANTONY ANGHIE, IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW (2004); MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW, 1870–1960 (2002).

exciting analytical categories and archival material that could support a new approach to the theory and politics of the pre-war women's movement. It is perhaps a testament to the durability of the segregated suffragist stereotype that none of these studies of pre-war radicalism and transnational legal movements consider or, in most cases, even mention the organized women's movement as a participant in this global radical and intellectual exchange.

What follows is an introduction to this historiographical challenge as well as a preliminary framework for reconsidering the pre-war women's movement. If we employ the techniques of the new global histories and legal theories, does a different image of the women's movement come into view? I suggest that if we focus on the transnational elements, a profoundly radical critique of the late imperial state begins to emerge from the archive, a revolutionary strand that has been submerged by the traditional scholarly fixation on the suffragists' use of the dominant imperial discourse. A recasting of the pre-war women's movement that turns "philanthropists" into "revolutionaries" and "nationalists" into "cosmopolitans" would reveal another side to a history we thought we knew while also providing a relevant global past, one that speaks to women today from Tahrir Square to Madison, Wisconsin. From this alternative perspective we can then examine the operation of gender in the construction of international law and pose the same question raised by critical legal theorists: is it possible for international law to deliver justice to those whose exclusion is built in to its very foundation?

I. THE HISTORIOGRAPHICAL CHALLENGE

Any attempt to claim a place for the pre-war international women's movement at the heart of democratic revolutionary history faces an often crippling postmodern objection at the outset. "Women" as an analytical category, it is argued, is fatally overbroad. In purporting to write the history of "women," historians in fact write the history of a dominant subset of women while erasing the class, race, and other divisions within this category. To make claims about the global ideas and politics of the pre-war women's movement will inevitably be a partial story that privileges the bourgeois white women who led it and

that hides the particular stories of non-Western, peasant and working class women activists of this period.[8]

No historian can escape the paradox of having to use categories that do violence at some level to the ever-fragmenting particularity of the past, yet the category "women" seems to be off limits in a way not applied to other equally problematic categories, such as "Third World," or "Global South," or "African American," or "working class," or any postcolonial nationality. Making claims about the past of any of these groups inevitably places the historian in the taxonomical trap of assuming the existence of the very thing to be explained, of describing a group using terms that were not of the group's own making.[9] But one clear constant in the long history of modern liberation movements is the indispensability of a historical identity as a precondition for political mobilization.[10] To claim that women are too diverse to have a common history or, to put it in postmodern terms, that "women" is a social construction that cannot be employed without reproducing the hegemonic relations inherent in the term, is effectively to deny women political agency.[11] As I suggest below, women in the pre-war international movement were acutely aware of this paradox yet it did not stop them from making political claims on behalf of women of the world. Historians with far less at stake should have at least as much audacity as these women and directly confront the de-politicizing academic critique that accepts the intellectual validity of, for example, a history of Indian colonial liberation (Whose India? Can Western-educated Congress Party elites speak for the peasant woman from the Deccan plateau?), while rejecting a history of the international women's movement as conceptually flawed. In writing the history of any of these groups, the historian is tracking the construction of "inventing sub-

8. *See* Chandra Talpade Mohanty, *Under Western Eyes: Feminist Scholarship and Colonial Discourses*, *in* FEMINISM WITHOUT BORDERS: DECOLONIZING THEORY, PRACTISING SOLIDARITY 17 (Chandra Mohanty ed., Duke University Press 2003); Jane Haggis, *White Women and Colonialism: Towards a Non-Recuperative History*, *in* GENDER AND IMPERIALISM 45, 48 (Clare Midgley, ed., Manchester University Press 1998).

9. The linguistic paradox reproduced in the writing of "feminist" history as something separate from the history of radical democracy is addressed by Denise Riley in "AM I THAT NAME?": FEMINISM AND THE CATEGORY OF "WOMEN" IN HISTORY (1988). Joan Wallach Scott traces this discursive conundrum in modern French history in ONLY PARADOXES TO OFFER: FRENCH FEMINISTS AND THE RIGHTS OF MAN (1996). For the paradox of writing the history of India using names and identities constructed by imperial Britain, see DIPESH CHAKRABARTY, PROVINCIALIZING EUROPE: POSTCOLONIAL THOUGHT AND HISTORICAL DIFFERENCE (2000).

10. *See* BENEDICT ANDERSON, IMAGINED COMMUNITIES: REFLECTIONS ON THE ORIGIN AND SPREAD OF NATIONALISM (rev. ed., 1991).

11. *See* Chandra Talpade Mohanty, *"Under Western Eyes" Revisited: Feminist Solidarity through Anti-Capitalist Struggles*, 28 SIGNS 499 (2003).

jects," described by Mrinalini Sinha as social subjectivities that are "both invented (the cultural and ideological effects of others' invention) and as inventing (as opportunistically self-inventing new subjectivities enabled within a given sociohistorical context)."[12] Rather than assuming the existence of a fixed reality called "women," historians of the women's movement follow the political ideas and actions of human beings wrestling with gendered categories and trying to articulate their ideals and expand their freedoms within a matrix of cultural identities. Any one of these humans will mobilize her gender identity at one moment and her racial or class or other identity at another (or simultaneously), depending upon the utility of these categories in a given context. It is, therefore, not surprising but expected that what we perceive today as "racist" discourse would be employed as an enabling tool by women who, in the pre-war cultural context, carried a privileged racial identity. This does not close the door, however, to the possibility that these same women could be simultaneously inventing a political subjectivity with women who carried other racial identities, that their complex registers of constructed and constructing identities could converge in politically empowering ways.

This is precisely the sort of cultural convergence that the new global histories describe as they track unexpected alliances between metropolitan radicals and colonial subjects. The postcolonial theoretical framework that structures these studies applies as well to an analysis of gender politics. As was argued by second wave feminist theorists, but never fully integrated into mainstream political theory or history, the relationship of men to women is an imperial one, a mutually constructed and economically based relationship of dominance in which a universal masculine identity is constructed against the presumed natural difference of the "other."[13] Dipesh Chakrabarty's analysis of European historicism in which the colonial other is indefinitely assigned to "an imaginary waiting room of history," tracks precisely the discourse found in the women's suffrage archive.[14] Like imperial subjects, suffragists simultaneously denied and embraced the "civilizing mission" through which they were to become capable of governing themselves,

12. *See* MRINALINI SINHA, SPECTERS OF MOTHER INDIA: THE GLOBAL RESTRUCTURING OF AN EMPIRE 47 (2006).

13. *See* Monique Wittig, *The Straight Mind*, *in* 1 FEMINIST ISSUES 103 (Mary Jo Lakeland & Susan Ellis Wolf eds., 1980); SUSAN MOLLER OKIN, WOMEN IN WESTERN POLITICAL THOUGHT (1979); CAROLE PATEMAN, THE SEXUAL CONTRACT (1988); *The Combahee River Collective: A Black Feminist Statement*, *in* THE SECOND WAVE: A READER IN FEMINIST THEORY 63 (Linda Nicholson ed., 1997).

14. CHAKRABARTY, *supra* note 9, at 8.

claiming at one moment to have a different and superior culture and at the next demonstrating that they were the same as civilized men and, therefore, ready for self-rule. They found themselves in the same discursive trap as the non-Western communities Martti Koskenniemi describes in his history of international law in the decades before the war: nations that challenged Western practices were not "civilized" enough to be considered equal sovereigns in the family of nations, yet those that deferred to Western demands and relied upon the West economically lacked the independence that was the mark of a true sovereign.[15] The suffragists' alternating criticism of the masculine state and acceptance of its rules, by which measure they, like the non-Western nations, always came up short, parallels precisely this imperial relation of difference. Antony Anghie's thesis—that the central problem of international law is not how order is created among sovereign states, but instead how it was determined who gets to be a "sovereign" in the first place—is theoretically equivalent to a feminist understanding of the central problem of liberal democratic theory: not how order is created among equal individuals, but who gets to be considered an "individual" in the first place. A mass women's movement was demanding that law recognize their individuality at the very moment that non-Western nations and colonial subjects began demanding recognition of their sovereignty, and the terms, logic, and often the activists themselves were inter-related. This cultural traffic between women activists and critics of Western rule is present but not recognized in Leela Gandhi's account of fin-de-siecle radicalism. Her account highlights the themes of friendship and passive resistance, including hunger strikes, without noting that friendship as an ideal and an alternative to bourgeois marriage was one of the oldest and most revered slogans in the women's movement, or that women were engaging in hunger strikes at the very moment and place that is the setting for her study. Marilyn Lake and Henry Reynolds subtitle their widely acclaimed study "white *men's* countries and the international challenge of racial equality" (emphasis added), yet do not discuss the mass women's movement as a possible factor in the white male panic they chronicle and instead see it entirely as a response to migrant labor and colonial nationalism. The cosmopolitan network of anarchists and anti-colonialists that Benedict Anderson describes in his most recent work relied upon Western women as translators, couriers, fund-

15. KOSKENNIEMI, *supra* note 7, at 135–36.

raisers and publishers, and the links he tracks between Tokyo, Manila, Paris and London converge with the itineraries of global suffragist activists.

Clearly, the theoretical and archival material is available for a project of re-thinking the pre-war women's movement and placing its ideas, tactics and heroes in the center of both academic and popular revolutionary memory. What follows is a suggested framework for approaching the massive women's movement archive in support of this project.

II. SUFFRAGIST REVOLUTIONARIES: DISCOURSE

What strikes any historian entering the suffrage archive for the first time is the weight of nationalist and eugenic rhetoric. But as suggested above, this is precisely the discourse one expects to find from an excluded group in this period: they will use the most effective tools available to claim an identity with those in power. Similar rhetoric can be found among other pre-war anti-colonial groups and radicals, including Mohandas Gandhi, whose Indian nationalism at this time was still framed by his claim of rights as a subject of the British Empire, with a racial identity distinct from (and superior to) that of the native South Africans with whom he lived.[16]

But like Gandhi and the other anti-colonial activists, the suffragists simultaneously drew scathing indictments of their governments, including the imperial economic relations upon which they depended. In targeting the "Government of Men" and its unjust "Law" as the chief barriers to women's freedom and, consequently, to the freedom of the world, the suffragists were drawing upon a long anti-state tradition within the Western women's movement, a movement that from its origin in the mid-nineteenth century had been principally a campaign against disabling, immoral, and intrusive laws. This rhetorical current was fed by an even longer libertarian stream within the socialist movement. An essential first step in re-visioning the suffrage movement is to recognize its close links with the socialist tradition and to look again at the internationalist ideals and tactics that animated both pre-war movements. The strategic skirmishes and trade union resistance that produced a narrative of separation between suffragists and socialists should no longer obscure the more important fact that a sizeable majority of women in the suffrage movement identified them-

16. *See* LAKE & REYNOLDS, *supra* note 6.

selves as socialists, in theory and, where it was viable, in political affiliation. Indeed, many of the leaders of the pre-war women's movement got their political education in the socialist revival of the 1880s. At a time when the term "feminism" did not exist, when the complexity and cross-currents of gender unrest were reflected in the open-ended phrase most often used to describe it—"The Woman Question"—the discourse of socialism, which in all of its doctrinal manifestations promised freedom for women, was the best available way to express ideals of gender emancipation.[17] In the socialist debate over participation in elections, a lengthy "reform versus revolution" discussion that was settled by the ejection of the anarchist socialists from the Second International in 1893, disenfranchised socialist women were likely to take the revolutionary side, understanding that to adopt the state socialist strategy of electing representatives to Parliament would be to place the future of socialism in a governmental system they could not enter and that enforced their subordinate position through a myriad of laws. Many of these women who called themselves anarchists in the 1880s, or allied with anarchists in the socialist debates, called themselves suffragists twenty years later while pursuing the same substantive socialist ideals. Charlotte Wilson, editor of the London anarchist communist journal *Freedom* in the 1880s and 90s, and then suffragist activist in the decade before the war, in 1908 described "Socialism and Women's Emancipation" as "the two most vital movements of our time," clearly suggesting that for her suffragism and socialism were part of the same revolutionary cause.[18] The slogans, rituals, and art of the suffrage movement revived the Victorian culture of revolutionary socialism, as the same emancipatory verses from Shelley's "Prometheus Unbound" were quoted in suffrage journals that had appeared in the pages of anarchist journals in the 1880s, and hundreds of brightly colored banners of Indian silk and pre-Raphaelite posters decorated the massive suffragist rallies and marches, recalling earlier, smaller scale exhibitions of socialist art. Alongside the suffrage discourse of national and Christian duty, one also finds a new voicing of the radical revolutionary tradition, a gendered commitment to "the sacred duty of

17. *See* Susan Hinely, *Charlotte Wilson, the "Woman Question," and the Meanings of Anarchist Socialism in Late Victorian Radicalism*, INT'L REV. OF SOC. HIS. (forthcoming Apr. 2012).

18. The Fabian Women's Group, *To the Members of the Society* (1908) (transcript available at the Fabian Society Archives, British Library of Political and Economic Science, London).

insurrection" through a defiant stance against "masculine sovereignty."[19]

While the discourses of international socialism and suffragism both drew upon the emancipatory tradition, both promising to deliver "a re-created world," the rhetoric of the women's movement distinctly identified its cause with the freedom of "subject races." Reporting on the gathering of international suffragists in Amsterdam in 1908, Teresa Billington-Grieg wrote that "the rebellion of the women of Great Britain" had sent "widening rings of unrest pulsing out" to "other lands and set other women afire."[20] As suffragists, women tapped in to global circuits they had earlier built as revolutionary socialists. In contrast to the state socialists, the anarchist socialists included immigrants, political refugees, and other disenfranchised groups as part of their constituency. The links socialist women made with anti-tsarist exiles, Eastern and Southern European immigrants, and African-American activists were then renewed in their pre-war service to "the Cause." Co-existent with the imperial discourse that we all know well, an anti-colonial theme courses through the suffrage archive as many of these women continued to support causes they had first taken on as socialists. Gathered in Budapest in 1913, international suffragists heard condemnations of low-waged, colonial labor that were at least as damning as anything in the socialist press:

> In great buildings filled with buzzing, whirring machinery, floor after floor are filled with young women, who are driven the pace of Western labour at cotton and silk looms, and in the making of cigars. Here there are no child labour laws, and babies scarcely out of arms are at work in the hot, greasy-smelling rooms. Here laws set no time limit, and fourteen hours is considered a fair day, and is regarded as a Western standard of Christian justice. Eastern avarice has been stirred by Western example, and many an Eastern master has learned to play the game of the sacrifice of the life and health of employees for his own profit as unscrupulously as any of his Christian mentors. Western nations engaged in the rivalries of international politics have planted the seat of their activities in Asia, and are believed to be actuated by no nobler motive than the exploitation of the East for the selfish benefit of the West.[21]

19. TERESA BILLLINGTON-GRIEG, THE MILITANT SUFFRAGE MOVEMENT: EMANCIPATION IN A HURRY 28 (1911) (on file at TWL). The socialist suffragist Billington-Grieg continued: "I disavow your authority. I put aside your cobweb conventions of law and government. I rebel."

20. Teresa Billington-Grieg, *The Storm-Centre of the Woman Suffrage Movement*, THE INTERNATIONAL, Sept. 1908, at 109-113 (on file at TWL).

21. REPORT OF THE SEVENTH CONGRESS OF THE INTERNATIONAL WOMEN'S SUFFRAGE ALLIANCE 97 (1913) (on file at TWL) [hereinafter Report].

Anti-capitalist rhetoric was accompanied by revolutionary stories with non-Western women as heroes, and with no distinction drawn between the causes of national liberation and women's emancipation. The suffragists pondered the global pattern in which women, both Western and Eastern, are mobilized for revolution and then denied citizenship in victory:

> [W]hen a national interest arises which needs aid, all through the ages, such men, black, brown, white, or yellow, have forgotten their reasons, and become not only willing but anxious that women should come out of the cloister, take off their veils, break their silence, and cease their servility. At such times they encourage women to plunge their nimble fingers into the nation's fire and to bring out the roasting chestnuts of the nation's liberty. These men take the chestnuts, and send the women back to the cloisters and veils, the silence and servility. . . .It is our business to encourage these women to demand their share of the chestnuts when they have been won.[22]

Aletta Jacobs and Carrie Chapman Catt's 1913 suffrage world tour had found sister "Revolutionists" all over the world, including Japan, the Philippines, and Java. They told the story of "a Princess of Egypt" who had "taken up her weapons" and was now part of "a society of Mohammedan women organized in Cairo to work towards the emancipation of their sex."[23] The story of Nouradojah Kahnom, a "brave, intrepid heroine" for the cause of "emancipation for women and self-government for Persia" was told as part of a larger narrative that placed the blame squarely on British and Russian imperial politics for the failures of the 1906 revolution: "Do not forget, women of the West. . .that all this came to an untimely end through the interference of Western Christian nations."[24] Women's militant participation in the 1911 Chinese Revolution became the central story in Chapman Catt's presidential address. Offered "equal rights in the deeds of risk and danger," Chinese women formed "Dare to Die clubs, and secretly carried arms and ammunitions from Japan to Canton"; an estimated three to four thousands of them died in the fighting. In spite of their sacrifice, the National Convention held at Nanking "acknowledged their services and the theoretical belief in woman suffrage," but determined "that the women were not yet ready!", proving once again that "in some things the East is a faithful follower of Western example!"[25]

22. *Id.* at 89.

23. *Id.* at 91. *See also* International Women's Suffrage Alliance, *Women Suffrage in Practice* 55 (1913) (on file at TWL) (where Finnish revolutionaries are praised).

24. Report, *supra* note 21, at 93.

25. *Id.* at 96.

Although Chinese women were denied national enfranchisement, the Kwangtung Provincial Assembly did pass universal suffrage and reserved ten seats for women representatives. No doubt with conflicted emotions, Jacobs and Chapman Catt observed the Assembly in session and saw women they described elsewhere as "miserable, feet-bound women" exercising more political power than they possessed.[26] This was hardly the only occasion when Western women, who in the dominant discourse should be leading the way in the march of emancipation, found that non-Western women possessed civil rights and professional opportunities they still lacked. The discursive dissonance between Western women's subjective imperial power and the reality of women's suffrage equality in a number of colonial legislatures, including Rangoon, where women had had the vote on the same terms as men for over thirty years, surfaces periodically in the archive and reveals cracks in the usual rhetoric of suffragist optimism.[27] Enfranchisement of colonial sisters not only reversed the fable of Western-led progress, it threw into question the value of the vote since the enfranchised colonial women still clearly lacked meaningful emancipation and political power. The fracturing of Western identity is also legible in the slightly disoriented but clearly awed manner in which European women related to Cornelia Sorabji, the Oxford educated lawyer and activist from Bombay who, as described by Chapman Catt, "has not only studied law, but is permitted to practise by the British government, which denies this privilege to its own daughters at home."[28]

Perhaps it was the suffragists' link with the discourse of colonial liberation that led them to develop one other distinctive theme in their rhetoric. The Cause was not only international but also "interconfessional," an often iterated claim that the women of the world were united by a spirituality beyond any one organized religion. While Biblical references and Christian motifs mark the archive at least as frequently as the nationalist themes, there simultaneously exists a shaming of the practice of Christianity, especially its legacy in the non-Western world. Christian armies, manufacturers and politicians are compared unfavorably with the "heathen" (invariably set in quotation marks) women and children they employ and enslave. Enlightened and

26. *Id.* at 32–33.

27. *See also* CHRYSTAL MACMILLAN, FACTS VERSUS FANCIES ON WOMAN SUFFRAGE 1 (1914) (on file at TWL) (where she bemoans the fact that Britain "has been outstripped by her own colonies"); *Women Suffrage in Practice*, *supra* note 23, at xi (listing the non-Western women with franchise rights "still denied to their western sisters of the Latin, the German, and the Slav nations").

28. Report, *supra* note 21, at 92.

empowered women, the suffragists claimed, are not only re-making the world's religions, they are part of an international spirit expressed in new habits of living, such as vegetarianism, and in new blended faiths such as Baha'i and Theosophy, whose world spiritual leader, the 1880s English socialist activist Annie Besant, was building schools and supporting the Cause from her adopted home in Benares.[29]

III. TACTICS

Perhaps the strangest aspect of the mainstream de-radicalized version of the suffrage movement is the popular memory of "militancy," a chapter within the segregated story that turns suffragists into "suffragettes" and reduces a complex tactical history into a one-dimensional tale of desperate but ineffective violence.[30] A wide range of original and carefully deliberated strategies, from civil disobedience to street theater to property destruction, are all conflated into one militant stereotype that turns an international strategic debate and practice into a localized and personalized story about the Pankhursts. Not only are suffragists missing from radical stories of political freedom, they are missing, remarkably, from many accounts of the modern political tradition of the hunger strike. These accounts typically present Gandhi as the global model and originator, yet these accounts have it exactly backward, for Gandhi, writing from South Africa where his campaign for Indian independence was just underway, admired the suffragist political prisoners, made note of their tactics, and predicted their ultimate success, as he put it, "for the simple reason that deeds are better than words."[31] The project of re-telling the history of the pre-war women's movement must re-assert the historical fact that the suffragists were the first to prosecute hunger strikes as protests against imprisonment and were doing so quite consciously as part of a global tradition of radical revolt.

The standard version of the "militant" campaign has the effect of localizing and sanitizing the one moment in modern history when women as women, that is, as part of a distinctly gendered political movement, physically confronted the state and forced it to use violence

29. *See* KUMARI JAYAWARDENA, THE WHITE WOMAN'S OTHER BURDEN: WESTERN WOMEN AND SOUTH ASIA DURING BRITISH COLONIAL RULE 123–34 (1995).

30. For just one example of the popular memory of "militancy," see the portrayal in the film, *The Great War and the Shaping of the 20th Century* (PBS 1996).

31. Gandhi is quoted by Dr. James D. Hunt in *Suffragettes and Satyagraha*, 9 INDO-BRITISH REV. 67 (1981).

against them. The suffrage archive is rich with material for important contemporary discussions of governmentality, biopolitics, and state violence, yet this archive is routinely overlooked in favor of the examples of imperial or ethnic resistance to the state. Like Giorgio Agamben's "homo sacer," suffragists understood themselves to be "outlaws" whose open defiance of man-made law forced the state to reveal the violence underlying the façade of liberal consent.[32] This tactic of provocation was not the particular and exclusive notion of the Pankhursts or the WSPU, but was rather a broadly debated and applied strategy that co-existed with "constitutional" strategies within the international movement; again, this sort of simultaneous defiance and embrace of the existing political order is precisely what one should expect when approaching this archive from a postcolonial perspective. The popular history of the "suffragette," however, transforms an array of strategies, including passive resistance and the refusal to eat, into a simple story of "militancy." In fact, it was overwhelmingly the state that exercised "militancy" against the bodies of the suffragists, not only in the policy of forced feeding—another contemporary political practice whose origin in the suffrage movement is routinely ignored—but also in violent attacks on suffragist demonstrations, a forgotten history of police brutality that the archive reveals in graphic detail. The tactic of provocation was successful, in suffragist terms, to the extent that the "civilized" state was unmasked and the Cause translated into a "just war" against brute force.

Again, the suffragists cast their "just war" against "sovereign masculinity" as part of an international revolt against the imperial state, and they recognized the similarity in the state's response to both challenges. Speaking to the Women's Freedom League in 1912, Laurence Housman sarcastically noted that "it is *male* government that has made our rule in India the success it seems" (emphasis original), and he drew a direct parallel between violence against women at home and violence against colonial nationalists:

> The conscience that is not offended by the unjust subjugation of struggling nationalities abroad, is less likely to be offended by the unjust and brutal treatment by our authorities at home of Women's

32. I would like to thank Eva Vaillancourt of the Barnard Center for Research on Women for bringing this important point to my attention. *See* GIORGIO AGAMBEN, HOMO SACER: SOVEREIGN POWER AND BARE LIFE (Daniel Heller-Roazen trans., Leland Stanford University 1998); CHARLOTTE DESPARD, WOMAN IN THE NATION (1910) (on file at TWL).

> deputations and political prisoners; for they too are a subject people struggling against despotism for constitutional rights.[33]

Certainly the British imperial state saw the two political uprisings as linked, and it devised pre-war international containment strategies that addressed both forms of "outrage." In expanding the surveillance capabilities of Scotland Yard to address the uprisings at home and in the colonies (including, of course, Ireland), and in practicing its own form of internationalism through police collaboration with other Western nations, the British were continuing a project commenced in the 1880s in response to the perceived threat from anarchist immigrants. Indeed, there is a striking continuity between Victorian state and media depictions of anarchist "dynamitards" and the pre-war depiction of suffragists, who are quite explicitly described as "anarchistic" and whose behavior is often ascribed to the same criminal biopathology as the racialized immigrant anarchists.

Here again we find a merging of the histories of suffragism and revolutionary socialism, with a focus now on the tactic of "propaganda by the deed." The incendiary effect of symbolic strikes against the state had been part of the socialist tradition since Bakunin, and arguably part of the revolutionary tradition since the seventeenth century Levellers. The resurrection of this tactic by the pre-war women's movement shows a sophisticated appreciation of the power of mass media to construct and broadcast politically charged images. Suffragists used acid to sear the slogan "Votes for Women" on golf course greens, painted the 1689 Bill of Rights on the side of St. Stephen's Hall, refused to cooperate in the courtroom under "Manmade Law," and shattered the windows of 10 Downing Street, all as part of a well-considered strategy of connecting the Cause with a global emancipatory tradition. The extensive and passionate debates about tactics show that the suffragists understood the limits of symbolic politics, and their disagreements over strategy provide a fascinating record of the paradox of politics, rather than a simple story of personalities in conflict, as is conventionally portrayed.[34] When Teresa Billington-Grieg accused the Pankhursts of "abusing the name and spirit of revolution," she did so in support of the critical connection between the Cause and what she called "the big

33. Laurence Housman, Sex-War and Women's Suffrage 52–53 (May 7, 1912) (on file at TWL). Housman went on to describe domestic violence and marital relations as the primordial political arena, in terms that prefigure Carole Pateman's analysis.

34. *See Shoulder to Shoulder* (BBC 1974) (for the tactical debate as a television miniseries drama of wills between Emmeline and Christabel Pankhurst on one side and Sylvia Pankhurst and the Pethick-Lawrences on the other).

movement," a universal "fight for fundamental things," an emancipation "of very much greater value than the vote we demanded."[35] The proper means for reaching the transformative end were debated not only in London, but also in New York, Paris, and in every capital where international suffragists convened.

IV. INTERNATIONAL LAW

Suffragists and socialists, as well as a wide range of other intellectuals, began to see the body of public international law developing in the pre-war period as a first step in the construction of the emancipated global community they imagined. Disillusioned by the failures of the liberal nation state, they transposed the democratic ideal to an international level and claimed that here, at last, a truly universal political order of freedom and equality could be secured. In so doing, as Koskenniemi shows, they were renaming, rather than resolving, the fundamental tension between liberty and order and were participants in the construction of a legal regime still resting upon doctrines of exclusion. Nonetheless, the strategies, ideals, failures, and small successes of actors building a new order are the very core of political history, and the role of suffragists in making this "last utopia" deserves central treatment.[36] While they are hard to detect in a record dominated by state politics and elite academics, areas from which women were still excluded, their indispensable presence as interlocutors, researchers, translators, fundraisers, hostesses, benefactors, organizers, stenographers, as supporters in every sense, is legible in the developing discourse of "the gentle civilizer of nations," one of the many phrases used to describe international law in this period that hints at the influence of a gendered politics.

As is to be expected, the discourse of international law in the pre-war women's movement is marked by the characteristic co-existence of both a challenge to and acceptance of the established international order. While Western women mobilized their identities as citizens of powerful states when useful, most often in international conferences not explicitly identified with the movement, where they attempted to be heard in an overwhelmingly male conversation, they also constructed new categories in this evolving legal discourse, hybrid legal identities that reflected their paradoxical position both within and outside of

35. Teresa Billington-Grieg, *supra* note 20.

36. See SAMUEL MOYN, THE LAST UTOPIA: HUMAN RIGHTS IN HISTORY (2010).

the international order. Their ambiguous and tentative national identity, an identity that dissolved upon marriage to a man of a different nationality, alongside their political alliance with national movements seeking sovereign status, both within Europe and beyond, produced a dissonance within their legal discourse and a need to employ new units of "sovereignty" in order to picture an international community that included them and their non-Western sisters in the revolutionary movement.

The question who gets to be a "nation" in the new world of internationalism was specifically addressed in the first conference of the International Women's Suffrage Alliance in 1904, where it was acknowledged that to accept existing definitions of sovereignty would raise "difficulties" for the politics of international suffrage. The founders addressed this problem by "freeing the new organization from the embarrassments which beset international diplomacy" and defining a "nation" as "a country which possesses the independent right to enfranchise its women."[37] The IWSA, however, stretched and molded the terms of this definition in order to include groups that clearly lacked this power, but that perhaps would have this power in the imagined international community of the future. Thus, Poland was recognized as sovereign for purposes of international suffrage politics, even though its dependent and divided status as a possession of the Russian, German and Austro-Hungarian empires meant that the Polish suffrage delegation was necessarily divided and forbidden by law from collaboration, a "political persecution" by imperial powers that the IWSA regularly condemned.[38] The suffragists went back in time as well as into the aspirational future to resurrect sovereign identities in which women held pre-modern political rights. Thus, Bohemia became a sovereign in the women's international structure since landed women had held ancient political rights that had been extinguished in the modern reconfiguration of German speaking Europe. As with the unexpected legal rights held by some non-Western women, such disheartening retreats from power in the march of modernization disrupted the story of Western progress, leaving critical openings for new categories and recasting the West, not as a unified and civilized culture, but as a still contested arena of imperial power. The unified identity of the United States similarly dissolved in international suffrage congresses, where the power to enfranchise held by each state in the federal system

37. Report, *supra* note 21, at 84.
38. *Id.* at 126.

turned these states into "nations." The recasting of the states into imperial subjects that Lake and Reynolds describe is apparent in the suffrage discourse as well, as the movements in California and Colorado and other states are often clothed in the rhetoric of national liberation, and their progress noted alongside reports from France or Argentina or other sovereign states. American suffragists supported proposals for uniform codes that would commit American states to progressive laws in a discourse analogous to the international suffragists' simultaneous promotion of uniform laws on industrial safety and human trafficking that were to bind the international community.

The fragmentation of established sovereign units and the renaming of the building blocks of an international community were also evident in the attempts to find "nations" in the non-Western world. As described above, the liberation struggles of Chinese and other non-Western women were seen as re-enactments of the Western emancipatory mission, restoring passion and utopianism to a no longer revolutionary West. It was critical for these revolutionary nations to be members of the new legal order, but established categories did not seem to describe the women Western suffragists admired and worked with. This conundrum was especially clear in the case of India, a colony, not a sovereign, but also a vibrant center of activism and solidly part of the international women's movement. Efforts to get information about women's voting rights, either traditional or municipal imperial grants, revealed that the India Office in London did not know and did not care, leaving it to the IWSA to explore and establish meaningful political communities for suffrage politics.[39] The result was a flexible taxonomy that reflected cultural divisions within India, so that "Mohammedan" is used as a national category, as is "Hindu" and "Parsee." At the same time, "Burma" is a recognized entity because of its documented municipal franchise rights for women, even though there was an overlap between this category and the religious categories.

In spite of these taxonomical challenges, the women's movement placed high hopes and an enormous amount of labor into the pre-war project of public international law. While a distinctive voice from the movement is hard to detect in the pre-war annals of an emerging global civil society, I will briefly outline three areas of international law where pre-war women's activism is legible. First is in the law of war, specifically, disarmament and arbitration of international disputes. The

39. *See Women Suffrage in Practice*, *supra* note 23, at 147.

leadership of suffragists in the pre-war peace movement is well-known, not only their roles behind the scenes at The Hague Conventions of 1899 and 1907, but also in the less known Universal Peace Congresses held annually from their first meeting in 1889 as part of the centennial celebration of the French Revolution. By the time of the 1913 Universal Peace Congress at The Hague, where the French delegate Jeanne Mélin denounced international banks that provided money for armaments but refused loans to women, the discourses of socialism, suffragism, and peaceful arbitration were thoroughly intertwined.[40] Activists took full advantage of women's widely accepted claim to maternal expertise in the mechanisms of peaceful mediation, securing them a place in the movement for international arbitration, as well as a voice in parallel movements within states promoting arbitration in legal disputes. In the lead-up to war, as militarism and diplomatic tensions grew, international suffragists highlighted this association between mothers and peace and presented their cause as the last, best hope for avoiding war.

Second is industrial health and consumer protection. Already leaders in national efforts to regulate working conditions and the safety of consumer goods, women in the pre-war movement promoted international standards as the only way to insure compliance in a competitive global marketplace. As in all the international law organizations, the leadership of the International Association for Labour Legislation was male, but women ran the business of the organization, served on its sub-committees, and made up much of the audience at its public presentations. Alice Hamilton, physician, pioneering toxicologist and first female member of the Harvard faculty, was often the only woman represented in the Association's publications as an authority on issues such as lead and petroleum products poisoning. But Hamilton traveled the world advocating international safety standards while residing at Hull House and promoting women's suffrage with her lifelong friend Jane Addams, and the two international causes were mutually supportive. The most successful of the pre-war international occupational initiatives, and the one with the clearest lineage in the women's movement, was the effort to ban the production and import of white phosphorous matches. As a socialist, Annie Besant had exposed the horrors of "phossy jaw" and had led the highly publicized strike of working women and girls at the Bryant and May Match Com-

40. See DAVID CORTRIGHT, PEACE: A HISTORY OF MOVEMENTS AND IDEAS (2008).

pany in 1888. By the pre-war years, the socialist complaint against match manufacturers had transformed into a suffragist and international law campaign, resulting in the 1906 Berne Convention against the Manufacture, Sale and Import of White Phosphorous Matches. At their international congresses, suffragists drew a correlation between the enfranchisement of women and support for the white phosphorous ban, as when Tasmania's 1911 bill enfranchising women was soon followed by its decision to join the Berne Convention. The federalist language suffragists used to describe U.S. state/nations, appears in the rhetoric of international labor law advocates as they bemoan the U.S. unwillingness to submit to international standards, and a taxonomical disorientation similar to that of the suffragists marks their uncertain application of international law to non-sovereign colonial economies.[41]

Finally, international laws against slavery and human trafficking are the most clearly marked by the politics of the international women's movement. Women in the pre-war movement knew well that abolition of slavery and women's emancipation shared a common political history, and they saw their campaign against the "White Slave Trade" as a continuation of this honored crusade. Even though the activists and the victims in this campaign were almost always women, when it moved to the plane of international law the leadership and public voice became male. Josephine Butler, whose campaign against the Contagious Diseases Act had started the movement and who remained the spiritual leader of the cause through the 1904 passage of the International Convention for the Suppression of the White Slave Trade, is present but largely silent in the record of the international congresses. Slightly more audible are the representatives from women's organizations who attend all of the White Slave Trade conferences and report back to their own conferences on the progress of this closely monitored international legal initiative. What is striking is the difference in tone of Millicent Fawcett or Carrie Chapman Catt when addressing a suffrage gathering and when addressing the mostly male delegates at the law conferences. As chair of the Thursday morning session of the 1913 Congress for the Suppression of the White Slave Traffic, Chapman Catt is reserved and strictly parliamentarian; when addressing the International Women's Suffrage Alliance just a few weeks earlier, she speaks with passion and redefines the cause as an interracial one:

41. *See* International Association for Labour Legislation, *Report, British Section, For the Year 1912–13*, at 3 (on file at TWL) (discussing the particular problems attendant upon "the growing Indian match industry").

> The "Slave Traffic"—white, brown, and yellow—has received a tremendous impetus through the demand of Western men living in the East. Slavers—Christian, Jew, Mohammedan, Confucian, Shintoist—ply their common trade with ceaseless activity, and girls by the thousands are annually sacrificed upon the altar of the common lust of East and West . . .This unspeakable barbarism, so out of place in the twentieth century, would never have existed had not the men of the world, regardless of race, colour, or religion, united in the preachment of doctrines concerning women, wickedly false in every particular, and enforced those teachings by physical force.[42]

Although Chapman Catt dropped the word "White" from the name of the campaign when addressing suffragists, a proposal to do the same at the international law conference received little support. While the German delegate pointed out the existence of countries where "women of another colour" need protecting, the French delegate responded that "White Slave Trade" was a recognizable trademark that should not be changed, for it carried "great moral and emotional weight with the public." The disinterest in broadening the racial scope of the campaign no doubt related to the majority view that the "coloured women of the Colonies" were not victims at all but had chosen to engage in prostitution. With regard to the Straits Settlements, the British delegate F.S. Bullock reported:

> We have made enquiries, and find that no innocent girls are known to be in the Straits. . . .There are a certain number of girls brought in to replace the prostitutes in the Straits, but they are not innocent girls; they were prostitutes before they went to the Straits at all.[43]

To hearty applause, Bullock further reported that "all the British Possessions, Crown Colonies, and Protectorates have, without exception, carried out the conditions of the Arrangement of 1904," closing any further discussion of trafficking in the colonies. This formalistic dodge provoked a response from one of the few female voices in the record. "I do not mean that Mr. Bullock's speech is not strictly accurate," Mrs. Archibald Little began,

> but I have lived so long in the Far East that I cannot sit silent and hear English people speak for foreign nations. The state of Hong Kong and Shanghai and Singapore fills one's soul with sadness, fills one's soul with shame; and I know no nation more responsible for that than my own.[44]

42. *Report*, supra note 21, at 97.

43. THE FIFTH INTERNATIONAL CONGRESS FOR THE SUPPRESSION OF THE WHITE SLAVE TRAFFIC, PROCEEDINGS 340 (1913) [hereinafter PROCEEDINGS].

44. *Id.* at 341.

In a direct rebuke to Bullock, Little went on to describe an elaborate, open and expanding system of trafficking in East Asia, a network that extended to the west coast of America, and that involved "temporary purifications" of mass deportation.[45] No applause was recorded at the end of her comments, and the Convention's focus on the trade in Western women remained unchanged until after the War.

Though women appear to have had little impact on the language of the law, they continued to dominate the practice on the ground, as their decades old organizations of philanthropic assistance were relied upon to carry out the reporting, sheltering, and repatriation requirements of the Convention. Doing the same work as is done today by international non-governmental organizations, these pre-war abolitionists criticized the practice of compulsory repatriation, as do most anti-slavery activists today.[46] The repatriation policy ignored the stateless character of many of the victims, as was pointed out by Miss Pappenheim in an unsuccessful motion to eliminate the requirement at the 1913 conference. Employing the discourse of suffragism, she spoke "internationally and interconfessionally" on behalf of a "nation" that was not recognized in international law:

> It is also my duty as a Jewess to draw your attention to the fate of the Jewish girls. . . [who] form a large contingent of the merchandise in the world's White Slave Traffic. There is no consulate, no philanthropic society, no Home, no "friend" compelled to befriend this Eastern European Jewish girl, and if she is compulsorily. . . sent back to the frontier of her native country. . .she would be an *outlaw and at the mercy of the officials at the frontier and the agents of prostitution*.[47]

Real world difficulties in implementing the law were also raised by Mrs. Leathes of Toronto, whose Local Council of Women had responded to victims' hesitance to turn to an all-male police or appear in an all-male court by creating the equivalent of today's "safe houses"

45. *Id.* at 341–42. Quoting a member of the Hong Kong Municipal Council, Little asked "can anyone suggest what ought to be done with these poor creatures? You cannot quite drive them into the sea." Note that the Dutch delegate also challenged Bullock's formalistic response to the conditions in the colonies: "Let us therefore not allow our Governments to live in peace till they have started the fight against the Slave Traffic not only in white but also in the coloured women of the Colonies. . .[A]ll the world over it must be heard: Against the *White* slave, against the *Black* slave, against the *Brown* and the *Red* and the *Yellow* slave, against *all Women* traffic; we can't tolerate any Women traffic. Woman is not a commercial article." *Id.* at 339.

46. *See* Kevin Bales & Jody Sarich, *Anti-Slavery and the Redefining of Justice*, *in* GLOBAL CIVIL SOCIETY 2011: GLOBALITY AND THE ABSENCE OF JUSTICE 64 (Martin Albrow et al. eds., 2011). Note that Bales & Sarich describe the late nineteenth and early twentieth century campaign against the white slave trade as a useful historical example for today's anti-slavery efforts.

47. PROCEEDINGS, *supra* note 43, at 119.

and bringing women rescue volunteers into the courtrooms. A special women's court, to which "the male outside public is not admitted," was supplemented by the appointment of two women to the police force, "dressed in plain attire" but with "full powers of arrest." Mr. Coote noted that the London Metropolitan Police also "have a lady who takes depositions and is always at the command of any girl or woman," but the notion of deputizing women police was more controversial. Rescue workers also confronted resistance from organized crime, whose profits from human trafficking made them formidable foes, not only of the women abolitionists but also of the suffragists working to empower them politically.

CONCLUSION

The popular narrative that tells a story of suffrage victory looks problematic once the movement is analyzed from a global history and critical theory perspective. Like most radical democratic uprisings, the women's movement failed, ended abruptly by the very war between "Masculine States" that the women claimed they could prevent if they had the vote. The bestowal of a limited franchise in the postwar years as a reward for cooperation in war-making was no victory, and although the inclusion of women in the electorate soon became a global mark of state legitimacy, it did not lead to the international community the suffragists had imagined.

This story helps us better see the parallel story of failed postcolonial "victories." Like the granting of the vote to women, the granting of formal sovereignty to colonial nations after World War Two masked the persisting inequalities within the international economic and political framework. Both stories continue to be written in contemporary global efforts to give substantive, egalitarian meaning to the language of law and democracy.

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PUERTO RICAN WOMEN NATIONALISTS VS. U.S. COLONIALISM: AN EXPLORATION OF THEIR CONDITIONS AND STRUGGLES IN JAIL AND IN COURT

MARGARET POWER*

INTRODUCTION

In this paper I examine several Puerto Rican women who were members of the pro-independence Nationalist Party and the United States legal system during the 1950s. The relationship between them was the result of a direct confrontation between two opposing forces: these women's determination to end what they considered to be the U.S. government's illegal occupation of Puerto Rico and the U.S. government's refusal to relinquish its control of the island. My exploration of the legal relationship necessarily involves a discussion of the political relationship between Puerto Rico and the United States. The inevitable and unequal confrontation between the Nationalist Party and the United States government took place in two successive moments, which I briefly describe below. In both, the U.S. government triumphed, at least militarily, over the Nationalist Party. The U.S. victory led to the arrest and extended imprisonment of thirteen female members of the Nationalist Party, whose story is the subject of this paper. What follows is a preliminary discussion of this topic and these women.

I. BACKGROUND

In 1898 the United States took possession of Puerto Rico, Cuba, the Philippines, and Guam, as a result of its victory over Spain in the Spanish American War. Puerto Rico, unlike the other former Spanish colonies, became (and remains) a direct U.S. colony. In 1917 the U.S.

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government made Puerto Ricans citizens, although to this day those who reside on the island cannot vote in any federal elections. They were, however, drafted and served in the U.S. armed forces.

In 1922, the Puerto Rican Nationalist Party (PN) was founded.[1] During most of the 1920s the party promoted cultural identity, intellectual discussions, and an ambivalent but fundamentally friendly relationship with the United States. The 1930 election of Pedro Albizu Campos as president of the Nationalist Party radically transformed the party's politics, mission, and relationship to the United States. Henceforth, the PN publicly and vociferously rejected U.S. colonialism in Puerto Rico and actively sought to end U.S. domination of the island.[2] In 1932 the PN declared that it would no longer cooperate with the United States, and in 1935 "it declared war on the Empire."[3] The U.S. government, for its part, viewed the Nationalist Party with hostility and employed various measures to weaken and eliminate the party, ranging from surveillance to imprisonment and even assassination.[4]

The U.S. government also employed political means to undermine support for independence, both on the island and globally. It sponsored two significant political changes in Puerto Rico beginning in the late 1940s. International sentiment against colonialism increased following the end of World War II and the defeat of fascism. The Cold War erupted simultaneously with the global push for national liberation. The U.S. government sought to position itself as the leader of the "free world," but its colonial possession of Puerto Rico generated skepticism and weakened its ability to do so. The alterations in Puerto Rico's status and the election of a Puerto Rican government would allay, if not dispel, questions about the U.S government's commitment to democracy, or so the latter hoped. Thus, the U.S. government worked with forces on the island to change Puerto Rico's status and, at least nominally, granted the island more self-government. In 1948 Puerto Ricans elected their governor, Luis Muñoz Marín, for the first time. Second, the U.S. Congress adopted Law 600, which gave Puerto Rico the right to create

1. MIÑI SEIJO BRUNO, LA INSURRECCIÓN NACIONALISTA EN PUERTO RICO, 1950, at 12 (Rio Piedras: Editorial Edil 1989).

2. LUIS ANGEL FERRAO, PEDRO ALBIZU CAMPOS Y EL NACIONALISMO PUERTORRIQUEÑO 39, 48–49 (San Juan: Editorial Cultural 1990).

3. SEIJO BRUNO, *supra* note 1, at 13.

4. *See generally* PUERTO RICO UNDER COLONIAL RULE: POLITICAL PERSECUTION AND THE QUEST FOR HUMAN RIGHTS (Ramon Bosque-Pérez & José Javier Colón Morera eds., Univ. of N.Y. Press 2006) [hereinafter PUERTO RICO UNDER COLONIAL RULE] (especially chapters one and four).

its own constitution, and opened the door to making Puerto Rico a "Free Associated State."[5]

The Nationalist Party considered this law a direct threat to the right of Puerto Rico to obtain its independence and strongly urged all patriotic Puerto Ricans to oppose it. As Pedro Albizu Campos said on October 27, 1950,

> [t]hey [the U.S. government] are attempting to establish a legal basis in the eyes of the world to dismiss the accusation made by the Nationalist Party that after fifty-two years [of U.S. colonial rule] we are no longer Puerto Ricans, rather we are Yankee citizens. They call on us to give up our right to be Puerto Rican.[6]

Three days later, on October 30, 1950, units of the Puerto Rican Nationalist Party attacked institutions representing the U.S. colonial government across Puerto Rico. Fighting broke out in eleven towns across Puerto Rico and in San Juan. According to Miñi Seijo Bruno, 140 Nationalists actively participated in the fighting. Of the 140, 137 were men and three were women: Blanca Canales, Carmen Pérez, and Doris Torresola.[7] Blanca Canales led the attack in Jayuya after the designated commander, Carlos Irizarry Rivera, was killed. In Jayuya, the Nationalist Party took over the town and held it for three days. After the Nationalists captured Jayuya, Canales climbed to the balcony of the Palace Hotel, whereupon she hoisted the Puerto Rican flag, shouted "Viva Puerto Rico Libre!" and declared the Republic of Puerto Rico.[8] Carmen Pérez and Doris Torresola served as Pedro Albizu Campos's bodyguards and were arrested in San Juan in the general roundup that followed the insurrection.

Oscar Collazo and Griselio Torresola (Doris Torresola's brother), two members of the Nationalist Party in the United States, traveled from New York City to Washington, D.C. to attempt to kill President Harry Truman on November 1, 1950. Torresola was killed in the attempt and Collazo survived. The police arrested him and the FBI questioned the two men's wives, Rosa Collazo and Carmen Torresola, along with other family members and several dozen members or supporters of the Nationalist Party in New York City. Lydia Collazo, Oscar Collazo's

5. Ivonne Acosta-Lespier, *The Smith Act Goes to San Juan: La Mordaza, 1948–1957*, *in* PUERTO RICO UNDER COLONIAL RULE, *supra* note 4, at 60–61.

6. MARISA ROSADA, LAS LLAMAS DE LA AURORA: ACERCAMIENTO A UNA BIOGRAFÍA DE PEDRO ALBIZU CAMPOS 335(San Juan: Ediciones Puerto 2006).

7. SEIJO BRUNO, *supra* note 1, at 225–26, 262–63.

8. BLANCA CANALES, LA CONSTITUCIÓN ES LA REVOLUCIÓN 25–29, 39–40 (San Juan: Comité de Estudios, Congreso Nacional Hostosiano, 1997); HERIBERTO MARÍN TORRES, ERAN ELLOS 122 (Rio Piedras: Ediciones Ciba 2000).

stepdaughter, remembers that as the police were taking her mother, her two sisters, and herself off to be questioned, her mother, Rosa Collazo, the treasurer of the party's New York City chapter, said to them, "Don't cry and don't sign anything."[9]

By November 3rd, the National Guard had defeated the uprising in Puerto Rico. Twenty-one Nationalists and one National Guard were killed, five Nationalists and eleven National Guard wounded; 1,106 Puerto Ricans were arrested in the initial roundup and held for several weeks afterwards.[10] The majority of those arrested were released soon thereafter. However, as of July 1951, 173 Nationalists were still imprisoned, seven of whom were women.[11]

Lolita Lebrón, easily the most famous Nationalist woman prisoner, was not arrested in Puerto Rico in 1950 but in Washington, D.C. four years later. On March 1, 1954, four members of the Puerto Rican Nationalist Party, led by Lolita Lebrón, attacked the U.S. Congress in Washington, D.C. The Nationalist Party launched these assaults in order to demonstrate to the world that Puerto Rico was still a colony and there were Puerto Ricans willing to sacrifice their lives, if necessary, to protest this. The four Nationalists climbed to the visitor's gallery of the House of Representatives, fired shots, and Lebrón shouted, "Free Puerto Rico."[12] All four were subsequently arrested, tried, and sentenced to lengthy terms in U.S. prisons.

II. WHO WERE THESE WOMEN?

The ten women imprisoned for a lengthy period of time in Puerto Rico following the 1950 uprising were Blanca Canales, Juana Ojeda, Juana Mills, Carmen María Pérez, Doris Torresola, Isabel Rosado, Olga Isabel Viscal, Carmen Rosa Vidal, Leonides Díaz Díaz, and Ruth Reynolds, a North American.[13] Two of these women, Blanca Canales and Isabel Rosado, were social workers; three of them, Olga Isabel Viscal,

9. Interview with Lydia Collazo, in Levittown, Puerto Rico (May 25, 2008); CHÉ PARALITICI, SENTENCIA IMPUESTA: 100 AÑOS DE ENCARCELAMIENTOS POR LA INDEPENDENCIA DE PUERTO RICO 155 (San Juan: Ediciones Puerto 2004).

10. PARALITICI, supra note 9, at 106. Not all the arrested were from the Nationalist Party; members of the Communist Party, the Puerto Rican Independence Party, and labor leaders were also detained. *Id.* at 108.

11. *See* The FBI Files on Puerto Ricans, *Partido Nacionalista de Puerto Rico (PNPR) #SJ-100-3, Vol. 19*, http://www.pr-secretfiles.net/binders/SJ-100-3_19_019_153.pdf (last visited Jan. 25, 2012) [hereinafter The FBI Files on Puerto Ricans].

12. Interview with Lolita Lebrón, in Chicago, Ill. (Sept. 9, 2004).

13. To date I have not been able to find out more information on Carmen Rosa Vidal or Juana Mills.

Carmen María Pérez, and Doris Torresola, were students. Pérez and Torresola also served as bodyguards for Pedro Albizu Campos, which was an atypical role for women at that time, in Puerto Rico or elsewhere.[14] Ruth Reynolds was a North American pacifist who worked with the Nationalist Party, and Juana Ojeda was the treasurer of the Nationalist Party.[15]

These ten women, like their male comrades, were convicted of felony charges stemming from the unsuccessful uprising. All the women were convicted of violating Insular Law 53.[16] The Legislative Assembly of Puerto Rico promulgated this law in 1948, which made it a felony to "foment or advocate the need to overthrow, destroy, or paralyze the Insular Government by means of force or violence."[17] Ché Paralitici characterizes this law as "the first anti-subversive legislation established in Puerto Rico following World War Two and during the Cold War."[18]

Blanca Canales and Doris Torresola were additionally convicted of "attack to commit murder." Canales was further convicted on federal charges of "Conspiracy; Damaging Government Property; Destruction of Mail Matter; Forcibly Breaking and Entering a U.S. Post Office; and Destroying records of a Federal Office" as a result of her actions in Jayuya.[19] These women were all sentenced and served time in prisons in Puerto Rico.

TABLE 1: PRISON AND WOMEN NATIONALISTS FOLLOWING THE 1950 REVOLT

Name	Charge(s)	Length of Sentence	Prison	Release Date/Notes
Blanca Canales	Pub. L. 53, three counts attempted murder, attempt to	Three sentences between 6 and 14 years and	First in Vega Alta, Puerto Rico, then	Aug. 18, 1967

14. Most accounts of the time referred to them as his "secretaries." *See, e.g.*, *Weak Case Frees Assassin's Widow*, N.Y. TIMES, Dec. 28, 1950. However, subsequent descriptions, including the women's self-descriptions, define them as bodyguards. *See Una mujer valiente*, CLARIDAD, Oct. 4–10, 2002, at 2; PARALITICI, *supra* note 9, at 117.

15. SEIJO BRUNO, *supra* note 1, at 276–277; CANALES, *supra* note 8, at 5; Interview with Isabel Rosado, in Ceiba, Puerto Rico (Mar. 20, 2006); PARALITICI, *supra* note 9, at 145–46.

16. The Insular Government was the government of Puerto Rico. The FBI Files on Puerto Ricans, *supra* note 11; PARALITICI, *supra* note 9, at 424–25, 428, 430.

17. Acosta-Lespier, *supra* note 5, at 13.

18. PARALITICI, *supra* note 9, at 103.

19. The FBI Files on Puerto Ricans, *supra* note 11, at 27.

	burn the Jayuya post office	one of life imprisonment[20]	Alderson, West Virginia; in 1956 back to Vega Alta. Served 17 years[21]	
Rosa Collazo	Detención	2 months	Women's House of Detention, New York City	
Leonides Díaz	Pub. L. 53; four cases 1st degree murder; six cases intent to commit murder[22]	Life without parole (496 years in prison)[23]	Women's prison in Vega Alta;[24] served 7 years at forced labor[25]	July 19, 1957
Juana Mills	Pub. L. 53			
Juanita Ojeda	Pub. L. 53	8–13 months	Arecibo District Jail	Sept. 18, 1952
Carmen Pérez	Attempted assassination	22 months	La Princesa (San Juan) and Arecibo District Jail	
Ruth Reynolds	Pub. L. 53	2–6 years	Arecibo District Jail	June 21, 1952
Isabel Rosado	Pub. L. 53	1 year, 3 months	Humacao District Jail	Apr. 4, 1952
Carmen Torresola	Arrested	2 months	New York City	
Doris Torresola	Pub. L. 53	10 years	San Juan District Jail	Aug. 25, 1953

20 . José Enrique Ayora Santaliz, *Blanca Canales*, CLARIDAD, Aug. 2–8, 1996.

21. CANALES, *supra* note 8, at 52.

22 . MARÍN TORRES, *supra* note 8, at 68. Numerous sources say that she was arrested because she had prepared food for her husband and three sons who took part in the uprising.

23. *Partial List of the Political Prisoners Serving Sentence on the Penitentiaries of the United States of America in Puerto Rico and the Continental U.S.*, United Methodist Church Archives, Madison, New Jersey, 1253-4-1:08 Ralph Templin Papers, at 2 (P. R. (2)) [hereinafter *Partial List of Political Prisoners*].

24. MARÍN TORRES, *supra* note 8, at 67.

25. *Id.*

Olga Viscal	Pub. L. 53; 37 cases of contempt of court26	1–10 years; 31 months	La Princesa (San Juan) and Arecibo District Jail	

Source: PARALITICI, *supra* note 9 (unless otherwise noted).

In New York City, Rosa Collazo and Carmen Torresola were arrested, charged with having "Conspired . . . [to] harm a member of the Government," and imprisoned in the Federal House of Detention in Manhattan.[27] Rosa Collazo shared a jail cell with Ethel Rosenberg, with whom she became good friends.[28] A judge ordered both Puerto Rican women released in December 1950, due to the "flimsy evidence" against them presented by the U.S. attorney. It is likely that the judge was also influenced by the fact that Carmen Torresola, only twenty-two years old at the time, was the mother of a six-month old infant and expecting another child.[29] However, the charges against Rosa Collazo, who had been an active member of the Nationalist Party since 1937, were not dropped until 1951.[30]

The U.S. government rearrested Rosa Collazo and Carmen Torresola after the Nationalist Party attacked the U.S. Congress in March 1954.[31] In 1950 and 1951, the media had referred to Rosa Collazo as "the wife of Oscar Collazo," in 1954 the *New York Times* identified her as "the secretary of the women's section of the [Nationalist] party."[32] The change could be due to the leading role that Rosa Collazo played in mobilizing domestic and international opposition to the death penalty her husband received. Rosa Collazo was subsequent-

26. *Partial List of Political Prisoners*, *supra* note 23, at 4.

27. *Assassins' Kin and Friends are Rounded up in Bronx*, N.Y. TIMES, Nov. 2, 1950.

28. Interview with Lydia Collazo, *supra* note 9; Telephone Interview with Robert Meerepol (July 30, 2009).

29. *Weak Case Frees Assassin's Widow*, N.Y. TIMES, Dec. 28, 1950.

30. Comité Pro-Homenaje a Rosa Collazo, *Homenaje a Rosa Collazo* (Impresos Puerto Rico: San Juan, 1984).

31. *91 Puerto Ricans Rounded up Here: Nationalists Are Subpoenaed for 3 Federal Grand Juries in Capitol Shootings*, N.Y. TIMES, Mar. 9, 1954, at 1. The U.S. government subpoenaed ninety-one Puerto Ricans to appear before grand juries following the attack. Rosa Collazo "brought lunch for a number of party members" as they waited to be questioned in the grand jury witness rooms in New York City. *Id.* at 21.

32. *Id.* at 1, 21. The article quoted the prosecutor in the case who lauded the FBI that "did an amazingly good job in locating these people," and noted that "no witness had been threatened by contempt in any of the panels for failure to cooperate or answer questions." *Id.* It also added that "it was said that Mrs. Collazo brought lunch for a number of party members." *Id.*

ly charged with seditious conspiracy, as were seventeen other Nationalists.[33] She was convicted and sentenced to six years in prison.[34]

Isabel Rosado, Carmen Pérez, and Doris Torresola were also arrested following the 1954 attack on Congress. They were in the Nationalist Party headquarters in Old San Juan when the police came to arrest Pedro Albizu Campos. They, like Albizu Campos, resisted the arrest. In order to subdue them, the police fired tear gas and bullets into the room they occupied. After two hours, the police entered the headquarters and carried out Doris Torresola, bleeding and unconscious as a result of the shots and tear gas fired by the police. Isabel Rosado and Albizu Campos were also removed, unconscious, from the building. Carmen Pérez and José Rivera Sotomayor were also arrested at the same time.[35] The three women, along with Angelina Torresola and two female members of the Communist Party, were jailed together in general population in the Arecibo District Jail.[36]

TABLE 2: PRISON AND WOMEN NATIONALISTS FOLLOWING THE 1954 ATTACK ON CONGRESS

Name	Charge	Sentence	Release Date	Time Served
Rosa Collazo	Conspiracy	4–6 years		
Lolita Lebrón	Intent to kill; conspiracy	56 years[37]	Sept. 1979	25 years
Juana Mills	Pub. L. 53	7–10 years		
Juanita Ojeda	Pub. L. 53	7–10 years		
Carmen Pérez	Weapons	60 years		15 years[38]
Isabel Rosado	Weapons;	1–15 years; 1–	1965[39]	10 years

33. The charge of seditious conspiracy means conspiring to overthrow the U.S. government by force. *See* 18 U.S.C. § 2384 (1994).

34. Edward Ranzai, *Anti-U.S. Plot is Laid to 17 Puerto Ricans*, N.Y. TIMES, May 27, 1954, at 14; *13 Puerto Ricans Get 6-Year Terms: Leaders of Terrorist Group Under Maximum Sentences for Seditious Conspiracy*, N.Y. TIMES, Oct. 27. 1954; Comité Pro-Homenaje a Rosa Collazo, *supra* note 30; interview with Lydia Collazo, *supra* note 9.

35. *Capturan Albizu y Otros Tres*, EL MUNDO, Mar. 6, 1954, at 1.

36. *6 Acusadas de Subversión Comparten la Misma Sala*, EL MUNDO, Mar. 9, 1954. Angelina Torresola, Doris and Griselio's sister, was arrested in her mother's house in Puerto Nuevo by the Negociado de Seguridad Interna.

37. Sources differ on the length of her sentence. *See, e.g.,* PARALITICI, *supra* note 9 (56 years); CONRAD LYNN, THERE IS A FOUNTAIN. THE AUTOBIOGRAPHY OF A CIVIL RIGHTS LAWYER 136 (1993) (54 years). *See also* Vanguard Betances, *Tragedia Hispanoamericano, Presos Políticos de Puerto Rico en Carceles de Estados Unidos*, 1961, Centro de Estudios Puertorriqueños, Ruth Reynolds Papers, Box 20, File 87.

38. *Muere una líder Nacionalista*, EL NUEVO DÍA, Apr. 5, 2003.

39. Mildred Rivera Marrero, *Un siglo de lucidez*, EL NUEVO DÍA, Jan. 30, 2007.

	attack with intent to kill	5 years		
Angelina Torresola	Pub. L. 53	7–10 years		
Carmen Torresola	Conspiracy	4–6 years		
Doris Torresola	Pub. L. 53	7–10 years		

Source: PARALITICI, *supra* note 9 (unless otherwise noted).

III. GENDER IN SENTENCING

The 1950 and 1954 attacks carried out by the Nationalist Party took place during a period of intense anti-communism in the United States. Indeed, the government initially attempted to link the Communist Party to the 1950 revolt.[40] They also took place during a time when conservative ideas about women and their role in society were both part of U.S. cold war ideology and defined many people's ideas and conceptions of gender in the United States.[41] Given this context, the prominent positions held by some Nationalist Party women were especially remarkable. As mentioned above, Doris Torresola and Carmen Pérez served as bodyguards for Pedro Albizu Campos. Blanca Canales became the leader of the Jayuya revolt, albeit by default. Lolita Lebrón led three other male members of the Nationalist Party to attack the U.S. Congress. How did the U.S. government respond to these women, both as anti-colonial fighters and as women? As the two cases I examine below illustrate, it is not so easy to answer this question.

The majority of the over 1,000 Puerto Ricans arrested following the 1950 uprising, as well as the several dozen detained after the 1954 attack on Congress, were released shortly thereafter. The women that were sentenced to longer prison terms, like the men, were those who had demonstrated a deep and long-standing commitment to the party

40. For example, when John Foster Dulles, U.S. Secretary of State, spoke at the meeting of the Organization of American States in Caracas, Venezuela shortly after the 1954 attack on U.S. Congress, he claimed that the communists had influenced the Nationalist attack. *Opina Rojos han influído Nacionalismo*, EL MUNDO, March 5, 1954, at 1. Although the Nationalist Party and the Communist Party did have some connection, and Communist Party lawyers defended the arrested or convicted Nationalists, the two organizations also differed on many issues. This is a topic on which I have only conducted preliminary research. It will be part of the larger study that I am making on the Nationalist Party.

41. *See* ELAINE TYLER MAY, HOMEWARD BOUND: AMERICAN FAMILIES IN THE COLD WAR ERA (New York: Basic Books 1999).

and the struggle for Puerto Rican independence. Although the U.S. government, along with the media, branded both male and female Nationalists as terrorists, not all members received the same sentences, even when they were charged with the same crime. Although gender played a role in the amount of time the Nationalists were given, so too did one's role in the actions that gave rise to the charges against them.

Since this is a preliminary study, I do not have information on all the charges and sentences of all the Nationalist Party members. Therefore, I will limit my analysis to two cases: that of the Nationalist Party members arrested in Jayuya in 1950 and that of the four Nationalists who attacked the U.S. Congress in 1954. I have chosen these two cases because there is sufficient information on them, because both Blanca Canales and Lolita Lebrón were military leaders in the attacks, and because both women were given extraordinarily long sentences.[42]

Fourteen members of the Nationalist Party were convicted of a variety of federal charges for their role in the 1950 uprising in Jayuya. Heading the list was Blanca Canales, who the media of Puerto Rico designated as "the leader" of the Jayuya attack.[43] Canales, along with Mario Irizarry, received eight years for one set of charges; however, Ramon Robles and Elio Torresola, the brother of Griselio and Doris Torresola, received eleven years for a similar set of charges.[44] All four received higher sentences than the other ten Nationalists, four of whom received either six or seven years and six of whom were indicted by the Grand Jury.[45]

Canales was also convicted of attack to commit murder, possession of an unregistered firearm, carrying weapons, murder, and arson. She received a variety of sentences, one of which was life in prison. Mario Irizarry, who I discussed in the previous paragraph, was charged and convicted of the same crimes as Canales, as well as robbery and second degree murder. They were both sentenced to roughly the same amount of time for their shared charges, which indicates that perhaps gender did not play a significant factor in determining the length of the sentences. However, as the publicly designated "leader" of the Jayuya

42. Jan Susler studied the very lengthy prison sentences given to the FALN prisoners following their arrests in the Chicago area in the early 1980s. She found that their sentences were highly disproportionate to those of other people convicted during that same time for far more serious offenses. *See* Jan Susler, *Puerto Rican Political Prisoners in U.S. Prisons*, *in* PUERTO RICO UNDER COLONIAL RULE, *supra* note 4, at 123.

43. *Blanca Canales Alegó Ayer Inocencia*, EL MUNDO, November 9, 1950, at 1, 2.

44. The FBI Files on Puerto Ricans, *supra* note 11.

45. *Id.* I have not yet been able to determine if or for what they were convicted.

attack, I find it notable that in general she received either the same or lighter sentence than her male comrades. Certainly, the fact that she came from a locally prominent family could have influenced the judge.[46]

In the case of Lolita Lebrón it is clear that gender played a role in determining the length of the sentence she received. Lolita Lebrón, the acknowledged leader of the attack on Congress, was convicted of assault with intent to commit murder and, in a trial held nine months later, of conspiracy to murder the congressmen. She was sentenced to fifty-six years in prison.[47] The three men who accompanied her, Rafael Cancel Miranda, Irvin Flores, and Andres Figueroa Cordero, however, were convicted of the same charges and each sentenced to seventy-five years in prison.[48] Lebrón had no prior federal convictions or charges.[49] Rafael Cancel Miranda had been convicted and sentenced to two years in prison in 1948 for refusing to register with the military service, but the other two men had no previous records.[50] Nonetheless, they all received the same sentence, which suggests that Cancel Miranda's prior record did not influence the length of his sentence.

Conrad Lynn, Lebrón's attorney, offers an explanation for her lighter sentence. The day before she was to stand trial, a priest had visited her and told her that her twelve-year old son had drowned. She was distraught when she appeared in court. The judge responded to her grief and allowed her to tell the court the story of how, when her

46. Mario Canales, her brother, was a representative in the Puerto Rican Congress. He obtained a lawyer who wanted to sever her case from that of the other Jayuyense Nationalists arrested following the uprising. Blanca Canales rejected the effort and said, "I don't want a separate trial. I want to run the same risks as the revolutionary compañeros of Jayuya." Ayora Santaliz,, *supra* note 20.

47. *Time* magazine, for example, first described her as "an attractive woman" accompanied by "two dark young men." *Puerto Rico is Not Free*, TIME, Mar. 8, 1954. It subsequently characterized her as "the fiery divorcee who organized and led the armed assault on Congress." *THE CONGRESS: Aftermath*, TIME, Mar. 15, 1954. The popular weekly magazine also reported, erroneously, that Lebrón "is a convicted thief and forger who has spent much of her adult life in prison." *Id.* The same article referred to Pedro Albizu Campos as a "crackpot" who was arrested in San Juan after he was found "cowering on the floor with two women friends." *Id.* The women were Doris Torresola and Carmen Pérez. The claims that Lebrón had a prior criminal record were disproved when her records were searched. *See Nada le Imputan Archivos de Corte Federal de la Isla*, EL MUNDO, Mar. 5, 1954, at 3; *see also Boricuas Tirotean Congreso*, EL MUNDO, Mar. 2, 1954, at 1. It described the attackers as "four fanatics led by a 34-year old woman." *Id.*

48. Rafael Cancel Miranda did have a felony conviction, but neither Irvin Flores nor Andres Figueroa Cordero had any prior convictions and they all received the same sentence. So their previous records, or lack thereof, could not have been the critical factor that determined the different length of sentences between the three men and Lebrón.

49. *Nada le Imputan Archivos de Corte Federal de la Isla*, EL MUNDO, Mar. 5, 1954, at 3.

50. SEIJO BRUNO, *supra* note 1, at 19.

son had lived with her in New York City, she was out of work and money and she desperately searched the streets looking for money to feed her son. According to Lynn, when she finished recounting her story, "the judge was blowing his nose and the defense table and the jury were in tears."[51] Although she, like her male comrades, was found guilty, perhaps the sympathy she inspired as a bereaved and loving mother influenced the difference in sentences.

Lolita Lebrón served twenty-five years in prison, most of them spent at Alderson Federal Prison Camp in West Virginia. Her lengthy term of incarceration meant that she was the longest-held woman political prisoner in the history of the Americas. President Carter released her in September 1979, along with Oscar Collazo and the three male Nationalists who attacked the U.S. Congress.

IV. TREATMENT AND CONDITIONS IN PRISON

Very little has been written about the conditions these women endured during their many years of imprisonment.[52] The portrait of their confinement that follows is based on information that I have gathered from interviews, letters, reports, memoirs, and some secondary sources.

Conditions in the cells were primitive. Many of the women (as well as a number of the men) were held at La Princesa, in San Juan, which one of their attorneys, Conrad Lynn, described as "the forbidding old Spanish fortress that served as a prison for the Nationalists." In December 1950 Lynn met with Ruth Reynolds in her cell at La Princesa, which he described as follows: the cell "was windowless, there was no bed, and an overflowing pail served as the latrine. The stench was horrible, not sharp and pungent like a stockyard but heavy and pervasive. There seemed to be no air to breathe."[53]

Blanca Canales served much of her sentence in Alderson, after first being held in Vega Alta, Puerto Rico. In Alderson, her cellmate was none other than Tokyo Rose! Following the 1954 attack on Congress, Lolita Lebrón, Rosa Collazo, and Carmen Torresola were also impris-

51. LYNN, *supra* note 37, at 136.

52. Blanca Canales ends her memoir, *La Constitución es la Revolución*, in 1950. *See* CANALES, *supra* note 8.

53. LYNN, *supra* note 37, at 129.

oned in Alderson. In Alderson, Canales worked making curtains until she was transferred back to Vega Alta.[54]

After the 1950 revolt, Isabel Rosado was convicted of violating Law 53. She served fifteen months in prison. In her memoirs, *Mis Testimonios*, Isabel Rosado wrote about her life in prison and that of the other Nationalist women prisoners she was incarcerated with. At first she, like the other Nationalists, was not allowed to receive or send letters. And, like the other Nationalists, she completely ignored this prohibition and sent many "clandestine missives from jail."[55] The prisoners were, however, allowed to receive packages with things they needed, like soap, and treats, like cake. Rosado remembers that one of the Nationalists, Leonides Díaz, spent her time knitting. Diaz gave any money that she raised from the sale of her work to help her imprisoned husband, three sons, brother, and cousin. The only visitor Rosado, or any of the women, received was that of their lawyer. The women were allowed out of their cells at three o'clock in the afternoon to "get some sun" and to bathe.[56] On top of the quotidian miserable conditions of confinement, it is also possible that some of these women suffered torture, as I explore in the next section.

V. TORTURE

The accusation that Pedro Albizu Campos was subjected to radiation while imprisoned is well known. The charges made by several women prisoners that they were tortured have received much less attention. Some of the Nationalist women prisoners have written or recounted their treatment in prison. This next section draws heavily on their words as they describe what happened to them in prison.[57]

In 1951 Doris Torresola wrote an account of her time in the Arecibo District Jail; La Princesa, a jail in San Juan where many of the Nationalist prisoners were held, including Pedro Albizu Campos; and her return to Arecibo. Doris Torresola was first arrested in 1950 and

54. Ayora Santaliz, *supra* note 20. Canales and Tokyo Rose planned and carried out a hunger strike that "paralyzed the prison." *Id.*

55. Rivera Marrero, *supra* note 39.

56. ISABEL ROSADO, MIS TESTIMONIOS 5–6 (2007).

57. *See, e.g.,* MARÍN TORRES, *supra* note 8, at 19. He took part in the Jayuya uprising. He describes being taken back to prison in Arecibo, where he was subjected to sleep deprivation. "It was like returning to hell. Once again the *apretujamiento* (squeezing) and the flashes of light, the wattage of which I don't know, were turned on all night long, directly on our faces." Later, he says explicitly, "The tortures Jones [the North American warden of the prison] [subjected us to]were huge. They tortured us both physically and spiritually. It was so bad that later, some [of the Nationalist prisoners] went crazy." *Id.* at 26.

then rearrested in the Nationalist Party headquarters in Old San Juan after the 1954 attack on Congress. Convicted of violating law 53, she was sentenced to ten years in prison. Held in Arecibo District Jail, she was taken to La Princesa prison to testify in a trial. While she was there, she experienced a series of disturbing, painful, and disorienting attacks.

She recounted her experiences in La Princesa a little over two months after the events occurred. In August 1951, when she lay down on her bed in her cell in La Princesa in San Juan she began "to hear the sound of a motor and vibrations." She heard them again the next day. She called on Carmen Pérez, who was in the same cell, to put her head on her pillow to see if she heard the same noises, which she did. The sounds disappeared for a while, however when she lay down the next night, she "felt them again." She continued, "I couldn't sleep, my head hurt, and I felt dizzy." The noise and vibrations continued and grew stronger."[58] She no longer felt them after she was transferred back to Arecibo.[59]

Ruth Reynolds, the North American pacifist who supported independence for Puerto Rico and the Nationalist Party, was in jail with the Nationalist women. When they were transferred back to Arecibo, the guards told her to stay behind in La Princesa because she had a visitor. When Reynolds did return several days later, "she was unrecognizable. She was so thin and so nervous that we all felt sorry for her. Her attitude was very strange. She started to speak and then stopped talking. She had the look of someone who is deeply worried about something."

While Ruth Reynolds was still in La Princesa, her attorney Conrad Lynn visited her in her cell. He wrote about his first encounter with her in one of his memoirs: "The light was dim, and it took me a while before I could see her sitting on the cold limestone bench. She was unable to stand up. She inched sideways on the stone bench, and as she came nearer the light of starvation was visible in her eyes."[60]

What had happened? Reynolds, like Doris Torresola, wrote about the strange vibrations she experienced while she was being held in La Princesa. However, she also spoke of hearing voices, "invisible voices that I and only I could hear." When Conrad Lynn came to visit her, she confided what she had heard to him. She told him that the voices,

58. Doris Torresola, 1–4 (Nov. 8, 1951)(archival material)(on file with the Centro de Estudios Puertorriqueños, Ruth Reynolds Papers).

59. *Id.* at 5–6.

60. LYNN, *supra* note 37, at 129.

whose origin she could not detect, spoke of different themes. Recently, she had heard the voices "speculating as to whether or not she had had sexual relations with Albizu Campos." She further confessed that she had not told many people about these voices because they would "naturally consider me crazy."[61]

When she went back to her cell, the voices spoke to her about what she had just said to Conrad Lynn. "My God, this woman has condemned herself because she told Conrad Lynn about us. Doesn't she know that the life of this black idiot [Conrad Lynn was African-American] is in danger?" After hearing this, she concluded that all of her conversations in La Princesa had been overheard. "How can I describe the next four days and nights of horror?"[62] At the end of the four days, Reynolds was shipped back to Arecibo, where she rejoined the women Nationalists imprisoned there.

There are various ways to interpret what these women described. One could attribute their words to the product of nerves, fear, and the poor conditions in prison. Or, perhaps, one could dismiss them as nothing more than a transparent effort to foment criticisms of the United States and those forces in Puerto Rico that backed U.S. rule. Or, perhaps, they sought to generate sympathy for themselves and their plight. Certainly, any and all of these explanations are possible, but I do not think they are likely.

The U.S. government mounted a campaign to isolate the imprisoned Nationalists and to ridicule them and their actions. It persistently portrayed them as nothing more than a small band of fanatics and terrorists whose beliefs and actions the majority of Puerto Ricans opposed. For years, it had characterized Pedro Albizu Campos as "crazy."[63] It is certainly possible that the U.S. government would attempt to drive people crazy in order to buttress its argument that no one in their right mind would want Puerto Rico to be independent.[64]

61. LAURA DE ALBIZU CAMPOS, ALBIZU CAMPOS Y LA INDEPENDENCIA DE PUERTO RICO 128 (Hato Rey: Publicaciones Puertorriqueños 2007).

62. *Id.* at 128–129.

63. This is reminiscent of the Soviet Union's practice of categorizing those who opposed the socialist system as insane and confining them to psychiatric hospitals.

64. There is a long, sordid history of the U.S. Bureau of Prisons conducting tests on inmates. *See, e.g.* Barron H. Lerner, *Subjects or Objects? Prisoners and Human Experimentation,* 356 NEW ENG. J. MED. 1806, 1806 (2007), *available at* http://www.nejm.org/doi/pdf/10.1056/NEJMp068280; Allen M Hornblum, *They Were Cheap and Available: Prisoners as Research Subjects in Twentieth Century America*, 315 BMJ, 1437, 1438 (1997).

VI. RELATIONSHIPS AMONG THE WOMEN

Housed in difficult conditions, possibly subjected to torture, these women not only survived prison, they also maintained their political beliefs intact. How did they do it? I believe that several elements offered them comfort and strengthened their will. First, several of the women were very religious and some, such as Lolita Lebrón, became if anything more devout while in prison. Second, these women were in the positions they were in, leaders of military assaults, bodyguards to Pedro Albizu Campos, because of the tenacity of their commitment to an independent Puerto Rico. This belief, which does not appear to have wavered, sustained them. Third, and the factor that comes through in all their writings and interviews, is that they had each other. Many of them were housed in the same prison, even in the same cell at times or in contiguous ones. They implicitly trusted, cared for, and loved each other. Their profound friendship, which lasted them the rest of their lives, helped them to survive the extremely challenging life they confronted daily and the prospect of spending many years, perhaps much of the rest of their lives, in prison.

When I interviewed her, Isabel Rosado talked about how much she admired Ruth Reynolds and how important she and the other women who served time with her were to her.[65] When Ruth Reynolds walked into the Arecibo District Jail, Doris Torresola and the other Nationalist women were waiting there for her and did all she could to help her recover from her ordeal. These women, who were not married and did not have male partners, looked to each other for solidarity and understanding.

CONCLUSION

This is a very preliminary study of a group of Puerto Rican Nationalist Party women who were imprisoned in Puerto Rican or U.S. prisons. What strikes me most about these women is the strength and conviction with which they confronted the U.S. government in Puerto Rico or in the United States. Despite the long years many of them spent in jail and the physical, emotional, and psychological privations they suffered while incarcerated they came out of prison just as committed to obtaining an independent Puerto Rico as they went in. They all participated actively in political activities and movements as long as they

65. Interview with Isabel Rosado, *supra* note 15.

lived.[66] I last saw Isabel Rosado last November, when she celebrated her 103rd birthday. At the party, which representatives from a range of political parties and organizations attended, she got to her feet and called for the independence of Puerto Rico and the release of all Puerto Rican political prisoners. When Blanca Canales was released from prison, prison authorities wrote the following notes on her record, "we give up on her, she cannot be rehabilitated."[67] If the goal of the U.S. government had been to weaken these women's resolve or to shake their faith in themselves, it failed miserably.

66. There was one exception: Doris Torresola. She burned herself to death a few years after she was released from prison.

67. Ayora Santaliz, *supra* note 20.

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WOMEN'S RIGHTS, PUBLIC DEFENSE, AND THE CHICAGO WORLD'S FAIR

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INTRODUCTION

At the Chicago World's Fair in 1893, distinguished judges, legal scholars and advocates met in an international Congress of Jurisprudence and Law Reform. Women lawyers were there as attendants and participants and two of them were officially on the program. This piece will focus on the contribution of Clara Foltz, the first woman at the California Bar (1878); she spoke on the need for public defenders to match the public prosecutors and improve the quality of criminal justice. It was a speech of breathtaking originality and scope. Though she said nothing at all about women's liberation, Foltz's thoughts grew partly from her experience as a pioneer lawyer and women's rights activist.[1]

I. WOMEN AT THE WORLD'S FAIR: SETTING THE STAGE

More than a hundred years later, the 1893 Chicago World's Fair continues to excite interest—inspiring works as various as a popular novel about a serial killer and a scholarly exposition on women's art.[2] The Fair was one of those historical watershed events that seem to bear endless interpretation and to provide countless illustrations and

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1. I rely mainly on the following sources: BARBARA BABCOCK, WOMAN LAWYER: THE TRIALS OF CLARA FOLTZ 288–319 (2011) [hereinafter BABCOCK, WOMAN LAWYER], notes and archives at the women's legal history website, http://wlh.law.stanford.edu. [hereinafter WLH website] (with specific notes title pinpointed), Barbara Allen Babcock, *Inventing the Public Defender*, 43 AM.L.REV. 1267 (2006), [hereinafter Babcock, *Inventing*]. For Foltz's writings related to public defense, see The Public Defender and the Woman's Rights Movement—1878–1913, which are part of The Women and Social Movements Website, http://womenhis.alexanderstreet.com.

2. ERIK LARSEN, THE DEVIL IN THE WHITE CITY (2003); WANDA M. CORN, WOMEN BUILDING HISTORY: PUBLIC ART AT THE 1893 COLUMBIAN EXPOSITION (2011).

metaphors. Half the population of the United States—26 million people—passed through the Fair's electronic turnstiles (themselves one of its wonders) between May and September 1893. The visitors came to see the displays in two hundred buildings spread over six hundred acres, with some of the grandest outlined by electric necklaces and reflected in a lagoon plied by gondolas. The first Ferris wheel was the icon of the Exposition, just as the Eiffel tower had been at the 1889 Paris Exposition.

Though the sights were astonishing, it was the symbolism of the Fair that made it important to the huge crowds in attendance. It marked the reunification of the country after the Civil War, and its emergence on the world stage as a great power. The Exposition's grandeur was proof of progress: more "in the last fifty years than the previous fifty centuries," said a popular orator, adding, "we live in the best age of history and the most favored portion of the globe."[3] Thus, despite the economic depression, the worst in history, that hit in full force soon after the Fair opened, Americans continued to find hope and inspiration in the gleaming white city.

For American women, the Fair was an important historical moment because they had a significant role in the planning and programs for the first time at any such international exposition.[4] The women's rights movement was greatly enlivened by the Fair, and new alliances formed among the activists, clubwomen and society ladies. Clara Foltz attended the Fair twice, traveling by train from San Francisco. On her second trip, she spoke to a nationwide meeting of women lawyers, and a few days later to the World's Congress of Jurisprudence and Law Reform. Her Fair activities took her to the pinnacle of her career.

Though the Fair brought women together in new ways, considerable strife marked the opening stages of their participation. The suffragists, led by Susan B. Anthony, spearheaded the effort to accord women an equal place in the planning, exhibits and programs of the Fair. They tried unsuccessfully to persuade Congress to put women on the major planning board for the Fair, but instead there was a separate but equal Board of Lady Managers created. Congress chose "Mrs. Potter Palmer,"

3. John J. Ingalls, *quoted in* DONALD L. MILLER, CITY OF THE CENTURY: THE EPIC OF CHICAGO AND THE MAKING OF AMERICA 494 (1996).

4. BABCOCK, WOMAN LAWYER, *supra* note 1, at 262–67. Bibliographic notes for this book are published online at the women's legal history website. *See* Indexes and Bibliographic Notes—Woman Lawyer: The Trials of Clara Foltz—Online Notes for the Book, *available at* http://wlh-wiki.law.stanford.edu/index.php/Indexes_and_Bibliographic_Notes (last visited Jan. 25, 2012) [hereinafter *WLH Website Bibliographic Notes*].

the wife of a Chicago tycoon, as President of the Board. She was stylish, bejeweled, man-pleasing and not an avowed suffragist—not exactly what the movement women had in mind when they fought for an equal place at the Fair. But Mrs. Palmer turned out to be a superb organizer and, in her way, a great advocate for women. She deserves much of the credit for women's prominence at the Fair so many decades before they won political equality.[5]

Rich Chicago women had a tradition of social concern and moral seriousness, which was not always true of society ladies elsewhere. Along with other wealthy and fashionable women, Bertha Palmer was active in the Chicago Woman's Club, which had fostered Jane Addams' foundation of Hull House in 1889. In the Chicago Club, the society ladies worked together with the women doctors, lawyers and teachers. But the two groups did not, on the whole, overlap socially, nor did they agree on how women should be and how they should present themselves.[6]

Even before Chicago had won the privilege of holding the Fair, the professional women of Chicago formed an association to prepare for it. They took the name of Queen Isabella and commissioned a statue by a woman sculptor of the monarch holding out her jewels, presumably to Columbus, who was not depicted. The Isabella society members were probably the most disappointed by the formation of the Board of Lady Managers, and very few of their members made it onto that Board.[7]

As the stress of the huge Fair enterprise began to wear on everyone, the Lady Managers and the Isabellas became increasingly antagonistic. At the center of the controversy was the Woman's Building, which the Lady Managers sponsored and the Isabellas disliked because of the segregation of women's concerns. They also opposed the largely a-political exhibits (fine arts, handicrafts, and literary works) and predicted that the building would be an embarrassing sideshow to the Fair.[8]

5. ISHBEL ROSS, SILHOUETTE IN DIAMONDS: THE LIFE OF MRS. POTTER PALMER 85 (1960); ANNE FIROR SCOTT, NATURAL ALLIES: WOMEN'S ASSOCIATIONS IN AMERICAN HISTORY 128–31 (1991); KATHRYN KISH SKLAR, FLORENCE KELLEY AND THE NATION'S WORK: THE RISE OF WOMEN'S POLITICAL CULTURE, 1830–1900, at 242 (1995); Gayle Gullett, *Our Great Opportunity: Organized Women Advance Women's Work at the World Columbian Exposition of 1893*, 87 ILL. HIST. J. 259 (1994).

6. SCOTT, *supra* note 5, at 128–31; SKLAR, *supra* note 5, at 242.

7. *WLH Website Bibliographic Notes*, *supra* note 4 (*Bertha Palmer and the Isabellas*).

8. ANITA MILLER & JEANNE MADELINE WEIMANN, THE FAIR WOMEN: THE STORY OF THE WOMAN'S BUILDING, WORLD'S COLUMBIAN EXPOSITION, CHICAGO, 1893, at 39 (1981); Matthew J. Sanders, *An Introduction to Phoebe Wilson Couzins* (2000), WLH website, *supra* note 1 (Couzins was one of the few Isabella members of the Lady Managers); *WLH Website Bibliographic Notes, supra* note 4.

But the Isabellas were wrong about what people wanted. With its human scale and relative comfort, the Woman's Building was an enormous success and Bertha Palmer's lovely face adorned many things sold there from postcards (first widely used at the Fair) to silver spoons. A brilliant tactician, Mrs. Palmer separated the Isabellas from the other women's clubs and organizations by arranging accommodations in the Woman's Building for virtually every other group. Throughout the summer and early fall, most days saw some special program, reception, congress or other occasion in the Woman's building. Only the Isabellas and their large statue were obviously excluded.

Women's meetings at the Fair began most auspiciously with the World's Congress of Representative Women in May, which Clara Foltz attended. The Congress was the first of seventeen great public gatherings held in connection with the Chicago World's Fair. The Congresses were the brainchild of Charles Bonney, a local lawyer and educator, who proposed an intellectual adjunct to the physical exposition. Chicago boosters and businessmen, eager to establish the town as cultivated and civilized, backed him generously.[9]

A building with two big auditoriums and smaller meeting rooms (now the Art Institute) was constructed to house the Congresses. It was near the Fairgrounds; both opened in May 1893. For the first of the Congresses, Bonney had the brilliant idea of celebrating woman's progress over the past one hundred years. "The woman of the century," or "The World's Congress of Representative Women" was a huge draw, kicking off the rest of the Auxiliary season. Its success showed that women were to be taken seriously at the Fair, and encouraged their demands for greater inclusion in all the Congresses.[10]

The women's Congress filled the new building, where the workman's hammer was still ringing, (as many speakers pointed out) from morning to night for six days. Ten thousand women in one place on the subject of themselves was a sobering sight to some, and thrilling to

9. Charles Bonney, *Mr. Bonney's Proposal,* THE STATESMAN, October 1889; DAVID F. C. BURG, CHICAGO'S WHITE CITY OF 1893, at 235–85 (1976) (chapter on the World's Congress Auxiliary). On the Congresses in general, see HUBERT HOWE BANCROFT, THE BOOK OF THE FAIR (1893) (particularly chapter 26 on the World's Congress Auxiliary). On Bonney, see DICTIONARY OF AMERICAN BIOGRAPHY (1957) (Bonney entry); *The World's Congress Auxiliary of the World's Columbian Exposition*, 23 CHI. LEG. NEWS 250 (1891) (featuring Bonney with a picture).

10. THE WORLD'S CONGRESS OF REPRESENTATIVE WOMEN: A HISTORICAL RESUME FOR POULAR CIRCULATION OF THE WORLD'S CONGRESS OF REPRESENTATIVE WOMEN, CONVENED IN CHICAGO ON MAY 15 AND ADJOURNED ON MAY 22, 1893 UNDER THE ASUPIECES OF THE WOMAN'S BRANCH OF THE WORLD'S CONGRESS AUXILIARY 8–10 (May Wright Sewall, ed., 1894) [hereinafter REPRESENTATIVE WOMEN] (opening remarks of Charles C. Bonney).

many. The Chicago Inter-Ocean lead ran: "In 1492 a woman sent Columbus to discover a new world; the opening of the woman's congress in this new continent, 400 years later, is evidence that woman has since discovered herself."[11] On the first day of the women's Congress, Charles Bonney stepped forward from the mass of female celebrities on the platform to proclaim: "The century of woman's progress . . . . carrying [with it] not the degradation of man, but the substitution of the law of love for the law of force." In her lecture on lawyers, given many times over the fifteen years since she joined the Bar, Foltz made the same point; she believed that women lawyers would improve the profession because they would practice at a high humanitarian level, with "mother-love and solicitude."[12]

The women's Congress was significant in two respects—the range of topics covered in the week and the diversity among the attendants. Foreign women, working women, black women, society women, religious women, reformers of every possible stripe, all were invited and most came. Most participants were invited through their clubs and federations, with many of these holding national conventions under the auspices of the World's Congress of Representative Women. In addition to non-stop meetings of every size, dozens of receptions and social events were "tendered" to the attendants. Serious topics included Industries and Occupations, Education and Literature, as well as Industrial, Social and Moral Reform.

The summaries of the 80 "report congresses" fill over 800 closely printed pages.[13] Not all the meetings at the women's World's Congress were on overtly intellectual topics. Indeed critics complained that the total effect was a little light, pointing especially to the dress reformers' domination of the sessions on "Moral and Social Reform." Others defended dress as the mother reform because women "shackled by corset and train" would never succeed "in the close scientific study of present social conditions, and in the scientific administration of public charities."[14]

11. CHICAGO INTER-OCEAN, May 16, 1893, at 1; *see* Duncan R. Jamieson, *Women's Rights at the World's Fair, 1893*, 37 ILL. Q. 5, 5–19 (1974) (focusing on the Congress of Representative Women).

12. *Lawyers,* S.F. CALL, Mar. 8, 1884, at 3; *On Lawyers: Mrs. Clara S. Foltz's Ideas of Shyster Practitioners,* S.F. DAILY EXAMINER, Apr. 11, 1885, at 2; Clara Shortridge Foltz, *The Struggles and Triumphs of a Woman Lawyer*, THE NEW AMERICAN WOMAN, Dec. 1917 [hereinafter Foltz, *Struggles*]; REPRESENTATIVE WOMEN, *supra* note 10, at 8–10; BABCOCK, WOMEN LAWYER, *supra* note 4, at 96.

13. *See* Gayle Gullett, Feminism, Politics and Voluntary Groups: Organized Womanhood in California, 1886–1896, at 209–263 (1988) (Ph.D. thesis, U. Cal. Riverside) (contains an especially good section on the women's Congress and California women at the Fair).

14. REPRESENTATIVE WOMEN, *supra* note 10, at 314.

Though the intense interest they aroused at the Congress showed that dress reformers were no longer on the fringe (so to speak), they never attracted Clara Foltz. Her 1893 portraits show her be-trained and corseted, much more like Mrs. Potter Palmer, the Chicago society lady who was head of the Fair's Lady Managers, than Foltz's sister-activists in comfortable split skirts. While Foltz was not converted to dress reform, she was very sympathetic to the purposes of another crowd-pleaser at the Congress: the session on Literature and the Dramatic Arts featuring a number of well-known actresses.[15]

"The participation of [actresses] in the congress marked and indeed made, an epoch in the progressive movement," bringing together "artists and reformers, formerly aloof from each other," said a contemporary observer.[16] Actresses occupied an ambiguous place in late nineteenth century America. Even the most famous and successful did not fit the ideal of Victorian womanhood. Helen Modjeska, the Polish Shakespearean, who was a great hit in the United States, spoke about the difficulties. The stage "exposes us to many temptations, stimulates our vanity . . . and takes us . . . from our family duties." Yet, she said, acting also develops "a sense of independence and therefore of responsibility." She lamented the "materialism, or at least a practical spirit" that had made the theater "principally a commercial enterprise" and urged women to support true art. Other actresses echoed Modjeska's line that women actresses and women reformers had much in common. Clara Morris concluded: "Standing here by the right of kindly invitation, before this great body of brainy, big-hearted women—I feel I am receiving the highest honor of my life."[17]

Clara Foltz undoubtedly appreciated the inclusion of the female actors in the Congress because as a dramatic orator and courtroom lawyer, she developed and deployed similar skills and sought acceptance and recognition for them. Several years before the Fair when she was having difficulty making a living, she even considered leaving the law for the stage. All three of Foltz's daughters had stage careers.

Joining the actors, performers and reformers in the great women's Congress were the club women. When Susan B. Anthony looked out over the packed rooms, she was impressed by organized womanhood, but she was also dismayed. Ticking off various organizations represented at the Congress (e.g., The Federation of Clubs, 3 years old,

15. *Id.* at 138–192 (section entitled Literature and the Dramatic Art).
16. *Id.* at 162.
17. *Id.* at 175 (address by Clara Morris).

40,000 members; The King's Daughters, 7 years old, 200,000 members), she said of the woman suffrage movement, now in its fourth decade:

> I will tell you frankly and honestly that all we number is seven thousand. This great national suffrage movement that has made this immense revolution in this country represents a smaller number of women, and especially represents a smaller amount of money to carry on its work than any organization under the American Flag.

Women's political liberty held the keys to all other reforms, she pleaded: "If only we could call upon the 5 million women in the US who sympathize with us in spirit then we could persuade congress, and state legislatures and change everything."[18]

The time spent on suffrage at the women's Congress was only the beginning of the turnout for suffrage rallies and speeches in all parts of the Fair. Susan B. Anthony's reception at events over the summer was the best indicator of the positive jolt that the Fair gave the suffrage cause. Every time, everywhere, she spoke, the halls were packed. New generations of women as well as those previously indifferent joined up at the Fair. Anthony's near apotheosis seemed to promise imminent victory in the struggle she led.[19]

It is impossible to reconstruct all the events that Clara Foltz attended on her trip to the World's Congress of Representative Women. But the newspapers picked her up several times. On May 20 for instance, Foltz was at a "meeting of prominent women connected with the National American Women's Equal Suffrage Association" planning for upcoming campaigns in Colorado, New York and Kansas. Also present were Susan B. Anthony, Elizabeth Cady Stanton, Lucy Stone, Abigail Duniway, Laura Johns, Anna L. Diggs, Rachel Foster Avery, Harriet Taylor Upton, Clara Colby, Anna Shaw, and Carrie Chapman. It would be hard to name more important movement women than these, and must have been a great thrill for Foltz to be among them.[20]

Another day, Foltz spoke about the poor living conditions of Italian immigrants in San Francisco, at a sub-congress on labor at which about fifteen hundred women were present and "much interest was shown." Jane Addams chaired the meeting. But the central speaker was Mrs. A.P. Stevens of Chicago, a Knights of Labor Organizer, and "one of

18. *Id.* at 463 (address by Susan B. Anthony of New York: Organization Among Women as an Instrument in Promoting the Interests of Political Liberty).

19. *Id.* at 77.

20. CHI. INTER-OCEAN, May 21, 1893, at 5; CHI. INTER-OCEAN, May 16, 1893, at 1.

the greatest female agitators." An anti-sweatshop resolution was passed and plans made to present it to the Illinois legislature.[21]

On her May trip, Foltz undoubtedly visited the California Building, one of the hits of the Fair. Some of her closest friends were among the Lady Managers of the state program. From this first visit, Foltz drew the inspiration for bringing together society ladies and movement women to study law, public affairs, and to prepare for women's full political equality. In early 1894 she started the Portia Club in San Francisco, which, according to the *History of Woman Suffrage* had a large part in the renewal of the movement on the west coast.[22] Foltz also credited the Fair with stirring "unusual activity in thought" and with the birth of the "new woman." Though like most who spoke on the subject, Foltz never fully defined the new woman, she talked often of her attributes—mainly that she sought self-improvement and education.[23]

II. WOMEN'S PARTICIPATION IN THE OTHER AUXILIARY CONGRESSES

Despite the fabulous success of the Congress devoted especially to them, women were initially omitted altogether from the planning of the other congresses. Even the liberal men who were their usual allies, were queasy about including women in the public meetings as planners or speakers, though they would be free to attend. Some of the opposition was based on increasingly dated arguments about women out of their spheres in public. The more modern objection centered on women's competence. From the pages of a progressive magazine, one writer who claimed to be sympathetic to women's progress, warned that if given an equal voice in the Congresses, they would almost certainly "allow zeal to outrun discretion," and "in order to swell their numbers" would include speakers who have "a merely dilettante interest in a subject."[24]

Some of the men also seemed to feel that the women were ingrates—that they should be satisfied with the attention and success of their own opening Congress. In addition, the women had their own building, where Congresses on topics of special interest to them were

21. CHI. INTER-OCEAN, May 22, 1893, at 3.

22. 4 HISTORY OF WOMAN SUFFRAGE 479 (Susan B. Anthony & Ida Husted Harper eds., 1901).

23. S.F. CALL, Jan. 25, 1895 (Foltz commented that the reason there was so much talk about the new women after 1893 is that the Fair had stirred "unusual activity in thought."). For more on Foltz, the Portia Club and the "new woman," see BABCOCK, WOMAN LAWYER, *supra* note 1, at 152–153, 262–267.

24. *The World's Congress Auxiliary*, THE DIAL: A SEMI-MONTHLY JOURNAL OF LITERARY CRITICISM, DISCUSSION, AND INFORMATION, Dec. 16, 1892, at 377.

held almost daily throughout the Fair. But Bertha Palmer, showing strong leadership, refused to confine women to separate spheres for the intellectual aspects of the Fair. She and her lieutenants set up women's auxiliary committees, which carried out a congress-by-congress struggle over the particulars of participation. In the end, women spoke at fourteen of the seventeen total congresses. (The exceptions were real estate, engineering, and electricity.)[25]

No congress was more contested than Jurisprudence and Law Reform. Myra Bradwell, her lawyer-daughter Bessie Helmer, and two other Chicago lawyers, Mary Ahrens and Catherine Waugh McCullough, were on the women's auxiliary for this Congress. All four of these women were exceptionally brave and forceful. Though Bradwell was in declining health, she was the spiritual leader of the group, while her daughter did much of the actual lobbying work.[26]

Bradwell was a sort of dean of women lawyers, having brought a case to the Supreme Court arguing that the privileges and immunities clause of the newly enacted Fourteenth Amendment gave women citizens the right to pursue any vocation or calling.[27] At the time she sued for bar admission, Bradwell was already the editor of the *Chicago Legal News*, the most influential legal paper in the west. Though Bradwell lost her case, so that women were relegated to a state-by-state struggle to join the bar, the Illinois legislature passed a woman lawyer's bill. By the time of the Fair, Chicago had more women lawyers than any other city in the world.[28]

In her newspaper, Bradwell wrote that the men fought them so hard on participation that the women thought of holding their own law reform congress, where they "could send an early invitation, giving ample time for the preparation of papers to women lawyers." But "af-

25. Ellen M Henrotin, *The Great Congresses of the World's Fair*, COSMOPOLITAN MAG., Mar. 1893, at 627; Ellen M. Henrotin, *The Coming Congresses at Chicago*, 23 WOMAN'S J., 406 (1892). (Henrotin was one of Bertha Palmer's main lieutenants and, as vice-president of the Women's Branch of the World's Congress Auxiliary, proved to be a strong leader herself.)

26. *See* Jennifer A. Widmer & Maureen P. Cunningham, *Bessie Bradwell Helmer*, *in* BAR NONE—125 YEARS OF WOMEN LAWYERS IN ILLINOIS 64–66 (Gwen Hoerr McNamee, ed., 1998); Denise R. Jackson, *Mary A. Ahrens*, *in* BAR NONE—125 YEARS OF WOMEN LAWYERS IN ILLINOIS 38–39; Maria A. Farrigan, *Catherine Waugh McCullogh*, *in* BAR NONE—125 YEARS OF WOMEN LAWYERS IN ILLINOIS 50–52; Mary JANE MOSSMAN, THE FIRST WOMEN LAWYERS: A COMPARATIVE STUDY OF GENDER, LAW AND THE LEGAL PROFESSIONS 64 –67 (2006) [hereinafter MOSSMAN, THE FIRST WOMAN LAWYERS].

27. *See* Bradwell v. Illinois, 83 U.S. 130, 130–31 (1973).

28. BABCOCK, WOMAN LAWYER, *supra* note 1, at 22; *WLH Website Bibliographic Notes*, *supra* note 4 (*Myra Bradwell*). For a recent interesting article on arguments in the Bradwell case, see Gwen Hoerr Jordan, *"Horror of a Woman:" Myra Bradwell, the 14th Amendment and the Gendered Origins of Sociological Jurisprudence*, 42 AKRON L. REV. 1201 (2009).

ter mature deliberation" they concluded that "interests of women in the profession of law would be best conserved by a joint congress," though the invitations to four women to speak did not issue until "the eleventh hour."[29]

The two foreign women lawyers invited to speak, Eliza Orme of England, and Cornelia Sorabji of India, could not come due to the last minute invitation. Orme's paper, *The Legal Status of Women in England*, was read in her absence by Mary Ahrens; Sorabji's paper, *Legal Status of Women in India*, was presented by Bessie Bradwell Helmer. Professor Mossman has compelling biographical studies of Orme and Sorabji in her comparative study of women lawyers, and she discusses their contributions to the Congress in her paper for this symposium.[30]

From among the dozen or so American women lawyers who enjoyed national reputations, Clara Foltz and Mary Greene were chosen by the Bradwell committee. Why these two instead of Belva Lockwood, who had twice run for President in the 1880s or Marilla Ricker, the first federal notary public, for instance, is not clear. Bradwell never said. Foltz and Greene were representative in a sense; from opposite coasts, one an office attorney, specializing in property matters, and the other that rarest of women—a courtroom lawyer. The two would become, in Bradwell's formulation, the first women "in the history of the world" to speak for themselves "at an international congress of lawyers."[31]

Though there were only a few hundred people, mostly men, at the Congress, it was in the parlance of the day, a "select" audience—meaning small but impressive. The aristocracy of the American Bar was there as well as dignitaries from other countries: professors, judges, legislators, code-makers and text writers. They met from August 7th–10th, in two sessions a day, one at 10 a.m., lasting into the afternoon, and the next at 8 p.m., often extending past midnight. The complete proceedings are not published anywhere together, so must be picked up and pieced together from law journals, individual accounts and newspapers.

29. *Women in the Law Reform Congress,* 25 CHI. LEGAL NEWS, Aug. 12, 1893, at 435, *reprinted in* 48 ALB. L. J. 147 (1893); *see also Public Defenders,* 28 CHI. LEGAL NEWS, Aug. 22, 1896 (recalling that Myra Bradwell had "invited" Foltz to speak at the Law Reform Congress, where she had presented the public defender idea).

30. *See* MOSSMAN, THE FIRST WOMAN LAWYERS, *supra* note 26. Both the Orme and the Sorabji papers were reprinted in the Chicago Legal News. *See* 25 CHI. LEGAL NEWS, Aug. 12, 1893, at 321, 431.

31. *Women in the Law Reform Congress*, *supra* note 29.

Greene later wrote that attendance at the Fair was "the most important event in her whole career" adding that she appeared on "the same platform with leading jurists of the world, such as Sir Richard Webster of England, Hon. David Dudley Field of the United States and jurists from Scotland, Austria, Italy, Russia, Spain and elsewhere."[32] Clara Foltz referred to the Congress experience as visiting "the holy of holies of my profession."[33] Louis Frank, a European advocate of women's rights, especially their right to be lawyers, wrote about the women lawyer's participation in the Congress that "women lawyers had thus achieved recognition from the most eminent jurists in the world."[34]

Greene's speech at the Congress explained clearly the progress women had made in their legal rights to own and manage property after marriage, outlined the further reforms needed, and seemed to accept the proposition that progress would proceed through a combination of common-law development with many legislative fixes along the road to fairness. Like the papers from Orme and Sorabji, Greene's topic was gendered; essentially it was about fairness to women and called for change within the existing legal system. Showing thorough research and systematic exposition, the paper compared in its style and its approach to change to many of the men's presentations on topics like the administration of civil justice, the codification of law to make it simpler and more easily applied, the reform of probate law to limit the fortunes that could be transmitted by descent and will.[35]

Greene made the kind of arguments one would expect from a well-educated common lawyer with a scholarly bent, speaking of incremental change. By contrast, Foltz declaimed in jury lawyer, dramatic orator style, and called for revolutionizing the administration of criminal justice; she urged bold constitutional, historical, and public policy arguments in favor of her proposal. Her speech was very different from the presentations of the other women and from the men's efforts also.

32. MARY ANNE GREENE, LL. B.: A PIONEER WOMAN LAWYER 5 (1917). Greene wrote her autobiography in the third person.

33. BABCOCK, WOMAN LAWYER, *supra* note 1, at 309 (quoting Foltz from S.F. CALL, Sept. 14, 1894).

34. MOSSMAN, THE FIRST WOMAN LAWYERS, *supra* note 26, at 65.

35. For a complete listing of the papers at the Congress, at least as they were planned, see *Law Reform Congress*, 25 CHI. LEGAL NEWS 387, July 15,1893.

III. FOLTZ'S PUBLIC DEFENDER SPEECH

Many hours of speeches on heavy topics hardly adapted to oral presentation preceded Foltz on the program. When she took the podium on the second day of the Congress, elegantly attired with fresh flowers at her corsage, a voice that filled the room and a text buzzing with provocative phrases, Clara Foltz must have been refreshing at the least. A woman speaker on this platform was a novelty in itself, a woman with a novel idea and the rolling periods of a theatrical orator, was a sensation in this company.[36]

Lasting only about half an hour, the speech was short for Foltz, and devoid of personal references or patented stories. To one who knows her biography, however, she is in every line of a text taken from her jury arguments, legal briefs and lectures. Foltz's speech followed the form advised by nineteenth century rhetoricians, starting with an "exordium" on the importance of protecting the innocent. Then she turned directly to the central question of criminal defense: how do we distinguish those deserving of defense from those who are not—the innocent from the guilty?

Her answer: we don't. Until the jury verdict everyone is presumed innocent, and should be so treated. A rights-based presumption of innocence was in itself an unusual idea; Foltz continued with a string of brilliant arguments and observations. I will summarize the main ones here in order to illustrate the tone and originality of her discourse.[37]

One of her most powerful arguments for public defense was the prevalence of prosecutorial misconduct throughout the criminal justice system. She started by picturing the typical prosecutor, a composite of her opponents, as a powerful male figure: "strong of physique, alert of mind, learned in the law, experienced in practice and ready of speech." He was once "a minister of public justice, aiding the court in a solemn investigation of crime . . . laying bare the truth, whatever it may be." Here Foltz was relying on Blackstone for her history, and for the ideal of the prosecutor who takes responsibility for the fair presentation of both sides of a criminal case.

Having set him up, Clara Foltz, a preacher's daughter, made a gripping sermon of his fall. It was a tale of power corrupting. "The vani-

36. BABCOCK, WOMAN LAWYER, *supra* note 1, at 305–09.

37. *See generally* Babcock, *Inventing, supra* note 1, at nn.265–328 (for more on the substance of Foltz's arguments); *see also WLH Website Bibliographic Notes, supra* note 4 (*Foltz's Arguments for Public Defense*) (for this and following paragraphs in this article).

ty of winning cases" and "the lust for gold" turned him into an "indiscriminate public persecutor," whose motives were mainly his own "interest, vanity, avarice and fear." Then, verbatim from a brief she had recently filed, Foltz added: "Around and behind [the prosecutor] is an army of police officers and detectives ready to do his bidding, and before him sits a plastic judge with a large discretion often affected by newspapers."

Both the prosecutor and the police, she told her audience, mistakenly believe that "it is the duty of the State to convict whoever is arrested." The prosecutor "misrepresents the facts he expects to prove, attempts to get improper testimony before the jury, garbles and misstates what is allowed, slanders the prisoner and browbeats the witnesses." The police, "impelled by vanity to justify its arrests" lend highly "colored testimony and overawing presence." Again, prosecutorial misconduct and police perjury were far from usual subjects among legal writers and scholars.

After picturing the force mustered to convict the guilty, Foltz compared it to the pathetic "machinery [that] is provided for the defense of the innocent." If the accused pleads his poverty, she said, the court may appoint a lawyer to defend but these are not usually able men. Instead they are the "failures" or the "kindergarteners" of the profession who have no resources for preparation or investigation. Foltz had used such descriptions of appointed counsel many times, starting with her *Lawyers* lecture in the 1880s. She described the effect on the defendant of a trial in which all the powers of his government are turned against him. Even if acquitted he "comes from the courthouse a changed mail . . . Disgrace has crushed his manhood and injustice has murdered his patriotism."

She spoke of the right to counsel enacted in

> the Federal Constitution, re-enacted in almost every State, which guarantees to the accused certain rights. He may have a speedy trial; he may have a trial by jury; he may meet the witnesses; he may have witnesses in his behalf; and he may have counsel for his defense. It is a grave question whether Congress or the Legislature may add to any of these rights a condition—if the accused can pay—a condition that renders the guaranty inoperative.

Again, this argument that burdening a constitutional right by making it costly can virtually obliterate it, was novel at the time. Moreover, Foltz's interpretation of the constitutional right to mean that every accused is entitled to "full, adequate and free" representation was far

ahead of its time. Seventy years after Foltz spoke at the Fair, the United States Supreme Court decided as much in *Gideon v. Wainwright*.[38]

Having painted the scene of prosecutorial misconduct, neglectful and incompetent defense lawyers, confused and innocent defendants, Clara Foltz then offered her solution. "For every public prosecutor there should be a public defender chosen in the same way and paid out of the same fund as the public prosecutor. Police and sheriffs should be equally at his command and the public treasury should be equally open to meet the legitimate expenses." Unlike the usual run of appointed lawyers, Foltz's powerful advocate would investigate the case, prepare the law, summon witnesses, advise the client on the plea, and use all ethical means to achieve the most favorable result for the defendant, including a verdict at trial. No office such as Foltz described existed anywhere; she was making it up from what she had seen of bad representation in the western courts.

But she did not limit her call for "exact, equal and free justice" to courts she knew first hand. Foltz envisioned a public defender wherever there was a public prosecutor—in every courthouse in the land. Her learned audience was surely amazed at the audacity of her proposal. Perhaps they were also surprised to hear a woman on a topic so apparently removed from the usual stuff of scholarly debate and concern. Not only the subject itself, but the frankness of her language was somewhat unsettling, especially from a woman; it was unusual to refer to "vicious" and malicious prosecutors, "plastic" judges and lying police.

Foltz long remembered that her speech caused a "tremendous sensation" and claimed that *Public Defenders* "called out the most comment and discussion" of any paper read.[39] That seems likely given the comparative liveliness and breadth of her proposal though the proceedings and discussion were not recorded and contemporary newspaper reports were sparse. Most of the Fair coverage the day after Foltz's speech was on other parts of the Congress, taking place in the same building, one having to do with municipal reform and the other with woman suffrage.

Somewhat paradoxically, since the women's appearance before the jurisprudes was a momentous event in the history of women's pro-

38. 372 U.S. 335 (1963).

39. Jennie Van Allen, *The Fight for a Public Defender: A Sketch of Clara Shortridge Foltz*, 13 WEST COAST MAG. 42, 44 (1912); *Clara Foltz, San Francisco, Cal.*, 1 LAW STUDENT'S HELPER 263, 265 (1893).

gress, the simultaneous meeting on suffrage drew the most attention. It packed in "[o]ne thousand women and a red-headed man," according to *The Chicago Tribune.*[40] Susan B. Anthony, Frederick Douglas, Clarence Darrow, and many old workers like Laura Gordon, and the young women who would lead the next generation were there rather than next door listening to the legal scholars. Swelling the audience were hundreds of women who had never been to a suffrage meeting back home. For the first time in a long while, the vote for women seemed very near. Looking out over the multitudes, Anthony spoke of "wandering in the wilderness of disenfranchisement for forty-five years, five years longer than the children of Israel." But now, at last, she prophesied, the promised land was in sight.[41]

In the same news story reporting on Anthony's moving speech, one paper also noted that at the meeting on jurisprudence and law reform "Miss [sic] Clara Shortridge Foltz of the San Francisco bar, easily carried off the palm" and added that that her presentation "was highly complimented by several of the most eminent jurists present." This accords with Foltz's memory of the instant success of her speech, though Belva Lockwood, writing up her impressions of the Congress noted that Judge Woods of Indiana found Foltz's description of the need for public defense "exaggerated."[42]

It would not be surprising if the public defender idea raised opposition at the Congress. Several years earlier Foltz had spoken on the subject at a convention of rump suffragists and liberal reformers, and roused a debate, along gender lines, with male lawyers attacking the concept, and women lawyers supporting it.[43] Men took it as a criticism of the court system they ran, for one thing. Also, they thought many court appointed lawyers did a good job—and it is true that at least some did, especially in less heavily populated places, where the lawyers knew each other and there was a kind of peer review. Foltz acknowledged that sometimes good lawyers would represent poor people but she said this was not generally true. Of course, as a matter

40. *Law Reform Congress,* CHI. TRIBUNE, Aug. 9, 1893 ('red-headed man').

41. *Susan B. Anthony Speaks on the Suffrage Question; Sees The Promised Land*, CHI. INTER-OCEAN, Aug. 9, 1893, at 8. The same story covers the Clara Foltz talk at the Congress of Jurisprudence and Law Reform.

42. Belva Lockwood, *The Congress of Law Reform*, 3 AM. J. POL. 321 (1893).

43. BABCOCK, WOMAN LAWYER, *supra* note 1, at 297–298; *WLH Website Bibliographic Notes, supra* note 4 (*The Women's National Liberal Union Convention*); Babcock, *Inventing*, *supra* note 1, at nn.242–260.

of rhetoric, she could hardly present her costly proposal as a minor fix to a system that was working pretty well.

Of more consequence than the immediate reception of Foltz's public defender speech, is her decision to give it at all. It was a courageous and idealistic thing to do, highlighted by the fact that she had a choice. Foltz had on hand an impressive, well-honed speech on a clearly jurisprudential topic—how law should adapt to the pace of technological change. Written in academic language, exhibiting erudition, and containing an original idea, *Evolution of Law* proposed that the state supreme court act as an advisory council to the legislature to improve the speed and quality of legal change. Rather than wait for the vagaries of litigation to bring a case for review on constitutional grounds, the court would automatically study legislation soon after passage and suggest changes to remedy constitutional defects. This is the paper she delivered at the meeting of women lawyers sponsored by the Isabella Society and held a few days before the Congress of Jurisprudence and Law Reform.[44]

Foltz's *Evolution of Law* compares well with the only very famous paper from the World's Congress. Delivered by Harvard Law Professor James Bradley Thayer, it advocated restraint in Constitutional review of legislative decisions, and would apply the same standard as an appellate court reviewing a jury verdict for sufficiency of the evidence: reversing only when there was no reasonable doubt about the error below. His ideas stirred "deep interest" from the start and today the speech is considered one of the greatest commentaries on constitutional law ever delivered anywhere.[45]

Though he said nothing specifically political, Thayer's analysis undermined the invalidation of progressive and protective labor laws by conservative appellate courts. Similarly, Foltz's *Evolution of Law* speech had a political concern right beneath her legal analysis. Suffrage measures often faced court challenges that tied up their execution, sometimes for years; Foltz's idea would speed the review. If Foltz had given *Evolution* at the Congress of Jurisprudence and Law Reform, it

44. BABCOCK, WOMAN LAWYER, *supra* note 1, at 226–231.

45. James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, n.1 (1893); DAILY INTER-OCEAN, Aug. 10, 1893, at 8 ("very profound, logical and exhaustive treatise and called forth deep interest"); Thomas C. Grey, *Thayer's Doctrine: Notes on Its Origin, Scope and Present Implication*, 88 NW. U. L. REV. 28, 28–41 (1993); *see generally Symposium*, *One Hundred Years of Judicial Review: The Thayer Centennial Symposium*, 88 NW. U. L. REV. 1 *passim* (1993).

would have fit right in with the tenor of the other presentations, especially Thayer's, the one that has historically gained all the attention.

As her biographer in search of Foltz's motives without the benefit of her papers, I have long suspected that she wrote *Evolution* for delivery at the Congress, and then, perhaps impulsively, substituted the speech she gave on *Public Defenders*. But I am not able to show that. I do know that she was working on a brief in a case she lost because of prosecutorial misconduct when she received the last minute invitation to speak at the Congress. The public defender idea had to be prominent in her mind as Foltz reviewed the abuses at trial and pursued the appeal without hope of financial reward even if she won (which she ultimately did).[46]

Instead of her erudite paper on effecting change through the legal process, Foltz gave her barn-burner speech about public defense. Using a precious opportunity for personal advancement, on the best platform of her life, she sought to arouse and inform these influential men about conditions in the baseline criminal courts. Most of them had no idea because by the end of the nineteenth century, as the profession grew increasingly stratified, the legal elites were far removed from this type of practice.[47] At the same time, urbanization, industrialization and immigration were putting tremendous pressure on the appointed counsel system. Clara Foltz declared that the situation was dire and that strong measures were needed. She went on to draft a public defender statute, write two important law review articles on the subject, and to see the first office in the United States established in Los Angeles. Public defense was part of the new city charter passed with women's votes in 1912.[48]

IV. WOMEN'S RIGHTS AND PUBLIC DEFENSE

Foltz did not speak or write at any point of a connection between women's rights and public defense. Indeed, she never even acknowl-

46. BABCOCK, WOMAN LAWYER, *supra* note 1, at 298–305 (describing People v. Wells, 100 Cal. 459 (1893)).

47. On the stratification of the legal profession, see Michael McConville & Chester L. Mirsky, *Understanding Defense of the Poor in State Courts: The Sociological Context of NonAdversarial Advocacy*, 10 STUD. L. POL. & SOC'Y 217 (1990); RICHARD HOFSTADER, AGE OF REFORM: FROM BRYAN TO F.D.R. 156–58 (1955). For changes in the legal profession, see Robert W. Gordon, *The Ideal and the Actual in the Law: Fantasies and Practices of New York City Lawyers, 1870–1910*, *in* THE NEW HIGH PRIESTS: LAWYERS IN POST-CIVIL WAR AMERICAN (Gerald W. Gawald ed., 1984).

48. BABCOCK, WOMAN LAWYER, *supra* note 1, at 317–319; Babcock, *Inventing, supra* note 1, at nn.17–42 (statute at n.30).

edged that the women's auxiliary committee was the source of her opportunity to speak at the World's Congress. Instead she said that she represented the California Bar there. Though there is no record of this other than her statements, this is possible since the head of the Bar in 1893 was a close family friend and supporter of Foltz's.[49] She may well have thought it would increase her credibility to speak with the Bar credential rather than the women's invitation, and engineered the sponsorship at the last minute.

Though Foltz did not connect her two great causes, the idea of public defense surely grew from her own practice situation. For anyone without independent wealth or family connections, starting a law business was hard in the nineteenth century. For Clara Foltz, who had no choice but to hang out her shingle alone, it proved extremely difficult, especially in the early days of her practice, to attract paying clients. Instead, she helped dependent women obtain divorces and reprerepresented poor people charged with crime. At least with the divorce cases, there was a chance of a fee if she could win a property settlement for her client. But only the most destitute criminals were desperate enough to turn to a woman lawyer. Indeed, some of her criminal defendants did not turn to her but were assigned by a judge to her for their defense. Foltz suggested that she was called on more often than male attorneys for this duty because she promoted the public defender idea. "Though they laughed at my idea as chimerical," she wrote, criminal court judges often appointed her to cases "as a sort of try-out of my idea."[50]

When she went to the criminal courts on behalf of her poor clients, Foltz appeared as an outsider and newcomer. Thus, she saw the injustices ignored by the regulars, who she said were case hardened by constant contact. It was not a great mental leap from Foltz's first-hand observations to the idea that the state was responsible for a fair presentation of both sides of the case. She probably first started urging a public defender a few years after she started practice in lectures she gave in the 1880s to supplement her income as a lawyer.

One of her most popular productions, entitled simply *Lawyers,* was a humorous account of her lawsuit against Hastings. She then

49. *See* Allen, *supra* note 39 (represented Bar). Judge W.W. Morrow, a family friend, former Republican Congressman and currently on the Federal Circuit court, was also the head of the Bar in 1893 and could have made the designation. *See* OSCAR TULLY SHUCK, BENCH AND BAR IN CALIFORNIA (1888) (Morrow entry).

50. BABCOCK, WOMAN LAWYER, *supra* note 1, at 290 (quoting from Foltz, *Struggles*).

went on to talk about the profession generally—especially the inadequacies of appointed counsel and the unfairness of pitting trained prosecutors against shysters, incompetents, or no lawyers at all for the accused. She told her audiences that it would change everything for the criminally accused to be represented by a powerful figure backed by the full resources of the state. At the same time she spoke of justice for the accused, however, Foltz's sub-text was equal treatment for women lawyers in the courtroom.[51]

Too often she had found herself on trial, along with her clients. Prosecutors reacted harshly to what they saw as the unsporting advantage she had with the all-male juries. At the same time, they experienced it as a peculiar humiliation to lose to a woman. Some prosecutors routinely attacked both Foltz and her client—him for his alleged crime and her for doing the dirty, unfeminine work of representing criminals. The existence of a public defender would make criminal defense more respectable and acceptable for everyone—especially perhaps for women lawyers.

Though in this light, Foltz's public defender is related to the movement for women's equality in the legal profession, it is a secondary and indirect relation. Moreover, I think it is a stretch to suggest, as Professor Mossman does, that Foltz's proposal was "a reform initiative in women's interest" because it would benefit female defendants (making free counsel available to them). Foltz did not even hint that she was thinking of women more than any other accused in creating the office and she specifically urged a few years later that the sexes should be treated exactly the same by criminal justice system.[52]

On the other hand, public defense is related to women's rights in Foltz's own biography and mainly through her efforts it became part of the reform agenda of some suffragists and progressives. In a larger sense, women's rights were part of all Foltz's reform efforts. She wanted suffrage, for example, as a badge of full citizenship, but she also thought women voters would make government more responsive to human needs. Similarly, she believed that once women became lawyers, they should work to improve the administration of justice. The Public Defender was an example of the kind of idea women would contribute.[53]

51. *Id.* at 292.

52. Clara Shortridge Foltz, *Should Women be Executed*?, 54 ALB. L. J. 309 (1896).

53. "THE BLUE BOOK": WOMAN SUFFRAGE, HISTORY, ARGUMENTS AND RESULTS 53–54, 57 (Frances M. Björkman & Annie G. Porritt eds., 1917) (suggesting that "women's first care after their enfran-

CONCLUSION: WOMEN LAWYERS AND WOMEN'S RIGHTS

Professor Mossman and I study pioneer women lawyers, she on a global and I on an individual scale. And each of us admires and benefits from the other's work.[54] We have some differences in interpretation that I will briefly take up here, though not all are specifically related to this symposium. The first has to do with the involvement of first wave women lawyers with women's rights.

In reviewing Professor Virginia Drachman's Sisters in the Law: Women Lawyers in Modern American History (1998),[55] I argued for more emphasis on the connection between the women lawyers and the women's rights movement. I relied on Foltz's life, and other biographical evidence collected at the Women's Legal History website to show this connection. I also pointed out that the arguments against women becoming lawyers, serving on juries, and voting were all essentially joined. They had to do with women's proper sphere, the rough male nature of the courtroom and the polling place, and the possible change in women's nature (un-sexing them) if they left the domestic sphere.

As to the suffrage wing of women's rights, I think many if not most of the early women lawyers sought political equality. Certainly both sides in the long struggle for the vote assumed suffrage support for women professionals, and vice versa. The suffrage press heralded newly made women lawyers as a great plus for the women's movement. In Foltz's life, especially in the 1880s and 90s, the suffragists were constantly at her side, lobbying, supporting her financially, filling courtrooms and lecture halls where she appeared. Moreover, I believe from the biographical evidence, that the opposition to women lawyers was so powerful that connection to a cause greater than their personal ambition was a practical necessity for the early women lawyers.

Initially, Mossman's objection to my observation about the nexus between the pioneer women lawyers and the women's rights movement seemed to be one of nomenclature; I wrote that I thought biographical digging would reveal "a self-conscious feminist in virtually every [early]woman lawyer."[56] She pointed out that the term "feminism" did not come into general use until the early twentieth centu-

chisement was to put through a most extraordinary legislative program" in California, that included a provision of a public defender for poor persons).

54. *See, e.g.,* Mary Jane Mossman, *Review of Barbara Babcock Woman Lawyer: The Trials of Clara Foltz*, 5 CAL. LEGAL HIST. 339 (2010).

55. *See* Barbara Babcock, *Feminist Lawyers*, 50 STAN. L. REV. 1689 (1998).

56. *Id.* at 1699.

ry.[57] In a later article, Mossman suggested that perhaps I was making a "historical judgement about these women, based on their ideas and actions, rather than merely focusing on the linguistic terminology in use in the late nineteenth century."[58] That's right; but to avoid arguments about the word "feminism" (which I love, but which seems increasingly to rouse needless opposition), I've been sparing in my use of it, especially as to the first-wave women lawyers, since Mossman's comment in her 2006 book.

But in a recently published book chapter Mossman continues to take issue with my presentation of the relation of the pioneer women lawyers to women's rights. Relying on Professor Nancy Cott, she defines "feminism's" three elements: opposition to male hierarchy, recognition that the social situation of women can be changed, and identification with women. Mossman finds that early women lawyers fail on the third factor because they became identified instead with professional standards of merit.[59] She is right that something like this happened—but not in the late nineteenth century. Not until suffrage was achieved did women professionals put aside their female identification and focus instead on the "neutral and meritocratic ideology" of the professions to mark their progress.[60]

The post-suffrage generation of women-lawyers did not have any real choice in the matter; they were so few, and once assimilated to the ethos of individual merit, so removed from each other. As Professor Cott observes: "Without the meritocratic pretensions of the professions women had no warrant for advancement or power within them at all." Thus did women take up "the professional credo that individual merit would be judged according to objective and verifiable standards," and clung to it "even when they saw it travestied in practice."[61]

Mossman's evidence that the ideological divorce between women lawyers and the women's rights movement actually started in the 1880s and 1890s is very thin.[62] Clara Foltz and the other early women

57. MOSSMAN, THE FIRST WOMEN LAWYERS, *supra* note 26, at 288.

58. Mary Jane Mossman, *"La Feminisme" and Professionalism in Law*: *Reflections on the History of Women Lawyers*, *in* TRANSCENDING THE BOUNDARIES OF LAW: GENERATIONS OF FEMINISM AND LEGAL THEORY 11 (Martha Fineman ed., 2011).

59. *Id.* at 18.

60. *See* NANCY COTT, THE GROUNDING OF MODERN FEMINISM 233–34 (1987).

61. *Id.* at 234.

62. For instance, she emphasizes a letter from Mary Greene in which she says that she does not have much to do with the suffragists because she disagrees with their emphasis on reform through the ballot, and their rhetoric about the inadequacy of present laws. Mary Jane Mossman, *Women Lawyers and Women's Legal Equality: Reflections on Women Lawyers at the 1893 World's*

lawyers I have studied put the condition of women at the center of their thought and activities—and worked to change and improve that condition. That is the heart of feminism whatever it is called. Again, though I have yet to do an exact count, my belief based on biographical study is that most of the early women lawyers were feminists in that sense, and many were like Clara Foltz, card-carrying members of the women's rights movement.

As to the presentations at the Congress of Jurisprudence and Law Reform, I don't think there is any way to fit them into a thesis about women lawyers separating themselves from the women's movement. In most respects Mossman's own careful look at the four presentations and the women's individual biographies show the opposite—three of the women spoke specifically on gendered topics, and Clara Foltz launched a movement for public defense that was only indirectly related to women's rights, professionalism or any other known cause. Generally, Professor Mossman calls for a more nuanced assessment of the relationship of the women lawyers to the women's rights movement, and the need to study early women subjects on their own complex terms. I applaud this approach and seek to engage in it myself.

Columbian Exposition in Chicago, 87 CHI-KENT L. REV. 503, 508 (2012). Lots of activist women, even Clara Foltz at times, disagreed with the national leadership on tactics and effective arguments. But Mary Greene spent her entire career on cases and writings aimed at improving the legal position of women.

WOMEN LAWYERS AND WOMEN'S LEGAL EQUALITY: REFLECTIONS ON WOMEN LAWYERS AT THE 1893 WORLD'S COLUMBIAN EXPOSITION IN CHICAGO

MARY JANE MOSSMAN*

I. WOMEN LAWYERS AND THE CHICAGO EXPOSITION IN 1893: GENDER AND THE EMERGENCE OF PROFESSIONAL IDENTITY

> The woman lawyer is largely a development of the last twenty-five years and of this country. . . . No other country has half as many women in the legal profession.[1]

As this comment in *Leslie's Illustrated Weekly* proclaimed in 1896, women in the United States were the first to successfully challenge their exclusion from the legal profession in the last decades of the nineteenth century. Thus, Arabella Mansfield became the first woman to gain admission to the Iowa bar in 1869, while Ada Kepley was the first woman to obtain the LLB (Bachelor of Laws) degree when she graduated from what is now Northwestern University in 1870.[2] Although a major setback for women lawyers occurred when the United States Supreme Court denied Myra Bradwell's claim for admission to the bar of Illinois in 1873,[3] later statutory reforms permitted women to become members of the legal profession in Illinois and in other states in significant numbers.[4] For example, by 1900, there were over 100 fe-

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1. *Women Lawyers*, 83 LESLIE'S ILLUSTRATED WKY. 363 (1896).

2. MARY JANE MOSSMAN, THE FIRST WOMEN LAWYERS: A COMPARATIVE STUDY OF GENDER, LAW AND THE LEGAL PROFESSIONS 26–27 (2006). *See also* VIRGINIA G. DRACHMAN, SISTERS IN LAW: WOMEN LAWYERS IN MODERN AMERICAN HISTORY (1998); D. Kelly Weisberg, *Barred from the Bar: Women and Legal Education in the United States 1870–1890*, 28 J. LEGAL EDUC. 485 (1976–77).

3. In re Bradwell, 55 Ill. 535 (1869); Bradwell v. Illinois, 83 U.S. 130 (1872).

4. MOSSMAN, *supra* note 2, at 26–28. *See also* KAREN BERGER MORELLO, THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA 1638 TO THE PRESENT (1986).

male members of the Illinois bar, including one African American woman.[5]

In this context, women's success in gaining access to state bars in the United States provided encouragement to women in other jurisdictions to challenge the male exclusivity of their legal professions. For example, when Marie Popelin's application for admission to the bar in Belgium was denied by a lower court and also by the Court of Appeals in 1888, she noted that the courts' decisions had cited Roman law, customs of the Middle Ages, and the Napoleonic Code, but they had failed to address changes in women's lives and "especially . . . the experience [of the woman lawyer], tried with success in the United States."[6] By the turn of the twentieth century, women began to achieve some success in their quest to gain admission to the bar in a few jurisdictions beyond the United States, including Canada, New Zealand, France, and Australia.[7] However, in many other countries, including England and Belgium, women did not become eligible to join the legal professions until after World War I, and, unfortunately, Marie Popelin died in 1913 without ever achieving her goal of becoming an *avocat*.[8]

Yet, with increasing numbers of women lawyers in the United States in the 1890s, and perhaps as a means of encouraging women to seek admission to the bar in other jurisdictions, a group of American women lawyers decided to participate in the Congress on Jurisprudence and Law Reform, one of a number of international Congresses planned in conjunction with the World's Columbian Exposition in Chicago in 1893.[9] As a contemporary account explained, these Congresses were intended to discuss themes in relation to art, science, literature, education, government, jurisprudence, ethics, religion, reform, "and other departments of intellectual activity and progress."[10] According to

5. Gwen Hoerr Jordan, Creating a Women's Legal Culture: Women Lawyers in Illinois, 1855–1939, at 1 (2004) (unpublished PhD dissertation, University of Illinois at Chicago) (on file with University of Illinois). *See also* CHICAGO BAR ASSOCIATION ALLIANCE FOR WOMEN, BAR NONE: 125 YEARS OF WOMEN LAWYERS IN ILLINOIS (Gwen Hoerr McNamee ed., 1998).

6. Letter from Marie Popelin to the Equity Club in the U. S. (1890), *in* WOMEN LAWYERS AND THE ORIGINS OF PROFESSIONAL IDENTITY IN AMERICA: THE LETTERS OF THE EQUITY CLUB, 1887 TO 1890, at 199 (Virginia G. Drachman ed., 1993) [hereinafter WOMEN LAWYERS].

7. Clara Brett Martin was admitted to the bar in Ontario, Canada in 1897, and a few months later, Ethel Benjamin was admitted as a barrister in New Zealand. After an unsuccessful application for admission to the Paris bar in 1897, a statutory amendment permitted Jeanne Chauvin and Olga Balachowsky-Petit to be admitted to the bar in France in 1900. In Australia, Grata Flos Grieg was admitted to the bar of the state of Victoria in 1903. For details, see MOSSMAN, *supra* note 2, at chs. 2, 4, 6.

8. MOSSMAN, *supra* note 2, at 117–19, 274–75.

9. CHI. LEGAL NEWS, July 15, 1893, at 397.

10. *Law Reform Congress*, 95 L. TIMES: J. REC. L. LAW. 330 (1893) (Eng.).

Mary Greene, a woman lawyer in Boston, it was Myra Bradwell who was responsible for achieving inclusion of four women lawyers on the Congress platform alongside male judges and lawyers, rather than holding a separate Congress for women lawyers on their own.[11] Not surprisingly, the appearance of women lawyers at this international legal Congress was regarded as a notable achievement. As the *Law Times* in England reported, this was "the first time in the history of the world [that] an international congress of lawyers has been held in which women lawyers have taken part."[12]

In the context of women lawyers' success in achieving participation in the Congress on Jurisprudence and Law Reform, my paper examines the presentations of the four women lawyers who were selected to participate along with male lawyers and judges. In doing so, I want to assess whether, or to what extent, the women lawyers' papers reveal a sense of connection between these women lawyers and the significant reform issues promoted by the nineteenth century movement for women's equality. In this way, my paper engages with Nancy Cott's observation that the first American women to enter the professions in the nineteenth century generally recognized their struggles as part of the greater "Cause of Women." In Cott's words, early women lawyers understood "the practice of law [as] . . . a part of the broad movement to achieve equal rights [for women]. . . ." Yet, as Cott also noted, as a result of the increasing magnetism of "professional ideology" by the turn of the twentieth century, women lawyers increasingly sensed more of "a community of interest between themselves and professional men, and a gulf between themselves and nonprofessional women."[13] That is, the sense of gender identity between the first women lawyers and the women's equality movement in the decades of the 1870s and 1880s gradually receded and was replaced by a new sense of identity with the legal profession and its culture and ideology in the early twentieth century.

In this way, the papers presented by these four women lawyers at the Congress on Jurisprudence and Law Reform in 1893 offer a significant "moment in time" to examine this question about identity among women lawyers in the last decade of the nineteenth century, as they negotiated between their gendered experiences as *women* and their

11. Letter from Mary Greene to Louis Frank, (Sept. 9, 1896) (on file with Bibliothèque Royale, Brussels, Section des Manuscrits, Papiers Frank # 6031 (file 2)).

12. *Women in the Law Reform Congress*, 95 L. TIMES: J. REC. L. LAW. 402 (1893).

13. NANCY F. COTT, THE GROUNDING OF MODERN FEMINISM 232–34 (1987).

professional roles as *lawyers*. Indeed, the Chicago Exposition reflects some of this transition in women lawyers' identity. Thus, on one hand, the Congresses associated with the Chicago Exposition in 1893 confirm Cott's conclusion about the magnetism of "professional ideology," since women lawyers participated alongside male lawyers and judges in the Congress on Jurisprudence and Law Reform. By contrast, women lawyers were generally unrepresented in the Congress on Representative Women after a split developed between some women lawyers and the married women philanthropists involved in the women's Congress.[14] On the other hand, at the same time that women lawyers' participation in the legal Congress may have emphasized an emerging sense of professional identity among them, and a "gulf between themselves and nonprofessional women," women lawyers at the Chicago Exposition also organized their own meetings, as *women* lawyers, under the auspices of the Queen Isabella Association,[15] an arrangement that may suggest the emergence of a companion identity that is professional but also gendered: an identity as *women* who were also *lawyers*. In this way, the Chicago Exposition provides an opportunity to examine and reflect on these questions about women lawyers and their identity in terms of gender and professionalism in the late nineteenth century.[16]

In the context of these issues, this paper focuses specifically on the presentations of the four women lawyers who participated in the Congress on Jurisprudence and Law Reform in 1893. Since the overall theme of the Congress was law reform, the paper examines whether, or to what extent, these four women presenters used their opportunity as participants in the Congress on Jurisprudence and Law Reform to promote the equality goals of the women's movement in their presentations. More precisely, to what extent did women lawyers at the Congress on Jurisprudence and Law Reform in 1893 envisage a (continuing) responsibility to foster law reform in women's interests? The next section provides some biographical information about these four women lawyers and an overview of their presentations to the Congress. In the final section, the paper offers an assessment of these presentations in relation to issues in the movement for women's equal-

14. Jordan, *supra* note 5, at 247–51.

15. Letter from Catharine Waugh-MacCulloch to Louis Frank, enclosing the program for the meetings of the Queen Isabella Association, Law Department (on file with Bibliothèque Royale, Brussels, Section des Manuscrits, Papiers Frank # 7791–6 (envelope 1)). CHICAGO BAR ASSOCIATION ALLIANCE FOR WOMEN, *supra* note 5, at 34.

16. *See* Mary Jane Mossman, *'Le Féminisme' and Professionalism in Law: Reflections on the History of Women Lawyers*, *in* TRANSCENDING THE BOUNDARIES OF LAW: GENERATIONS OF FEMINISM AND LEGAL THEORY 9, 18–19 (Martha Albertson Fineman ed., 2011).

ity, and some comments about whether, and to what extent, these four papers reflect an emerging professional identity for women lawyers in 1893.

II. GENDER EQUALITY AND LAW REFORM: WOMEN LAWYERS' PRESENTATIONS AT THE CONGRESS ON JURISPRUDENCE AND LAW REFORM[17]

The Congress on Jurisprudence and Law Reform commenced on Monday, August 7th, and all four of the women lawyers' papers were presented on the second day of the Congress. Two of these four women lawyer participants were Americans: Mary Greene, admitted to the bar in Boston in 1888,[18] and Clara Foltz, the first woman admitted to the bar of California in 1878.[19] By 1893, Greene had become involved in legal education, and she had published several articles on legal topics, and these accomplishments may have encouraged Bradwell to select her as a presenter. Foltz was also an accomplished speaker, writer, and campaigner on a variety of public policy issues (including women's suffrage), and may have been selected by Bradwell to ensure representation from both eastern and western states. Greene and Foltz both attended the Congress and presented their papers in person.

In addition to these two American women lawyers, Bradwell's committee invited two women who had studied law in England, although neither of them was yet a member of the legal profession in 1893. However, since there were almost no women lawyers outside the United States in 1893, these two women reflected how women were aspiring to join the professions, including law, at the end of the nineteenth century. Interestingly, the two women selected to participate in the Congress from jurisdictions outside the United States were both actively engaged in legal work in 1893 (even though they had not attained formal admission to the profession). For example, Eliza Orme had become the first women to attain the LLB degree at the University of London (and in the British Empire) in 1888, but she had also opened a law office in Chancery Lane in the 1870s, after a short apprenticeship at Lincoln's Inn. By the early 1890s, she was well known for her legal work, and also for public speaking and writing, particularly on issues

17. Most of the papers presented at the Congress on Jurisprudence and Law Reform, including those of the four women lawyers, were published in CHI. LEGAL NEWS, Aug. 12, 1893, at 431–33. The program for the Congress appeared in CHI. LEGAL NEWS, July 15, 1893, at 425.

18. Lelia J. Robinson, *Women Lawyers in the United States*, 2 GREEN BAG 10, 30–31 (1890).

19. BARBARA ALLEN BABCOCK, WOMAN LAWYER: THE TRIALS OF CLARA FOLTZ 30–32 (2011).

about women's equality rights and suffrage.[20] The other international participant was Cornelia Sorabji, a Parsi Christian woman from Pune in India, who had studied law at Oxford and was the first woman to sit the BCL (Bachelor of Civil Law) exams there in 1892, even though she did not receive her law degree until Oxford University began to grant degrees to women after World War I.[21] By 1893, Sorabji had returned to India and she had started to represent clients, particularly the *Purdahnashins* ("secluded women"), in some indigenous courts in India. Unfortunately, however, neither Orme nor Sorabji was able to attend the Congress on Jurisprudence and Law Reform in person. As a result, their papers were read by women lawyers from Chicago, Mary Ahrens and Bessie Bradwell Helmer, respectively.[22]

Before assessing these papers and their connections, if any, to ideas about legal reform and women's equality rights, this section provides an introduction to these four women lawyer presenters and a brief overview of their papers.

A. Mary A Greene: "Married Women's Property Acts in the United States, and Needed Reforms Therein"[23]

As noted, Mary Greene was a strong proponent of education (including education about law) for women. Indeed, her correspondence reveals her conviction that women's equality would be better achieved by more education about women's rights, rather than by the vote. As she explained in correspondence with the Belgian barrister Louis Frank, Greene firmly disagreed with suffragists that the "ballot will cure all ills," and preferred to "teach women how to use the power and the rights they already possess."[24] By the late 1880s, Greene was probably becoming well known through her writing. For example, she had appeared in a case in which she argued in support of the legal enforcement of contracts between husband and wife, and then published her arguments in the *American Law Review*.[25] Greene had also trans-

20. Leslie Howsam, *'Sound-Minded Women': Eliza Orme and the Study and Practice of Law in Late-Victorian England*, 15 ATLANTIS: WOMEN'S STUD. J. 44, 46 (1989). *See also* MOSSMAN, *supra* note 2, at ch. 3.

21. *See* SUPARNA GOOPTU, CORNELIA SORABJI: INDIA'S PIONEER WOMAN LAWYER 71, n.76 (2006). *See also* MOSSMAN, *supra* note 2, at ch. 5.

22. CHI. LEGAL NEWS, Aug. 12, 1893, at 431, 434.

23. *Id.* at 433–34.

24. Letter from Mary Greene to Louis Frank (May 1895) (on file with Bibliothèque Royale, Brussels, Section des Manuscrits, Papiers Frank, 7791–6 (envelope 1)).

25. Robinson, *supra* note 18, at 30.

lated a monograph about women lawyers, written in French by Louis Frank, which had been published serially in the *Chicago Law Times* in 1889.[26] Thus, she was well qualified to present a paper to the Congress on Jurisprudence and Law Reform.

Greene's paper for the Congress in Chicago provided a comprehensive and detailed overview of recent statutory reforms concerning married women's property rights throughout the United States. Her paper carefully explained their impact, and identified where further reforms were needed to overcome inconsistencies and omissions. The paper reveals that Greene's goal was to define a "perfect" statute: one that provided "an orderly and systematic application of a definite theory of the condition and powers of a wife."[27] In particular, Greene argued that a "perfect" Married Women's Property Act should not only confirm the wife's sole ownership of her property, but provide expressly for her sole control and power of disposition *inter vivos* or by will, and for her right to make contracts, incur liabilities, and to sue and be sued (including as between husband and wife).

Having identified the content of a "perfect statute," Greene's presentation then focused on the terms of existing statutes, concluding that the "Perfect Married Women's Property Act is not yet evolved." For Greene, therefore, there was a duty to enact additional statutory reforms because it was necessary for the law to respond to recent social changes. As Greene noted, the rise of trade and commerce, the growing significance of personal property rather than land, and the fact that women were no longer obliged to devote themselves to domestic duties exclusively, all created urgent needs for legal reforms that reflected new social realities. In defining the need to ensure that legal transactions between married women and third parties could be enforced, she argued that there was a need for "a systematic, logical application of a definite principle" to replace existing confusion in the statutes. As she asked rhetorically:

> Is it not the duty of the law-making power to recognize [the need for legal reform] and to enact laws that shall place wives upon a footing of legal responsibility for their acts, rather than to encourage dishonesty and disregard of moral obligations by invalidating transac-

26. Louis Frank, *The Woman Lawyer*, 3 CHI. L. TIMES 74–86, 120–40, 253–68, 382–411 (Mary A. Greene trans., 1889).

27. Greene, *Married Women's Property Acts in the United States, and Needed Reforms Therein*, *in* CHI. LEGAL NEWS, Aug. 12, 1893, *supra* note 17. Significantly, Greene did not address the fundamental rationale for the reform of married women's property in the United States, an issue discussed in NORMA BASCH, IN THE EYES OF THE LAW: WOMEN, MARRIAGE AND PROPERTY IN NINETEENTH-CENTURY NEW YORK (1982).

> tions made in good faith, on the sole ground that one of the parties thereto happens to be married?

As her paper clearly demonstrated, Greene was highly confident about the ability of law reformers to create order amidst the challenges of changing social conditions.

B. Eliza Orme: "The Legal Status of Women in England"[28]

According to *The Law Times* in London in 1893, Eliza Orme was "regarded as one of the ablest women in England."[29] Indeed, by the early 1890s, Orme had been appointed by the British government to an important Royal Commission on Labour, with responsibility for investigating the working conditions for women in England, Scotland, Wales, and Ireland. When the report was submitted by Orme and her women colleagues in September 1893, Beatrice Webb's published review suggested that it was the "most valuable" of all the reports prepared for the Royal Commission.[30] However, because of her extensive research activity for the Commission, Orme had initially declined the invitation to attend the Congress in Chicago. Pressed by the organizers to reconsider, she agreed to prepare a brief paper about the status of women in England to be read at the Congress.

Orme's succinct paper included a brief description of women's constitutional rights, including their lack of voting rights. She noted briefly that the suffrage issue remained controversial, indicating that there were members of both political parties in Britain who supported, and also opposed, this reform. In relation to married women, Orme reported that although they did not yet have complete personal liberty, their rights were increasing as a result of a number of recent legal reforms. Significantly, however, Orme also reported on the reforms to married women's property enacted after 1870 in England. Moreover, she expressed reservations about the practical impact of these legal reforms, noting that:

> Wealthy persons continue to protect their female relatives with settlements as before, while the poorer classes derive but little benefit

28. CHI. LEGAL NEWS, Aug. 12, 1893, at 431.

29. *Women in the Law Reform Congress*, *supra* note 12, at 402. Indeed, the visibility of Orme as a public figure was noted by Susan B. Anthony when she visited Orme in 1883, and by Jessie Wright, a recent member of the bar of Massachusetts, who visited her in 1888. For details, see CHRISTINE BOLT, THE WOMEN'S MOVEMENTS IN THE UNITED STATES AND BRITAIN FROM THE 1790S TO THE 1920S 179 (1993); Letter from Jessie Wright to the Equity Club (Apr. 23, 1888), *in* WOMEN LAWYERS, *supra* note 6, at 141–45.

30. Beatrice Webb, *The Failure of the Labour Commission*, 36 NINETEENTH CENTURY 2, 9–10 (July 1894).

> from the change of law. A poor woman earning a weekly wage is cajoled or coerced into giving it to her drunken husband and *no law can prevent it*. I do not believe that the Married Women's Property Acts have had any appreciable effect on our social system (emphasis added).

Orme also criticized the custom of (equitable) settlements of property for married women on the basis that trustees, appointed to administer such property settlements had no personal interest in them, but also because such settlements ensured that women remained "mere children" with respect to their own property. As she concluded, "It would be a great advantage to England if property were always managed by those who spend the income."

Orme's critical views about married women's property reforms may have reflected her experience in her law practice, but they also revealed her longstanding conviction that women must take personal responsibility for themselves by *exercising* their rights. Indeed, Orme had published a similar argument in 1874 when she objected to references to independent women as "strong minded." Instead, she had suggested that independent women be regarded as "sound minded," arguing that women should be able to "take a journey by railway without an escort, . . . stand by a friend through a surgical operation, [but] . . . wear ordinary bonnets and carry medium-sized umbrellas."[31] Moreover, although Orme's paper for the Congress was brief, more in the character of a legal memo than an academic paper, her personal commitment to women's independence and equality was clearly in evidence. Perhaps significantly, Belva Lockwood commented that Orme's contribution was "short but interesting."[32] Orme continued her legal and public activities for at least a decade after the Chicago Exposition, but by the time that women became eligible for admission to the bar and the solicitors' profession in Britain after World War I, Orme was already in her early 70s and had retired from her legal work.[33]

C. Cornelia Sorabji: "The Legal Status of Women in India"[34]

Cornelia Sorabji's paper reveals her skilfulness in persuading a Western audience to respond to the needs of vulnerable women in India, a distant colony of the British Empire. Indeed, she had acquired this skill when she attended Oxford with support from prominent indi-

31. Eliza Orme, *Sound-Minded Women*, THE EXAMINER, Aug. 1874, at 820.
32. Belva A. Lockwood, *The Congress of Law Reform*, 3 AM. J. POL. 321, 324 (1893).
33. MOSSMAN, *supra* note 2, at 152–53.
34. CHI. LEGAL NEWS, Aug. 12, 1893, at 434–35.

viduals in England who were interested in educating Indian women (especially Christians) in the late nineteenth century, as part of a "mission" to send British-educated Indian women home to "civilize" native women in British India.[35] Both as the first woman to study law at Oxford, and as a Christian Indian woman in Britain, Sorabji had gained access to influential diplomatic, artistic, religious, and intellectual circles there, and was even presented to Queen Victoria before returning home to India in 1893.[36] Although not formally admitted to the bar in India, Sorabji was initially permitted to appear for clients in several indigenous courts in India.[37]

Sorabji's paper for the 1893 Congress was a revised version of a paper she had delivered to a private audience in London in March 1893, just before she returned to India.[38] Her paper for the Congress described in detail the substance of Muslim and Hindu laws about women and property in India, demonstrating how these women had greater rights with respect to property than women in Britain, even after the significant reforms enacted there in the 1870s and 1880s. Yet, notwithstanding the rights of Muslim and Hindu women, Sorabji's paper explained how their rights were limited in practice because they often lacked access to independent legal advice and the means to enforce their rights. This problem occurred because, as *Purdahnashins*, women were prohibited from communicating with men other than family members, so that women's interests could be thwarted by male relatives or their male agents in courts and other public settings.[39] After reporting some dire experiences with fraudulent agents on the part of Indian women, Sorabji concluded that this problem could be solved by the appointment of *women* lawyers in British India who could provide legal advice and representation for the *Purdahnashins*.

35. ANTOINETTE BURTON, AT THE HEART OF THE EMPIRE: INDIANS AND THE COLONIAL ENCOUNTER IN LATE-VICTORIAN BRITAIN 115 (1998).

36. MOSSMAN, *supra* note 2, at 205–06. *See also* CORNELIA SORABJI, INDIA CALLING: THE MEMORIES OF CORNELIA SORABJI 27–29 (1934).

37. Sorabji later achieved international fame in 1896 when she defended an accused in a murder trial in a British court in India, the first woman to plead in a British court within the British Empire. *A Pioneer in Law*, 27 ENGLISHWOMAN'S REV,SOC. INDUS. QUESTIONS 217–18 (1896).

38. Cornelia Sorabji, Address at Queen's House, Chelsea: The Law of Women's Property in India in Relation to Her Social Position (Mar. 19, 1893) (transcript available in the British Library, Sorabji Papers, F165/117) (later published as *The Legal Status of Women in India, in* THE NINETEENTH CENTURY 854 (November 1898)).

39. *Id.* Both Hindu and Muslim women lived in *purdah* in northern India in the late nineteenth century. Sorabji explained the nature of *purdah* for her British readers in *Safeguards for Purdahnishins,* 15 IMPERIAL AND ASIATIC REV. 69, 863–64 (January 1903).

As she concluded, the obvious remedy for this injustice was the creation of positions for

> [a] few women with a love for and a knowledge of law, and a love for Indian women, and a knowledge of their needs, who will brave the reproach and the attendant difficulties of untried labor, and will devote their heads and . . . their lives to the work.

Sorabji's paper for the Congress reveals her skill in appealing to a sense of "mission" among these international jurists in relation to law in nineteenth century colonial jurisdictions. Indeed, Antoinette Burton concluded that Sorabji had "pathologized the world of the *Purdahnashin*" to achieve her goal as a woman lawyer, while identifying herself with the modern colonial establishment.[40] At the same time, Sorabji's bold proposal to the Congress in Chicago in 1893 reveals both her skilfulness in seeking international support for the employment of women lawyers in India and her determination to achieve her personal independence through legal work. And, significantly, in 1893, Sorabji was the only qualified candidate for any such employment in India. All the same, it was not until a decade later in 1904 that her well-orchestrated lobbying efforts resulted in her appointment as Lady Assistant for the Court of Wards in northern India, a position that she held until after World War I. In this work, she was involved in disputes about property, succession, and support for widows and minor children over a vast region. For example, in 1916, her annual report indicated that she had travelled more than 20,000 miles that year by rail, road, and water, an accomplishment that demonstrates her courage and independence, as well as her skilfulness in achieving her goal of independent work as a *woman* lawyer in India in the early twentieth century.

D. Clara Foltz: "Public Defenders"[41]

Clara Shortridge Foltz was the first woman lawyer admitted to the bar of California in 1878, and she also provided the catalyst, in a lawsuit she initiated with Laura de Force Gordon, to open Hastings Law School in San Francisco to women in 1879.[42] Foltz practiced law in California for several years, but she was also engaged in political campaigns concerning suffrage, penal reform, and equal access to employ-

40. Antoinette Burton, '*The Purdahnashin in Her Setting': Colonial Modernity and the Zenana in Cornelia Sorabji's Memoirs*, 65 FEMINIST REV. 145, 149 (Summer 2000).

41. CHI. LEGAL NEWS, Aug. 12, 1893, at 431–32.

42. BABCOCK, *supra* note 19, at 46–51.

ment and education, and active as a speaker and writer on a variety of legal and political issues. As her biographer, Barbara Babcock, concluded, she "enjoyed remarkable celebrity," in part because she also lived as a single mother with several children to support.[43]

In the context of her paper for the Congress, however, it was Foltz's experience defending accused persons in criminal trials before all male juries that resulted in her proposed reform: the creation of a state-funded public defender system. In Foltz's view, a public defender system was necessary to ensure equality between the prosecution and the defense, to achieve a fair trial, and to preserve the principle that an accused is innocent until proven guilty. As an accomplished public speaker, Foltz demonstrated in her paper her skill in weaving together fundamental philosophical principles and details of practical legal realities to argue that the defense of the innocent should find a "prominent and exalted place" in legal processes in the United States. After providing examples of the inequities in criminal trials, particularly for accused persons who could not afford representation, she asserted that counsel for the defense was absolutely essential to the "just examination of the case." As she concluded, the current system placed an inappropriate burden on the judge and jury, wreaked unfairness on the accused, and ultimately destroyed an accused's love of country.

In the context of criminal trials in the 1890s, Foltz explained how an accused with financial resources was required to pay for his own defense, even though it might "ruin his business, impoverish his family and make his wife and children objects of charity," whether or not he was convicted. Moreover, where the accused had no financial resources, the court had a duty to appoint counsel, but the accused was then required to repay a debt to counsel in the future, a practice Foltz characterized as "a system of compulsory credit." As she concluded rhetorically, in such cases, "the prisoner has asked for bread and is given a stone."

According to Babcock, Foltz may have designed her paper to educate the jurists in the audience: elite members of the legal profession with no conception of proceedings in criminal courts and no appreciation for the extent to which urbanization, industrialization, and immigration were creating new challenges for both the legal profession and accused persons in these courts.[44] Foltz continued to support this idea of public defenders and even drafted legislation in the late 1890s.

43. *Id.* at ix.
44. *Id.* at 308–09.

However, it was not until Los Angeles voters passed a city charter just before World War I, introducing the first public defender office in the United States, that her proposal was finally adopted. Later on, the principle requiring defense lawyers to ensure fair procedures in criminal trials was enshrined in *Powell v. Alabama* in 1932 (prior to Foltz's death), and then in *Gideon v. Wainwright* in 1963.[45]

III. REFLECTING ON WOMEN LAWYERS, LAW REFORM AND WOMEN'S LEGAL EQUALITY

In reflecting on the papers presented by these four women lawyers to the Congress in 1893, this comment focuses on three features of their presentations. First, the papers reveal some differing views about the scope of law reform. For example, Mary Greene's assessment of differences in statutory reforms for married women's property in the United States reveals her high level of confidence that significant change can be accomplished by reforming law, and particularly by enacting a "perfect" statute. By contrast, Eliza Orme expressed pessimism about the impact of reform statutes concerning married women's property in England, suggesting that such reform must be accompanied by social change, including changes in women's senses of responsibility to exercise their rights in relation to property. Sorabji also recognized relationships between substantive legal rights for women and the extent to which social norms might curtail them in practice, but her reform proposal focused on providing access to legal advice and assistance, rather than attempting to change social norms to strengthen the roles of women and enable them to enforce their substantive equality rights. And, although Foltz's paper promoted a significant and fundamental reform for criminal courts, the creation of a public defender system, her main goal was to ensure a more "perfect" trial and to alleviate financial distress for accused persons. Like Sorabji's focus on access to justice, Foltz's proposed reform did not address the underlying social context in which "criminal activity" and "criminals" were defined by law in the context of changing social conditions in the United States at the end of the nineteenth century. Thus, these four papers reflect quite different views about the scope of legal reforms and about women's roles in relation to such reforms.

Moreover, these four papers illustrate, to a significant extent, how issues regarding law reform initiatives reflect contemporary chal-

45. *Id.* at 318–19.

lenges as well those of the 1890s. For example, should reform initiatives focus on reform of the law itself (as suggested by Greene) or of legal processes and procedures (as suggested by Foltz)? Should legal reforms address issues about access to justice (as suggested by Sorabji), or is it necessary for legal reform to be accompanied by efforts to change social norms as well (as suggested by Orme)? While all of these views are often reflected in current law reform challenges in many different jurisdictions, this paper's concern about the extent to which the papers at the Congress on Jurisprudence and Law Reform reflected the equality goals of the women's movement needs particular attention.

In this context, it is arguable that only Orme's paper seems grounded in the need for *both* law reform *and* social change to achieve equality reforms for women in the late nineteenth century. In this context, the emphasis in the other papers on reforming "law," "legal process," and "access to justice" offers some support for Cott's argument about the gradual emergence of a more "professional" identity among women lawyers at the turn of the twentieth century. That is, this reading of the papers suggests that women lawyers at the Congress in 1893 were generally becoming more focused on *law* and less on *gender*. At the same time, it is clear that Orme had more experience in the practice of law than either Greene or Sorabji, and her comments may also reflect the focus of her own legal practice on property matters including conveyancing (i.e., land transfers) and succession. By contrast, Foltz's paper reflects her legal work in the courts, and particularly in criminal courts at the end of the nineteenth century. Yet, in the context of reforms promoting women's equality, it is difficult not to conclude that Orme's views—about the need to accompany legal reforms with social changes—were particularly prescient.

A second common feature of these four presentations is that all of their papers reveal some evidence of professional "tone," even though there are some differences among them. Greene's paper, for example, was quite academic in its focus on legal principles, reflecting her experience in education and in writing and publishing. Interestingly, while Foltz's paper was also academic in its tone and its many references to authorities, her paper showed greater flair and persuasive advocacy, and her references were used effectively to advance her rhetorical flourishes. Sorabji's paper also used advocacy, but her approach was more subtle, adopting well-honed persuasive phrases designed to elicit sympathy and support from an elite Western audience for the

legal needs of *Purdahnashin*. By contrast with the other papers, Orme's paper was almost brusque, confirming that it was written for the Congress by a woman who was in the midst of other important legal and political commitments. Nonetheless, in different ways, all four women's papers presented a professional tone, using academic references, skilful advocacy and blunt advice in their focus on ideas about law reform. All the same, it seems significant that there are few direct references to law reform as a means of promoting fundamental equality rights for women.

Indeed, this lack of focus in these women lawyers' papers on law reform as a means of promoting the nineteenth century equality goals of the women's movement is a third significant feature of their presentations. For example, it seems significant that Greene chose to focus on improving existing statutes to reform women's property rights, rather than on more controversial issues such as suffrage. Moreover, since it appears that she firmly opposed suffrage goals, and had little respect for the women who advocated them, her choice to examine the need for reforms to improve existing statutes regarding married women's property may reveal her increasing distance from the goals of the women's movement in the 1890s. Similarly, although Orme's paper presented a number of examples of women's legal status in Britain, and although she herself was much engaged in public activities in support of reforms concerning women's employment and suffrage, her paper included only a rather cryptic reference to women's suffrage in Britain. In the context of her own activities, the decision to excise controversial issues from her paper was, at least arguably, a conscious choice. Moreover, although Clara Foltz had been actively involved for decades in a variety of reform efforts in pursuit of women's equality claims (including suffrage) her paper about criminal justice reform never strayed into gender issues at all, even though there were undoubtedly women accused who would benefit (along with men) from the creation of a public defender system. Instead, it seems that Foltz strategically selected her topic to garner support for her public defender proposal from the Congress's powerful male audience, a decision that may have reflected her conclusion that her chosen topic had greater potential for eliciting sympathy from those attending this Congress on Jurisprudence and Law Reform. And, at least to some extent, Cornelia Sorabji's paper was also strategically designed to persuade the Congress about the need for women lawyers in India, an approach that both emphasized a role for legal advisors and also ensured an opportunity for her to do legal work. In this context, these women presenters all selected

important topics of legal reform in 1893, but all of them generally avoided confronting suffrage, probably the most controversial topic of the women's equality movement in the last decade of the nineteenth century.

In this way, the gendered voices of these four women lawyers at the Congress on Jurisprudence and Law Reform appear somewhat muted, at least in relation to pressing issues concerning women's equality rights. The papers by Greene and Sorabji focused on incremental changes to property rights for women, while Orme's paper included brief references to a number of issues, including issues about the impact of reforms concerning women and property. While Foltz boldly presented a plan for a public defender system that was certainly controversial, it also appeared to assume a male accused or at best one who was gender neutral. Thus, in their selection of legal reform issues, in their use of a professional tone, and in their avoidance of direct references to women's equality rights, these presentations at the Congress also tend to confirm Cott's argument about women lawyers' emerging identity as *lawyers* at the end of the nineteenth century, and a lessening of their "community of interest" with controversial issues in the women's equality movement.

Yet, this conclusion must also take account of the context for these four women lawyers at the Congress on Jurisprudence and Law Reform in 1893. In my view, it is possible that these four women lawyers astutely shaped their papers and presentations to suit the audience they were addressing. Thus, while Foltz and Orme both had highly successful experiences in public speaking on controversial matters, they may have recognized the Congress on Jurisprudence and Law Reform as a different audience and a different context, requiring a different kind of approach. In this context, moreover, both Greene and Sorabji appeared anxious to demonstrate their comprehensive grasp of their subjects, with Greene adopting a more objective academic tone and Sorabji providing details about the colonial context to support her proposal for women lawyers in India. To put this argument another way, consider how a paper advocating women's suffrage would have been received by this Congress of male lawyers and judges. Unfortunately, it seems all too likely that a paper about women's suffrage would have been rejected as a matter of "politics" rather than "law."

Thus, an assessment of these four papers requires recognition that these four women lawyers understood the unstated condition of their participation in the Congress: their conformity to emerging

norms of legal professionalism. Significantly, as Cott argued, these norms rendered women lawyers' gender invisible, "part and parcel of a larger process of purging politics, advocacy, or reform from within professional definition" at the end of the nineteenth century.[46] In this way, it seems that women lawyers accepted the need to subscribe to professional *male* norms as a condition of their acceptance as *women* who were also *lawyers* at the Congress on Jurisprudence and Law Reform. In this way, the Congress in Chicago in 1893 represents an important "moment in time" for women lawyers, as it reveals how this transition to "professional" identity was occurring in the 1890s.

For the women lawyers at the Congress in Chicago in 1893, these competing identities of gender and professionalism provided challenges that they met in different ways. Moreover, their experiences in 1893 may offer important insights for modern women lawyers, at least some of whom continue to experience gendered identities as legal professionals.[47]

46. COTT, *supra* note 13, at 234.

47. Fiona M. Kay, *The Social Significance of the World's First Women Lawyers*, 45 OSGOODE HALL L. J. 397 (2007).

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ENGENDERING THE HISTORY OF RACE AND INTERNATIONAL RELATIONS: THE CAREER OF EDITH SAMPSON, 1927–1978

GWEN JORDAN*

INTRODUCTION

"Remember, I too, am one of the despised."[1] Edith Sampson uttered this pronouncement in her 1957 address in Kansas City, Missouri at a regional conference of the Links, a prominent, national African American women's volunteer service organization.[2] Sampson was speaking as a black woman attorney of thirty years and a former U.S. Delegate to the United Nations (U.N.). She was responding to black radicals who criticized her for aiding the U.S. government's anti-communism campaign.[3] They asserted she was one of a group of conservative African Americans that the State Department enlisted to emphasize the progress of race relations in the U.S. as they downplayed the significant racism that persisted.[4] More than half a century later, activists and scholars continue to identify Sampson as one of that conservative group.[5]

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1. Edith Sampson, *Equal Opportunity-Equal Responsibility,* Vital Speeches of the Day, June 15, 1957, at 519 [hereinafter *Equal Opportunity*].

2. THE LINKS, INC., About The Links, Incorporated, http://www.linksinc.org/about.shtml (last visited Nov. 20, 2011). Sampson became a member of The Chicago Links in 1951. *Edith Sampson, 3 Others Join Chicago Links*, CHI. DEFENDER, Oct. 27, 1957, at 8.

3. Marguerite Cartwright, *The United Nations and the U.S. Negro,* 18 NEGRO HIST. BULL. 133 (Mar. 1955); William Worthy, *In Cloud-Cuckoo Land,* 59 CRISIS 226–30 (Apr. 1952). See also Letter from Claude A. Barnett to Howland Sargent, Assistant Sec'y of State, Edith Spurlock Sampson Papers 1927–1979, Box 3 Folder 72 (Mar. 27, 1952) (on file with the Schlesinger Library, Radcliffe Institute, Harvard University) [hereinafter ESS Papers],, which documents and disagrees with criticism of Sampson.

4. MARY L. DUDZIAK, COLD WAR CIVIL RIGHTS: RACE AND THE IMAGE OF AMERICAN DEMOCRACY 15, 56–60, 105 (2000).

5. THOMAS BORSTELMANN, THE COLD WAR AND THE COLOR LINE: AMERICAN RACE RELATIONS IN THE GLOBAL ARENA 77–78 (2001); GERALD HORNE, COMMUNIST FRONT? THE CIVIL RIGHTS CONGRESS 1946–1956, at 173 (1988).

In her speech to the Links, Sampson was both defending her support of American democracy and calling on the black women in attendance to join her in a continued fight for racial justice for African American women within the democracy. She acknowledged that in practice the U.S. fell short of its ideology of equality and cited some instances of discrimination she had endured as evidence of her deep understanding of racial bigotry, but she juxtaposed these with the advances she experienced:

> I have twice been privileged to serve with the United States Delegation to the United Nations. I have also known what it means to have a white sneer and refuse to shake my hand, and to be denied membership in a bar association. . . . I have been called 'Madame' respectfully in Iran and India, and I have also been called unspeakable names in scores of cities in my native land. So if I do not now dwell upon the many injustices done to us, it's not for *any want* of knowing them.[6]

Sampson's message in this speech and throughout her career, to this point, had always focused on the greatness of democracy and the possibilities of change it provided, especially for African American women. She explained, "*in no other nation, in no other time* has a people managed to make the strides that we who are Negroes have been able to make here. . . . And the world does move," she emphasized, "It does move."[7]

Sampson's fierce support of American democracy and her outspoken criticism of communism made her an easy target for more radical African Americans who rejected U.S. domestic and foreign policies. In the 1950s and 1960s, in the aftermath of World War II and the beginning of the Cold War, Sampson's appointment to the U.N. and her numerous international addresses in support of democracy created the impression that she was tied to the U.S. government, its racially discriminatory policies and practices, and its aggressive red scare tactics. Radical African Americans saw through the U.S. government's attempts to present what Mary Dudziak has described as "a particular story about race and American democracy: a story of progress, a story of triumph of good over evil, a story of U. S. moral superiority." They rejected "the lesson of this story," which Dudziak explains, "was always that American democracy was a form of government that made the achievement of social justice possible, and that democratic change, however slow and gradual, was superior to dictatorial imposition."[8]

6. Equal Opportunity, *supra* note 1, at 519.
7. *Id.* at 521.
8. DUDZIAK, *supra* note 4, at 13.

Sampson, however, believed this story and repeated it through the 1950s. But Sampson did not, as her critics charged, downplay the racism that persisted in the United States. Sampson consistently acknowledged the pervasive racial injustice that occurred at every level in America and skillfully used her position as an international spokesperson to fight for racial justice for all people of color, especially women.

The historiographical debate in the last decades of the twentieth century between left revisionists, right anti-communists, and centrist scholars continues to rage over whether and how communist or anti-communist African Americans advanced or hindered the cause of racial justice.[9] Edith Sampson gets only slight, but polarized, mention in this debate. Among revisionists, Gerald Horne is the most critical of Sampson. Horne claims elites used Sampson to "cover up racism and barbarism at home," but "kept [her] distant from important matters like policymaking." Horne asserts Sampson "was a hired gun," even a "stooge."[10]

Sampson's greatest defenders, Helen Laville and Scott Lucas, argue that Sampson cooperated with the White House and the State Department not out of naiveté but out of a firm conviction that democracy was the best hope for race equality. They further posit that Sampson used her position to seek "advances against racial discrimination at home and abroad" and that her "vision of Americanism was broadly representative of many of her contemporaries," those who supported American democracy as they fought for racial justice within it.[11] Legal historians explain that this group of consensus liberals believed that "only liberal and democratic ideals could cope with the threats of the post-war period, namely fascism and communism."[12]

But Horne, Laville, and Lucas miss the import of gender and its intersection with race in understanding Sampson. Horne, like many other revisionists and critical race theorists, ignores the effect of gender on the racial hierarchy and, in this case, its affect on Sampson's position and strategy. As Bernie Jones explains, "the critical race theory

9. Eric Arnesen, *No "Grave Danger": Black Anticommunism, the Communist Party, and the Race Question*, 3 LAB. STUD. WORKING-CLASS HIST. AMERICAS 13, 35–37 (2006).

10. Horne, *Who Lost the Cold War? Africans and African Americans*, 20 DIPLOMATIC HIST. 613, 623 (1996).

11. Helen Laville & Scott Lucas, *The American Way: Edith Sampson, the NAACP, and African American Identity in the Cold War*, 20 DIPLOMATIC HIST. 565, 567–68 (1996).

12. Bernie Jones, *When Critical Race Theory Meets Legal History,* 8 RUTGERS RACE & L. REV. 1, 5 (2006–07); Scott Lucas, *Approaching Race and "Americanism:" The NAACP and the State in the Early Cold War*, *in* CROSS ROUTES—THE MEANINGS OF "RACE" FOR THE 21ST CENTURY 114 (Paola Boi and Sabine Broeck eds., 2003).

focus on race exclusively means that gender-based differences within communities of color escape scrutiny: men cannot fully represent women, and it is presumptuous to conclude that women of color are represented solely by their race."[13] Lucas and Laville also miss the import of gender on Sampson's activism. They incorrectly assert that because Sampson did not figure prominently in Chicago's black organizations run by men, she came to her international work in 1949 having played only "a minor role" in the civil rights movement with "little involvement either with international affairs or with racial issues."[14] Including gender in the analysis, examining Sampson's life from a critical race feminist perspective that considers the intersection of her race and gender, however, reveals Sampson's historical importance as a leader in African American women's domestic and international civil rights movements.

Gender was as central to Edith Sampson as was race. Both her perspective and her aim were shaped by the intersection of her race and gender. Sampson understood that law and politics treated women of color differently than they treated not only white men, but also white women and black men. Sampson lived critical race feminism before scholars identified it as a legal theory.[15] It complicated her position as a liberal gradualist. It both drove her strategy, which included developing relationships with other women of color from around the country and the world, and her aims, which focused on securing a gendered racial justice that advanced the position of black women as well as the race in general.

This paper does not assess whether Edith Sampson's pro-democracy, anti-communist position was right or wrong. Rather, it attempts to place Sampson in the historical context of gendered black activism that sought racial justice for women of color in the United States and around the world. This context connects the activism of African American women to the issues of race and international rela-

13. Bernie Jones, *Southern Free Women of Color in the Antebellum North: Race, Class and a "New Women's Legal History"*, 41 AKRON L. REV. 763, 770 (2008).

14. Laville, *supra* note 11, at 566, 568. *Cf.* Helen Laville, *Spokeswomen for Democracy: The International Work of the National Council of Negro Women in the Cold War in* CROSS ROUTES – THE MEANINGS OF "RACE" FOR THE 21ST CENTURY, *supra* note 12, at 125. Here Laville argues for the importance of a gender analysis and recognizes the contribution of Sampson and the National Council of Negro Women to the issues of race and international relations, but concludes that their leadership was "co-opted" and their voices were "distorted" by the U.S. government. *Id*. at 135.

15. Kimberle Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics,* 1989 U. CHI. LEGAL F. 139 (1989); Jones, *supra* note 13, at 769.

tions during the decades before and after the start of the Cold War. Sampson came to her position as an international spokesperson for the U.S. after more than twenty years of domestic civil rights work for African American women. In 1949, on her first international trip with the World Town Hall radio program, she determined to use her expanded international access to advance the cause of racial justice, particularly for women of color.

Sampson engaged in a version of the strategy Margaret Keck and Kathryn Sikkink have labeled the Transnational Advocacy Network (TAN) model that employed the "boomerang pattern." This strategy allowed individuals or groups whose rights were being violated by their own government to use international connections to voice their plight and motivate "international allies to try to bring pressure on their states from outside."[16] Sampson's version of this strategy was to develop relationships with women of color in many of the newly decolonized foreign countries, listen to their concerns regarding the racial violence and discrimination that occurred in the U.S., and then relate those concerns to U.S. citizens and officials. She related them with a warning that the persistence of racial discrimination in the U.S. was turning these countries away from democracy as a form of government and from the U.S. as an ally. Sampson then urged her own government to end such practices and live up to its ideals of equality.[17]

This perspective of Sampson's international activism undermines arguments that she was primarily a spokesperson for the government's propaganda[18] and engenders our understanding of the role international relations played during the Cold War civil rights era. It also alters our understanding of the role African American women, including black women lawyers, played in the domestic civil rights movement from the 1920s through the 1950s. This paper argues that Edith Sampson, and her sister black women lawyers and activists, engaged in domestic and international activism to pressure the United States government and its citizens to end race discrimination as they worked to ensure that the civil rights movement included the advancement of the position, rights, and protections of African American women.

16. MARGARET E. KECK & KATHRYN SIKKINK, ACTIVISTS BEYOND BORDERS: ADVOCACY NETWORKS IN INTERNATIONAL POLITICS 12 (1998). Frederick Douglass and Ida B. Wells invoked this strategy earlier in anti-lynching campaigns. DUDZIAK, *supra* note 4, at 6–7.

17. *Cite Problems Arising in Ban on Segregation*, CHI. TRIB., Aug. 14, 1954, at A7 [hereinafter *Cite Problems*].

18. DUDZIAK, *supra* note 4, at 59.

This paper attempts to revive Sampson's role as a leader among women of color activists within the broad civil rights movement by examining Sampson's work as an attorney and a leader in Chicago as well as her international work. It is organized into three additional sections. The first examines Edith Sampson's development and work as one of the few, early, black women lawyers in the United States from the 1920s through the 1940s. Although small in number, these women wielded influence locally and nationally. They developed careers to fulfill their own ambitions, engaged in service work for their communities, became leaders of the black women's social networks, pursued a gendered agenda of law reform that addressed the legal needs of black women, and pushed for the inclusion of women's rights issues within the growing civil rights movement. This section identifies Sampson as a leader in the context of African American women's civil rights activism.[19]

The next section examines Sampson's work as an activist in the international context. It first documents the historical foundations of African American women's international activism. It then identifies Sampson's strategy of using her international connections and experiences to pressure the U.S. government and U.S. citizens to end racial discrimination in America. It also explores the way Sampson used her connections with women in countries throughout the world to advance civil and human rights activism specifically for women of color.

The third section explores Sampson's changed, but continued activism in the 1960s during a period of growing domestic unrest. It focuses first on her reassessment of the gradualist approach to civil rights she had championed. Sampson never doubted her support of American democracy, but she did come to believe that the slow, incremental advance of black civil rights had failed to yield racial justice. It then briefly examines her activities as judge, counsel to the U.S. government in the 1960s, and as mentor to other black women activists.

The paper concludes with an assessment that understanding Sampson's efforts, and her sister women activists, is essential to understanding race and international relations before and during the Cold War era. It also argues that they were an important faction of the

19. On black women's civil rights activism, see JOYCE A. HANSON, MARY MCLEOD BETHUNE & BLACK WOMEN'S POLITICAL ACTIVISM (2003); GLENDA GILMORE, DEFYING DIXIE: THE RADICAL ROOTS OF CIVIL RIGHTS 1919–1950, at 247–94 (2008); BETTYE COLLIER-THOMAS, JESUS, JOBS, AND JUSTICE: AFRICAN AMERICAN WOMEN AND RELIGION (2010); DEBORAH GRAY WHITE, TOO HEAVY A LOAD: BLACK WOMEN IN DEFENSE OF THEMSELVES, 1894–1994 (1999).

early civil rights movement. It assesses that the application of a critical race feminist lens to the life and work of Edith Sampson reveals that women of color had a different agenda and employed different strategies than white men, black men, and white women, and that their efforts helped to shape the historical course of race relations in the U.S. The paper concludes with a call to continue this work so that we might broaden, and perhaps correct, current narratives as well as strengthen the foundation of future activism for gendered racial justice.

I. THE EMERGENCE OF A CIVIL RIGHTS ACTIVIST

A. The Early Years

Edith Sampson's personal and professional life drove her civil rights activism. She was born Edith Spurlock in Pittsburgh, Pennsylvania, in 1901, one of eight children. Her family was poor. Everyone worked. Sampson began working when she was fourteen, cleaning fish at a fish market and assisting her mother. After she graduated from high school, she sought a position as a schoolteacher, but Pittsburgh did not hire black teachers. She did secure employment at the Associated Charities of Pittsburgh who sent her to the New York School for Social Work because they needed a black social worker. One of her professors, George Kirchwey, recognized her potential and encouraged Sampson to attend law school. Sampson would eventually heed his advice, but not for a number of years.[20]

In her early twenties, Sampson left New York, married Rufus Sampson, a Tuskegee Institute representative, and moved with him to Chicago where she would soon emerge as a civil rights leader for African American women. Sampson initially continued her career in social work, attending the School of Social Service Administration at the University of Chicago, working for the YWCA and the Illinois Children's Home and Aid Society, as she cared for one of her sister's two young children after her sister's death. Sampson soon also began taking courses at night at John Marshall Law School. She earned her law degree in 1925. When she failed her initial bar exam, she enrolled and then graduated from Loyola University Law School with a Masters of Law. Two years later she passed the Illinois bar exam.[21] Once a lawyer,

20. Dianne M. Pinderhughes, *Edith S. Sampson*, *in* NOTABLE BLACK AMERICAN WOMEN 969 (Jessie Carney Smith ed., 1992).

21. *Id.* at 969–70.

Sampson worked first as a probation officer and then as an Assistant Referee for the Cook County Juvenile Court as she also established her own law firm on the Southside of Chicago. She would later reflect, "Day by day I saw the need for service and the greater need for intelligent, honest and fearless Negro leadership."[22] These experiences "get[ting] to know the real needs of [my] people" gave her "the urge, not only to make progress for [myself], but to pave the way for others to follow."[23]

B. Black Women Lawyers in Chicago

Edith Sampson joined a very small but critical mass of black women lawyers in Chicago. The first African American woman lawyer in Illinois, Ida Platt, was admitted in 1894.[24] It took more than a quarter century before Violette Anderson became the second black woman to be licensed to practice law in the state.[25] In 1927, Sampson became the ninth black woman to earn her law license in Illinois.[26] This group of women practiced every kind of law, but all focused most of their activities on the legal injustices suffered by African American women. Sampson recognized the need and issued a call for more black women to enter the profession:

> Women as lawyers are needed in matters concerning the protection and welfare of women, children; as public defenders in specialized women's courts; as probation officers in Juvenile Court; as arbitrators in on industrial accident boards; as judges in Juvenile and Domestic Relations Courts; as members of the state legislatures, etc.

She saw the work as critical and explained, "the profession of law, is concerned with the administration of justice."[27]

This generation of black women lawyers entered the profession when a sea change was occurring within the black movement for racial justice. As Clarence Darrow explained in 1930, black men and women needed to elevate their fight for civil rights because white support had significantly diminished. "In the early days there were many people who believed in the equality of all people. That number," Darrow ex-

22. Edith Sampson, *Speech* 1 (1947) [hereinafter Sampson's Speech], ESS Papers Box 5 Folder 109.

23. *Id.* at 2.

24. Gwen Hoerr McNamee, *Platt, Ida*, *in* WOMEN BUILDING CHICAGO 1790–1990, 699 (Rima Lunin Schultz & Adele Hast eds., 2001).

25. *Colored Woman is First in State to Be Admitted to Bar*, CHI. TRIB., June 20, 1920, at 12.

26. Edith Sampson, *Law: Legal Profession Followed by Nation's Best Known Socialites*, CHI. DEFENDER, May 4, 1935, at 25 [hereinafter *Socialites*]. Sampson's husband earned his law license the following year. *Barrister: Attorney Rufus Sampson,* CHI. DEFENDER, Oct. 20, 1928, at 5.

27. *Socialites*, *supra* note 26, at 25.

claimed, "has dwindled to a mere handful. . . ." Darrow specifically urged black lawyers to use the courts to protect their rights.[28] Historians have long documented the resurgence of racism in the years before and after 1920 that included the rebirth and growth of the Ku Klux Klan, anti-immigration sentiment spurred by the Red Scare, and the race riots that occurred in cities across the country, including Chicago. African American men and women were responding to this racism through a number of organizations and strategies, including the NAACP and its legal strategy to fight discrimination through the courts,[29] black clubwomen's organizations,[30] and the small, but committed, cadre of black women lawyers.

Black women lawyers included civil rights work as part of their practice. One of Edith's Sampson's first acts as an attorney was to organize the handful of Chicago's black women lawyers into the Portia Club to provide free legal services to poor black women and children.[31] Ever the optimist, in 1930 after practicing law for three years, Edith Sampson described a palpable change in the position and influence of women and, more specifically, black women. "The changes which have taken place in the past few years in the activities and position of women . . . [include] distinctive[ly] the tendency of women to invade every intellectual area." [32] She especially noted that "women as lawyers have made tremendous progress."[33]

Sampson explained her generation of women lawyers sought more than formal equality; they sought race and gender justice. "[Black women lawyers] strive to cure social ills, they preach and advocate justice and reason in law and in social institutions. They are frank, progressive and humane."[34] Sampson's description was of a particular paradigm of law practice, one that incorporated civil rights works into the very essence of their practice. These lawyers combined their ambitious pursuit of a career with a social justice agenda that focused on

28. *Race Must Fight Own Battle, Says Darrow,* CHI. DEFENDER, Dec. 6, 1930, at 2; *Clarence Darrow Warns Race,* CHI. DEFENDER, July 11, 1931, at 1.

29. MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 98–108 (2004); CHARLES J. OGLETREE, JR., ALL DELIBERATE SPEED: REFLECTIONS ON THE FIRST HALF CENTURY OF BROWN V. BOARD OF EDUCATION 109–23 (2005); *Negro Rights and Duties*, CHI. DEFENDER, May 11, 1929, at A2.

30. WHITE, *supra* note 19, at 110–41.

31. Edith Sampson, *Women Lawyers Throughout the Country,* CHI. DEFENDER, May 3, 1930, at A5 [hereinafter *Women Lawyers*]; *Women Offer Expressions of Gratitude,* CHI. DEFENDER, Dec. 1, 1928, at 5.

32. *Women Lawyers*, *supra* note 31, at A5.

33. *Id.*

34. *Id.*

alleviating the effects of race and gender discrimination, and especially assisting those who stood at the intersection of those discriminations. Specifically, they worked in their law practices, within legal professional organizations, women's associations (both black and mixed-race), and political organizations in pursuit of justice. This generation of black women lawyers was integral to laying the groundwork for the civil rights movement that evolved in the subsequent decades and ensuring that it considered the rights and position of black women as well as black men.[35]

Through the 1930s and 1940s as Sampson rose in her career, she maintained her focus on seeking racial and gender justice. Her accomplishments included admission to practice law before the U.S. Supreme Court in 1934, appointment as Special Commissioner to the Cook County Juvenile Court in 1940,[36] admission as one of the first three women of color to the National Association of Women Lawyers when it ended its color ban in 1943,[37] and appointment as the first black woman assistant state's attorney for Cook County in 1947.[38] When Sampson received this appointment, she entrusted her law office to two young black lawyers, one a woman, Ernestine Washington, to operate it as "a legal clinic where the people can get legal aid at minimum cost."[39] Within two years, Sampson left the practice of law to advance her gender and racial justice agenda at the national and international level.

C. National Black Women Civil Rights Activism

Mary McLeod Bethune founded the National Council of Negro Women (NCNW) in 1935, during the heart of the Great Depression, to bring together the voices of black women from around the country in order to organize their efforts and increase their collective power. She wanted to ensure black women's "representation and participation . . . in the policies and plans which were to seriously affect the na-

35. See Kenneth 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, 1461–64 (2002) for a description of similar findings among black women lawyers in Philadelphia.

36. *Race Woman Attorney Serves on Bench in Chicago Juvenile Court,* CHI. DEFENDER, June 1, 1940, at 1. In 1934 Sampson also divorced Rufus Sampson and married Joseph Clayton, a Chicago attorney. Pinderhughes, *supra* note 20, at 970.

37. J. CLAY SMITH JR., EMANCIPATION: THE MAKING OF THE BLACK LAWYER 545–46 (1993).

38. Edith Sampson, *I Like America*, 9 NEGRO DIGEST 3, 7 (1950), "Professional Women Honor Edith Sampson at Public Reception", ESS Papers Box 7 Folder 137.

39. *Edith Sampson Appointed to State Law Job*, CHI. DEFENDER, May 10, 1947, ESS Papers Box 7 Folder 137.

tion's employment, education, welfare, health and civic opportunity."[40] It was an organization for African American women, because Bethune understood that the needs of black women were often distinct from those of black men and white women. "We need a unified organization to open new doors for our young women; we need a vast council of women—and when that council speaks," Bethune declared, "its power will be felt."[41]

Edith Sampson was an early member and leader within the NCNW. She helped to shape and carry out its civil rights agenda for black women. This included an economic campaign to establish a minimum wage, maximum hours, and "to improve the working condition of Negro women—especially those in domestic service," as well as educating black women as consumers.[42] They also organized protests against the "vicious propaganda which reflects discredit on the Negro race."[43] This type of propaganda depicted black men as sexual predators and black women as sexually promiscuous.[44] The Council also focused very specifically on the New Deal programs of the Roosevelt administration and sought to ensure that black women and children were able to fully and equally participate in all federal social welfare programs. It insisted that black women be included in both the processes of developing and administering these policies. "Only in this way," the NCNW explained, "do we feel that the Negro viewpoint will be adequately presented and the special problems and difficulties of Negro women and children be satisfactorily approached and met."[45]

By the 1940s the NCNW expanded its civil rights agenda to address additional issues that were central to the lives of black women. It focused on issues of: "discrimination against married women; discrimination against Negro women; new opportunities opening up for Negro women; migration of Negro women; lay-offs in industry; wages; strikes affecting Negro women as workers; unions old and new which accept or bar Negro women; and outstanding achievements of Negro women."[46] The organization also worked for health care and childcare and

40. Edith Sampson, *Council History* 1, ESS Papers Box 9 Folder 188 [hereinafter *Council History*].

41. *Id.* at 2; HANSON, *supra* note 19, at 9–10; WHITE, *supra* note 19, at 148–49.

42. *Council History*, *supra* note 40, at 4; on struggles of black women working as domestics see CHERYL D. HICKS, TALK WITH YOU LIKE A WOMAN 38–40 (2010).

43. *Council History*, *supra* note 40, at 4.

44. HICKS, *supra* note 42, at 8.

45. *Council History*, *supra* note 40, at 6.

46. *Id.* at 18.

pre-school education, vocational training and education for black youth and adults, and for political rights, especially enforcing the franchise. It further sought to ensure that black women would be included in post-war planning and programs. Throughout, it maintained its aim: "the complete integration of Negro women into the American commonwealth, with all normal rights and privileges."[47] This is the civil rights work in which Sampson was fully engaged.

At the end of World War II, Sampson spoke out forcefully to African American women and girls in cities throughout the country urging them to act "to promote the interest of Negro women for the post war days."[48] Determined not to endure the discriminations African Americans, and especially African American women, endured after WWI, Sampson implored black women to band together. "The Negro woman is the source of tremendous woman power if we would work as an organized unit, if we would join hands and present a solid front."[49] She posited that women of color needed to assert their rights to economic, social and political justice. She urged them to study the issues and the candidates, to vote, to take their place as leaders, to support each other, and to work to relieve tension between the races.[50]

II. INTERNATIONAL ACTIVIST

A. The Historical Foundations

Sampson joined a long tradition of women of color engaged in international coalition activism. Organized international participation began in 1893 when six African American women spoke at the first quinquennial meeting of the International Congress of Women (ICW).[51] African American women served internationally through the YMCA during World War I assisting the African American soldiers serving in Europe. After the war, a handful of African American women participated in numerous international conferences held throughout

47. *Id.* at 24; WHITE, *supra* note 19, at 148–55.

48. *Council History*, *supra* note 40, at 2.

49. Sampson's Speech, *supra* note 22, at 3.

50. *Id.* at 4–6.

51. Michelle Rief, *Thinking Locally, Acting Globally: The International Agenda of African American Clubwomen, 1880–1940*, 89 J. AFR.-AM. HIST. 203, 204 (2004). Elizabeth Cady Stanton and others, including Frances Ellen Watkins Harper, a black activist, founded the ICW in 1888. When the National Association of Colored Women was founded in 1896 it joined the US branch of the ICW, the National Council of Women. *Id.* at 203, 205.

Europe. 52 These experiences increased African American women's efforts to unite with women of color around the world and to play a role in shaping U.S. domestic and foreign policy.

Black women's most prominent influence in women's international organizations after World War I was in the Women's International League for Peace and Freedom. A number of black women joined the organization and persuaded it to place racial justice at the core of its conception of peace.53 But these women soon determined it was important to establish their own international organization, free from the control of white women. In the fall of 1922, a number of African American women met in New York City with women from "Africa, Haiti, West Indies, [and] Ceylon." They founded the International Council of Women of the Darker Races (ICWDR). There were women from other nations who could not attend the meeting but "pledged their heartiest cooperation in the new movement." The object of the organization was "the economic, social and political welfare of the women of all the dark races." They explained, "the many handicaps, barriers and embarrassments from which the women of the darker races suffer because of color prejudice can and must be overcome by a powerful organization working intensively along definite lines."54 The primary organizer and first president of the ICWDR was Margaret Murray Washington, widow of Booker T. Washington. With the assistance of a number of prominent African American women, the organization remained active until 1940.55

When Mary McLeod Bethune, who had been a member of the ICWDR, founded the NCNW she brought with her its international aim to advance "racial, gender, and economic justice" for women of the darker races in the United States and throughout the world.56 In its first years the NCNW determined to "establish a working relationship with the women of India" and formally endorsed the work of the ICWDR.57 In 1940, it held its first summer seminar "for intellectual and

52. Rief, *supra* note 51, at 209–10. Some women, including Madam C. J. Walker, Ida B Wells Barnett, and Alice Dunbar-Nelson desired to attend conferences in Europe but were denied passports. *Id.* at 210–11.

53. *Id.* at 212.

54. *International Organization of Colored Women is Formed*, N.Y. AGE, Aug. 26, 1922, at 5.

55. Rief, *supra* note 51, at 214–18. The date of the founding is somewhat contested. Some assert it was founded in 1920 but held its first meeting in 1922. Jacqueline Anne Rouse, *Out of the Shadow of Tuskegee: Margaret Murray Washington, Social Activism, and Race Vindication*, 81 J. NEGRO HIST. 31, 40 (1996).

56. Rief, *supra* note 51, at 218–19.

57. *Council History*, *supra* note 40, at 12.

cultural growth" in Cuba, focusing on the activism of Cuban women of color in their fight for liberty and equality.[58] In 1943, it pledged to Liberia that it would stand with its people during the war and "when there is peace again, and the chance for reconstruction, the National Council of Negro Women of the United States looks forward to a pilgrimage of good will to Liberia."[59] And, in 1944, it hosted its first international session in which representatives from the Philippines, Liberia, Mexico, Costa Rica, France, China, Haiti, Great Britain, and Belgium were in attendance.[60]

After World War II, the NCNW intensified its international work. It participated, along with the National Association of Colored Women (NACW), in the ICW 1947 meeting held in Philadelphia. It also participated in the first Inter American Congress of Women (IACW) held in Guatemala City. The IACW was comprised of thirty-nine women's associations from nineteen countries from North, Central, and South America. Like the ICW, the IACW was an inter-racial, but primarily white organization, although its first president was Dr. Gumersinda Paez, from Panama, "one of the three Negro women in attendance."[61] Its aims were broad, focusing primarily on peace and human rights.[62]

In 1947, Bethune also insisted on taking her place as one of the consultants to the State Department at the U.N. Conference on International Organizations where the U.N. charter was to be established. Although the State Department initially declined to include Bethune, she insisted. Ultimately, the State Department allowed her to be an associate consultant through the NAACP. No other African American women were included. Bethune, nonetheless, participated actively in the conference and brought with her more than fourteen African American women as observers. "Negro women like all other women," Bethune explained, "must take part in building this world, and must therefore keep informed of all world-shaping events."[63]

58. *Id.* at 14.

59. *Id.* at 21.

60. ELAINE M. SMITH, MARY MCLEOD BETHUNE AND THE NATIONAL COUNCIL OF NEGRO WOMEN: PASSING A TRUE AND UNFETTERED DEMOCRACY 238 (2003).

61. *Inter-American Women's Congress Elects Negro as First President*, CHI. DEFENDER, Sept. 13, 1947, at 1.

62. *Id.*

63. SMITH, *supra* note 60, at 240. *See also* GILMORE, *supra* note 19, at 406.

B. First International Efforts

Edith Sampson became directly involved in the NCNW's international work in 1949 when she was chosen to participate in a Town Hall World Seminar. It was an extension of Town Hall, Inc., a program that since 1935 had aired weekly radio broadcasts on public issues of the day. In 1949, it decided to hold town meetings around the world.[64] This program was technically distinct from the State Department, but it was supported by the Department and worked in concert with its campaign to promote American democracy and oppose communism during the growing Cold War.[65] Sampson was one of twenty-eight seminar members, one of two African Americans (with Walter White, the executive secretary of the NAACP), and the only African American woman.[66] Bethune, as president of the NCNW, authorized Sampson to serve as the NCNW's representative on the trip and charged her "to represent the high standards of fine womanhood, and reflect that cultural atmosphere that will ingratiate the spirit and the lives of the American women whom you represent, and particularly the six and a half million brown American women of which you are a part."[67]

Sampson came to this work fully indoctrinated from decades of activism in the civil rights struggles of African American women. She had been a practicing attorney in Chicago for twenty-two years where she focused on assisting women of color. Through the NCNW she had participated in economic campaigns for African American women, including labor reforms and antidiscrimination campaigns. She had been involved in education reforms to allow women of color greater access to higher quality education and training and voting campaigns to meaningfully enfranchise women of color.[68] She fully shared the aim of the NCNW, "the complete integration of Negro women into the American commonwealth, with all normal rights and privileges."[69]

Sampson was initially frustrated with the tour, as it purposefully determined not to focus on issues of race or gender. But when the Town Hall reached Asia, the audience persisted in raising issues of race

64. Indian Council of World Affairs, Program for America's Round-the World Town Meeting 1 (Aug. 17, 1949), ESS Papers Box 9 Folder 191.

65. DUDZIAK, *supra* note 4, at 48–49; Laville, *supra* note 11, at 568.

66. *Id.* at 569.

67. Letter from Mary McLeod Bethune to Edith Sampson (Apr. 14, 1949), ESS Papers Box 3 Folder 67.

68. Sampson, *supra* note 40, at 18–20.

69. *Id.* at 24.

discrimination in the United States, and Sampson quickly became the most important member of the tour.[70] Sampson answered the questions directly, as a woman of color who had endured a lifetime of discrimination and yet had also risen from poverty to a position as an accomplished lawyer. Her response in New Delhi received international attention: "Let me answer here and now the question that you in New Delhi, as well as people throughout Europe and the Middle East, have been asking," Sampson stated clearly. "The question is, quite bluntly, 'Do Negroes have equal rights in America?' My answer is no, we do not have equal rights in all parts of the United States. But let's remember," Sampson added, "that eighty-five years ago Negroes in America were slaves and were 100 per cent illiterate. And the record shows that the Negro has advanced further in this period than any similar group in the entire world."[71] Sampson then gave examples of African Americans who had attained great achievements and made great contributions to American life, excluding the more radical activists, but including herself.

Sampson's response was firmly in line with the strategy that the State Department was pursuing. Through a number of agencies, including the Information Agency, the U.S. was telling the story of past U.S. racial transgressions while insisting that only in a democracy can these wrongs be overcome. It painted a picture of significant improvement in race relations and the condition of African Americans and asserted that the U.S. was well on the way to fixing the remaining problems.[72] Sampson's response agreed that there was improvement, but stopped short of the positive picture of current race conditions. Sampson echoed the position of the NCNW and its founder Bethune who, during World War II, had said that she supported the war against Hitler "in spite of the discrimination against Negroes in America."[73] Bethune explained, "[w]e're not blind to the fact that the doors of democratic opportunity are not opened very wide to us," but asserted "under Hitler their persecution would be far greater."[74] Eight years later, Sampson agreed there was much racial work yet to be done. "Does this mean that I am satisfied?" she asked. "Or that Negroes in the United States are satisfied? No, not by a long shot! We will never be satisfied

70. Laville, *supra* note 11, at 570.

71. Town Meeting: What are Democracy's Best Answers to Communism? 10 (1949) [hereinafter Town Meeting], ESS Papers Box 9 Folder 192.

72. DUDZIAK, *supra* note 4, at 50–51.

73. *U.S. Negroes Held Foes of Fascism,* N.Y TIMES, Nov. 14, 1941, at 20.

74. *Id.*

until racial barriers are lifted and we have full and complete integration."[75]

Sampson did believe and, in line with the State Department, did reiterate that a democracy was the best form of government under which to secure better conditions. However, she turned the State Department's strategy back on itself. She called upon the U.S. to act immediately to prove that democracy is a better form of government. "From an international standpoint, we in the United States must realize the importance of cleaning up our own back yard," she warned. "The countries of the world are looking to America for leadership in democracy. We must set an example," Sampson challenged, "if we would win their support. We will not win their confidence, especially the confidence of Asia's dark-skinned millions, if they continue to read about discriminatory practices in America. Therefore, I say," she chided, "democracy's best answer to communism is to practice what it preaches, but fast!" Sampson concluded by calling for a world-wide end to racial discrimination, "Let us wipe out the last vestige of separation of the races by eliminating in each and every country of the world any trace of discrimination because of race, color, or creed."[76]

Contemporary and more recent reports of Sampson's speech note her acknowledgement of race discrimination in the U.S., but emphasize her support of American democracy. Most accounts omit her call for the U.S. to live up to its rhetoric and end race discrimination immediately. One of the most recent discussions of her speech, repeat a distorted account "that Sampson told her audience that she would not tolerate criticism of the United States for its civil rights record."[77] Sampson did defend the United States and democracy against leftist radicals that asserted African Americans would support socialism or communism over democracy, but she offered her own criticism of the U. S. civil rights record.[78] These attacks on Sampson as a puppet for the State Department continued for decades.[79]

Sampson's identity as a woman of color was perhaps even more important than her identity as an African American. When Sampson met with the All-Pakistani Women's Association on the 1949 tour, they formed a gendered bond. The Pakistani women, who included Begum

75. Town Meeting, *supra* note 71, at 11.
76. *Id.*
77. DUDZIAK, *supra* note 4, at 60, 105.
78. Laville, *supra* note 11, at 571.
79. Letter from Claude Barnett, *supra* note 3.

Liaquat Ali Khan, the wife of Pakistan's Prime Minister, shared with Sampson that they too were victims of race and religious discrimination and asked how the U.S. addressed its similar problems. Sampson responded that she paid her way and participated in the seminar because she "wanted to know what the other women of the world were going through" and she "thought there should be a Negro woman along to answer the question you have asked."[80] Ali Kahn offered to pay Sampson the cost of her trip. Sampson accepted the gift and returned the amount as a contribution to the Pakistan Women's Association. At the end of the meeting Sampson and Ali Khan embraced and the audience applauded. Walter White recognized the importance of this gender bond and postulated that this "one simple act of human sisterhood cemented a more lasting bond between East and West than a thousand pompous speeches."[81] The two women maintained correspondence for years.[82]

After the close of the Town Hall tour, the delegates determined to continue their work in the U.S. They elected Sampson president of their association and dispatched her to spread their experiences in cities throughout the country.[83] Although Sampson had impressed the delegates on the tour and they supported her, they did not completely understand her. This became apparent when the group attempted to dine at a hotel in Washington, D. C. The hotel refused to serve the group because Sampson was black. When they moved their dinner to another hotel that did serve blacks, the other delegates were reportedly too upset to eat. Sampson, who nonetheless enjoyed her meal explained, "I've been colored a long time. If I stopped eating every time something like this happened, I'd be thin as a rail."[84] As a woman of color Sampson maintained a perspective white men and women and black men would never fully understand.

The message Sampson took on the road was two-fold. She called for the U.S. to end racial discrimination at all levels immediately, and she called for women of color to unite locally, nationally, and interna-

80. Laville, *supra* note 11, at 570–71.

81. *Mrs. Sampson Wins Hearts in India,* CHI. DEFENDER, Sept. 17, 1949, at 10.

82. Letter from Begum Liaquat Ali Khan to Edith Sampson (Aug. 26, 1950), ESS Papers Box 3 Folder 69.

83. Laville, *supra* note 11, at 571; Edith Sampson, *To the Members of the Committee on International Relation of the National Council of Negro Women,* circa 1950, ESS Papers Box 9 Folder 188.

84. Laville, *supra* note 11, at 565; *No title,* LA. WKLY, Oct. 29, 1949, ESS Papers Box 8 Folder 192.

tionally to ensure that their voices were heard and that they would help shape the new social order. The first part of her message was often reported in news accounts of her speeches in various cities. She began to repeatedly emphasize that two-thirds of the people of the world are non-white and that they "are watching America's treatment of her Negro population as they decide whether they should accept democracy."[85]

But Sampson's message to African American women was a critical part of her mission. She reported back to the NCNW and urged the black women members to take an even larger role in working for peace and equality. She saw a special role for women of color in moving America to end its racial hierarchy. "You and I know," she explained, "that we have yet to convert those who give lip service to democracy into people who believe in it and practice it."[86] She mobilized the NCNW to have all of their chapters hold a program on October 24, 1950, the day President Truman declared as International Relations Day. The program was to address the questions "what would it mean to this community if the Declaration of Human Rights were observed." She offered them "practical steps and projects for implementing the Declaration of Human Rights in this community."[87] At every turn she urged members of the NCNW, and all black women, to seize the opportunities before them. "My great plea to 'our people,'" she wrote, "would be that they prepared themselves because the doors of opportunity are opening faster than we have people prepared to walk through them." She urged, them to "be optimistic about the future. . . ."[88]

Sampson's work gained her the attention of India Edwards, one of President Harry Truman's advisors and Truman then chose her to serve as an alternate representative of the U.S. to the fifth General Assembly of the U.N. Some dismissed her appointment as part of the U.S. propaganda effort, but Sampson, and other black women, saw her appointment as an important opportunity for African Americans, for women, and specifically for women of color. Pauli Murray wrote to Sampson offering her support and assistance. She explained she was

85. *Race Bias held Costly to US*, DES MOINES REG., Aug. 18, 1950, ESS Papers Box 9 Folder 192; *U.S. Must Clean Up Racial Problem to Sell Democracy*, UNION SOUTH HADLEY, MASS., July 11, 1950, ESS Papers Box 9 folder 192; Edith Sampson, *World Security Begins at Home,* 43 J. HOME ECON. 516–17 (1952), ESS Papers Box 5 Folder 109.

86. Edith Sampson, *To the Members of the Committee on International Relations of the National Council of Negro Women*, ESS Papers Box 9 Folder 188.

87. *Id.*

88. Letter from Edith Sampson to the NCNW (Oct. 29 1950), ESS Papers Box 9 Folder 198.

"deeply aware of how much this [appointment] means to you and to us."[89] Jane Bolin, who had been appointed the first black woman judge in the country in New York in 1939, wrote to Sampson welcoming her to the city and emphasized, "[w]e are depending on you to do your usual magnificent job."[90] Neither of these women identified who "we" represented; they did not have to. Women of color understood their bond and the import of this opportunity.

Sampson carried this work forward in her position as a U.S. representative to the U.N. In a speech she presented within a month of her appointment, Sampson called on Americans to help advance world security. She listed a number of general ways all individuals could contribute to U.S. foreign policy, including fighting inflation and hoarding and working to increase production. But then Sampson asked more; she asked individuals to promote a free civilization. "World security begins at home," she explained, "where children who are born without racial or religious prejudice either learn it from parents and neighbors or are taught, according to the words of the United Nations' Charter, 'to practice tolerance and live together in peace with one another as good neighbors.'"[91] She further implored Americans to reach out to the immigrants living in their communities, advocating a "grass-roots, down to earth approach to world security."[92]

Sampson continued to spread her message in the U.S. and abroad, traveling to Austria, Germany, and Scandinavia in 1951. When acts of grave racial injustice happened in the States, Sampson used the occasion to attempt to scare white America into ending racial discrimination. She chided the people of Cicero, Illinois who rioted and vandalized an African American veteran who moved his family into an apartment in the city. She explained the great loss from their actions was "to the 136 million white Americans. They have lost prestige throughout the civilized world as a result of this terrible act," she explained. "The 360 million people in India, the 100 million people in Pakistan, the 80 million people in Japan, and the countless millions in other parts of the East now have the news of what happened in Cicero, and they are saying," Sampson asserted, "that you speak with your mouths about democracy but you do not practice it; that you describe

89. Letter from Pauli Murray to Edith Sampson (Sept. 29, 1950), ESS Papers Box 9 Folder 197.

90. Letter from Jane Bolin to Edith Sampson (Oct. 11, 1950), ESS Papers Box 9 Folder 198.

91. Edith Sampson, *World Security Begins at Home* 5 (Oct. 19, 1950) ESS Papers Box 5 Folder 109.

92. *Id.* at 6.

America as the land of the free and the home of the brave, but they know now it is not so."[93]

Sampson also used her international women's coalition to push this message. The most vivid example of her use of this network occurred in January 1952 after the murder of Harry Moore. Moore, a leader in the Florida NAACP, and his wife had died from injuries they received when their home was bombed on Christmas night. Many in Florida and throughout the country called for official action to catch and prosecute those responsible.[94] Sampson, who was in Paris at the time, engaged in nongovernmental organization work as a representative of the NCNW, brought the matter to her international sisterhood. She described to Walter White, chief secretary for the NAACP, that she proposed a motion the day after the bombings "calling upon all NGOs and their influential organizations to bring strong pressure upon [the U.S. attorney general, J. Howard] McGrath to act."[95] Sampson told White that many answered her call. Although there is no evidence that this pressure resulted in any action, that Sampson utilized her position and the NGO network to put pressure on the United States to address racial injustice, demonstrates the strategy and activism of the black women's civil rights movement during this era.

C. Post United Nations Service

After serving the United Nations in 1950 and 1952, Sampson returned to Chicago and resumed her legal career and her domestic gendered racial justice work. In 1955, Mayor Daley appointed her assistant corporation counsel in the appeals division.[96] That year she also co-chaired with Ellen Borden Stevenson, the ex-wife of former Illinois Governor Adlai Stevenson, a project to construct a center for homeless and neglected girls on Chicago's Southside.[97] Sampson maintained a rigorous speaking calendar, most often addressing women of all races, and continued to use her international connections and experience as a tool to persuade Americans to take steps to end racial discrimination. In 1954, after the Supreme Court ruling in *Brown v. Board*

93. Edith Sampson, *What Price Cicero*, NEGRO DIGEST 32 (Nov. 1951), 32 ESS Papers Box 5 Folder 109.

94. PATRICIA SULLIVAN, LIFT EVERY VOICE: THE NAACP AND THE MAKING OF THE CIVIL RIGHTS MOVEMENT 413 (2009).

95. Letter from Edith Sampson to Walter White (Jan. 8, 1952), ESS Papers Box 3 Folder 72.

96. *Mayor Daley and Edith Sampson in City Hall*, CHI. TRIB., Nov. 18, 1955.

97. *Daley Indorses So. Side Girl's Home Project*, CHI. TRIB., Oct. 27, 1955.

of Education that public schools must be desegregated, Sampson warned Americans to achieve that end. As a member of the executive committee of the U.S. commission for UNESCO, Sampson warned "'we don't have much time to set our democracy in order' . . . people of nonwhite races in Asia and Africa are unwilling to become allies of this country because of 'our reluctance to implement democracy at home.'"[98]

Sampson also continued to develop relationships with women all around the world, white and nonwhite. In 1952, she met with women's organizations throughout Scandinavia, Central Europe, and England.[99] In 1955, she received an award from the American Friends of the Middle East to travel and lecture in Turkey, Egypt, Iran, Iraq, Lebanon, Jordan, Israel, and Syria. Her message was consistent, women of color needed to play a crucial role in advancing civil and human rights for all, but especially for themselves.

By the late 1950s, however, Sampson's belief that the United States would achieve racial and gender justice began to falter. As she spoke to audiences across the country, her underlying message did not change, she still loved America and supported democracy, but her assault on white America became stronger. She was growing weary of the continued incidences of violence and discrimination against African Americans. She increasingly confronted white audiences with the contradiction in their conception of democracy. As her list of the foreign countries she visited grew longer, she added them to the mantra. In Iowa in 1959, she asked the all white audience, "What question do you imagine was put to me most often as we moved through Caracas, Bogotá, Lima, Santiago, Buenos Aires, Montevideo, San Paolo, Rio de Janeiro? Everywhere in those eight cities that we held a town meeting session, and we held many of them, the question was the same: 'What about Little Rock and Faubus?'" "Others," she continued, ask, "what about Emmett Till, dead in Mississippi, his murderers graciously set free by an all white jury?"[100] And she went on, citing more instances noting, "they are all too typical of what happens over and over again with dreary, heartbreaking monotony."[101] Her recounting of the advances of African Americans no longer held out the promise that the

98. *Cite Problems*, *supra* note 17.

99. Letter from Edith Sampson to Mary McLeod Bethune (Jan. 26, 1952), ESS Papers Box 3 Folder 72.

100. Edith Sampson, *International Aspects of Race Relations* 5 (Oct. 4, 1959) [hereinafter *International Aspects*], ESS Papers Box 6 Folder 117.

101. *Id.* at 6.

continued discriminations would end. Increasingly she seemed to say that these strides "cannot really erase the other facts" and instances of violent and blatant race discrimination.[102]

Her trip to South America was a continuation of the Town Hall of the Air program. Its mission was in part to "revisit most of the places where Vice President Nixon on his tour of Latin America had run into hostility."[103] Dorothy Height, the new President of the NCNW and the only other woman of color on the delegation, described how she and Sampson were often "put on the firing line . . . about the racial situation in the United States," especially in light of the negative reaction in many cities to the Supreme Court ruling in 1954 that public schools must be de-segregated.[104] Sampson and Height described the current situation and shared their own experiences in an effort to explain the disparities regarding race across the United States. "We did not deny the impact of segregation," Height explained, "nor the fact that there was resistance to the court decision." But she asserted that as they shared their experiences, "we could see among the Uruguayans glimmerings of understanding about the nuances of our situation . . . these small pieces of our personal histories suddenly became an important part of our national story."[105] Height described that their honest reflections engendered trust from the many Latin Americans of color they encountered and the respect of the white members of their delegation for "find[ing] the balance between acknowledging that the United States still had racial problems to solve, on the one hand, and pointing out the progress already made and confirming our hopefulness about the future, on the other."[106] But Sampson's hopefulness continued to fade.

By 1959, Sampson began to more forcefully use the threat of communism and world shame to try to persuade whites to change their ways. She spoke of "the colored people of the world" explaining, "far from being minorities, [they] constitute a real majority on this shrunken globe of ours." She also explained that they had been awakened "and now, fully conscious of new found strength, they are making a determined drive for recognition of their human dignity on their own

102. *Id.* at 7.

103. Edith Sampson, *Report on Latin America* 2 (Dec. 20, 1958), ESS Papers Box 5 Folder 113. *See also 30 from US Look at Latin America,* N.Y. TIMES, Dec. 8, 1958, at 18; *3 Chicagoans to Make Latin America Tour*, CHI. TRIB., Nov. 4, 1958, at 17.

104. DOROTHY HEIGHT, OPEN WIDE THE FREEDOM GATES 225 (2003).

105. *Id.* at 226.

106. *Id.* at 227.

terms."[107] She also more forcefully lamented the continued race prejudice in the U.S., despite the race progress that had been made. Her speech in Iowa laid bare her frustration. "The fact that a Negro can get a hotel room in the nation's capital today," she explained, "cannot really erase the other fact that some towns in Illinois still will not let a Negro stay within the town limits overnights. The fact that some Negroes now have jobs in some industries two steps above portering," she continued, "does not remove from the bylaws of the Brotherhood of Railroad Trainmen the clause that demands that an applicant for membership be white. The fact that Miles Davis is cheered by jazz fans at Newport," she emphasized, "does not save him from a beating by police in front of a New York night club. . . ." [108] She told Iowans, it does not only happen in the south, but also "throughout the North—even in Iowa."[109]

Sampson described these and other acts as betrayals of the U.S. creed of equality, surmising, "small wonder, then, that other people elsewhere look upon us with bewildered dismay."[110] She warned, it is especially troubling when these people are from the newly decolonized countries in Asia and Africa, twenty-nine of which were represented at the Asia-Africa Conference in Bandung, Indonesia in 1955. Although we may "be much heartened by the fact that Bandung turned out to be anti-Communist. We run a grave risk unless we note as well that, even more than being anti-Communist, Bandung was first and foremost anti-racist."[111]

III. WISE JUDGE AND COUNSEL

By 1960, Sampson had lost faith in the "gradualist" approach she had championed her first sixty years. She explained that she had long believed that blacks were gradually climbing the hill to equality. She noted that she had taken this position "at something of a price" because a "'gradualist' [is] a dirty word in many circles."[112] She offered support for the students who staged sit-ins and asserted that although

107. *International Aspects*, *supra* note 100, at 10.
108. *Id.* at 7.
109. *Id.* at 11.
110. *Id.* at 8.
111. *Id.* at 10.
112. Edith Sampson, *Which Way from Little Rock*, THE ETHICAL OUTLOOK 51 (1958), ESS Papers Box 5 Folder 113.

she did not agree with all of their tactics, she understood their frustration.

Sampson was entering the final phase of her career, one of a judge, counsel, and mentor. In 1962, she became the first black woman elected as a judge in Illinois. She served on the Chicago Municipal Court hearing domestic cases where she developed a reputation as a compassionate judge. After four years of service, Sampson was elected to the Circuit Court bench in Cook County where she served for twelve years.[113] In addition to her elected post, Sampson also remained active in national and international affairs, offering counsel to Presidents and other federal officials on issues of race and gender justice.

Sampson became aware of Senator Lyndon Baines Johnson and his civil rights agenda in 1959. She corresponded with Dean Acheson, Truman's former Secretary of State, about Johnson as a potential white southern leader in the civil rights movement. Sampson expressed to Acheson that she believed he was "attempting to lead his colleagues of the South, as well as their northern counterparts 'out of the darkness into the light.'" Sampson vowed to attempt "to interest some of my own people in supporting Mr. Johnson" and used her planned speaking engagements at three Dallas high schools to muster support for Johnson among African Americans.[114]

Johnson was grateful for the support.[115] After he was elected Vice-President, he appointed Sampson in 1961 and 1962 to the U.S. Citizens Commission on NATO.[116] After Kennedy was assassinated, Sampson sent a letter to Mrs. Johnson announcing her special encouragement for the new President Johnson. "As an American citizen, I pledge my unstinting support; but as a Negro I give him my *understanding* support not only for what he says, but for what he is to us." She continued, "As a woman I want also to express pride in the role of grace and dignity I know you will play as the First Lady of the Land. . . ."[117] In 1964 and 1965, President Johnson appointed Sampson to the Advisory Committee on Private Enterprise in Foreign Aid.[118]

113. J.D. Ratcliffe, *Justice—Edith Sampson Style*, READERS DIGEST, at 167, 170, 173 (1968).

114. Letter from Edith Sampson to Hon. Dean Acheson (Mar. 6, 1960), ESS Papers Box 4 Folder 79.

115. Letter from Dean Acheson to Edith Sampson (Mar. 18, 1960), ESS Papers Box 4 Folder 79.

116. *Two Chicagoans Are Appointed to NATO Commission*, CHI. TRIB., Mar. 24, 1961, at B4.

117. Letter from Edith Sampson to Mrs. Johnson, ESS Papers Box 4 Folder 87.

118. *Edith Spurlock Sampson in* NEGRO WOMEN IN THE JUDICIARY 15 ESS Paper Box 9 Folder 184.

Sampson corresponded with other Presidents and first ladies as well. She continued to work with Eleanor Roosevelt until her death, and she also corresponded with Jacqueline Kennedy, whom she met in October 1960 at a meeting of the Women's Committee for the New Frontiers.[119] She assisted John F. Kennedy with the Democratic Advisory Council in 1960[120] and accepted his invitation to meet with leaders of women's organizations throughout the country in 1963 "to discuss those aspects of the nation's civil rights problem in which women and women's organizations can play a special role."[121]

Sampson was invited to the White House on numerous occasions, including both Kennedy and Johnson's inaugurations, and in 1964 for the signing of the Proclamation designating 1965 International Cooperation Year. Sampson then served as a member of the National Citizens Commission to support the International Cooperation Year. In 1968, just two months before his assassination, Robert F. Kennedy asked Sampson to help him "rebuild our party and redirect our nation."[122]

Sampson delivered a commencement address a week after Robert F. Kennedy's assassination in which she called for an end to all racial injustice. Sampson was clearly overcome from the culmination of events of the last year, of which she included the Vietnam War, the riots in Watts, the assassinations of Martin Luther King, Jr. and then Robert Kennedy, as well as the "evil repeated daily, weekly, monthly" that she asserted "becomes so familiar that we're no longer stirred by it."[123] Sampson demanded an end to the violence. She said the answer was in front of them all and cited the Kerner report, a study conducted by President Johnson's National Advisory Commission on Civil Disorders issued earlier that year. The report, she explained, had called for action, for an end to the "discrimination and segregation [that] have long been permeated much of American life [and] now threaten the future of every American."[124] Sampson had worked her whole life for that end.

Sampson also continued to encourage and support the lives and careers of African American girls and women. She served as an inspira-

119. Letter from Mrs. Kennedy to Edith Sampson, ESS Paper Box 4 Folder 83.

120. Letter from JFK to Edith Sampson (Aug. 20, 1960), ESS Paper Box 4 Folder 86.

121. Telegram from JFK to Edith Sampson (July 3, 1963), ESS Paper Box 4 Folder 87.

122. Telegram from Robert F. Kennedy to Edith Sampson (Apr. 3, 1968), ESS Paper Box 4 Folder 91

123. Edith Sampson, *The Death in Los Angeles* 4, ESS Paper Box 6 Folder 129.

124. *Id.* at 11.

tion to many who heard her speak and knew of her work. Her influence had a profound effect on Barbara Jordan. When Jordan was just fourteen years old, she heard Sampson speak at the University of Texas, and determined at that moment to study law.[125] Sampson also served as an inspiration and colleague to Pauli Murray, an African American woman lawyer, and activist. Sampson kept copies of Murray's speeches and followed her career.[126]

Like Sampson, Murray understood the important role black women lawyers and activists must play in the civil rights movement. Murray articulated this position in 1963 in an address to the NCNW, which condemned the 1963 March on Washington for its exclusion of women activists as speakers at the event. "Would the Negro struggle have come this far," Murray asked, "without the indomitable determination of its women?"[127] Sampson echoed these remarks a year later when she spoke at a tribute held for Eleanor Roosevelt in Washington, D.C. Sampson celebrated Roosevelt's work for human rights, but asserted, "civil rights and human rights are one and the same" and "only a woman of color can relate to you what it means to be a Negro in our country."[128]

CONCLUSION

Sampson retired from the bench in 1978 and died the following year after a long and distinguished career. During her life she was an attorney, a judge, a leader among African American women in the cause for civil rights, and a gendered racial justice. Throughout her career she encouraged and mentored black girls and women, some who followed her into the law. She was also a leader among women of color around the world and an international advocate for the rights of women of the darker races. She served each U.S. President from Truman through Johnson. Yet, Sampson's legacy is marginalized within the historical record.

125. Letter from Barbara Jordan to Edith Sampson (Feb. 23, 1977), ESS Papers Box 5 Folder 99; Irwin Ross, *Barbara Jordan—New Voice in Washington*, READERS DIGEST, Feb. 1977, at 151.

126. From the Desk of Pauli Murray (Aug. 16, 1971), ESS Papers Box 4 Folder 92; Pauli Murray, *Tribute to Mrs. Rosa Parks* (Nov. 7, 1965), ESS Papers Box 3 Folder 65; Pauli Murray, *The Law as it Affects Desegregation* (June 14, 1963), ESS Papers Box 2 Folder 46. After a more radical outlook in her youth, Murray had come to believe, like Sampson, that the best chance blacks had for racial equality was under a democracy. GILMORE, *supra* note 19, at 254–55.

127. Pauli Murray, *Address at the Leadership Conference of the National Council of Negro Women: The Negro Woman in he Quest for Equality* (Nov. 14, 1963), ESS Papers Box 123 Folder 23.

128. Edith Sampson, *Address delivered by Judge Edith Sampson* 1 (May 2, 1964), ESS Papers Box 6 Folder 126.

The importance of recovering Sampson's life, not only identifies yet another strong, accomplished woman of color, it also engenders our understanding of the historical narrative of race and international relations before and during the Cold War era. Sampson was part of a vibrant and dynamic African American women's civil rights network that fought for the human rights of women of color around the globe. These women employed a rich diversity of strategies, both domestic and transnational, to secure a gendered racial justice—one that included the concerns and position of black and brown women.

Sampson's life and her activism, like so many others of her generation, must be recounted. We need to understand more of this story, a story that complicates the troubling history and legacy of race in America. Mary Dudziak persuasively argues that we must place "American history within an international context, by telling American stories with attention to the world's influence upon them and their influence upon the world."[129] When we do this through a critical race feminist perspective, we uncover a rich cast of actors, strategies, and aims that alter our understanding of power and influence and justice. Women of color must be included in our analysis, even though they may be harder to find, not because they were not there, but because the record of their lives has been buried and their influence obscured.

We must also recover the lives and work of women of color to continue the underpinnings on which present and future activism can grow. Sampson's life work helped lay the foundation for the race and gender justice campaigns that others have pursued since her death and for the next generation of activists. Knowing her complex history and the histories of those with whom she worked will hopefully, broaden "the ground on which new programs, strategies, and coalitions [may] be built."[130] There is still much to be done.

129. DUDZIAK, *supra* note 4, at 252.

130. Nancy A. Hewitt, Introduction, *in* NO PERMANENT WAVES: RECASTING HISTORIES IN U.S. FEMINISM 6 (Hewitt ed., 2011).

PORTIA'S DEAL

KAREN M. TANI*

INTRODUCTION

The years of the New Deal were heady times for lawyers in the federal government. According to participant-observers, young "legal eagles" swooped down on Washington, D.C., from elite law schools, often at the beckoning of Harvard law professor Felix Frankfurter. There, they drafted groundbreaking statutes and codes, executed ambitious regulatory programs, and defended historic reform legislation against a hostile Supreme Court. "[G]overnment gave a young lawyer responsibility that was tenfold above what he would receive outside," recalled one such lawyer. Many lawyers recalled an *esprit de corps*. It followed from long hours spent tackling the same problems, but also from attending the same parties, rooming in the same houses, and recognizing themselves as a "counter-elite" to the bar's more corporate-oriented leadership. After the years of excitement ended, the eagles soared onward, to seats on the Supreme Court, partnerships in law firms, and professorships in elite law schools.[1]

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1. For first-hand accounts, see THOMAS I. EMERSON, YOUNG LAWYER FOR THE NEW DEAL: AN INSIDER'S MEMOIR OF THE ROOSEVELT YEARS (1991); THOMAS H. ELIOT, RECOLLECTIONS OF THE NEW DEAL: WHEN THE PEOPLE MATTERED (John K. Galbraith ed., 1992); DONALD RICHBERG, MY HERO: THE INDISCREET MEMOIRS OF AN EVENTFUL BUT UNHEROIC LIFE (1954); THE MAKING OF THE NEW DEAL: THE INSIDERS SPEAK (Katie Loucheim ed., 1983); ALGER HISS, RECOLLECTIONS OF A LIFE (1988); WILLIAM O. DOUGLAS, GO EAST, YOUNG MAN: THE EARLY YEARS—THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS (1974). For important secondary accounts, see JEROLD S. AUERBACH, UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA (1976); DONALD A. RITCHIE, JAMES M. LANDIS: DEAN OF THE REGULATORS (1980); PETER H. IRONS, THE NEW DEAL LAWYERS (1982); WILLIAM LASSER, BENJAMIN V. COHEN: ARCHITECT OF THE NEW DEAL (2002); DAVID MCKEAN, PEDDLING INFLUENCE: THOMAS "TOMMY THE CORK" CORCORAN AND THE BIRTH OF MODERN LOBBYING (2005); MICHAEL E. PARRISH, CITIZEN RAUH: AN AMERICAN LIBERAL'S LIFE IN LAW AND POLITICS (2010). On Frankfurter's role in placing young lawyers in government positions, see G. Edward White, *Felix Frankfurter, the Old Boy Network, and the New Deal: The Placement of Elite Lawyers in Public Service in the 1930s*, 39 ARK. L. REV. 631 (1986); THE MAKING OF THE NEW DEAL, *supra*. "Legal eagles" is from ELIOT, RECOLLECTIONS OF THE NEW DEAL, *supra*, at 29; the "tenfold" quote is from EMERSON, YOUNG LAWYER FOR THE NEW DEAL,

This account, while true to the experiences of notable participants, does not cover the spectrum of New Deal lawyering. Many "older, more anonymous government lawyers" populated New Deal agencies; they approached their jobs[2] not as a calling or crusade but "as ordinary legal work, albeit work with high stakes."[3] Further, a small but significant number of New Deal lawyers were women. Barbara Nachtrieb Armstrong, the first woman law professor in the United States, was one of the key designers of the Social Security Act.[4] Lucy Somerville Howorth served on the Board of Appeals of the Veterans Administration and later became the first woman to head an Executive Commission.[5] Bessie Margolin, who began her career with the Tennessee Valley Authority, became an important defender of the Fair Labor Standards Act, winning twenty-five of the twenty-seven cases she argued before the U.S. Supreme Court.[6] These women lawyers and others like them possessed a set of experiences, perspectives, and skills that differed from that of their male peers. Some stayed long after the "legal eagles" departed.

We know little about these women, because we have not asked. When influential "legal eagles" sat down to record oral histories and pen memoirs, they rarely mentioned their women colleagues (or lack thereof). A charitable interpretation is that these men understood their personal stories as part of a larger history of government, law, and politics in an era of great social and economic change; unless a woman was a major player in an important legal reform or court battle—and few women were—there was no reason to mention her.

supra, at 20; "Counter-elite" is from Michael E. Parrish, *The Great Depression, the New Deal, and the American Legal Order*, 59 WASH. L. REV. 723, 746 (1983–1984).

2. On the breadth and significance of the work that lawyers performed for agencies in this era, see Raymond P. Baldmin and Livingston Hall, *Using Government Lawyers to Animate Bureaucracy*, 63 YALE L.J. 197 (1953); EMERSON, *supra* note 1; IRONS, *supra* note 1.

3. Michele Landis Dauber, *New Deal Lawyers*, *in* ENCYCLOPEDIA OF THE SUPREME COURT OF THE UNITED STATES 399, 401 (David S. Tanenhaus, ed., 2008); *see also* ESTHER LUCILE BROWN, LAWYERS, LAW SCHOOLS AND THE PUBLIC SERVICE 59 (1948) (drawing distinctions, in a study of federal government lawyers in the 1940s, between "political appointees," "'top-flight' career men," permanent "career personnel," and temporary workers).

4. *See generally* Herma Hill Kay, *The Future of Women Law Professors*, 77 IOWA L. REV. 5 (1991); Roger J. Traynor, *Barbara Nachtrieb Armstrong—In Memoriam*, 65 CAL. L. REV. 920 (1977). On Armstrong's influence on the Social Security Act, see Alice Kessler-Harris, *In the Nation's Image: The Gendered Limits of Social Citizenship in the Depression Era*, 86 J. AM. HIST. 1251,1260–1263 (1999).

5. *See generally* DOROTHY S. SHAWHAN & MARTHA H. SWAIN, LUCY SOMERVILLE HOWORTH: NEW DEAL LAWYER, POLITICIAN, AND FEMINIST FROM THE SOUTH (2006).

6. FEMINISTS WHO CHANGED AMERICA, 1963–1975 298 (Barbara J. Love ed., 2006).

Today, many historians of the New Deal consider gender a useful category of analysis and women crucial actors, and yet work on women lawyers remains thin, for several reasons. Scholarship on New Deal lawyers tends to focus on Supreme Court litigation, an arena in which women lawyers played only a modest role. (Although women lawyers made great inroads into the federal government in 1930s, legal positions requiring court appearances remained the most difficult to secure.) More recent scholarship on New Deal administrative law is bet-better positioned to recognize women lawyers,[7] but has yet to explore an agency that was open to hiring them. As for scholars of women and the legal profession, they have produced broad surveys and rich monographs.[8] However, much of the best work clusters around the pioneer women who entered practice in the late nineteenth century, rather than subsequent generations, and around notable individuals rather than groups or cohorts of lower-profile women attorneys.[9]

By highlighting three lesser-known attorneys, all women and former employees of the Social Security Board, this essay argues for a gender-conscious social history of New Deal lawyering and compiles an under-explored set of research questions. Sue Shelton White, an outspoken feminist, came to the New Deal after a long career as a court reporter, political organizer, and senate staffer. Records of her time in government suggest the difference that gender, and specifically gendered opportunity structures, made to the work of a New Deal lawyer. Marie Remington Wing, a prominent politician and attorney in her native Cleveland, joined the New Deal as the lead attorney in a regional office. Her biography encourages scholars to remember that just as the

7. *See, e.g.*, Daniel R. Ernst, Lawyers, Bureaucratic Autonomy, and Securities Regulation During the New Deal (Georgetown Law Faculty Working Paper, Paper No. 115, 2009), *available at* http://scholarship.law.georgetown.edu/fwps_papers/115; Jessica Wang, *Imagining the Administrative State: Legal Pragmatism, Securities Regulation, and New Deal Liberalism*, 17 J. POL. HIST. 257 (2005).

8. Foundational works include CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW (1981) (and subsequent editions); KAREN BERGER MORELLO, THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA 1638 TO THE PRESENT (1986); REBECCA MAE SALOKAR & MARY L. VOLCANSEK, WOMEN IN LAW: A BIO-BIBLIOGRAPHICAL SOURCEBOOK (1996); VIRGINIA G. DRACHMAN, SISTERS IN LAW: WOMEN LAWYERS IN MODERN AMERICAN HISTORY (1998). For a more thorough bibliography, see Paul M. George & Susan McGlamery, *Women and Legal Scholarship: A Bibliography*, 77 IOWA L. REV. 87 (1991).

9. *See, e.g.*, VIRGINIA G. DRACHMAN, WOMEN LAWYERS AND THE ORIGINS OF PROFESSIONAL IDENTITY IN AMERICA: THE LETTERS OF THE EQUITY CLUB, 1887 TO 1890 (1993); JANE M. FRIEDMAN, AMERICA'S FIRST WOMAN LAWYER: THE BIOGRAPHY OF MYRA BRADWELL (1993); REBELS IN LAW: VOICES IN HISTORY OF BLACK WOMEN LAWYERS (J. Clay Smith, Jr. ed., 1998); Kenneth W. 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); MARY JANE MOSSMAN, THE FIRST WOMEN LAWYERS: A COMPARATIVE STUDY OF GENDER, LAW AND THE LEGAL PROFESSIONS (Oxford Hart Publ'g 2006); BARBARA BABCOCK, WOMAN LAWYER: THE TRIALS OF CLARA FOLTZ (Stanford Univ. Press 2011).

New Deal was national in scale, so too was its legal work. Regional outposts of the New Deal provided some women lawyers with a taste of the power that the men in Washington enjoyed. Bernice Lotwin Bernstein was in age, brains, and social networks the equivalent of one of Felix Frankfurter's "Happy Hotdogs." She joined the New Deal in 1933 and stayed for forty-five years, narrowly surviving a Cold War loyalty-security investigation. Her life offers a case study in the appeal, and the dangers, that government work held for women lawyers.

I. WOMEN LAWYERS IN THE NEW DEAL

As of May 15, 1939, there were an estimated 5,368 lawyers working in legal positions for the federal government.[10] Published memoirs suggest that very few of these lawyers were women. Reconstructing his New Deal years, Labor Department lawyer Thomas Eliot recalled a city filled with women in "secretarial, research, or minor administrative posts," but "hardly any female lawyers on the scene."[11] The actual number, while difficult to pinpoint, was considerably higher. A 1932 survey published in the *Women Lawyers' Journal* counted 192 women lawyers in federal government positions; their duties varied, but about two-thirds performed legal work.[12] These figures increased over time. Anecdotal evidence,[13] as well as the records of the U.S. Civil Service Commission[14] and the Women's Bar Association of the District of Co-

10. BROWN, *supra* note 3, at 28–29. By early 1943, this number had gone up to about 8,500 (owing to the new wartime agencies). *Id.*

11. ELIOT, *supra* note 1, at 29.

12. Mary Connor Myers, *Women Lawyers in Federal Positions*, 19 WOMEN LAW. J. 28 (Winter 1931) [hereinafter *Women Lawyers I*]; Mary Connor Myers, *Women Lawyers in Federal Positions*, 19 WOMEN LAW. J. 19 (Spring 1932) [hereinafter *Women Lawyers II*].

13. All three women profiled in this article attained their positions after 1932. *See* Virginia Lee Warren, *Woman Attorney Prefers Government Service to Private Practice and Tells Why*, WASH. POST, Mar. 21, 1934, at 13, *available* at www.washingtonpost.com (describing how some women lawyers in government "worked their way up" to legal posts from clerical and secretarial positions).

14. During the New Deal, some legal positions were political and others were covered by civil service rules. The U.S. Civil Service recorded how many women lawyers qualified for non-political attorney positions each year. The reports show small gains in the 1932–34 period: 7 women passed attorney entrance exams in 1932 (compared to 600 men); 1 in 1933 (compared to 18 men); and none in 1934 (compared to 14 men). In 1935, however, 212 women sat for attorney exams and 176 women passed (compared to 4916 of 6395 men). From 1936 to 1939, the numbers returned to previous levels: 1 in 1936 (compared to 38 men); none in 1937 or 1938 (compared to 16 men in each year); and 2 in 1939 (compared to 302 men). U.S. CIV. SERVICE COMMISSION ANN. REP. 49 (1932), at 73; U.S. CIV. SERVICE COMMISSION ANN. REP. 51 (1933), at 36; U.S. CIV. SERVICE COMMISSION ANN. REP. 51 (1934), at 42; U.S. CIV. SERVICE COMMISSION ANN. REP. 52 (1935), at 38; U.S. CIV. SERVICE COMMISSION ANN. REP. 53 (1936), at 36; U.S. CIV. SERVICE COMMISSION ANN. REP. 54 (1937), at 37; U.S. CIV. SERVICE COMMISSION ANN. REP. 55 (1938), at 70; U.S. CIV. SERVICE COMMISSION ANN. REP. 56 (1939), at 89. Without knowing how many women lawyers occupied political posi-

lumbia,[15] suggests that by 1939 several hundred women worked as lawyers for the federal government.

Government positions had their disadvantages. Although the hiring process was more transparent and accessible than in the private sector, gender-based discrimination was common. Two years into Franklin Roosevelt's first term as President, U.S. Attorney for the District of Columbia Leslie Garnett had no qualms about declaring his office "no place for [women lawyers]." Women made fine "wives, sweethearts and secretaries," he explained, but they were incapable of the "cold dispassion" necessary for prosecutorial work.[16] Garnett's prejudices were widely shared. The Department of Justice's Antitrust Division, headed by leading liberal Thurman Arnold, "made no secret of the fact that it would not hire women," recalled Judge Cecilia Goetz, a 1940 graduate of New York University School of Law.[17] At the Securities and Exchange Commission, women were likewise "unwelcome."[18] Agencies and departments that invited more than a few women into the fold, such as the Review Division of the National Labor Relations Board (NLRB),[19] soon had reason to regret their progressivism. Critics of the NLRB invoked the image of the young, attractive woman lawyer in their effort to portray the agency as soft-headed, overly idealistic, and dangerously impressionable (i.e., open to communist influences).[20]

Once hired, women also faced discrimination in pay, promotion, and retention. Women lawyers in the federal government commonly received lower salaries than men with similar or lesser qualifications and were often passed over for promotions.[21] One Department of Jus-

tions, or how many women lawyers left government each year, these records are of limited use. At the very least, however, they suggest that the number of women lawyers was in the hundreds during the second stage of the New Deal.

15. In 1940, "practically all" of the 300-some members of the Women's Bar Association of the District of Columbia worked in government agencies. *Uncle Sam's Women Lawyers*, N.Y. TIMES, Jan. 21, 1940. Two years earlier, the figure was 69 out of 215 members. Louise Foster and Florence Curoe, *Women Lawyers in U.S. Work Are Discussed at Bar Dinner*, WASH. POST, Mar. 4, 1938, at 19, *available* at www.washingtonpost.com.

16. *Women Won't Work for Him If District Attorney Knows It*, WASH. POST, Mar. 24, 1934.

17. Quoted in CYNTHIA FUCHS EPSTEIN, WOMEN IN LAW 84 (Univ. of Ill. Press 2d ed. 1993).

18. *Id.*

19. Of the 105 attorneys in the NLRB's Review Division, 11 percent were women. LANDON R. STORRS, CIVILIZING CAPITALISM: THE NATIONAL CONSUMERS' LEAGUE, WOMEN'S ACTIVISM, AND LABOR STANDARDS IN THE NEW DEAL ERA 217 (Univ. of N.C. Press 2000). In the agency as a whole, women lawyers constituted about 9 percent of the total (23 of 258). *Uncle Sam's Women Lawyers*, *supra* note 15.

20. STORRS, *supra* note 19, at 218–19; JAMES A. GROSS, THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD: A STUDY IN ECONOMICS, POLITICS, AND THE LAW 182–83 (SUNY Press 1974).

21. *Women Lawyers I*, *supra* note 12; *Women Lawyers II*, *supra* note 12; *cf.* Clara Greacen, *Experiences in Government Service*, 20 WOMEN LAW. J. 11, 12 (1932–1933).

tice lawyer, for example, reported that after she married, she received a demotion and $1,000 less in pay than a man doing the same work.[22] In the event that both a husband and wife were employed by the federal government and cutbacks became necessary, Section 213 of the 1932 Economy Act mandated the dismissal of one member of the marital unit.[23] Of the 1,603 persons dismissed under this provision in the first few years, three-fourths were women.[24] What became of them is unclear, but as pioneering federal appeals judge Florence Allen observed in 1944, when thousands of soldiers began re-entering the civilian workforce, the transition from the public sector to the private was not kind to women lawyers. Only those with an established roster of clients—a hard thing for even men to cultivate while in government — would survive.[25]

Still, federal government work offered women lawyers better opportunities than they found elsewhere. From inside agencies, they drafted laws, policed private industry, negotiated settlements, and created policy.[26] Mima Riddiford Politt, for example, a single mother who cobbled together a legal education at four different law schools and tried eight times to pass the District of Columbia bar, was eventually tasked, as a lawyer for the Interior Department, with helping draft Felix Cohen's famous treatise on Indian Law[27] and representing Japanese Americans interned during World War Two.[28] These vital but less visible administrative positions also sheltered women from some of the everyday dilemmas that plagued them in comparably important posts in the private sector, such as whether or not to behave feminine-

22. *Women Lawyers II*, *supra* note 12, at 29.

23. Bessie I. Koehl, *Present Day Attacks on the Employment of Married Women*, 21 WOMEN LAW. J. 36, 36 (1934–1935). For a full history of this provision and its later repeal, see John Thomas McGuire, *"The Most Unjust Piece of Legislation": Section 213 of the Economy Act of 1932 and Feminism During the New Deal*, 20 J. POL. HIST. 516 (2008).

24. McGuire, *supra* note 23 at 527.

25. Florence E. Allen, *Women in Law*, 17 J. EDUC. SOC. 498, 500 (1944).

26. Prominent New Deal lawyer Jerome Frank observed in 1945 that "effective women lawyers" had found their "largest opportunities . . . in the Federal government." Jerome N. Frank, *Women Lawyers*, 31 WOMEN LAW. J. 4, 5 (1945). Labor Department solicitor Bessie Margolin agreed, although she adopted a less sanguine tone: "Government attracts the competent women because they have no alternative." Briton Hadden and Henry Robinson Luce, *Lawyers: Perils of Portia*, TIME, Mar. 6, 1964, at 47.

27. FELIX S. COHEN, HANDBOOK OF FEDERAL INDIAN LAW (1941).

28. Oral history Interiew with Daniel H. Pollitt (Nov. 27, 1990) (Interview L-0064-1, in the Southern Oral History Program Collection), *available at* http://docsouth.unc.edu/sohp/L-0064-1/excerpts/excerpt_8950.html. Of course, not all the work was so glamorous. Pollitt also devoted many hours to reviewing low-level tort claims against the government, her son recalled, such as complaints of squirrel bites at the White House and canoes overturning at Monmouth Cave. *Id.*

ly in the courtroom (either way, they were publicly criticized).[29] Advising the federal government, like representing poor clients or writing briefs in the back office of a small law firm, was a "gap within the bar's discriminatory structure."[30]

Of the New Deal agencies, the Social Security Board was more hospitable to women than most.[31] The programs it administered (old-age insurance, unemployment insurance, public assistance, maternal and child health) fell under the rubric of "social reform," and were therefore considered to be women's business. Further, the clients of the new agency—the elderly, the disabled, poor women and children—were among the beneficiaries of established "maternalist" projects (mothers' pensions, poor law reforms, wage and hour restrictions, etc.). Just as social workers, who were predominantly female, were considered perfectly suited to this work, women lawyers were "peculiarly adapted" to represent "the downtrodden and the maladjusted."[32] The following sections spotlight three of the Board's women lawyers and suggest their relevance for current scholarly conversations.

II. SUE SHELTON WHITE

Sue Shelton White (1887–1943) was a "woman of the New South." Born to a genteel, respectable Tennessee family (her father's bloodlines tied her to Thomas Jefferson and John Marshall), she was acutely aware of the roles that her society prescribed for women of her race and class. At the same time, her own household was relatively egalitar-

29. Hadden and Luce, *supra* note 26, at 48.

30. Mack, *supra* note 9, at 1473; Hadden and Luce, *supra* note 26.

31. SSB General Counsel Tom Eliot recalled that of the ninety lawyers he hired for the Social Security Board in 1936, only three were women. ELIOT, *supra* note 1, at 29. (He likely had in mind Sue Shelton White, Bernice Lotwin Bernstein, and Rosalie M. Moynahan). These numbers, while small, are significant when paired with the lack of evidence of SSB hostility toward women lawyers (other agencies and departments rejected them outright), as well as the data from the following years, in which at least three additional women (Lilian Poses, Marie Wing, and Gladys Harrison) joined the SSB legal staff in high-visibility positions. Other agencies noteworthy for their hospitality to women include the Labor Department, see *supra* note 19, and the Treasury Department, see Oscar S. Cox to George D. Riley (Nov. 24, 1939) Oscar S. Cox Papers, Box 50 (on file with the Franklin D. Roosevelt Presidential Library and Museum, Hyde Park, N.Y.) (noting that as of Oct, 31, 1939, there were 440 lawyers on the staff of the Treasury's legal division, twenty-one of which were women).

32. H. T. Thurschwell, Letter to the editor, N.Y. TIMES, Sept. 3, 1934. Women, too, voiced this opinion. *See, e.g.*, *Bench and Bar Bright Career for Women Now*, WASH. POST, Nov. 14, 1933, at 10 (quoting woman attorney Edith Atkinson as describing women as "naturally altruistic" and "naturally inclined to give more consideration to small details of the welfare of the child"). On women lawyers' greater access to opportunities involving the poor, especially poor women and children, see Felice Batlan, *The Birth of Legal Aid: Gender Ideologies, Women, and the Bar in New York City, 1863–1910*, 28 L. & HIST. REV. 931 (2010).

ian, and all around her old traditions and hierarchies were buckling.[33] As young adults, White and like-minded female peers used their resources and privileges to advocate for progressive reforms and to claim a wider sphere of influence than their predecessors had enjoyed.[34]

Among these women, White was a radical: she viewed marriage as "too much of a compromise."[35] She criticized racial discrimination in both its brutal and more genteel forms.[36] In a place where many women thought it imprudent to press for the vote, White was a leader in the suffrage movement, one unashamed to use direct, rather than discrete, lobbying tactics.[37] In 1919, she impressed some of her peers (and mortified others) by joining picket lines in front of the White House and burning then-President Woodrow Wilson in effigy. For this she spent five days in jail, but also solidified her reputation as one of the most important suffrage leaders of the day.[38] Along with fellow members of the National Women's Party (NWP), she later co-authored the Equal Rights Amendment and campaigned tirelessly for its ratification by the states.[39]

Unlike many members of her social set, White worked for wages. By the time she was fourteen, both her parents had died, leaving White and her siblings few assets. White took up stenography and spent her twenties working as a court reporter in Jackson, Tennessee.[40] She considered pursuing law school during this time, but her lawyer friends discouraged her,[41] and her involvement with the suffrage movement kept her occupied. She waited to study law until 1920, after the conclu-

33. Betty Sparks Huehls, Sue Shelton White: Lady Warrior 5–25 (Dec. 2002) (unpublished Ph.D. dissertation, University of Memphis) (on file with McWherter Library, Univ. of Memphis).

34. MARJORIE SPRUILL WHEELER, NEW WOMEN OF THE NEW SOUTH: THE LEADERS OF THE WOMAN SUFFRAGE MOVEMENT IN THE SOUTHERN STATES 50–51 (1993); *see also* GLENDA ELIZABETH GILMORE, GENDER AND JIM CROW: WOMEN AND THE POLITICS OF WHITE SUPREMACY IN NORTH CAROLINA, 1896–1920 (1996).

35. WHEELER, *supra* note 34, at 87.

36. *Id.* at 105–06.

37. *Id.* at 77.

38. Florence Armstrong, "Personal recollections of Sue Shelton White (1887–1943) by some of her friends and associates," 1959, Sue Shelton White Papers, Schlesinger Library, Radcliffe Institute for Advanced Study, Cambridge, Mass.; Betty Sparks Huehls & Beverly Greene Bond, *Sue Shelton White (1887–1943): Lady Warrior*, *in* TENNESSEE WOMEN: THEIR LIVES AND TIMES 140 (Sarah Wilkerson Freeman & Beverly Greene Bond, eds., vol. 1, 2009); KATHERINE H. ADAMS & MICHAEL L. KEENE, AFTER THE VOTE WAS WON: THE LATER ACHIEVEMENTS OF FIFTEEN SUFFRAGISTS 146 (2010).

39. ADAMS & KEENE, *supra* note 38, at, 149; WHEELER, *supra* note 34, at 195. On the National Women's Party, see Nancy F. Cott, *Feminist Politics in the 1920s: The National Woman's Party* 71 J. AM. HIST. 43 (1984).

40. Huehls, *supra* note 33, at 24–27,

41. *Id.* at 28.

sion of the ratification campaign. By then, she was living in Washington, D.C. (she had relocated at the request of NWP founder Alice Paul) and working as a clerk to Senator Kenneth McKellar (D., Tennessee).[42] She enrolled in night classes at Washington College of Law[43] and received her degree in 1923.[44]

Sue White believed that the capable, intelligent woman ought to "be admitted to her destiny, wherever it may lead her"—even, she once told the *Washington Daily News*, to the highest office in the land.[45] She also understood, however, that she was in the minority, and that her path to "destiny" would likely be obstructed.[46] After graduation, while her male counterparts enjoyed the mentorship and sponsorship of older members of the bar,[47] White continued to work for Senator McKellar.[48] Only when their relationship became irreparably strained,[49] in 1926, did she attempt to make her way as a practicing lawyer. By moving back to her hometown and partnering with a male lawyer, she earned enough to survive, but she did not consider her practice a success.[50]

It was White's organizational work for the Democratic Party that eventually launched her legal career.[51] Party leaders, such as the influential Molly Dewson, quickly realized that White had a powerful presence in the South, especially among women. In 1930, at the urging of Dewson and her network,[52] the Party elevated White to Executive Sec-

42. *Id.* at 28–29.

43. On the relationship between part-time schools and the rising numbers of women lawyers in the 1920s, see Ronald Chester, *Women Lawyers in the Urban Bar: An Oral History*, 18 NEW ENG. L. REV. 521, 524 (1982–1983). Chester also discusses Washington College of Law and its women-friendly policies. *Id.* at 528–530.

44. Huehls, *supra* note 33, at 201–04.

45. Ronald Chester, *A Survey of WCL Women Graduates: 1920's Through the 1940's*, 32 AM. U. L. REV. 627, 629–30 (1982–1983) (quoting *Should a Woman be President of the U.S.?* WASH. DAILY NEWS, Nov. 14, 1931).

46. The *Washington Daily News* ran White's editorial alongside one by psychiatrist Nolan Lewis, who opined that a woman presidential candidate would not have the confidence of the people, owing to women's tendency toward "contradictory emotional behavior . . . in times of stress." According to Lewis, 19 of 20 men and 18 of 20 women "consider[ed] the question as premature, as absurd, or as a joke." *Id.*

47. White observed this phenomenon during her court reporter days. WHEELER, *supra* note 34, at 85.

48. Huehls, *supra* note 33, at 208–09.

49. Political disagreement may have helped produce the strain, WHEELER, *supra* note 34, at 196. However, it resulted primarily from Senator McKellar's decision to promote White to senatorial secretary, only to quickly replace her with his brother. Huehls, *supra* note 33, at 209.

50. Huehls, *supra* note 33, at 222–25.

51. *Id.* at 241–49.

52. On Molly Dewson, Eleanor Roosevelt, Frances Perkins, and other members of this women's network, see Susan Ware, *Women and the New Deal*, *in* FIFTY YEARS LATER: THE NEW DEAL

retary of the Women's Division. She did not disappoint; women turned out strongly for Franklin Roosevelt in the 1932 presidential election, earning White a top slot on the post-election patronage list ("Class A—Imperative Recognition").[53]

White got neither the political position (Executive Director of the Women's Division)[54] nor the legal position (General Counsel of the Tennessee Valley Authority)[55] that she most wanted, despite Dewson's repeated personal appeals to the President,[56] but she eventually landed a coveted position in the National Recovery Administration (NRA). In early 1934, she became the executive assistant to the head of the NRA's Consumer Advisory Board.[57] After the Supreme Court invalidated the National Industrial Recovery Act in May of 1935,[58] the women's network mobilized again, securing White a transfer to the Office of the General Counsel of the newly formed Social Security Board.[59]

As one of the first employees that the Board hired, White performed important legal work. The Social Security Program was a "broad scale" effort that included not only old-age insurance (today's "Social Security"), but also unemployment insurance, child and maternal health grants, and categorical public assistance.[60] These programs were politically and administratively complex, and in the early years, generated novel legal questions nearly every day.[61] By answering those questions, White helped "lay the foundations" of the entire enterprise. Like many New Deal lawyers, White also did more than simply analyze legal questions. "Everyone on the professional staffs of the Social Security Board knew Sue White, consulted her, and valued her

EVALUATED 115–22 (Harvard Sitkoff, ed., 5th ed. 1985); SUSAN WARE, PARTNER AND I: MOLLY DEWSON, FEMINISM, AND NEW DEAL POLITICS (1989); JOAN HOFF-WILSON & MARJORIE LIGHTMAN, EDS., WITHOUT PRECEDENT: THE LIFE AND CAREER OF ELEANOR ROOSEVELT 52–55 (1984). For an especially nuanced view of this network and the cleavages within it, *see* Robyn Muncy, *Women, Gender, and Politics in the New Deal Government: Josephine Roche and the Federal Security Agency*, 21 J. WOMEN'S HIST. 60 (2009).

53. Huehls, *supra* note 33, at 318.

54. *Id.* at 318–19. Although White held this position on an interim basis from 1932 to 1933, President Roosevelt decided that he wanted Dewson to fill the post.

55. The position went to Frankfurter protégé James Lawrence ("Larry") Fly.

56. Huehls, *supra* note 33, at 322–25.

57. *Id.* at 326.

58. A.L.A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

59. DOROTHY S. SHAWHAN & MARTHA H. SWAIN, LUCY SOMERVILLE HOWORTH: NEW DEAL LAWYER, POLITICIAN, AND FEMINIST FROM THE SOUTH 88 (2006).

60. Jack B. Tate, contribution to "Personal recollections of Sue Shelton White," *supra* note 38.

61. *See generally* Karen M. Tani, Securing a Right to Welfare: Public Assistance Administration and the Rule of Law, 1935–1964 (2011) (unpublished Ph.D. dissertation, Univ. of Pa.) (on file with the Van Pelt Library, Univ. of Pa.).

advice," recalled White's office-mate. "She was equally the confidante of the young New Deal lawyers fresh from law school and veterans of the Democratic political campaigns."[62] Echoed White's former boss, Jack Tate, "[s]he was at home with the most idealistic social worker fresh from college and with the most cynical politician."[63] For all of these reasons, White rose quickly, working her way to Chief of the General Counsel's Division of Business Law and Chief of the Regional Staff.[64] Only cancer stopped her rapid ascent. White died in 1943, at the age of fifty-five.

Historians of women and gender have by now thoroughly mined Sue Shelton White's biography,[65] but legal scholars have yet to recognize her importance. If nothing else, she helps scholars begin to investigate the difference that gender made to the work of government lawyers. There were clear educational differences between White and her male counterparts: unlike the nation's elite law schools, Washington College of Law welcomed students who worked (it offered only evening classes during White's time) and relied primarily on a textbook and lecture system, rather than the Harvard case method.[66] These were but a subset, however, of larger differences in life experience and career trajectory. White earned her legal position not by scoring top marks, as many male New Deal lawyers did, but by inspiring others to join her causes and devoting years of her life to unglamorous work. In other words, her main assets were personality, passion, and time in the trenches. The result was a New Deal lawyer who cultivated the affections of a wide swath of co-workers and who chose her battles carefully. (Some of her male counterparts, by contrast, had difficulty understanding the perspectives of non-lawyers and drew criticism for their unbending legalistic stances.)[67] White remained "explosive," friends recalled, but because she "express[ed] her objections very eloquently" and attempted to overcome petty resentments, her "loud blasts"—such as over the rule preventing a married woman from using

62. Rosalie Moynahan, "Personal recollections of Sue Shelton White," *supra* note 38.

63. Tate, "Personal recollections of Sue Shelton White," *supra* note 38.

64. Armstrong, "Personal recollections of Sue Shelton White," *supra* note 38.

65. WHEELER, *supra* note 34; WARE, *supra* note 52; Anne Firor Scott, *After Suffrage: Southern Women in the Twenties*, 30 J. S. HIST. 298 (1964);.THESE MODERN WOMEN: AUTOBIOGRAPHICAL ESSAYS FROM THE TWENTIES (Elaine Showalter, ed., 1989).

66. Chester, *supra* note 45, at 632.

67. Tani, *supra* note 61, at 45–46, 115–47.

her own name on the government payroll after her marriage—received attention.[68]

Friends also recalled White's affinity for the "underdog,"[69] which likely related to her own sense of disadvantage. This affinity manifested itself in White's legal work. For example, when asked to analyze whether the Social Security Act allowed states to discriminate against Native Americans—a question that plagued the agency for decades[70]—White's initial reaction was that failure to include them would be a clear violation of the Fourteenth Amendment. Since 1924, Native Americans had been formally recognized as U.S. citizens, she explained; the fact that "the paternalism of the white man's government results in their receiving aids of various kinds" did not mean that a state could lawfully exclude them from its social welfare programs.[71] Upon further reflection, White added nuance to her position (e.g., she recognized that the Board might be criticized for "assuming judicial functions" were it to invoke the Fourteenth Amendment), but she expressed no sympathy for the would-be excluders.[72] Factors other than gender may, of course, provide even greater insight into White's thinking, but at the very least this evidence suggests the value of further research.[73]

III. MARIE REMINGTON WING

Like Sue White, Marie Remington Wing (1885–1982) came from a respectable, educated, and relatively progressive family. In Cleveland, Ohio, where her father was a federal judge, she attended the prestigious Miss Mittleberger School for Girls. She proceeded directly to Bryn Mawr College, interrupting her studies only once, when her mother insisted that she stay home to make her social "debut." Also like White,

68. Armstrong, "Personal recollections of Sue Shelton White," *supra* note 38.

69. *Id.*

70. Tani, *supra* note 61, at 199–217.

71. Sue S. White to Thomas H. Eliot, "Indians," Feb. 5, 1936, General Records of the Department of Health, Education, and Welfare, Office of the General Counsel, Correspondence on Public Assistance Programs and the Social Security Act, 1935–1961, Box 10.

72. Sue S. White to Thomas H. Eliot, "Indians—Additional Memorandum," Feb. 10, 1936, General Records of the Department of Health, Education, and Welfare, Office of the General Counsel, Correspondence on Public Assistance Programs and the Social Security Act, 1935–1961, Box 10.

73. *Cf.* Linda Gordon, *Social Insurance and Public Assistance: The Influence of Gender in Welfare Thought in the United States, 1890–1935*, 97 AM. HIST. REV. 19 (1992) (illustrating the difference that gender-based analysis makes to scholarly understandings of New Deal social welfare policy).

hard times (in Wing's case, her father's "financial reverses") caused Wing to set aside her educational ambitions and seek paid employment. In 1907, she secured a receptionist job at the local Young Women's Christian Association (YWCA) and quickly climbed the ranks to "Industrial Secretary" (a position dedicated to guiding factory girls towards religion, education, and wholesome recreation). Eleven years later, after a brief stint in New York City, Wing was General Secretary of the Cleveland Metropolitan YWCA and a leading advocate for women's suffrage and social welfare legislation. Wing remained with the YWCA until 1922, when she applied to and was accepted at Cleveland Law School.[74]

Law, at that moment, was a natural choice for Wing. From her advocacy work, she had come to appreciate the promise and complexity of legal reform.[75] She also had every reason to expect a warm welcome at Cleveland Law School, which her father helped found in 1897. Wing's legal education was far from secure, however. Her father had by then passed away, and she remained unmarried.[76] Lacking the luxury of a male breadwinner's salary, Wing attended night classes and during the day worked for the Consumers' League. The job often took her to Columbus, where she lobbied the state legislature for wage and hour reforms, compulsory education, and old-age assistance.[77]

The biggest demand on Wing's time, however, was local electoral politics. As General Secretary of the YWCA, she had joined the campaign for a new city charter and proportional representation in city government. In 1922, after that effort succeeded, friends encouraged her to run as an independent for one of the new seats on the City Council. In the post-Nineteenth Amendment world, they urged, women

74. Marie Remington Wing, "One Woman's Memories of Cleveland and Mentor, 1890–1979," Marie Remington Wing papers, Container 1, F 2; Marie Wing, interview by Clinton Warne and Dorothy M. Austin, April 18, 1980, Consumers League of Ohio Oral History Interviews, Western Reserve Historical Society Library, Cleveland, Ohio. On the Miss Mittleberger School, see Sharon Morrison Pinzone, The Sociocultural Context of Cleveland's Miss Mittleberger School For Girls, 1875–1908 (May 2009) (unpublished Ph.D. dissertation, Cleveland St. Univ.) (on file with OhioLINK).

75. *See 'Lady Bountifuls' Draw Fire of Feminist Leader*, WASH. POST, Jun. 28, 1935, at 16 (reporting that after the suffrage fight and some battles over social legislation, Wing came to believe that a legal education would be helpful); *cf.* ADAMS & KEENE, *supra* note 38, at 149 (observing that a number of suffragists applied to law school after the campaign ended, in order "to extend [their] ability to help others secure their civil rights").

76. The closest thing Wing had to a husband was her longtime companion, Dorothy Smith. Western Reserve Historical Society, Finding Aid to the Marie Remington Wing Papers, Western Reserve Historical Society Library, Cleveland, Ohio. Sue White followed a similar path. *See* Huehls, *supra* note 33, at 347–64 (on White's "long-term friendship" with Florence Armstrong).

77. On the politics and policies of the National Consumers' League, see STORRS, *supra* note 19.

ought to hold public office. To Wing's surprise, she beat a powerful Republican opponent in 1923 and won reelection in 1925. She lost in 1927 (a result, she alleged, of vote tampering),[78] but in the meantime, she had graduated from law school, passed the bar, and "hung out [her] shingle." At the age of forty-one, she had amassed many friends and acquaintances, and never lacked for clients.[79]

Marie Wing became a New Deal lawyer by accident: she sought out a position in the Roosevelt administration, but in fact aimed higher than the legal staff. In 1936, when Social Security Board member John Gilbert Winant came through town to inquire about someone to head a regional outpost of his agency, Wing's name came up. She was a much better choice, friends of the Administration urged Winant, than the man he had in mind. Thereafter, Wing lobbied hard for the job, making personal appeals to female power brokers Molly Dewson and Frances Perkins, traveling to Washington to state her case to the Social Security Board, and encouraging supporters to write on her behalf.[80] She did not get the position, but the Board was sufficiently impressed to offer her the job of Regional Attorney—general counsel, in effect, for the brand new regional office.[81]

As Regional Attorney, Wing helped the states in her region (Ohio, Kentucky, Michigan) understand the various titles of the Social Security Act and create plans that qualified for federal aid. This was no small task: some programs outlined in the federal Act seemed to replicate existing state-level programs (e.g., aid to dependent children resem-

78. She would later be grateful for having lost the '27 election: soon after, the Council became the center of a corruption scandal; one of Wing's former colleagues was killed, reportedly for knowing too much. Wing, "One Woman's Memories of Cleveland and Mentor, 1890–1979," *supra* note 74; Wing interview, *supra* note 74.

79. Wing, "One Woman's Memories of Cleveland and Mentor, 1890-1979," *supra* note 74; Wing interview, *supra* note 74. Cleveland was by then accustomed, if not entirely friendly, to women lawyers. Genevieve Rose Cline, the first woman to serve on the U.S. Customs Court, began her career in Cleveland in 1921. Florence Allen, the first woman to be elected to a state supreme court and the first woman to serve on a federal appeals court, began her career there in 1914. MORELLO, *supra* note 8, at 231–35.

80. Marie Wing to Mary Dewson, Apr. 24, 1936, Marie Remington Wing papers, Container 4, F 56; Marie Wing to Mary Dewson, May 7, 1936, Marie Remington Wing papers, Container 4, F 56; Marie Wing to Frances Perkins, May 7, 1936, Marie Remington Wing papers, Container 4, F 56; Marie Wing to John G. Winant, May 8, 1936, Marie Remington Wing papers, Container 4, F 56. For letters from Wing to her supporters, and from her supporters to Winant, see Marie Remington Wing papers, Container 4, F 56.

81. Marie Wing to Thomas H. Eliot, May 20, 1936, Marie Remington Wing papers, Container 4, F 56. White's biography includes a similar episode: after working for the SSB's Office of the General Counsel for several years, she applied for the position of Regional Director. The Civil Service Commission rejected her application, ostensibly because she lacked the right kind of experience and the requisite number of years in government service. Huehls, *supra* note 33, at 343–44.

bled state-run mothers' pensions), but in fact demanded the creation of new bureaucracies and the implementation of new, unfamiliar rules. This caused confusion and sometimes hostility.[82] Other programs, such as unemployment compensation, had no precedent in the region, which meant that Wing spent many hours with legislators and lobbyists trying to design an acceptable plan.[83]

Political landmines abounded. In Wing's home state of Ohio, Governor Davey treated the new social welfare programs as a source of plum patronage opportunities and resisted federal guidance. He provoked one of the first compliance hearings in the Board's history when he used old-age assistance records to solicit votes for the 1938 gubernatorial election.[84] Part of Wing's job was to monitor this behavior and advise the central office in Washington about how to pressure state and local officials into compliance. In this, she was fearless. Jack Tate, the highest-ranking attorney in the Social Security Board for much of Wing's tenure, recalled her as a "hell-raiser": she "wanted to try new things in a new way" and was unafraid to "turn the world upside down."[85] Wing stayed in her post for nearly seventeen years, resigning only when a consolidation of the regional offices shifted her position to Chicago.[86]

Wing's path to government work was similar to White's: she became a New Deal lawyer by virtue of her skill, ambition, and social and political networks. What is special about her biography and what merits further exploration is her experience working for the federal government out in a "region." What did it mean to represent the New Deal in locales far removed from Washington, D.C.? Regional attorneys may not have had to confront hostile Supreme Court justices, but they faced an equally difficult task: translating a complex federal law into something intelligible, and sellable, to people who had no part in its drafting and who had strong attachments to alternative legal orders. Simultaneously, they were the eyes and ears of the central agency. Without them, the General Counsel in Washington had no sense of the life of the

82. BLANCHE D. COLL, SAFETY NET: WELFARE AND SOCIAL SECURITY, 1929–1979 (1995); *see generally* Tani, *supra* note 61, at 47–62.

83. Wing interview, *supra* note 74; *see also* Marie Wing's monthly reports to the General Counsel and the Regional Director, Marie Remington Wing papers, Container 4, F 56.

84. *See* CHARLES MCKINLEY & ROBERT W. FRASE, LAUNCHING SOCIAL SECURITY: A CAPTURE-AND-RECORD ACCOUNT 1935–1937, 169–74 (1970); COLL, *supra* note 82, at 75–76.

85. The Reminiscences of Jack B. Tate (July 6, 1965), at 115–16 (on file with the Oral History Collection of Columbia University, New York, N.Y.).

86. Wing interview, *supra* note 74.

law. In short, this was vital work. The implication is that regional offices may have been sites where women lawyers exercised a form of "ironic power" (i.e., power derived from occupying a less prestigious and desirable position).[87] We need to excavate more information about women like Wing, who situated themselves in the critical junctures between the national and the local.

IV. BERNICE LOTWIN BERNSTEIN

From White's and Wing's biographies, one might conclude that women lawyers, in contrast to their male counterparts,[88] still needed a certain pedigree to access federal government jobs—not only education, but an upper-class, Protestant, old-stock family. One might also conclude that outspoken feminism, or at least participation in the battle for women's suffrage, was a prerequisite. The biography of Bernice Bernstein (1908–1996), born Bernice Nisha Lotwin, suggests otherwise. Bernstein was the daughter of Russian-Jewish immigrants. She and her six siblings grew up in a small dairy farming community in Northwestern Wisconsin, where her father traded farming merchandise for a living. Her ticket out was neither family connections nor political influence, but a superior record in the village's public school, which in turn gave her access to the University of Wisconsin and the state capitol.[89]

Bernstein's path toward the New Deal began during her junior year of college, when she met progressive-minded faculty and graduate students in the school of economics. Edwin Witte, Arthur Altmeyer, Elizabeth Brandeis, and others were concerned about the social and economic insecurity that the Depression exposed. In "the old La Follette-John R. Commons tradition," they worked closely with state legislators, and later the Roosevelt Administration, to design solutions. Bernstein chose to enter the University of Wisconsin Law School rather

87. .*See* Mack, *supra* note 9, at 1473 (coining the phrase "ironic power"); *see also* Felice Batlan, *Engendering Legal History*, 30 L. & SOC. INQ. 823, 847 (2005) ("[The concept of] [i]ronic power conveys many of the ambiguities and contestations that so much of the literature on gender and legal history highlights.").

88. *See* Parrish, *supra* note 1, at 747 ("[T]he New Deal lawyers . . . were usually outsiders. They did not quite fit the traditional mold of the legal establishment, because of their ideas, their social background, or their ethnocultural heritage.").

89. Affidavit of Respondent as to Her Life, In the Matter of: Bernice Lotwin Bernstein In Security Proceedings, December 1954, Papers of Bernard Bernstein, Folder 7, Box 2 [hereinafter Bernstein affidavit].

than pursue an academic career, but she maintained a strong academic interest in social insurance.[90]

Bernstein, unlike White and Wing, closely resembled the prototypical New Deal lawyer when she graduated from law school: she served as note editor for the Wisconsin Law Review, was elected to the Order of the Coif, and graduated at the top of her class (with the best record, rumor had it, of any student in the school's history). Men with similar records were hand-picked for federal government positions, sold to their supervisors as the best and the brightest. After a year working for the Wisconsin Department of Agriculture, Bernstein was chosen, too. Under Donald Richberg, General Counsel of the National Recovery Administration, Bernstein analyzed industry-specific codes of fair practices (she played a particularly important role in drafting the lumber code) and later tackled problems with administration and compliance. She subsequently requested that the Labor Department "loan" her to the newly formed Social Security Board, where she drafted a model state unemployment insurance bill, helped states set up their programs, and eventually settled in for the long term. In her off time, she even relaxed like the prototypical New Deal lawyers, attending parties at the house on Q Street (where a number of the men boarded), and Sunday teas at Justice Brandeis's home.[91]

It was common for New Deal lawyers to move from agency to agency;[92] it was also common for them to leave for lucrative or influential non-government positions.[93] Bernstein, unlike the men of her caliber, did not leave her government position. Certainly, she found her work fulfilling, but she also knew that her options were limited. Years after her law school graduation, she still remembered a mentor warning her that "private practice was 'too tough' for a girl like [her]."[94] With the exception of brief absences, corresponding to the births of her children, Bernstein worked continuously for the federal government, moving from the Social Security Board, to the War Manpower Commission, to the Labor Department. Even after her family relocated to New York, Bernstein found work with the federal government. Jack Tate, a longtime colleague and by then the General Counsel of the Federal Se-

90. *Id.*

91. *Id.*; *see also* The Reminiscences of Bernice Lotwin Bernstein (Mar. 3, 1965, Apr. 2, 1965, Apr. 6, 1965) (on file with the Oral History Collection of Columbia University, New York, N.Y.).

92. *See generally* the materials cited *supra* note 1.

93. *See generally* the materials cited *supra* note 1.

94. Bernstein affidavit, *supra* note 89.

curity Agency,[95] wooed her back with the position of Regional Attorney. She held that post until 1966, when the agency elevated her to Regional Director. (In the meantime, her agency changed names, becoming the Department of Health, Education and Welfare (HEW).) After eleven years, spanning the welfare rights movement and New York City's fiscal crisis, Bernstein was finally ready to retire, but she served a capstone year as special assistant to HEW Secretary Joseph A. Califano, Jr.[96]

Bernstein's biography suggests that women lawyers, whether because of intra-governmental networks or private sector discrimination, may have been more likely than their male peers to stay in government once employed there. This choice had consequences, as a final episode in Bernstein's biography illustrates. On April 27, 1953, President Truman issued Executive Order No. 10450, which broadened the coverage of the 1950 statute that was the cornerstone of the federal loyalty-security program. Under the terms of the Order, the heads of *all* federal government departments and agencies became responsible for "insur[ing] that the employment and retention" of each of their civilian employees was "clearly consistent with the interests of the national security"; persons who failed to meet that standard could be summarily suspended or dismissed.[97] Agencies implemented the order by designating particular positions as "sensitive," and then conducting "full field investigations" of the holders. Learning that her position had been so classified, Bernstein contacted Frederick Schmidt, her agency's Director of Security (and a former supervisor in the FBI's Criminal Division), to inform him about two pieces of information: her prior membership in the National Lawyers Guild and her brief acquaintance with a handful of "'rotten' characters" in the Treasury Department, where her husband Bernard had worked as assistant general counsel. Bernstein urged Schmidt to review all the information in her government file and to secure from her and her husband any other information that he desired, but to postpone conducting a full field investigation. She considered her reputation "above reproach and outstanding," but she would rather resign, she said, than subject her three

95. In 1939, under an executive reorganization plan, the Social Security Board became part of the Federal Security Agency, an umbrella-type agency that housed both New Deal and war-related programs.

96. Bernstein affidavit, *supra* note 89; Wolfgang Saxon, *Bernice Bernstein, 87, U.S. Chief of New York Health Programs*, N.Y. TIMES, Mar. 2, 1996.

97. Security requirements for Government employment, 18 Fed. Reg. 2489 (Apr. 27, 1953) (to be codified at 3 C.F.R., 1949–1953).

school-age children to the "discussion" that an investigation would inevitably produce in her suburban Long Island community. Schmidt invited Bernstein to submit a written statement, which she promptly did. Without her knowledge, he also initiated a thorough investigation.[98]

On October 6, 1954, Bernstein received a letter from the Under Secretary of the Department of Health, Education, and Welfare informing her that "removal from employment may be necessary." In the 1940s, the investigation found, she and her husband "established and continued a sympathetic association" with Harry Dexter White, William Henry Taylor, Nathan Gregory Silvermaster, "and others who have been reported as members of the Communist Party and involved in a Soviet espionage conspiracy."[99] Accordingly, the Director of Security suspended Bernstein's employment. Bernstein had thirty days to refute the charges.[100]

The transcript of Bernstein's January 12, 1955, hearing before the HEW Security Hearing Board suggests how dangerous life had become for government employees. The proceeding centered on the extent of Bernstein's interactions with the alleged Communists in the Treasury Department, but ranged widely across her personal and professional life. Security Director Schmidt interrogated her about a particular book in her private library and the "accumulation" of funds in her family's bank account since the mid-1940s.[101] To attempt to demonstrate Bernstein's loyalty, her lawyer[102] asked her such questions as how she felt about the Russian invasion of Finland ("shocked"); how she perceived communism when she was in college and law school ("a freak ideology"); whether she was "a believer in our free enterprise system" ("I am"); what her taste was in music ("basically classical"); and whether her children attended "a progressive school" ("No. It is quite

98. Bernice Lotwin Bernstein to Parke M. Banta, August 23, 1954, Papers of Bernard Bernstein, Box 7, Folder 2; Bernice Lotwin Bernstein to Frederick Schmidt, May 17, 1954, Papers of Bernard Bernstein, Box 6.

99. On the exposure of the "Silvermaster Ring" (via informant Elizabeth Bentley) and the group's broader significance for American anti-communism, see JOHN EARL HAYNES & HARVEY KLEHR, EARLY COLD WAR SPIES: THE ESPIONAGE TRIALS THAT SHAPED AMERICAN POLITICS (2006).

100. Nelson A. Rockefeller to Bernice L. Bernstein, October 6, 1954, Papers of Bernard Bernstein, Box 7, Folder 2.

101. In the Matter of: Bernice Lotwin Bernstein, Transcript of Proceedings, Department of Health, Education, and Welfare, Security Hearing Board, Washington, D.C., Jan. 13, 1955 [hereinafter hearing transcript].

102. Joseph Fanelli was another New Deal lawyer. He served as special assistant to the U.S. Attorney General and was reportedly one of Felix Frankfurter's favorites. THE MAKING OF THE NEW DEAL, *supra* note 1, at 103.

conservative.").[103] Loyalty, these questions imply, could be proven only through demonstrated adherence to upper-middle class norms, cultural conservatism, and a muscular, capitalist-oriented variety of political liberalism. All non-conforming facts had to be explained. For example, in examining Bernstein about her 1936 work on social insurance, Bernstein's counsel observed that the topic was then "of particular interest to the left-wingers and pinkos and communists," and yet Bernstein took a "strictly technical and scholarly" approach.[104]

Through aggressive lawyering and the support of the many friends and colleagues who swore to her good character, Bernstein survived the loyalty-security review. But it nearly derailed her career and took a severe personal and financial toll. As Bernstein confided in a friend, the process was "exhausting and soul-searching"; nothing "in [her] whole life ha[d] hit [her] as hard."[105] This episode and others like it are important data points in our analysis of the opportunities that government offered, and continues to offer, less privileged members of the bar.[106] They remind us to investigate not just the rewards but also the risks that attend government work. Ideological purges may be a thing of the past, but changes in the political winds and fluctuations in the support for public jobs are not. Such instabilities are particularly problematic for lawyers who will be disadvantaged when they search for work outside government.

CONCLUSION: IMPORTANCE AND UNIMPORTANCE

When Marie Remington Wing sat down, at the age of ninety-three, to write her life story, she began with a scene from *Alice in Wonderland*. It is Alice's trial, and the King of Hearts is attempting to explain to the jury which facts are "important" and which are "unimportant." He

103. Hearing transcript, *supra* note 101.

104. *Id.*

105. Bernice Bernstein to "Reg," Jan. 17, 1955, Papers of Bernard Bernstein, Box 7. For more on the personal impact of loyalty-security investigations, see DAVID CAUTE, THE GREAT FEAR: THE ANTI-COMMUNIST PURGE UNDER TRUMAN AND EISENHOWER (1978); ELLEN SCHRECKER, MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA (1998); DAVID K. JOHNSON, THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT (2004); Andrea Friedman, *The Strange Career of Annie Lee Moss: Rethinking Race, Gender, and McCarthyism*, 94 J. AM. HIST. 44 (2007). In terms of financial expense, Bernstein's lawyer devoted 162 hours to the case, at a cost of $4,234. Bernstein and her husband surely dedicated those hours and more. Joseph H. Fanelli to Bernard Bernstein, Jan. 17, 1955, Papers of Bernard Bernstein, Box 7.

106. For more recent data on women lawyer's occupational segregation, and their continued disproportionate representation in public sector jobs, see DEBORAH L. RHODE, THE UNFINISHED AGENDA: WOMEN AND THE LEGAL PROFESSION 25 (2001).

quickly loses track of the meaning of the terms. "[I]mportant—unimportant—unimportant—important," he mumbles to himself, much to the confusion of Alice and the jury. Wing found herself in similar straits: she had much to say, but felt that she lacked the perspective needed to assess its significance.[107] This is the task of historical scholarship, and humanistic scholarship more generally: to continually assess and re-assess significance; to take existing categories and orderings and reconstruct them, so that raw data, new and old, becomes meaningful to today's consumers.[108] It is especially the task of historians of women, since their data is so often cast into the "unimportant" bin.

This essay is an attempt to re-assess the legal careers of three "unimportant-important" women, and a plea for others to continue this work. According to conventional narratives, these women are not significant. They did not stand up before the Supreme Court and defend New Deal legislation. They did not become legislators, judges, or famous academics. Yet, their stories have much to offer us. White, the fiery suffragist who died too young, encourages us to consider the difference that gender made to the high-stakes interpretive and administrative work of New Deal lawyers. White's biological sex did not dictate the style or quality of her lawyering, but there are hints that her path to the New Deal—a path that had everything to do with gender—affected the way that she interacted with colleagues and analyzed legal questions. Wing, the "hell-raiser" from Cleveland, inspires us to think more deeply about power and place. Regional outposts of the federal government were not as desirable to young, male graduates of Harvard Law School, and yet, as Wing discovered, they were the sites of political influence and vital legal work. Bernstein is perhaps the most intriguing case study, since in pedigree and placement she was the female equivalent of one of Felix Frankfurter's "Happy Hotdogs." Unlike most of her male counterparts, who used the New Deal as a launching pad for celebrated careers in academia, private practice, and politics, Bernstein remained an administrative lawyer for decades. We need more information about the costs and benefits of this career trajectory, both for the individual and for society.

Together, the lives of all three women provoke one final question. In the area of social welfare and elsewhere, much law-making happens

107. Wing, "One Woman's Memories of Cleveland and Mentor, 1890–1979," *supra* note 74 (quoting LEWIS CARROLL, ALICE'S ADVENTURES IN WONDERLAND 148–149 (Collins Design 2010)).

108. *See* BERNHARD FABIAN, THE FUTURE OF HUMANISTIC SCHOLARSHIP 18–21 (1990).

neither at the top, with Congress and the appellate courts, nor at the bottom, with the people. It happens somewhere in between, with ground-level decision-makers and mid-level bureaucrats.[109] Who occupied that level of decision-making in 1935? Who occupies it now? Much of the content of today's law is their doing.

109. Felicia Kornbluh & Karen Tani, *Siting the Legal History of Poverty: Below, Above, and Amidst*, *in* THE BLACKWELL COMPANION TO AMERICAN LEGAL HISTORY (Al Brophy and Sally Hadden, eds., forthcoming 2012); *see also* DANIEL P. CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862–1928, 19–21 (2001) (describing the importance of "mezzo-level" bureaucrats in executive agencies in the late nineteenth and early twentieth century); MARGOT CANADAY, THE STRAIGHT STATE: SEXUALITY AND CITIZENSHIP IN TWENTIETH-CENTURY AMERICA (2009) (observing the importance of federal bureaucrats in constructing an official response to homosexuality and in constructing the concept of homosexuality itself); LUCY SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW (1995) (describing the role of low-level immigration inspectors in shaping immigration law and policy).

THE POSSIBILITY OF COMPROMISE: ANTIABORTION MODERATES AFTER *ROE V. WADE*, 1973–1980

MARY ZIEGLER*

INTRODUCTION

Did *Roe v. Wade* destroy the possibility for compromise in the abortion debate? Leading studies argue that *Roe* itself radicalized debate and marginalized antiabortion moderates, either by issuing a sweeping decision before adequate public support had developed or by framing the opinion in terms of moral absolutes.[1] Others rely on this history in criticizing the sweeping privacy framework set out in *Roe*, attributing the radicalization of the general discussion and the antiabortion movement to the timing, reach, or framing of the abortion right in the opinion.[2]

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1. *See, e.g.*, DONALD T. CRITCHLOW, *Birth Control, Population Control, and Family Planning: An Overview*, *in* THE POLITICS OF ABORTION AND BIRTH CONTROL IN HISTORICAL PERSPECTIVE 1, 14–16 (Donald T. Critchlow ed., 1996) (arguing that *Roe* "only intensified, although unintentionally, growing polarization on the [abortion] issue," that *Roe* "activated pro-life opposition," and that *Roe* rendered "[s]erious moral dialogue and political compromise . . . more difficult"); LINDA GORDON, THE MORAL PROPERTY OF WOMEN: A HISTORY OF BIRTH CONTROL POLITICS IN AMERICA 300, 319 (3d ed. 2002) (arguing that political divisions and absolutist divisions in the abortion debate stem from broad disagreements about social values related to sex and reproduction and asserting that that absolutist divisions remain stable and tenacious); ELIZABETH MENSCH & ALAN FREEMAN, THE POLITICS OF VIRTUE: IS ABORTION DEBATABLE? 161 (1993). By contrast, Celeste Michelle Condit has argued that *Roe* represented a form of legal compromise between competing rhetorical frames, and she suggests that the media, too, has adopted elements of both pro- and anti-abortion strategies. *See* CELESTE MICHELLE CONDIT, DECODING ABORTION RHETORIC: COMMUNICATING SOCIAL CHANGE 117, 141, 201–03 (1990). Mark Graber has also been critical of the prevailing idea that compromise in the contemporary abortion debate is impossible. *See* MARK GRABER, RETHINKING ABORTION: EQUAL CHOICE, THE CONSTITUTION, AND REPRODUCTIVE POLITICS 17, 20–38 (1999). For his part, Gene Burns argues that, before *Roe*, the abortion debate had reached an impasse at which compromise was impossible, and he attributes this result to the rhetorical frames each movement endorsed, not to the Supreme Court's decision. *See* GENE BURNS, THE MORAL VETO: FRAMING ABORTION, CONTRACEPTION, AND CULTURAL PLURALISM IN THE UNITED STATES 310 (2005).

2. WILLIAM N. ESKRIDGE JR. & JOHN FEREJOHN, A REPUBLIC OF STATUTES: THE NEW AMERICAN CONSTITUTION 242 (2010); CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 114 (1999); Ruth Bader Ginsburg, *Some Thoughts on Autonomy and Equality in Relation to* Roe v. Wade, 63 N.C. L. Rev. 375, 381–82 (1985); Robin West, *From Choice to Reproductive Justice: De-Constitutionalizing Abortion Rights*, 118 Yale L.J. 1394, 1394–96 (2009).

The polarization narrative on which leading studies rely obscures important actors and arguments that defined the antiabortion movement of the 1970s. First, contrary to what the polarization narrative suggests, self-identified antiabortion moderates played a significant role in the mainstream antiabortion movement. As we shall see, activists like Warren Schaller and Marjory Mecklenburg assumed positions of leadership in the National Right to Life Committee (NRLC), then the largest national antiabortion organization and a clearinghouse for strategy for the wide variety of groups active at the state level. These activists shaped the mainstream movement's policies on issues like the treatment of unwed mothers or the Equal Rights Amendment. During testimony about a human life amendment to the Constitution, they helped to forge the movement's public-relations strategy.

Second, because of the influence exercised by these activists, post-*Roe* compromise in the 1970s was more possible than is conventionally thought, especially on issues beyond abortion itself. Working in organizations like Feminists for Life (FFL) or American Citizens Concerned for Life (ACCL), antiabortion moderates campaigned for what they defined to be alternatives to abortion: for example, laws prohibiting pregnancy discrimination or funding contraception or sex education. *Roe* did not undo these important opportunities for compromise.

Ultimately, however, for several reasons, moderates lost influence. First, in the mid-1970s, as part of their campaign against the Equal Rights Amendment (ERA), conservative women's groups like Phyllis Schlafly's STOP ERA took up the abortion issue. In order to persuade abortion opponents to condemn the Amendment, Schlafly and her allies began stressing that the Amendment would make *Roe v. Wade* a permanent constitutional fact. Similarly, Schlafly and her allies contended that feminism was and always would be pro-abortion. The involvement of antifeminist groups in the abortion debate helped to convince activists otherwise supportive of or indifferent to the ERA that no part of the feminist agenda was deserving of support. Moreover, Schlafly and a newer group, Beverly LaHaye's Concerned Women for America (CWA), identified and mobilized a cohort of women opposed to both abortion and the ERA.

Similarly, in the late 1970s, for strategic reasons, both the women's movement and the antiabortion movement began marginalizing activists opposed to abortion but supportive of the ERA or antipregnancy discrimination legislation. For the National Right to Life

Committee or other mainstream antiabortion groups, the Religious Right and New Right, both of which were becoming politically powerful in the late 1970s and both of which had members strongly opposed to abortion, appeared to be attractive allies. In the same period, as abortion-rights groups increasingly stressed that the antiabortion movement was intent on oppressing women, antiabortion moderates also lost any place they might have had on the political left.

The history of antiabortion moderates complicates leading criticisms of *Roe* that rely on the polarization produced by the decision. Arguing that *Roe* sidelined moderates, scholars criticize the sweep of the opinion, the privacy rationale it offers, or the timing of its issuance in a period in which the abortion issue was very much alive in state legislatures. However, to the extent that the history of antiabortion moderates offers an example, *Roe* did not polarize discussion. If *Roe* did not sideline antiabortion moderates, could it be properly said to have created a clash of absolutes? If *Roe* did not polarize debate, then should criticisms of the opinion's rationale, timing, or scope be reexamined? The history here makes more urgent a reconsideration of these questions.

The history considered here also offers new perspective on an increasingly rich scholarship on women of the Right. Scholars like Sarah Barringer Gordon and Donald Critchlow have studied the emergence, evolution, and strategies of organizations like Phyllis Schlafly's STOP ERA and Beverly LaHaye's Concerned Women for America.[3] Although strongly opposed to second-wave feminism, these groups argued that they were redeeming the essence of womanhood from feminists. These studies have not fully done justice to important "pro-woman" antiabortion activists in groups like the NRLC, ACCL, and FFL. Unlike the members of the CWA or STOP ERA, these activists identified with second-wave feminism or defined themselves partly by a willingness to form alliances with feminists. These moderate activists have largely been lost in the current history of both the abortion debate and of women of the Right.

This Article proceeds in four parts. Part I studies the influence of self-described antiabortion moderates on the mainstream antiabortion

3. *See, e.g.*, DONALD T. CRITCHLOW, PHYLLIS SCHLAFLY AND GRASSROOTS CONSERVATISM: A WOMAN'S CRUSADE (2005); CAROL FELSENTHAL, THE SWEETHEART OF THE SILENT MAJORITY: THE BIOGRAPHY OF PHYLLIS SCHLAFLY (1981); *see generally* SARAH BARRINGER GORDON, THE SPIRIT OF THE LAW: RELIGIOUS VOICES AND THE CONSTITUTION IN MODERN AMERICA (2010); REBECCA E. KLATCH, WOMEN OF THE NEW RIGHT (1987); CATHERINE E. RYMPH, REPUBLICAN WOMEN: FEMINISM AND CONSERVATISM FROM SUFFRAGE THROUGH THE RISE OF THE NEW RIGHT (2006).

movement between 1973 and 1975. Part II examines the role played in the abortion debate of the 1970s by the freestanding organizations these activists formed. Part III shows that these groups were marginalized not simply because of *Roe*, but because of a wide variety of factors, including the rise of the New Right and the evolution of the ERA battle. The final part briefly concludes.

I. WOMEN'S RIGHTS AS AN ALTERNATIVE TO ABORTION: ANTIABORTION RIGHTS FOR WOMEN

A wide variety of antiabortion leaders held liberal or moderate views on some social issues. For example, the United States Catholic Conference's Family Life Division, the group that spawned many subsequent organizations, was run throughout the 1970s by Monsignor James McHugh, who became known for his endorsement of sex education in public schools.[4] Similarly, Americans United for Life, a group originally formed by conservative Catholics displeased with Monsignor McHugh, had splintered because moderate members had led a vote refusing to oppose the use of certain forms of contraception, prompting an exodus by more absolutist members like Notre Dame Professor Charles Rice.[5]

However, the most telling evidence of the influence of antiabortion moderates may be found in the history of the largest national antiabortion organization, the NRLC. From the outset, the organization's leadership had a wide range of views on contraception, feminism, and sex education. More conservative Catholic members like Randy Engel, the founder of another organization, the United States Coalition for Life (USCL), held the view that support for sex education had ultimately led to the legalization of abortion.[6] Others were like Dr. Frederick Meck-

4. For McHugh's stand on the desirability of public-school sex education, see, for example, SEX EDUCATION: A GUIDE FOR TEACHERS (Rev. James T. McHugh ed., 1969). On the founding of the NRLC, see, for example, Keith Cassidy, *The Right to Life Movement: Sources, Development, and Strategies*, *in* THE POLITICS OF ABORTION AND BIRTH CONTROL IN HISTORICAL PERSPECTIVE 128, 140 (Donald T. Critchlow ed., 1996); MARY JO WEAVER & R. SCOTT APPLEBY, BEING RIGHT: CONSERVATIVE CATHOLICS IN AMERICA 273 (1995).

5. *See* Julie Grismstead, "Profound Obligation, Highest Privilege": Dr. Joseph R. Stanton and the Prolife Movement 131–38 (Feb. 20, 1991) (unpublished manuscript) (on file with author); Letter from Charles E. Rice, professor of law, Notre Dame Law School, to George Hunston Williams, professor, Harvard Divinity School (Feb. 10, 1972) (on file with author); Meeting Minutes, Americans United for Life, 4, 6–7 (Mar. 10–11, 1972) (Executive File, Folder 91, Concordia Historical Institute of the Lutheran Church Missouri Synod).

6. Engel argued that the "Sangerite movement," one she believed supported population control, contraception, and abortion, had "come full circle following the Supreme Court decision on abortion." *Abortion Part III: Hearing on S.J. Res. 119 and S.J. Res. 130 Before the Subcommittee on*

lenburg, a member of the American Association of Planned Parenthood Physicians and the founder of a family planning clinic at the University of Minnesota.[7] His wife, Marjory, also supported the availability of legal contraception.[8]

This diversity notwithstanding, it was the Mecklenburgs and their supporters who successfully promoted the idea of creating a separate and secular national organization opposed to abortion.[9] The influence of this moderate faction continued after the organization became independent from the Catholic Church. Because she had attracted an influential group of supporters, Marjory Mecklenburg was elected chairman of the organization.[10]

In the face of considerable opposition, the Mecklenburg faction also imposed its choice of interim Executive Director, Warren Schaller, an Episcopal minister from St. Paul, Minnesota, on the organization.[11] Later disagreements about Schaller's leadership reflected deeper divisions about how the organization should be run. Mecklenburg and her allies wanted the NRLC to take a stand more often on issues related to abortion, such as family planning or forced sterilization.[12] For the most part, members of the Mecklenburg faction supported or at least accepted broad access to family planning services, as well as publicly-funded daycare.[13] Finally, reversing an earlier position, the faction

Constitutional Amendments of the S. Comm. on the Judiciary, 93d Cong. 98 (1974) (statement of Randy Engel, director, U.S. Coalition for Life).

7. *See* Frederick Mecklenburg, Biographical Information (c. 1975), *in* The American Citizens Concerned for Life Papers (Box 17, Gerald Ford Memorial Library, University of Michigan).

8. *See, e.g.*, *Abortion—Part IV: Hearings on S.J. Res. 6, S.J. Res. 10 and 11, and S.J. Res. 91 Before the Subcommittee on Constitutional Amendments of the S. Comm. on the Judiciary*, 94th Cong. 660 (1976) (statement of Marjory Mecklenburg, President, American Citizens Concerned for Life).

9. *See* Robert N. Karrer, *The Formation of Michigan's Anti-abortion Movement, 1967–1974*, 22 MICH. HIST. REV. 67, 98 (1996).

10. *See* Arlene Doyle, *Do You Need Permission to Save an Unborn Baby?*, *in* U.S. COALITION FOR LIFE 1, 9 (1977), *available at* http://uscl.info/edoc/doc.php?doc_id=88&action=inline (on Mecklenburg's role as Chairman).

11. *See id.* at 11.

12. *See The Owl in the Saguaro* (Feb. 1974), *in* the American Citizens Concerned for Life Papers (Box 8, Gerald Ford Memorial Library, University of Michigan).

13. *See, e.g.*, Frederick Mecklenburg, Building Bridges Instead of Walls (1975), *in* The American Citizens Concerned for Life Papers (Box 14, Gerald Ford Memorial Library, University of Michigan); Letter from Judy Fink to Edward Golden et al. (Jun. 1973), *in* the American Citizens Concerned for Life Papers (Box 4, Gerald Ford Memorial Library, University of Michigan); Judy Fink, Policy Statement of the NRLC Concerning Birth Control" (May 15, 1973), *in* The American Citizens Concerned for Life Papers (Box 4, Gerald Ford Memorial Library, University of Michigan) [hereinafter Fink, Policy Statement] (proposing that the NRLC endorse "the pill" and IUDs in order to guarantee, among other things, "the participation of . . . 12 million Southern Baptists").

endorsed an open-ended, decentralized, participatory model of decision-making.[14]

Between June 1973 and October 1974, with Schaller's help, the Mecklenburg faction played an important role in shaping the structure, public image, priorities, and decisions of the NRLC. The first important development involved the group's daily operations and structure.[15] Throughout much of 1973, Marjory Mecklenburg successfully proposed and promoted a system whereby everyone on the NRLC's Executive Committee had "[f]reedom . . . to take some initiative in particular areas to get things done."[16]

The structure she endorsed was closely tied to her vision of "pro-life activism." Because of her influence, between 1973 and 1974, the NRLC endorsed a number of goals beyond abortion, including demands for the fair treatment of unwed mothers.[17] Moreover, in part because of the impact of Mecklenburg and her supporters, the NRLC did not come out against the Equal Rights Amendment (ERA) until 1977, voting in 1975 against a resolution critical of the Amendment.[18] Both of these policies offended conservatives within the organization.[19] That the Mecklenburg wing was able to exert such an influence is telling.

One important incident began when Judy Fink and Mecklenburg expressed anger at a recent program adopted by the Girl Scouts, called "To Be a Woman."[20] Mecklenburg and Fink voiced concern that it gave a misleading and destructive view of womanhood and feminism. In particular, they were outraged that participating Girl Scouts were obligated to visit an abortion clinic.[21] The pair demanded that the NRLC oppose the program and offer a countervailing view of womanhood and women's rights.

14. *See* Letter from Marjory Mecklenburg to the NRLC Executive Committee (Aug. 16, 1973), *in* the American Citizens Concerned for Life Papers (Box 4, Gerald Ford Memorial Library, University of Michigan).

15. *See id.*

16. *See id*.

17. *See, e.g.*, Resolution 3 (Jul. 1974), *in* The American Citizens Concerned for Life Papers (Box 8, Gerald Ford Memorial Library, University of Michigan).

18. *See* NRLC Board Meeting Minutes (Sep. 20–21, 1975), *in* The American Citizens Concerned for Life Papers (Box 8, Gerald Ford Memorial Library, University of Michigan).

19. *See, e.g.*, Letter from Randy Engel to the NLRC Board of Directors et al. (Mar. 30, 1974), *in* The American Citizens Concerned for Life Papers (Box 8, Gerald Ford Memorial Library, University of Michigan) (objecting to the Mecklenburgs' position on contraception).

20. *See* Letter from Judy Fink to the NRLC Executive Committee (Jul. 1, 1973), *in* The American Citizens Concerned for Life Papers (Box 4, Gerald Ford Memorial Library, University of Michigan).

21. *See id.*; *see also* NRLC Board Meeting Minutes (June 29–30, 1973), *in* The American Citizens Concerned for Life Papers (Box 4, Gerald Ford Memorial Library, University of Michigan).

Fink also raised a related, high-profile incident involving the involuntary sterilization of two African American teenagers in Alabama.[22] Fink argued that the NRLC should itself develop an argument about "rights to choose," opposing coercion in the context of reproductive decisions.[23] Neither effort resulted in a major public education campaign on the part of the organization. Instead, and perhaps more significantly, Mecklenburg's allies voted in favor of the creation of a Policy Committee designed to address and announce "pro-life" views on matters beyond the ratification of a human life amendment.[24] The creation of the Committee dovetailed nicely with one goal of moderate antiabortion advocates in the NRLC: these activists hoped to show that interest in protecting life reached beyond the Catholic Church and beyond the issue of abortion.[25]

Antiabortion moderates did spark controversy in the broader movement. Randy Engel, an influential opponent of population control from Pennsylvania, and Carolyn Gerster, a prominent Arizona activist, pressed for condemnation of Planned Parenthood as a whole, as well as criticism of supposedly "abortive" forms of contraception, like prostaglandins and the IUD.[26] For the moderates, persuading the organization to remain silent on these issues represented a significant victory.[27]

By the end of 1974, however, prominent moderates left the organization partly because of the bitter divisions that consumed it. However, as we shall see, Mecklenburg and Fink did not leave because of a significant decline in support for moderate positions. The immediate catalyst for their departure involved a dramatic loss of financial support.[28]

However, in spite of the funding crisis, Mecklenburg and the moderates retained influence over the organization. Schaller played an important role in framing the organization's public-relations strategy

22. *See* Bill Kovach, *Sterilization Consent Not Given, Father Tells Kennedy's Panel*, N.Y. TIMES, July 10, 1973, at 16; *Expand Sterilization Suit*, CHI. DEFENDER., Aug. 14, 1973, at 4.

23. *See* Fink to NRLC Executive Committee, *supra* note 20; Fink, Policy Statement, *supra* note 13.

24. *See* NRLC Board Meeting Minutes, *supra* note 21.

25. *See* Fink to NRLC Executive Committee, *supra* note 20; Fink, Policy Statement, *supra* note 13.

26. *See* Engel to NRLC Board of Directors, *supra* note 19.

27. The NRLC has not until present taken an official position on contraception. *See* William Saletan, *Rubber-Baby Money Lumpers: The Pro-Life Movement's Contraception Problem*, SLATE, Aug. 3, 2009, *available at* http://www.slate.com/id/2224154/.

28. *See, e.g.*, Letter from Frances Frech to Marjory Mecklenburg (Oct. 25, 1973), *in* The American Citizens Concerned for Life Papers (Box 4, Gerald Ford Memorial Library, University of Michigan).

during congressional testimony about a human life amendment. In February 1974, Schaller contended that the organization should emphasize medical arguments and should stress the religious diversity of the antiabortion movement.[29] In March, the leaders of the organization agreed, arguing for a broader focus on "Protestant, Lutheran, Mormon, and Jewish testimony."[30]

Indeed, as late as June 1974, the NRLC continued to pass relatively liberal resolutions. Two major policy statements issued by the organization at that time took up Mecklenburg's arguments about alternatives to abortion and antiabortion feminism. One proposed that antiabortion advocates work to remove the stigma attached to unwed motherhood.[31] If single women could act as mothers without fear of condemnation, as the resolution reasoned, there would be less need for abortion. Another resolution provided that antiabortion women, not members of NOW, truly spoke for women's rights: women exercised their own civil rights, the resolution argued, "by campaigning . . . for the enactment of an amendment to protect the civil right to life of all defenseless life and . . . for the affirmation of a pro-life ethic consistent with a truly liberated feminine role."[32]

As these resolutions suggested, Mecklenburg had maintained strong support. Moreover, as we shall see, moderates remained influential within the antiabortion movement even after the departure of Mecklenburg and Fink.

II. BEYOND ABORTION: THE INFLUENCE OF THE ACCL AND FFL, 1974–78

When Fink and Mecklenburg left the NRLC, they revived a more openly liberal antiabortion organization, American Citizens Concerned for Life (ACCL), a national expansion of Mecklenburg's Minnesota group. The group at first appears to be small and relatively short-lived: founded prior to *Roe*, active beginning in 1974, and no longer functioning by the mid-1980s.[33] However, the ACCL itself was more influential in the late 1970s than might be expected. As this Article will demonstrate, the organization's philosophy held that fetal rights could be

29. *See* Letter from Warren Schaller to the NRLC (Feb. 25, 1974), *in* The American Citizens Concerned for Life Papers (Box 8, Gerald Ford Memorial Library, University of Michigan).

30. *See* NRLC Meeting Minutes (Mar. 15–16, 1974), *in* The American Citizens Concerned for Life Papers (Box 8, Gerald Ford Memorial Library, University of Michigan).

31. *See* Resolution 3, *supra* note 17, at 1.

32. *See* Resolution 4 (June 1974), *in* The American Citizens Concerned for Life Papers (Box 8, Gerald Ford Memorial Library, University of Michigan).

33. *See, e.g.*, MENSCH & FREEMAN, *supra* note 1, at 138.

protected only if women were themselves guaranteed better legal and economic opportunities.

Members of the Mecklenburg faction began expressing this view more openly after their formal break with the NRLC. In 1975, when many antiabortion moderates had left the NRLC or had registered their dissent, Frederick Mecklenburg, a leader of the ACCL, issued an indictment of the mainstream antiabortion movement: "On the subject of building walls, if we persist in avoiding and rejecting the help of concerned citizens who may promote sex education or family planning or welfare programs, to support the unwed, we deserve to be left frustrated and angry."[34]

Dr. Mecklenburg laid out one vision of the moderates' philosophy: the only way to protect fetal rights was to "work harder than ever to make abortion unnecessary."[35] One way to achieve this goal concerned women who already had children: "more medical assistance for the unwed mother and her baby, programs to keep pregnant girls in school, and . . . provision for daycare centers and training."[36] A second and equally important set of proposals involved women's rights to prevent pregnancy.[37] In 1974, in her congressional testimony, Marjory Mecklenburg stressed a similar point, arguing that government should "treat pregnant women, wed or unwed, with some dignity and respect their rights" but "not at the expense of . . . children."[38] In short, as Mecklenburg argued, the ACCL took the position that "[a]ll these rights need to be balanced."[39]

Several developments in the mid-1970s allowed the ACCL to promote this vision effectively. The first was the 1976 presidential race. The NRLC had limited its role in the campaign, citing its tax-exempt status in deciding not to endorse or campaign heavily for any candidate, including Ronald Reagan and Ellen McCormack, who both supported a human life amendment.[40] By contrast, Marjory Mecklenburg and the ACCL campaigned for Gerald Ford, petitioning various antia-

34. *See* Mecklenburg, *supra* note 13, at 3.

35. *Id.* at 2.

36. *Id.*

37. *Id.*

38. *Abortion Hearings—Part IV*, *supra* note 8, at 643–53 (arguing for several measures, including publicly funded contraception and "daycare facilities [as] an important alternative to abortion").

39. *Id.* at 644.

40. *See* Judy Klemesrud, *Abortion in the Campaign: Methodist Surgeon Leads the Opposition*, N.Y. TIMES, Mar. 1, 1976, at 28 (explaining NRLC's position on the 1976 election).

bortion organizations for support.[41] She even served as a kind of in-house counsel, advising Ford on how best to approach antiabortion Americans.[42]

After the election, Marjory Mecklenburg and the ACCL found themselves in an equally advantageous position. President Jimmy Carter came into office seeking a compromise solution on abortion. The reasons for this were complex. The passage of Medicaid funding restrictions (commonly known as the Hyde Amendment) in 1976 began a series of battles in Congress about the scope of restrictions on the Medicaid funding of abortion, struggles so intense that Congress found itself repeatedly gridlocked and unable to pass major appropriations legislation.[43] In such an environment, compromise in and of itself was appealing.

Moreover, in his Administration and more generally, Carter hoped to attract and appease both women's-rights supporters and opponents of abortion. The divisions within the Administration in this regard were stark: the head of the Department of Health, Education, and Welfare under Carter, Joseph Califano, was a vocal opponent of abortion rights, while Sarah Weddington, a former leader of NARAL, served as general counsel for the Department of Agriculture.[44] Carter portrayed himself as a religious Christian and, by opposing some forms of abortion rights, hoped to create or maintain support among evangelical Protestants during his first term in office.[45] At the same time, by declaring the celebration of International Women's Year and support for the ERA, Carter hoped to court women in general and feminists in particular.[46]

The compromise settled on by the Carter Administration involved the kinds of legislation long promoted by the ACCL: Carter supported restrictions on the use of Medicaid for abortion while demanding greater funding for sex education and family planning, especially for

41. *See, e.g.*, ROBERT MASON, RICHARD NIXON AND THE QUEST FOR A NEW MAJORITY 230 (2004).

42. *See id.*

43. *See, e.g.*, Marjorie Hunter, *Congress Approves an Abortion Accord*, N.Y. TIMES, Nov. 17, 1979, at 10; James Strong, *Thousands of Workers Face Pay Delay on Abortion Fight*, CHI. TRIB., Oct. 8, 1977, § 1, at 3.

44. For Califano's account of his position, see JOSEPH CALIFANO, GOVERNING AMERICA 64–65 (2007). On the appointment of Weddington, see Douglas Frantz, *Carter Hit on Hiring of Abortion Backer*, CHI. TRIB., Sep. 9, 1978, § 1, at 12..

45. *See, e.g.*, Maxwell Glen, *The Electronic Ministers Listen to the Gospel According to the Candidates*, NAT'L J., Dec. 22, 1979, at 2142, 2145; Gary Willis, '*Born Again' Politics*, N.Y. TIMES MAG., Aug. 1, 1976, at 8–9.

46. *See* CHRISTINA WOLBRECHT, THE POLITICS OF WOMEN'S RIGHTS: PARTIES, POSITIONS, AND CHANGE 43 (2000).

juveniles.[47] The focus on juveniles came because of a series of reports, released by both Planned Parenthood's Guttmacher Institute and by university researchers, highlighting a hike in the rate of pregnancy for unwed white and black teenagers.[48]

In campaigning for and testifying on behalf of the so-called Adolescent Health Services and Pregnancy Prevention Act of 1978, Marjory Mecklenburg made the ACCL the public face of compromise in the debate. Testifying before Congress, she portrayed her organization and its position as the only one that enjoyed popular support. She pointed out that there was popular support for using "tax money to help . . . pregnant women with services," while there was no such support for publicly-funded abortions.[49] She described her position as a politically appealing one, a stance "on which people who differ on the questions of abortion legality or abortion funding should be able to agree."[50]

The passage of the Act was an important victory for antiabortion liberals. Debate about the Act also made Mecklenburg herself more prominent: Carter considered making her a part of his Administration but declined to do so primarily because she was too publicly known as an opponent of abortion.[51]

The ACCL's influence was also apparent in the public response to the Supreme Court's 1976 decision in *General Electric Company v. Gilbert*. In *Gilbert*, the Court had held that the systematic exclusion of pregnancy from disability coverage was not, under Title VII, sex discrimination.[52] In doing so, the Court effectively barred any pregnancy-discrimination claim, since an earlier decision, *Geduldig v. Aiello*, had held that pregnancy discrimination was constitutional under the Equal Protection Clause of the Fourteenth Amendment.[53]

Gilbert almost immediately produced outrage: a coalition of labor and feminist leaders formed an organization designed to undo *Gilbert*

47. On Carter's position, see, for example, *Calls For Sex Education: Abortion No, Family Planning Yes: Califano*, CHI. TRIB., Feb. 22, 1977, § 1, at 6.

48. *See Rising Concern Over Surge in Illegitimacy*, U.S. NEWS & WORLD REP., June 26, 1978, at 59.

49. *Adolescent Health, Services, and Pregnancy Prevention and Care Act of 1978: Hearings on S. 2910 Before the S. Comm. on Human Res.*, 95th Cong. 431 (1978) (statement of Marjory Mecklenburg, President, American Citizens Concerned for Life).

50. *Id.*

51. *See From Reject to Boss*, U.S. NEWS & WORLD REP., Jan. 1, 1981, at 38.

52. *See* Gen. Elec. Co. v. Gilbert, 429 U.S. 125, 138–140, 146 (1976).

53. *See* Geduldig v. Aiello, 417 U.S. 484, 494, 496–97, 496 n.20 (1974).

and its effects.[54] Although not part of that coalition, the ACCL was equally vocal in condemning *Gilbert*. The ACCL suggested that *Gilbert* encouraged abortion and also denied "protection and economic equality to pregnant women."[55] *Gilbert* was also said to violate fetal rights in part because it deprived women of the ability to make important reproductive decisions: faced with the choice of a loss of her job, a woman's willingness to seek abortion could "not be said to be the product of free choice but rather of coercion."[56]

An earlier press release made the point even more clearly. The statement described *Gilbert* as "intolerable to people who value human life and want to protect it."[57] However, as the ACCL put it, the decision was equally offensive because it failed to "protect the right of the woman to give birth without suffering discrimination."[58] As it had in the context of adolescent pregnancy prevention, the ACCL positioned itself as a reasonable antiabortion organization with which a variety of abortion advocacy groups could work.

In the 1970s, some antiabortion groups did find the ACCL's position to be controversial. Other antiabortion groups took the position that many family-planning methods were tantamount to abortion.[59] By 1978, Judie Brown, then-Executive Director of the NRLC, opposed the Carter plan on adolescent pregnancy, arguing that sex education and contraception led to teenage pregnancies instead of preventing them.[60] Nonetheless, in the 1970s, the efforts of the ACCL reflected interest among a significant segment of the antiabortion community in protecting both the rights of women and the rights of fetuses.

FFL charted a similar course in the 1970s. Between 1972 and 1974, new members from forty states joined the organization.[61] By

54. *See, e.g.*, *Feminist Leaders Plan Coalition for Law Aiding Pregnant Women*, N.Y. TIMES, Dec. 15, 1976, at 40.

55. *See* Press Release, ACCL (Apr. 29, 1977), *in* The American Citizens Concerned for Life Papers (Box 17, Gerald Ford Memorial Library, University of Michigan).

56. *Id.*

57. Press Release, Judy Fink, Pro-Life Group Says General Electric Corp. 'Encourages Abortions' in *Gilbert* Case (Mar. 15, 1977), *in* The American Citizens Concerned for Life Papers (Box 17, Gerald Ford Memorial Library, University of Michigan).

58. *See id.*

59. As early as 1973, Nellie Gray, leader of March for Life, took the position that a mandatory human life amendment would have to ban any form of "abortifacient" contraception. *See* Nellie Gray, *A Mandatory "Human Life Amendment"*, (Sept. 24, 1973), *in* The American Citizens Concerned for Life Papers (Box 4, Gerald Ford Memorial Library, University of Michigan).

60. Susan Fraker, *Abortion Under Attack*, NEWSWEEK, June 5, 1978, at 36, 47.

61. *See Abortion—Part III: Hearing on S.J. Res. 199 and S.J. Res. 130 Before the Subcommittee on Constitutional Amendments of the S. Comm. on the* Judiciary 93d Cong. 107 (1974) (statement of Pat Goltz).

contrast to the ACCL, Feminists for Life presented its mission not as an effort to balance the rights of women and fetuses, but rather as an attempt to redeem and fulfill the promise of second-wave feminism. In 1973, in an anthology of antiabortion feminist writings, Goltz attacked antifeminists and abortion opponents who had criticized the Equal Rights Amendment.[62] There, Goltz argued that the Amendment would not expand access to abortion because abortion did not at all promote sex equality.[63]

In 1974, in testifying before Congress, Goltz elaborated on this argument. First, she contended that abortion was not consistent with feminist ideology: "We are demanding an end to class stereotyping for women; we cannot and dare not introduce a new class stereotype based on age, mental and physical condition or degree of unwantedness."[64] Abortion, as Goltz saw it, was a concession that women did not demand "the right to be treated as equals and to be mothers at the same time."[65]

The experience of Goltz and other leaders of FFL in the late 1970s was emblematic of the increasing isolation and rejection encountered by antiabortion moderates in the late 1970s. In the mid-1970s, Goltz almost obsessively chronicled the rejection of pro-life women from feminist groups.[66]

By 1977, the antiabortion movement had done much to isolate Goltz and her supporters. That year, the heads of most mainstream national antiabortion organizations attended an event held by Phyllis Schlafly, the head of the nation's leading anti-feminist and anti-ERA organization. Since 1975, Schlafly had been the key proponent of arguments that the ERA would promote abortion, a claim that Goltz had fought desperately to refute.[67] Yet at an anti-feminist rally in 1977, Goltz watched as virtually every leading mainstream antiabortion woman took the stage and denounced both feminism and the ERA.[68]

The 1981 NRLC Convention made apparent that the antiabortion movement had left groups like FFL and the ACCL behind. Jerry Falwell,

62. *See* Pat Goltz, *Equal Rights*, *in* PRO-LIFE FEMINISM: YESTERDAY AND TODAY 224, 224–27 (Mary Krane Derr et al. eds., Feminism & Nonviolence Studies Ass'n, 2005) (1995).

63. *See id.*

64. *Abortion—Part III*, *supra* note 61, at 108.

65. *Id.*

66. *Id.* at 116.

67. For a study of Schlafly, see generally CRITCHLOW, *supra* note 3.

68. *See, e.g.*, Phyllis Schlafly, *ERA's Assist to Abortion*, THE PHYLLIS SCHLAFLY REPORT (Oct. 1977), *in* The Phyllis Schlafly Report Collection (on file with the Schlesinger Library, Harvard University).

a well-known televangelist, social conservative, and the head of the Moral Majority, had a prominent place at the event.[69] Moderates felt considerably more marginalized. Rosemary Bottcher of FFL stated that, when dealing with the new leadership of the antiabortion movement, her group would have to "hold [their] noses."[70] Part III next considers why activists found themselves sidelined by the end of the decade.

III. MARGINALIZING THE MODERATES, 1975–1980

There were several reasons for the marginalization of antiabortion moderates. One was the increased involvement of antifeminist groups in the abortion debate. The leading antifeminist group in the 1970s, Phyllis Schlafly's STOP ERA, began in 1972, when Schlafly, a former congressional candidate and long-term conservative activist, called a meeting of supporters at the O'Hare Airport Inn.[71] The same year, STOP ERA held its first national meeting in St. Louis, operating thereafter as a loose collection of organizations opposed to the Amendment.[72]

In the early 1970s, STOP ERA differed considerably from groups like FFL and the ACCL. STOP ERA members argued that feminists intended to destroy all the privileges women enjoyed and all of the traits that made women valuable and different from men.[73] By contrast, members of FFL and the ACCL viewed women as victims of discrimination at work, at school, and in abortion clinics.[74] Members of both FFL and the ACCL saw some aspects of the second-wave feminist agenda as valuable, pro-woman, and compatible with opposition to abortion.[75] To be pro-woman, as these groups argued, was to acknowledge that abortion entrenched rather than alleviated discrimination.

These differences were not entirely apparent in 1973–1975, since Schlafly had not yet addressed the relationship between abortion and the ERA. Schlafly had several reasons for ignoring the abortion question. First, most of Schlafly's supporters were evangelical Protestants,

69. *Id.*

70. *Id.*

71. CRITCHLOW, *supra* note 3, at 219.

72. *Id.*

73. *Id.* at 221–23.

74. The ACCL's support for bans on pregnancy discrimination reflected this point of view. *See supra* notes 55, 57, and text accompanying. Feminists for Life, under Pat Goltz, attributed the need for abortion to sex discrimination. *See Abortion—Part III*, *supra* note 61, at 108.

75. *See* Goltz, *supra* note 62, at 224–28 (describing Goltz's support for the ERA); *Abortion Hearings—Part IV*, *supra* note 8 at 647 (presenting the support of the ACCL for publicly-funded daycare).

and in the early 1970s, abortion was viewed as a Catholic issue.[76] Many of Schlafly's supporters might have been expected to oppose Catholicism as much as abortion.[77]

As importantly, the issue of abortion did not as obviously fit in with Schlafly's core argument: that feminists and the ERA would harm traditional homemakers.[78] Over time, it would become clear that Schlafly's core supporters—often young, evangelical women—opposed abortion for the same reasons they opposed the ERA.[79]

In the early 1970s, antiabortion groups were willing to support or at least live with the Amendment for different reasons. Some, like Goltz, supported the ERA.[80] Others believed strongly that the antiabortion movement should focus on only one issue.[81] However, by the mid-1970s, Schlafly and STOP ERA began publicizing abortion-based arguments against the ERA. In 1977, for example, she asserted: "The women's libbers expect ERA to be the constitutional means to assure and make permanent their goal of unlimited abortion on demand."[82] She suggested that the ERA would require the public funding of abortion, teaching and counseling about it in public schools, and the denial of tax exemptions to churches that opposed it.[83] She stressed that "[t]he women's libbers believe[d that] the greatest 'inequality' between men and women" was the fact that "women get pregnant and men do not."[84]

As abortion opponents became convinced that both the ERA and feminism were pro-abortion, groups like the NRLC began to condemn both in equal measure. This shift began to be apparent 1975. Part of this was due to the celebration of International Women's Year (IWY),

76. *See* CRITCHLOW, *supra* note 3, at 220.

77. At least as recently as 1960, anti-Catholic sentiment was believed to have cost John F. Kennedy the Evangelical vote. *See* MARK A. NOLL, RELIGION AND AMERICAN POLITICS: FROM THE COLONIAL PERIOD TO THE 1980S 375 (1990). Evangelical-Catholic relations improved in 1970. *See* RIGHTWARD BOUND: MAKING AMERICA CONSERVATIVE IN THE 1970S 37 (Bruce Shulman & Julian Zelizer eds., 2008). In 1974, even antiabortion activists were worried that abortion was still viewed as a sectarian Catholic issue. *See, e.g.*, Letter from Warren Schaller to the NRLC (Oct. 1974), *in* The American Citizens Concerned for Life Papers (Box 8, Gerald Ford Memorial Library, University of Michigan) ("Last week, Arlie Schardt of the Washington ACLU was stating that [the] NRLC is Catholic dominated . . . This kind of press will be hard to counteract.").

78. Phyllis Schlafly, *The Fraud Called the ERA*, THE PHYLLIS SCHLAFLY REPORT 1 (May 1972), *in* The Phyllis Schlafly Report Collection (on file with the Schlesinger Library, Harvard University).

79. *See* CRITCHLOW, *supra* note 3, at 221.

80. *See* GOLTZ, *supra* note 62, at 224–28.

81. *See* Carol A. Stabile, *The Traffick in Fetuses*, *in* FETAL SUBJECTS, FEMINIST POSITIONS 133, 143 (Lynn M. Morgan & Meredith W. Michaels eds., 1999).

82. *See* Schlafly, *supra* note 68.

83. *Id.*

84. *Id.*

an event scheduled for 1977. The IWY Conference promised to be a major event, attracting a significant media presence, drawing thousands of delegates and protesters, and proposing to offer a definitive political account of "what women wanted."[85] The National Commission on the IWY Conference made clear that the Conference would likely result in an endorsement of reproductive rights and of the ERA.[86] Ray White, the new Executive Director of the NRLC reacted with outrage, urging members to protest Congress's decision to fund IWY.[87]

The effects of IWY on the antiabortion movement were striking. Elizabeth Moore, an antiabortion correspondent, reported that antiabortion delegates had been denied admission to all of the major meetings at the conference.[88] In response, Nellie Gray of March for Life and Mildred Jefferson of the NRLC took a prominent part in a pro-family rally protesting the Conference and the ERA. Jefferson's speech was particularly telling. As late as 1975, Jefferson, a surgeon, had praised and expressed sympathy for women "striving for identity and recognition," arguing simply that abortion was not a solution for women's problems.[89] By 1977, by contrast, she explained to *Ebony* magazine of *Roe* and the women's movement: "We're at odds with everything they represent . . . . There isn't anything they talk about that I can support in any way."[90]

A second reason for the marginalization of pro-life moderates came with the emergence of the New Right and Religious Right in the late 1970s. Although the Religious Right of the 1970s is primarily associated with evangelical Protestantism, the movement attracted conservative Catholics, Mormons, and Jews.[91] The Religious Right also unified a variety of Protestant groups that had previously disagreed on

85. For a contemporary take on the IWY and the proposals emerging from it, see Caroline Bird, *National Commission on the Observance of International Women's Year*, *in* WHAT WOMEN WANT: FROM THE OFFICIAL REPORT TO THE PRESIDENT, THE CONGRESS AND THE PEOPLE OF THE UNITED STATES 43, 60 (1979).

86. *See* DONALD CRITCHLOW, THE CONSERVATIVE ASCENDANCY: HOW THE GOP RIGHT MADE POLITICAL HISTORY 161 (2007).

87. *See* Letter from Ray White to Board of Directors (Dec. 10, 1975), *in* The American Citizens Concerned for Life Papers (Box 8, Gerald Ford Memorial Library, University of Michigan).

88. Elizabeth Moore, *Footnotes from the Nation's Capitol* (1976), *in* The American Citizens Concerned for Life Papers (Box 10, Gerald Ford Memorial Library, University of Michigan).

89. *See* Kathleen Hendrix, *Impassioned Argument for Right to Life*, L.A. TIMES, Sept. 26, 1975, at F1.

90. *See, e.g.*, *A Fighter for the Right to Life*, EBONY MAG., Apr. 1978, at 78, 92.

91. Jerry Falwell, the head of the Moral Majority, a leading Religious Right organization, stressed the diversity of his own organization and of social conservatives more generally. *See* Joel Kotkin, *Ready on the Right: Christian Soldiers Are on the March*, WASH. POST, Aug. 25, 1979, at A10.

issues ranging from abortion to the civil rights movement.[92] Historians point to a number of long- and short-term trends that contributed to the rise of this form of social conservatism: for example, the end of the civil rights movement, the rapid demographic growth of populations naturally attracted to evangelical Christianity, and the migration of a significant number of Americans to states in the Sunbelt.[93]

Members of the Religious Right themselves claimed to have been inspired by important cultural, social, and economic changes that took place in the 1960s and 1970s. A list offered in the promotional materials put out in 1980 by one organization, the Moral Majority, may be representative: the Supreme Court had banned school prayer and had legalized abortion; the women's movement had won influential allies in criticizing some aspects of the traditional family, and gays and lesbians had become more visible and more vocal in demanding equal treatment.[94]

By the mid-to-late 1970s, the Religious Right had become a political force. One influential group, Christian Voice, was founded in 1978 as part of the Heritage Foundation, a conservative think tank.[95] By 1979, the organization had 100,000 members and a governing board that included fourteen members of Congress.[96] Headquartered in Pasadena, California, Christian Voice had raised as much as $3 million for the 1980 presidential campaign by the end of summer 1979.[97]

Described by Falwell as a "coalition capable of steering America away from liberal, humanist, and secular tendencies," the Moral Majority was also quickly establishing its political influence.[98] By December

92. *See* DANIEL K. WILLIAMS, GOD'S OWN PARTY: THE MAKING OF THE CHRISTIAN RIGHT 5–6 (2010). There were also differences of opinion on abortion. For example, as early as 1973, both fundamentalist groups and the National Association of Evangelicals opposed *Roe v. Wade*. By contrast, between 1971 and 1976, the position of the Southern Baptist Conference was that abortion should be permitted when there was evidence of rape, incest, severe fetal deformity, or a "likelihood of damage to the emotional, mental, [or] physical health of the mother." *See id.* at 115–16.

93. On the history and origins of the Christian Right, see, e.g., CLYDE WILCOX & CARIN ROBINSON, ONWARD CHRISTIAN SOLDIERS? THE RELIGIOUS RIGHT IN AMERICAN POLITICS (4th ed. 2011); SARA DIAMOND, NOT BY POLITICS ALONE: THE ENDURING INFLUENCE OF THE CHRISTIAN RIGHT (1998); DARREN DOCHUK, FROM BIBLE BELT TO SUNBELT: PLAIN-FOLK RELIGION, GRASSROOTS POLITICS, AND THE RISE OF EVANGELICAL CONSERVATISM (2011).

94. *See What Is the Moral Majority?*, *in* The Moral Majority General Materials Collection (Record Group 1, Subgroup 1, Series 1, Liberty University); *see also The Moral Majority*, (Aug. 1979), *in* The Moral Majority General Materials Collection, (Record Group 1, Subgroup 1, Series 1, Liberty University).

95. *See* Kotkin, *supra* note 91, at A10.

96. *See id.*

97. *See id.*

98. *Id.*

1979, Falwell was reaching an audience of 2.5 million and was raising $1 million a week in mail contributions.[99]

Founded in 1979 by former Colgate Palmolive salesman Ed McAteer, and James Robison, a thirty-six-year-old Southern Baptist preacher, a third organization, the Religious Roundtable, was focused on encouraging conservative Christians to become politically involved.[100] The group came to include many of the best-known televangelists, including Falwell and Pat Robertson. During the Reagan Administration, when Christian conservatives angrily protested the nomination of Sandra Day O'Connor to the Court, Ronald Reagan's White House was obliged to assuage the concerns of Roundtable members.[101]

Allied with the Religious Right in the later 1970s was another group sympathetic to the antiabortion movement, the nascent "New Right," which began as a tight-knit circle of social conservatives in Washington, D.C. As they described it, leaders of the New Right rose from the ashes of the Watergate scandal: the result of "impatience with the shambles of the Nixon-Ford Administration."[102] One of the orchestrators of this movement was long-time political activist Paul Weyrich, a co-founder of the Heritage Foundation, as well as the Committee for the Survival of a Free Congress (CSFC).[103] Weyrich's organizations provided valuable training and money to fledgling New Right causes: by 1978, the CSFC had raised $400,000 and contributed to the elections of thirty-one members of Congress.[104] While Weyrich provided political strategy for these groups, Richard Viguerie and his direct-mail organization offered lobbying and fundraising services. By March 1977, Viguerie employed a staff of 250 and sent an average of 250 million pieces of mail to over 10 million Americans.[105]

Another potent new potential ally tied to the Religious Right and the New Right was Beverly LaHaye's Concerned Women for America, a group founded in 1979 as an alternative to NOW for women who were

99. Glen, *supra* note 45, at 2142.

100. *See* CRITCHLOW, *supra* note 86, at 130, 175–76.

101. *See, e.g.*, Steven V. Roberts, *Foes of Abortion Meet with Reagan*, N.Y. TIMES, Jan. 23, 1982, at 1.

102. *See* Barry Sussman, *'New Right' in U.S. Politics May Be Only an Expression of Discontent, Not Ideology*, WASH. POST, Mar. 5, 1978, at C3.

103. *Id.*

104. CRITCHLOW, *supra* note 86, at 129.

105. *See id.* at 131.

opposed to abortion and the ERA.[106] In the early 1980s, the CWA became the leading pro-life women's group. Beginning at its first national convention in 1984, the CWA described itself as an alternative to the women's movement, which in turn was framed as "one of the evils besetting America."[107] In the mid-1980s, the CWA argued that feminism did not address the needs of modern women and was, by extension, irrelevant to American politics. As LaHaye stated in 1986: "NOW's ideas are no more popular than the Susan B. Anthony dollar . . . . The feminist coin came out of circulation because nobody liked it. Well, nobody likes their unisex, lesbian, radical philosophy, either."[108] The CWA's message in the period made apparent that there was no room for antiabortion feminists like those in groups like the ACCL or FFL.

The antiabortion movement appeared much more likely to be adequately funded and politically influential if it united with social conservatives. Partly for this reason, antiabortion activists began endorsing a number of conservative reforms largely unrelated to *Roe* itself. For example, by October 1977, the NRLC had passed a resolution describing the organization as a religious one, asserting that the "Right to Life Movement is founded on a belief that God creates life."[109] The same month, the organization passed a resolution condemning the ERA and stating that the true victims of discrimination in the United States were "preborn children who were denied their right to live."[110] As the Religious Right had become more politically savvy, the NRLC had redefined itself as being both more conservative and more religious.

CONCLUSION

Conventionally, *Roe v. Wade* is seen to have marginalized moderates on either side of the abortion debate and, in so doing, to have undone the kinds of state-level compromise that had been unfolding at the state level. Because of the dominance of this polarization narrative, important actors and arguments have largely been lost in contemporary abortion scholarship. Antiabortion moderates were more influential than is conventionally thought, both in the mainstream movement

106. *See* BEVERLY LAHAYE, THE NEW SPIRIT-CONTROLLED WOMAN 6 (2005) (describing the founding of Concerned Women for America).

107. *See CWA Fights for Conservative Causes*, SAN DIEGO UNION TRIB., Sept. 18, 1984, at D1.

108. *See* Beverly LaHaye, *Why Feminism No Longer Sells*, *in* THE HERITAGE LECTURES (Mar. 10, 1987).

109. *See* Resolution (Oct. 7, 1977), *in* The American Citizens Concerned for Life Papers (Box 10, Gerald Ford Memorial Library, University of Michigan).

110. *See id.*

and in separate organizations. Because of the impact of these activists, important compromises remained viable in the years immediately after *Roe*, solutions involving contraception, daycare, or pregnancy discrimination rather than abortion itself. Ultimately, by the early 1980s, these antiabortion moderates were marginalized. However, the reasons these groups lost influence went far beyond the decision of *Roe* itself.

The history of pro-life moderates raises important questions about leading criticisms of *Roe*. Scholars criticize the sweep of *Roe*, the privacy rationale for the opinion, or the Court's interference with an unfolding democratic process in part by pointing to the polarization produced by the opinion. However, at least insofar as antiabortion moderates were concerned, *Roe* did not radicalize discussion. To the extent that the history here offers an example, the history on which *Roe*'s critics rely is problematic.

As importantly, the history considered here adds new depth to important scholarship on women of the Right. The richest studies of this kind tend to focus on women who reject everything associated with the women's movement and the political left. The stories gathered here offer a more complete understanding of what it meant in the 1970s to be "pro-woman and pro-life."

ADULTERY BY DOCTOR: ARTIFICIAL INSEMINATION, 1890–1945

KARA W. SWANSON*

INTRODUCTION

In 1945, doctors and lawyers in the Chicago area planned their first Symposium on Medicolegal Problems. Limiting themselves to six topics, they included artificial insemination as one of the most pressing medicolegal problems of the day.[1] Although abortion had been a dominant medicolegal issue of the second half of the nineteenth century, by the middle of the twentieth century it was techniques of pregnancy initiation, rather than termination, that concerned the two professions.[2] Doctors and lawyers agreed that "there is no subject at this time which is more controversial."[3] The controversy was fueled by increasing popular attention to artificial insemination. Americans read in general interest magazines that medicine offered new hope to childless couples.[4] As Americans learned that hundreds or perhaps thousands of babies had been conceived by this method in the past decade alone,

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1. *Contents, in* SYMPOSIUM ON MEDICOLEGAL PROBLEMS xvii–xviii (Samuel A. Levinson ed., 1948) [hereinafter SYMPOSIUM]. The other five problems discussed were: (1) medical expert witnesses, (2) medicolegal problems arising out of pathology and treatment of dead human bodies, (3) sterilization, (4) trauma and tumors in industrial medicine, and (5) use of laboratory test results as courtroom evidence. Samuel A. Levinson, *Preface, in* SYMPOSIUM, *supra,* at xii-xiii.

2. For the dominant nature of abortion as a medicolegal problem in the nineteenth century, see JAMES C. MOHR, ABORTION IN AMERICA: THE ORIGINS AND EVOLUTION OF NATIONAL POLICY, 1800–1900, at 200–25 (1978). For its subsidence into less controversial status in the first half of the twentieth century, see KRISTEN LUKER, ABORTION AND THE POLITICS OF MOTHERHOOD 40 (1984). By the 1950s, abortion would again become a dominant medicolegal problem. *Id.* at 41; LESLIE J. REAGAN, WHEN ABORTION WAS A CRIME: WOMEN, MEDICINE, AND LAW IN THE UNITED STATES, 1867–1973, at 217 (1997). The relationship between abortion and artificial insemination as medicolegal problems over the course of the twentieth century is the subject of a planned future article.

3. B. Fain Tucker, *Legal Problems of Artificial Insemination*, 33 WOMEN'S L. J. 57, 58 (1947).

4. *See, e.g.,* Marie Beynon Ray, *Fathers Anonymous*, WOMEN'S HOME COMPANION, Jan. 1945, at 20; Greta Palmer, *Plan for Parenthood*, LADIES HOME J., Sept. 1941, at 28.

doctors and lawyers realized that this new hope posed many "delicate questions" for the law.[5] Was assisted conception legal, and who were the lawful parents of these "test-tube babies"?[6]

What bothered lawyers and doctors alike as artificial insemination became more common was that the law offered no direct answers to these delicate questions.[7] The only reported judicial opinion on the subject in the Anglo-American world was a Canadian case from 1921, *Orford v. Orford*.[8] In this alimony proceeding, Mrs. Orford claimed that her child, born while she and her husband had been living on opposite sides of the Atlantic Ocean, was the result of artificial insemination.[9] The judge disagreed, finding the child a product of an extramarital affair, and therefore addressed the legal status of artificial insemination only in dicta.[10] That dicta was troubling, however, as the judge found no legal difference between adultery and insemination using non-husband sperm.[11] Even if he had accepted Mrs. Orford's testimony, she still would have been guilty of adultery, and her child would be illegitimate.

While the number of assisted conceptions was increasing in the 1940s, doctors had been using this technically simple technique of family formation for decades. Artificial insemination is the use of instruments to deposit semen in a woman's reproductive tract, either at the cervix or within the uterus, a technique sometimes described as giving sperm a three-inch boost on a six-inch journey.[12] Also called "instrumental impregnation," this technique can be performed either with semen from a woman's husband or from another donor.[13] Doctors had been practicing artificial insemination both with husband and do-

5. Ray, *supra* note 4, at 20; Palmer, *supra* note 4, at 57.

6. J.P. Greenhill, *Artificial Insemination: Its Medicolegal Implications—Medical Aspects*, *in* SYMPOSIUM, *supra* note 1, at 43.

7. Samuel A. Levinson, *Preface*, *in* SYMPOSIUM, *supra* note 1, at xii ("no law thus far which can be of assistance").

8. Orford v. Orford, [1921] 49 O.L.R. 15.

9. *Id.* at 16–18.

10. *Id.* at 19.

11. *Id.* at 22–23.

12. Alan Frank Guttmacher, *Practical Experience with Artificial Insemination*, 3 J. CONTRACEPTION 74, 75 (Apr. 1938) [hereinafter Guttmacher, *Practical Experience*].

13. During this period, the two variations of artificial insemination were often referred to as "artificial insemination by husband," or "AIH," and "artificial insemination by donor," or "AID." Other terms in use since the nineteenth century include "artificial fertilization," "instrumental insemination," and "artificial fecundation." A brief review of the multiple nomenclature schemes is provided in WILFRED J. FINEGOLD, ARTIFICIAL INSEMINATION 3–4 (1st ed. 1964) and A.M.C.M. SCHELLEN, ARTIFICIAL INSEMINATION IN THE HUMAN 3–6 (M.E. Hollander trans., Elsevier Pub. Co. 1957).

nor semen in the United States since the nineteenth century. The resulting children were sometimes called "test tube babies" or "laboratory babies," reflecting the technical nature of their conception.[14] All such babies were controversial,[15] but it was donor insemination that was the focus of the perceived medicolegal problem of the mid-twentieth century. As the *Orford* court had concluded, donor insemination could be understood as the equivalent of an extramarital affair, adultery by doctor. That a medical technique practiced by reputable doctors could be cast in such a negative light by the law was the crux of the problem.

After 1945, assisted conception emerged onto the American legal scene. Courts in Illinois and New York heard the first United States divorce cases involving children allegedly conceived by artificial insemination.[16] These cases received nationwide newspaper coverage. By the late 1940s, state legislatures began to consider bills to clarify the legal status of such children.[17] This new medicolegal problem, once identified, was not quickly solved. While artificial insemination was the first successful technique of assisted conception, new assisted reproductive technologies have supported the persistence of the problem in American law and society to the present.[18]

The Chicago symposium was so not much an attempt to *resolve* the problem, as an early attempt to *define* the problem. It was a signal

14. *See* sources cited *supra* note 6 and *infra* note 90.

15. HERMANN ROHLEDER, TEST TUBE BABIES: A HISTORY OF THE ARTIFICIAL IMPREGNATION OF HUMAN BEINGS 139–62 (1934) (detailing opposition to any form of artificial insemination based on religion, nature, medical ethics, and morality); MARGARET MARSH & WANDA RONNER, THE EMPTY CRADLE: INFERTILITY IN AMERICA FROM COLONIAL TIMES TO THE PRESENT 163 (1996) [hereinafter MARSH & RONNER, THE EMPTY CRADLE].

16. The cases include Hoch v. Hoch (Ill. 1945) (unreported, but discussed in Ronald S. Jacobs & J. Peter Luedtke, *Social and Legal Aspects of Human Artificial Insemination*, 1965 WISC. L. REV. 859, 875 (1965)); Strnad v. Strnad, 190 Misc. 786, 78 N.Y.S.2d 390 (Sup. Ct. 1948); Doornbos v. Doornbos, 139 N.E.2d 844 (Ill. App. Ct. 1956).

17. Legislative efforts included bills introduced in New York, Minnesota, and Illinois. *See* Thurston A. Shell, *Artificial Insemination—Legal and Related Problems*, 8 UNIV. FLA L. REV. 304, 314 (1955) (describing bills introduced unsuccessfully in six states before 1955, including four attempts in New York between 1948 and 1951); Jacobs & Luedtke, *supra* note 16, at 881–82 n.117.

18. For example, the Leahy-Smith America Invents Act of 2011 (signed Sept. 16, 2011) includes a provision designed to prohibit the patenting of human clones, an anticipated technology of human reproduction. Pub. L. No. 112-29 § 33, 125 Stat. 340. For aspects of the later legal history of artificial insemination, see Kara W. Swanson, *'Adultery by Doctor': Law and the Treatment of Infertility in the 20th-Century United States* (May 1, 2011) (paper presented at the American Association for the History of Medicine, Philadelphia, PA); Gaia Bernstein, *The Socio-Legal Acceptance of New Technologies: A Close Look at Artificial Insemination*, 77 WASH. L. REV. 1035, 1067–98 (2002). This subsequent history is the subject of Kara W. Swanson, *How Americans Learned to Love the Sperm Bank: Artificial Insemination and the Law, 1945–2000* (work in progress) (on file with author).

that the medical profession could no longer confine the discussions about the suitability and effects of artificial insemination to itself. The symposium revealed a wide range of opinions on the subject, from condemnatory characterizations as "adultery in the test tube," to support for the practice as "humanitarian efforts" on behalf of infertile couples.[19] While doctors and lawyers could agree that the practice was controversial, there was no consensus within either law or medicine about artificial insemination. It would take decades to enshrine a consensus about artificial insemination in law and practice.

This Article focuses on artificial insemination during the years in which its status was largely a matter for deliberation by doctors.[20] It traces the transformation of assisted conception from a medical issue of the best treatment for involuntary childlessness to its current status as a problem in American law and society. I argue that donor insemination became a pressing medicolegal problem at mid-century because of three intertwined reasons, all related to use of the technique by doctors. First, by the 1940s, after decades of trial and error, doctors were able to achieve high rates of conception using artificial insemination. Second, because donor insemination often worked as a means of giving a baby to the involuntarily childless, and because in the post-World War II focus on domesticity and parenthood, patients increasingly asked for the procedure, there was a growing number of doctors willing to perform it. Third, because of the first two reasons, there was an increasing number of test tube babies being born, making the legal uncertainty surrounding their origins and status increasingly intolerable.

In examining the history of a medical procedure becoming a legal problem, I am also tracing the development of a medical practice in the face of legal uncertainty and fear of illegality. I argue that doctors modified the way they treated patients in response to perceived social and

19. Greenhill, *supra* note 6, at 53, 56. Note that the conference proceedings were published *in toto* in a volume which included two papers on artificial insemination and the moderated discussion among the attendees on the subject. *See* SYMPOSIUM, *supra* note 1, at 43–87. The artificial insemination papers and discussion were also published in a medical journal at 1 AM. PRACTITIONER 227–41 (1947). The conference volume was widely reviewed in law journals. *See, e.g.*, Book Reviews, 11 GA. B. J. 217–18 (1948); William H. Baker, Book Reviews, 14 MO. L. REV. 131, 132 (1949); Harry L. Kozol, Books Reviewed, 48 COLUM. L. REV. 973, 979–80 (1948); Thomas A. Gonzalez, Book Review, 34 VA. L. REV. 743, 743–44 (1948).

20. The extent to which artificial insemination was unknown to the law and to lawyers in this period is illustrated by a recent history of law and the family, which suggests that the successful use of artificial insemination began in the 1950s—which was when the law took cognizance of the issue. JOANNA L. GROSSMAN & LAWRENCE M. FRIEDMAN, INSIDE THE CASTLE: LAW AND THE FAMILY IN 20th CENTURY AMERICA 286 (2011).

legal condemnation. Further, doctors' persistence in meeting patient demand for fertility treatments despite such condemnation helped create the medicolegal problem of artificial insemination, transforming it from a narrow medical question into a broad social question.

In Part I, I examine the development and use of artificial insemination within medicine in the United States from the late nineteenth century until 1945, explaining its increasing, but limited, acceptance amongst medical professionals, the growing reliance on donor insemination by the 1940s and how the secrecy surrounding this medical treatment shaped both who was able to access it and how it was performed. The changes in medical knowledge and practice in the first decades of the twentieth century helped transform artificial insemination from a curiosity into a medicolegal problem. In Part II, I turn to the identification of this medicolegal problem. Worries about the law surfaced among medical professionals by the 1930s, and I examine the development of these worries, and the varied responses within medicine, including adjustments to medical practice designed to minimize legal problems. Only after doctors had been discussing artificial insemination as a medicolegal problem for about a decade did lawyers and legal scholars begin to consider the issue. In Part III, I trace the legal discourse surrounding artificial insemination in the 1940s and the burgeoning dialogue between law and medicine illustrated by the Chicago symposium. That dialogue revealed a profound rift between supporters and opponents of the practice, setting the stage for the public battles to follow.

I. ARTIFICIAL INSEMINATION AS A MEDICAL TECHNIQUE

A. Test Tube Babies: Artificial Insemination to 1934

In 1934, Americans could buy a copy of a slim volume by German physician Hermann Rohleder titled *Test Tube Babies: A History of the Artificial Impregnation of Human Beings*.[21] First published in German in 1921, Rohleder's book provides a glimpse of the status of artificial insemination in the first decades of the twentieth century. As indicated by his subtitle, even by 1921 this technique was not new, but a medical practice with a long history. Further, according to Rohleder, by 1934 the phrase "test tube babies" was "commonly used" in English-

21. ROHLEDER, *supra* note 15. The German version was published as Hermann Rohleder, *Die künstlich Zeugung (Befruchtung) im Tierreich,* MONOGRAPHIEN ÜBER DIE ZEUGUNG BEIM MENSCHEN, VOL. 7 (1921).

speaking countries to describe the desired results of "artificial impregnation."[22] Artificial insemination of humans had been a topic of discussion and experimentation in the medical community since at least the eighteenth century, and, by 1934, it was entering popular consciousness in the United States, even as it remained controversial among doctors.

1. Developing the Technique, 1799–1934

Involuntary childlessness is an age-old problem, the focus of biblical stories and royal intrigues. There is no way to pinpoint the first attempts to cure this condition or the numerous approaches that women and men have tried. People have been motivated to treat sterility for centuries. By the eighteenth century, the development of a culture of sharing experimental results through circulated publications, fostered by the *Philosophical Transactions of the Royal Society*, established a means of tracing such attempts in the published record. This early scientific literature contained reports of experimentation with artificial insemination in animals, and by 1799, Englishmen were claiming that John Hunter had performed the first successful assisted insemination in a human decades previously.[23] Throughout the nineteenth century, there were numerous published reports in Europe and the United States about the technique, as curious doctors and desperate would-be parents experimented.[24]

By 1866, doctors interested in treating infertility could read a detailed description of the artificial insemination technique used by American physician J. Marion Sims, later considered the "father of gynecology" for his contributions to the treatment of women's reproductive problems.[25] Sims discussed artificial insemination in his book

22. ROHLEDER, *supra* note 15, at xvi.

23. Everard Home, *An Account of the Dissection of an Hermaphrodite Dog*, 89 PHIL. TRANSACTIONS ROYAL SOC'Y 162 (1799). The English claimed that Hunter's efforts predated the Italian Lazaro Spallanzani's publication of results in a dog in 1780, which are often cited as an origin point for artificial insemination research, although there has been considerable discussion in the medical literature of fourteenth century records of artificial insemination in mammals. F.N.L. Poynter, *Hunter, Spallanzani, and the History of Artificial Insemination, in* MED., SCI., AND CULTURE: HIST. ESSAYS IN HONOR OF OWSEI TEMKIN 97, 99–100 (Lloyd G. Stevenson & Robert P. Multhauf eds., 1968). *See also* SCHELLEN, *supra* note 13, at 9–13.

24. There are reports of human artificial insemination performed in France, England, Italy, Germany, and the United States during the nineteenth century. Poynter, *supra* note 23, at 101, 104–05, 109, 112; SCHELLEN, *supra* note 13, at 14–18; ROHLEDER, *supra* note 15, at 42–44.

25. Sims, a member of a wealthy slave-owning family in the antebellum South, controversially honed his expertise in gynecological surgery on slave women. He then moved north and established a women's hospital in New York City and his reported cases of artificial insemination involved free white patients, both charity and private patients. DEBORAH KUHN MCGREGOR, SEXUAL

devoted to uterine surgery, his preferred method of treating female sterility.[26] His focus on women's fertility coincided with a campaign by American doctors to define childbirth as a medical matter for trained obstetricians who sought to replace midwives and other informally educated practitioners.[27] Like the simultaneous movement to criminalize abortion, the nineteenth-century medicalization of childbirth supported the goal of strengthening the weak position of regular physicians by pushing other medical practitioners out of lucrative practice areas.[28] It is not surprising that, having turned their attention to obstetrics, physicians also began to consider involuntary childlessness.

To the new "women's doctors" like Sims who dominated the medical treatment of infertility in the nineteenth century, artificial insemination was a minor technique of secondary importance. Sims focused on correcting perceived flaws in female anatomy, reflecting a belief that childlessness was almost exclusively a female problem.[29] For centuries, the dominant belief had been that any potent man was fertile.[30] Further, sperm was considered by many to be relatively unimportant to conception. There was a long-standing medical belief that sperm merely stimulated the development of a preformed embryo already complete within the ovum.[31] It was not until late in the nineteenth century that there was a medical consensus that sperm played a crucial role in conception and passed hereditary material to the resulting offspring.[32] Sims was an early convert to the position that male sterility

SURGERY AND THE ORIGINS OF GYNECOLOGY: J. MARION SIMS, HIS HOSPITAL, AND HIS PATIENTS 1–2, 257–58, 273–74 (1990); RANDI HUTTER EPSTEIN, GET ME OUT: A HISTORY OF CHILDBIRTH FROM THE GARDEN OF EDEN TO THE SPERM BANK 35–48 (2010). *See also, generally*, J. MARION SIMS, THE STORY OF MY LIFE (reprinted, De Capo Press 1968) (1884).

26. J. MARION SIMS, CLINICAL NOTES ON UTERINE SURGERY: WITH SPECIAL REFERENCE TO THE MANAGEMENT OF THE STERILE CONDITION 369 (1866).

27. RICHARD W. WERTZ & DOROTHY C. WERTZ, LYING-IN: A HISTORY OF CHILDBIRTH IN AMERICA 29–76 (Yale Univ. Press 1989) (1977); JUDITH WALZER LEAVITT, BROUGHT TO BED: CHILDBEARING IN AMERICA, 1750–1950, at 36–63 (1986); Judith Walzer Leavitt, *'Science' Enters the Birthing Room: Obstetrics in America since the Eighteenth Century*, 70 J. AM. HIST. 281, 281–304 (1983).

28. For the role of medical professionalization in the nineteenth century criminalization of abortion, see MOHR, *supra* note 2, at 147–70; Carroll Smith-Rosenberg, *The Abortion Movement and the AMA 1850–1880, in* DISORDERLY CONDUCT: VISIONS OF GENDER IN VICTORIAN AMERICA 217, 217–44 (1985).

29. *See* ROHLEDER, *supra* note 15, at xii–xiv (discussing persistent transnational belief that childlessness was a female problem).

30. ELAINE TYLER MAY, BARREN IN THE PROMISED LAND: CHILDLESS AMERICANS AND THE PURSUIT OF HAPPINESS 43–44 (1995).

31. JOHN FARLEY, GAMETES AND SPORES: IDEAS ABOUT SEXUAL REPRODUCTION, 1750–1914, at 17–20, 29 (1982) (a belief that existed alongside another long-standing but less common belief that placed the preformed homunculus in the sperm).

32. *Id.* at 160.

and impotence were not the same condition, referencing what he called the recent conclusive proof that "sterility in the male does positively exist."[33]

Yet Sims, like his contemporaries, concentrated almost exclusively on curing childless wives, as the cause of any barren marriage. Sims's volume reflected his understanding that sterility was most often caused by malpositions or malformations of the uterus, and that the best treatment was usually uterine surgery. Sims saw a use for artificial insemination only in cases in which the intended father was unable to deposit semen near the cervix of his wife, due to a malformation in the wife that she was too "timid" to allow Sims to correct by surgery.[34] His experiments with artificial insemination were not encouraging. He reported fifty-five attempts to artificially inseminate six women by intrauterine injection of their husband's semen, with only one resulting pregnancy.[35] Given these results, he announced that he was giving up on the practice.[36] Artificial insemination remained a poor step-sister to surgical methods to correct the major perceived source of involuntary childlessness, infertile women.[37]

Despite Sims's poor results, there is evidence that a geographically scattered handful of American practitioners continued to attempt artificial insemination during the next half century.[38] By the first years of the twentieth century, their various reports could be collected and applied. In 1912, Dr. Eliza Mosher, one of the few female gynecologists,[39] reviewed the medical literature on the technique in the *Wom-*

33. SIMS, *supra* note 26, at 364–65.

34. *Id.* at 376.

35. *Id.* at 380.

36. *Id.* at 365.

37. For nineteenth century medical views of and treatments for sterility, see Margarete J. Sandelowski, *Failures of Volition: Female Agency and Infertility in Historical Perspective*, 15 SIGNS: J. OF WOMEN IN CULTURE AND SOCIETY 475, 480–86 (1990).

38. Although there are no known records of such use, it likely that some couples tried do-it-yourself insemination as well. Dr. Edward Bliss Foote published a home medical advice book in 1870 describing artificial insemination and advertised an "impregnating syringe" by mail order for home use. MARSH & RONNER, THE EMPTY CRADLE, *supra* note 15, at 69–70.

39. Obstetrics and gynecology was one of the few areas in which women physicians in early twentieth century tended to specialize, if they specialized at all. (Note that before World War I, most doctors did not consider themselves specialists). Women who did concentrate in that field were not admitted to the national societies until the 1920s, and it was 1970 before the American Gynecological Society admitted its second woman. ELLEN S. MORE, RESTORING THE BALANCE: WOMEN PHYSICIANS AND THE PROFESSION OF MEDICINE, 1850–1995, at 47–49, 55, 96 (1990). While acknowledging the existence of women doctors in this area, including Mosher and Frances Seymour, discussed *infra*, I use the male pronoun to refer to doctors in this Article, reflecting the gender of the vast majority of the doctors discussed.

an's Medical Journal.[40] While she reported that American publications on the subject were sparse, French physicians had more enthusiastically adopted the practice and had published more case studies.[41] Based on her review, Mosher was much more optimistic than Sims. She estimated that doctors achieved success in about fifty percent of cases, albeit often after numerous attempts.[42] Mosher considered artificial insemination both "proper" and "peculiarly adapted to women in medicine," and explained the "technic" she used in her Brooklyn practice in detail.[43]

Artificial insemination in the first years of the twentieth century was not limited to eastern urban specialists. Five years later, Dr. Frank Davis, an Oklahoma practitioner, published a treatise titled *Impotency, Sterility and Artificial Impregnation*.[44] Unlike Sims and Mosher, Davis explicitly linked artificial insemination to eugenic policies, which enjoyed broad support among educated elites in the first decades of the twentieth century.[45] Davis, former superintendent of the Oklahoma State Hospital for the Feeble-Minded,[46] believed that while the "feeble-minded" needed to be confined and cured, superior persons needed to be encouraged to reproduce, and assisted as necessary. Davis, like many of his contemporaries, was concerned about "race suicide," by which he meant the declining birth rate among "Christian countries."[47] In order to correct sterility amongst this deserving population, Davis, like Sims a half-century earlier, advocated the correction of uterine malpositions in women, often by surgery.[48] Undeterred by Sims's poor results, he also performed artificial insemination and taught couples to perform the technique themselves, providing them with the necessary instruments.[49] Through this approach, Davis claimed to relieve "many cases of barrenness."[50]

40. Eliza M. Mosher, *Instrumental Impregnation*, 22 WOMAN'S MED. J. 224, 224–25 (1912).

41. The extent of public discussion of artificial insemination in France and the evident frequency of the practice did not keep it from being controversial. Michael Finn, *Female Sterilization and Artificial Insemination at the French Fin de Siècle*, 18 J. HIST. SEXUALITY 26, 40–42 (2009).

42. Mosher, *supra* note 40, at 224.

43. *Id.* at 223.

44. FRANK P. DAVIS, IMPOTENCY, STERILITY, AND ARTIFICIAL IMPREGNATION (1917).

45. DANIEL KEVLES, IN THE NAME OF EUGENICS: GENETICS AND THE USES OF HUMAN HEREDITY 64 (1985).

46. DAVIS, *supra* note 44, at title page.

47. *Id.* at 8, 76–83.

48. *Id.* at 98.

49. *Id.* at 104–05.

50. *Id.* at 106.

Through publications such as Mosher's article and Davis's book, by the interwar years doctors throughout the United States had access to detailed directions for artificial insemination and reason to believe the technique worked in some cases.[51] There is little question that the focus in treating the involuntarily childless remained on women and that doctors attempted a wide range of techniques to restore female fertility, including surgery.[52] The extent to which doctors or couples performed artificial insemination and the numbers of children resulting are unknowable, but in 1920, the practice was given new prominence and official sanction. Dr. Robert Latou Dickinson, newly-elected president of the American Gynecological Society, used his first presidential address to urge his fellow gynecologists to study and pool their experience with what he called "artificial impregnation."[53] A few months later, Dickinson followed his own advice by presenting a paper discussing his decades of experience with artificial insemination, which he described practicing since the 1880s.[54]

Dickinson advocated a reversal of the traditional surgery-focused approach to infertility, suggesting that if insemination held out "reasonable promise," it should become "the accredited procedure before turning to operation."[55] Based on his experience, he, like Mosher and Davis, provided his colleagues with detailed instructions, complete with diagrams.[56] He suggested using the treatment not only for the wives of impotent men, and for women with uterine malformations, but also for the wives of men whose sperm was "not vigorous," although he lamented that it usually failed in such cases.[57] Dickinson reported five pregnancies in cases of "normal pelvic organs and semen

51. *See also* Victor D. Lespinasse, *Clinic of Victor D. Lespinasse*, 1 INTERNATIONAL CLINICS, Series 28, at 47 (1918) (use of artificial insemination in Chicago practice).

52. The focus on women persisted for several more decades, causing fertility specialists frequently to lament the failure to examine male partners in involuntarily childless couples. *See, e.g.*, Joseph Cohen, *Sterility,* 83 NEW ORLEANS MED. & SURGICAL J. 401, 401 (1930). *See also* MARGARET MARSH & WANDA RONNER, THE FERTILITY DOCTOR: JOHN ROCK AND THE REPRODUCTIVE REVOLUTION 121 (2008) [hereinafter MARSH & RONNER, THE FERTILITY DOCTOR] (Dr. John Rock did not extend his sterility clinic to include men as patients until late 1940s, twenty years after he became director, although the clinic did seek to examine the husband of each female patient); Sandelowski, *supra* note 37, at 489 (female responsibility for sterility).

53. Robert L. Dickinson, *Suggestions for a Program for American Gynecology*, 45 TRANSACTIONS AM. GYNECOLOGICAL SOC'Y 6–7 (1920).

54. Robert L. Dickinson, *Artificial Impregnation: Essays in Tubal Insemination*, 45 TRANSACTIONS AM. GYNECOLOGICAL SOC'Y 141–48 (1920).

55. *Id.* at 141.

56. *Id.* at 144–46.

57. *Id.* at 147.

showing multiple quick travelers."[58] Dickinson's stature and platform helped to transform the ongoing medical discussion from one in which artificial insemination was a curiosity into a discussion of the technique as a modern, scientific practice endorsed by highly trained specialists. After Dickinson's report, other interested doctors were emboldened to join the professional discourse on the subject, which continued in the pages of various professional journals.[59] By 1927, the editors of the *Journal of the American Medical Association*, the publication of the largest professional medical organization, could provide a straightforward answer to an anonymous query from a doctor wishing to know how to perform artificial insemination. The editors recommended that he check the husband's semen for live spermatozoa, and the wife for fertility, and then proceed using the technique as outlined in a simple paragraph.[60] When Dr. John Rock opened a fertility clinic at the Free Hospital for Women in Brookline, Massachusetts,[61] he offered artificial insemination as one possible treatment for his patients through the 1920s.[62]

Still, many doctors remained unconvinced. When Dickinson first presented his results, one audience member described himself as "skeptical."[63] And with some reason. Artificial insemination remained a frustrating technique. The *Journal of the American Medical Association* editors, in their 1927 reply, noted that "[i]nsemination should not be undertaken lightly because the results have not been encouraging," and sometimes required up to fifty attempts.[64] Part of the frustration, not generally discussed before 1920, was the failure of artificial insemination to assist many couples in which the wife was apparently normal and fertile, but the husband's sperm was "not vigorous" or wholly absent.

58. *Id.* at 148.

59. ERNEST HENRY BREUER, ARTIFICIAL INSEMINATION: A SELECTED BIBLIOGRAPHY OF THE MEDICAL, LEGAL, RELIGIOUS AND MORAL ASPECTS OF ARTIFICIAL HUMAN INSEMINATION 18–20 (1948) (cataloging one or more publications per year through the 1920s and 1930s). *See also* FINEGOLD, *supra* note 13, at 7 (listing the new investigators who worked on donor insemination in 1920s and 1930); SCHELLEN, *supra* note 13, at 22 (listing papers published in the 1920s).

60. Queries and Minor Notes, *Artificial Impregnation*, 89 J. AM. MED. ASS'N 1354 (Oct. 15, 1927).

61. MARSH & RONNER, THE FERTILITY DOCTOR, *supra* note 52, at 50–51.

62. Based on review of patient records, 1925–1931, John Rock Papers, Countway Library of Medicine, Harvard University, Box 10. *See also* MARSH & RONNER, THE FERTILITY DOCTOR, *supra* note 52, at 90.

63. *Discussion of the Symposium on Sterility (Papers of Drs. Charles G. Child, Jr. and Robert L. Dickinson)*, 45 TRANSACTIONS AM. GYNECOLOGICAL SOC'Y 149 (1920).

64. Queries and Minor Notes, *Artificial Impregnation, supra* note 60, at 1354.

2. Bringing in the Hired Man

When Dickinson put artificial insemination on the agenda of gynecology in 1920 and revealed his long experience with the practice, he glossed over the use of sperm other than from the patient's husband. As he knew from his own practice, however, some husbands lacked "quick travelers," and if so, a three-inch boost was unavailing. In the first decades of the twentieth century, doctors estimated that anywhere from 12 percent to 70 percent of involuntarily childless marriages were due to male infertility.[65] Male sterility could be congenital, or it could be the result of an earlier infection with mumps or gonorrhea.[66] If doctors were going to "cure" barren wives who were married to sterile men, artificial insemination using sperm from a third party was the only reasonably successful treatment doctors had to offer—the other choice was adoption.[67] Despite the plethora of surgical approaches to female sterility, doctors had virtually nothing effective to offer the sterile male.[68] As one nineteenth-century medical student had reportedly joked, the solution was to bring in the "hired man."[69]

While the medical literature included numerous instructions about performing artificial insemination, it included almost no reference to artificial insemination by donor.[70] By 1920, Dickinson himself had performed donor insemination, but he almost certainly avoided discussing this practice because he knew it would be highly controversial.[71] If some doctors were "skeptical" about artificial insemination in

65. SCHELLEN, *supra* note 13, at 31 (surveying literature). MAX HUHNER, STERILITY IN THE MALE AND FEMALE AND ITS TREATMENT 87 (1913) (59 percent).

66. Cohen, *supra* note 52, at 402 (surveying causes of male sterility); Alfred Koerner, *Male Fertility as Seen in Artificial Insemination*, 56 J. UROLOGY 133, 136 (1946) (describing gonorrhea and mumps as two of the most common causes of sterility among his patients).

67. Abner I. Weisman, *Studies on Human Artificial Insemination*, 2 TRANSACTIONS CONF. ON STERILITY & INFERTILITY 126 (1946) [hereinafter Weisman, *Studies*].

68. Doctors did try a variety of techniques to stimulate the production or improvement of sperm, but with little success. MARSH & RONNER, THE FERTILITY DOCTOR, *supra* note 52, at 135–36.

69. A.D. Hard, *Artificial Impregnation*, 27 MED. WORLD 163 (1909).

70. One exception was the case report of an artificial insemination by donor in G.W. Shidler, *Induced Pregnancy*, 15 W. MED. REV. 644–45 (Nov. 1910) and a suggestion of injecting donor sperm into the seminal vesicles of a sterile man in G.F. Lyston, *Preliminary Note on New and Physiologic Method of Artificial Fertilization*, 75 J. AM. MED. ASS'N 193 (July 17, 1920). Foote's self-help manual also mentioned the possibility. MARSH & RONNER, THE EMPTY CRADLE, *supra* note 15, at 69.

71. Dickinson's student, Dr. Sophia Kleegman, reported that Dickinson had told her he had performed his first donor insemination in 1890. Sophia J. Kleegman, *Practical and Ethical Aspects of Artificial Insemination*, 1 ADVANCES SEX RES. 112, 114 (1963). The official historians of the American Fertility Society would later claim that Dickinson was the second physician ever to perform donor insemination in the United States, after the Philadelphia episode in 1884, discussed *infra*. WALTER E. DUKA & ALAN H. DECHENERY, FROM THE BEGINNING: A HISTORY OF THE AMERICAN FERTILITY SOCIETY 3 (1994).

any form, many were outright hostile to the idea of donor insemination.

This hostility was grounded in broad social suspicion of the practice. Artificial insemination of any sort seemed unnatural and perhaps immoral to many. As early as 1897, the Catholic Church formally opposed any form of artificial impregnation.[72] All aspects of the technique were seldom publicly discussed before 1920, reflecting its uncertain social acceptance. While doctors since Sims were willing to attempt it, and couples from Oklahoma to Brooklyn were willing to use it, artificial insemination remained largely unmentioned. Dickinson, in raising the issue in his presidential address to a prestigious, mainstream medical association, reflected his own willingness to stretch the boundaries of professional discussion with respect to sexuality and reproduction.[73] Introducing a third party between husband and wife through donor insemination was even more suspect. Separating biological and social paternity went against centuries of effort by the Church and the state to establish clear lines of paternity. It also triggered equally ancient anxieties among men in patrilineal societies that they might be deceived by women into claiming another man's child as their own. For these reasons, sexual intercourse between a married woman and a man not her husband was deemed adultery, a crime and a violation of Judeo-Christian religious teachings.[74] Further, adultery was grounds for divorce in most states.[75] While some doctors, including Dickinson, had been willing to try donor insemination since the nineteenth century, mainstream medical opinion was against the practice.

The medical hostility to donor insemination—as well as the history of clandestine attempts to practice the technique—had surfaced in the United States a decade previously. In 1909, a Minnesota doctor wrote the editor of *Medical World* to describe an artificial impregna-

72. GLANVILLE WILLIAMS, THE SANCTITY OF LIFE AND THE CRIMINAL LAW 129 (1966) (revised and expanded from the 15th Annual James S. Carpentier Series, Columbia University School of Law, Apr., 1956); FINEGOLD, *supra* note 13, at 77–79.

73. Dickinson's willingness to take controversial positions was evidenced by his support of the campaign to legalize contraception in the 1920s. Merriley Borell, *Biologists and the Promotion of Birth Control Research, 1918–1939,* 20 J. HIST. BIOLOGY 51, 64–73 (1987). He eventually left medical practice to focus full-time on social reform and education efforts. Sophia Kleegman, *Robert Latou Dickinson, 1861–1950*, 13 MARRIAGE & FAMILY LIVING 39 (1951).

74. Adultery is prohibited in all major world religions, although the conversation in the twentieth century United States about the morality of donor insemination in a religious context focused on the objections of the Catholic Church and some Protestant denominations. FINEGOLD, *supra* note 13, at 76–86.

75. *See* HENDRIK HARTOG, MAN AND WIFE IN AMERICA: A HISTORY 65 (2000).

tion by donor sperm that he had allegedly witnessed in 1884 at the Jefferson Medical College in Philadelphia, and which he believed to be the first successful donor insemination in the United States.[76] The author of the report stated that "the origin of the spermatozoa which generates the ovum is of no more importance than the personality of the finger which pulls the trigger of the gun," reflecting the early nineteenth-century belief about the minimal role of sperm. Many readers disagreed and found his narrative repugnant. The details given portrayed artificial insemination by donor in a particularly unattractive light, as the author described the insemination of the wife while chloroformed, without prior discussion with her or her husband. The donor was one of the students present at the examination. The husband was supposedly later told, but at his request, the wife was left ignorant of the procedure.[77] This publication caused a series of critical letters published in *Medical World*.[78] While public discussion of any sort of artificial insemination, even among medical professionals, lagged behind private use of the technique, subsequent medical reports on artificial insemination through 1934 focused solely on artificial insemination using the husband's sperm. Even after Dickinson provided some professional respectability for open discussions of artificial insemination, donor insemination remained a rarely broached topic.

B. Ghost Fathers and Scientific Babies: Artificial Insemination 1934–1945

Given the reluctance of the medical profession to discuss donor insemination after the *Medical World* controversy, it was left to the popular press to bring the practice into public view, which it did in 1934.[79] When the "test tube baby" burst into public consciousness in the 1930s, it did so in the context of a robust eugenic movement. Since the turn of the century, many social reformers, including Theodore Roosevelt, had joined Frank Davis in worrying about "race suicide,"

76. Hard, *supra* note 69, at 163. Note no supporting documentation of this claimed event, over twenty years past by the time it was reported, has been found. The truth of the account, and any of the details, cannot be confirmed.

77. *Id.*

78. For the six follow-on letters published in *Medical World* after the Hard article, and the controversy within professional medicine, see SCHELLEN, *supra* note 13, at 23 nn.30–35; A.T. Gregoire & Robert C. Mayer, *The Impregnators*, 16 FERTILITY & STERILITY 130, 132–33 (1965); Anne Lockhart Needham, *Artificial Insemination and the Emergence of Medical Authority in Twentieth Century America*, 17–20, 21–22, 24–34 (B.A. thesis, Harvard University 1988). *See also* MAY, *supra* note 30, at 65–69.

79. Note that Rohleder discussed donor insemination in his book, but the volume was intended for a medical audience, and was published as a limited edition. ROHLEDER, *supra* note 15, at 165–68.

and the swamping of the white, Protestant, native-born population by an influx of immigrants from southern and eastern Europe.[80] At the same time, the emerging science of genetics supported the popular movement for eugenic improvement of the United States population.[81] Planned breeding of humans could improve the overall stock, both by discouraging the reproduction of undesirables through forced sterilization programs implemented during this period and by encouraging the scientific selection of mates.[82] In this context, artificial insemination by donor was not just a treatment for childlessness, but also a cure for broader social ills. Dickinson had obliquely referenced this possibility in his address in 1920, describing artificial impregnation as having "enormous potentialities of betterment of the race."[83] "Test tube babies" from donor insemination could be both appropriate and modern in ways that the practice had not been in the nineteenth century, or even in 1909.[84] Without public discussion, Dickinson and other doctors had been creating test tube babies by donor insemination through the 1920s, and in 1934, a broad range of the American public learned about these "laboratory babies." The popular discussion increased demand for donor insemination, and led to increased medical reliance on the technique.

1. Popular Discussions, 1934

The public discussion started in a magazine designed to bring science to the non-specialist, the *Scientific American*. In an article titled "Babies by Scientific Selection," the magazine announced:

> Babies of extra-marital paternity are now being born of women who have sterile husbands, by artificial insemination with the life-giving germ from selected men. This is one of the most significant eugenic developments in the history of man.[85]

The article was based on personal interviews with 200 physicians, located in seven cities across the eastern half of the United States, from

80. Fear of "race suicide" is discussed in MAY, *supra* note 30, at 61–93; KEVLES, *supra* note 45, at 72–76; MARSH & RONNER, THE EMPTY CRADLE, *supra* note 15, at 113–14; and throughout WENDY KLINE, BUILDING A BETTER RACE: GENDER, SEXUALITY, AND EUGENICS FROM THE TURN OF THE CENTURY TO THE BABY BOOM (2001).

81. KEVLES, *supra* note 45, at 69.

82. KEVLES, *supra* note 45, at 93–95, 100 (sterilization programs). *See also* Burke Shartel, *Legal Implications of Operations to Produce Sterility, in* SYMPOSIUM, *supra* note 1, at 140, 140–41.

83. Dickinson, *supra* note 53, at 6.

84. Cynthia R. Daniels & Janet Golden, *Procreative Compounds: Popular Eugenics, Artificial Insemination and the Rise of the American Sperm Banking Industry,* 38 J. SOCIAL HISTORY 5, 6–7, 9–11 (2004).

85. John Harvey Caldwell, *Babies by Scientific Selection*, 150 SCI. AM. 124, 124 (1934).

Chicago to New York.[86] The doctors were asked about the use of donor insemination in their practices. The *Scientific American* reported that at least a quarter of the doctors surveyed had received patient requests for donor insemination by 1934, with the requests increasing in frequency within the last decade.[87] Eighteen of the doctors were willing to state that they had tried donor insemination and nine claimed success. Based on his limited sample, and the extent to which doctors had been willing to discuss the matter with him, the author concluded that 50 to 150 "test tube" babies were being born each year, and that 10–20,000 involuntarily childless couples could benefit from this treatment.[88] Given that "our sterility is increasing" as we become "biologically weaker," the author imagined a future in which a network of "fertility clinics" provided screened sperm donors in each city. Such clinics, while perhaps "first resented," could become "accustomed and tolerated," like other hallmarks of modern eugenics: "the baby show at the county fair; the boy or girl health contests; clinics to teach birth control; and artificial sterilization of the unfit."[89] Anyone could then have "babies by scientific selection."

The *Scientific American* article appeared in March, reaching its limited audience of Americans interested in scientific developments. But in May 1934, artificial insemination and donor insemination were discussed in newspapers and news magazines across the United States. In their morning papers, Americans learned about Mrs. Lillian Lauricella of Long Island, New York and her twin baby girls, the "blessed" results of artificial insemination.[90] The Lauricella family's willingness to go public provided a rare glimpse into this practice. The reporters drew upon the *Scientific American* article, repeating that an estimated 150 "test tube babies" were being born each year in the United States.[91] Mrs. Lauricella's doctor, Frances Seymour, reportedly

86. The cities were Chicago, Milwaukee, Cleveland, Washington, Philadelphia, Newark, and New York (and Brooklyn). *Id.* at 124.

87. *Id.*

88. *Id.* at 124–25.

89. *Id.* at 125.

90. The story was reported, for example, in New York, Chicago, Washington, D.C., Los Angeles, and Billings, Montana, and also in the May 12 issue of Newsweek. *'Synthetic' Babies Born to 12 Mothers*, N.Y. TIMES, May 1, 1934; *13 Babies in N.Y. Have Test Tube as Father*, CHICAGO DAILY TRIBUNE, May 1, 1934; *Parents of 'Test Tube' Twins Reveal Eugenic Baby Practice*, WASH. POST, May 1, 1934; *Laboratory Twins Born to Couple on Long Island*, L.A. TIMES, May 1, 1934; *Birth of 'Test Tube' Twins Reveals 'Lab Baby' Technique*, BILLINGS GAZETTE, May 1, 1934; and *'Ghost' Fathers: Children Provided for the Childless*, NEWSWEEK, May 12, 1934, at 16. *See also* MARSH & RONNER, THE EMPTY CRADLE, *supra* note 15, at 161–63.

91. *'Ghost' Fathers*, *supra* note 90, at 16.

offered the treatment after Mr. Lauricella, a mechanic who rented Seymour a parking space, described the couple's eight years of efforts to have a child. Unlike almost all other physicians who had attempted artificial insemination, Seymour was willing to speak to the press, and described her success in impregnating women in the previous two years.[92]

While the Lauricella babies reportedly were the result of artificial insemination using the husband's sperm, it was the "eugenic babies" that sparked the most interest, that is, those conceived using third party sperm.[93] Seymour was eager to use artificial insemination as a eugenic technique and worked as medical director of the National Research Foundation for the Eugenic Alleviation of Sterility, Inc., an organization devoted to reducing sterility in the "eugenically sound."[94] She disclosed to the press that within the past year she had inseminated two unmarried "prominent businesswomen" who wanted babies, using sperm from men she chose from a local blood donor list.[95] Seymour, as the physician, was the only one who knew the identity of the biological fathers, whom *Newsweek* called "ghost fathers."[96]

The press sought comments from prominent physicians on the "new" technique of artificial insemination. Dr. Morris Fishbein, editor of the *Journal of the American Medical Association*, like other doctors interviewed, explained that the practice was not new, but known.[97] When journalists pressed their medical sources on whether the use of donor sperm to create "eugenic babies" was also "relatively common," the reporters found that "the doctors retreated into professional silence."[98] The *Chicago Tribune* found one local doctor, Dr. Victor Lespinasse, willing to say that he, like Seymour, had arranged donor

92. *'Synthetic' Babies Born, supra* note 90.

93. *Laboratory Twins, supra* note 90 (using phrase "eugenic babies" to refer to babies created with donor sperm). Note that Marsh and Ronner argue that the Lauricella twins were born after donor insemination. MARSH & RONNER, THE EMPTY CRADLE, *supra* note 15, at 163. While that is quite plausible, I have not found any confirmation of this assertion in my review of the newspaper reports. The *Chicago Daily Tribune* and *Los Angeles Times* reported that all Seymour's inseminations were done with husband sperm except her two unmarried patients, and described the Lauricella babies as "truly of their own flesh and blood." *13 Babies In N.Y, supra* note 90; *Laboratory Twins, supra* note 90.

94. *Handbook of Scientific and Technical Societies and Institutions of the United States and Canada*, BULLETIN OF THE NATIONAL RESEARCH COUNCIL, NO. 106, Jan. 1942, at 221.

95. *13 Babies in N.Y, supra* note 90.

96. *'Ghost' Fathers, supra* note 90.

97. *'Test Tube Babies' Began Long Ago, Check Up Shows*, L.A. TIMES, May 2, 1934.

98. *Id.*

insemination for couples.[99] *Newsweek* reported that the Marriage Consultation Center in New York City, staffed by Drs. Hannah and Abraham Stone, would refer couples to doctors who were willing to perform donor insemination if the husband signed a document indicating his consent to this procedure to preserve the "mutual happiness" of the couple and the "well-being" of his wife.[100] Americans who bought the Stones' *Marriage Manual*, first published in 1935, could read about donor insemination in this popular book for couples.[101]

2. By Popular Demand, 1934–1945

Buoyed by this popular discussion, public demand for artificial insemination continued to grow. Persistent patients could find physicians willing to perform artificial insemination. If artificial insemination by husband was not possible or failed, knowledgeable couples requested donor insemination, sometimes called "semi-adoption," as an attractive alternative to traditional adoption.[102] Some persistence might be needed, however, as many doctors continued to find the practice distasteful or unethical. Fewer than 10 percent of the doctors surveyed by the *Scientific American* in 1934 admitted to using donor insemination, and the New York Academy of Medicine had moved quickly to counter the Lauricella story. The following day the Academy issued statements designed to dampen press hype and public enthusiasm, declaring that artificial insemination of any type was not new, was potentially dangerous, and was not very effective.[103] Artificial insemination of any type was not a mainstream medical practice.

In the next decade, however, some doctors worked to distinguish what is now called reproductive medicine as a medical subspecialty, separate from obstetrics, gynecology and urology. This group of doctors concentrating on fertility and sterility formed a nucleus of practitioners willing to include artificial insemination within their arsenal of treatments for the involuntarily childless. A group of such specialists

99. *Id.* Lespinasse had espoused artificial insemination using husband sperm as early as 1918. Lespinasse, *supra* note 51, at 49.

100. *'Ghost' Fathers, supra* note 90. Note that this is the same language used in the Seymour & Koerner informed consent forms, described *infra* in text accompanying note 159.

101. HANNAH M. STONE & ABRAHAM STONE, A MARRIAGE MANUAL: A PRACTICAL GUIDE-BOOK TO SEX AND MARRIAGE 138–39 (1935).

102. *See, e.g.,* William H. Cary, *Experience with Artificial Impregnation in Treating Sterility: Report of 35 Cases*, 114 J. AM. MED. ASS'N 2183, 2183 (June 1, 1940); Grant S. Beardsley, *Artificial Cross Insemination*, 48 W. J. SURGERY, OBSTETRICS & GYNECOLOGY 94, 94 (Feb. 1940).

103. *Doctors Frown on 'Test-Tube Babies' and Criticize Revelations on Them*, ATLANTA CONSTITUTION, May 2, 1934. *See also* MARSH & RONNER, THE EMPTY CRADLE, *supra* note 15, at 166.

founded the American Society for the Study of Sterility ("Society") in 1944,[104] and began to hold annual meetings and publish a medical journal, *Fertility and Sterility*. Even among these doctors, the limited acceptance of donor insemination was evident. A survey taken in 1947 revealed that over 10 percent of Society members refused to perform donor insemination, and while the other 90 percent were not opposed in principle, only about half performed the technique.[105]

Despite the popular enthusiasm of the 1930s, even those specialists who were willing to perform artificial insemination had much to learn in order to make the technique routinely successful. When the Society began meeting in 1944, the exact timing of ovulation, a crucial matter for successful insemination, was still unknown. The state of medical knowledge had improved significantly from the nineteenth century, when the best understanding of ovulation had the timing off by weeks. Yet predicting ovulation in advance remained a "perplexing problem."[106] The viability of sperm also was not well understood—motility and form, it turned out, were only imperfect indicators of fertility. Treatment could drag on, and with the discomfort and embarrassment that the procedure afforded, a significant number of women simply gave up trying, opting to reconcile themselves to childlessness or adoption.

These patient "revolts," as Dickinson called them, were understandable when some practitioners reported using artificial insemination up to seventy times to achieve pregnancy, with the average pregnancy requiring twelve attempts.[107] Seymour along with her husband, Dr. Alfred Koerner, published an article in the *Journal of the American Medical Association* in 1941, detailing the results of a survey that they had taken of 30,000 doctors about artificial insemination. While less than one-quarter responded, more than half the respondents admitted "personal knowledge" of artificial insemination.[108] While Society members may have been much more likely to perform artificial

104. DUKA & DECHENERY, *supra* note 71, at 1–2, 6, 34–35, 43. The Society changed its name to the American Fertility Society in 1965, and then in 1994, to the American Society for Reproductive Medicine. *Id.* at 13, 99–100.

105. Alan F. Guttmacher, John O. Haman & John MacLeod, *The Use of Donors for Artificial Insemination: A Survey of Current Practices*, 1 FERTILITY & STERILITY 264, 266 (1950).

106. Cary, *supra* note 102, at 2184.

107. Dickinson, *supra* note 54, at 147 (describing frequent patient "revolts"). Frances I. Seymour & Alfred Koerner, *Artificial Insemination: Present Status in the United States as Shown by a Recent Survey*, 116 J. AM. MED. ASS'N 2747, 2747 (June 21, 1941) [hereinafter Seymour & Koerner, *Artificial Insemination*].

108. Seymour & Koerner, *Artificial Insemination*, *supra* note 107, at 2747.

insemination often, and to publish in the medical literature on the topic, the survey indicated that significant numbers of doctors beyond the approximately one hundred self-identified fertility specialists were quietly familiar with the practice.[109] Seymour and Koerner found these practitioners in every region of the United States.[110]

Based on the survey evidence, Seymour and Koerner claimed that almost 10,000 babies had been produced to date by artificial insemination, about two-thirds by artificial insemination by husband and about one-third by donor insemination.[111] This estimate, one-hundred times greater than the estimate published in *Scientific American* a few years earlier, was startling even within the medical profession and drew attention from outside medicine.[112] Other practitioners of the technique questioned these results—the reported pregnancy rates seemed much too high to men who had been trying the technique, some, like Dickinson, for over forty years. The estimated total number of artificial insemination children also appeared high, as the previous medical literature had revealed fewer than one thousand births.[113] The technique, however, was becoming more reliable, with practitioners in the 1940s claiming success rates from 50–85 percent.[114] In fact, "bringing in the hired man" through donor insemination was probably the most effective treatment doctors could offer couples in which only the male was infertile.[115] As fertility clinics increased in number during the 1940s, and the emphasis on domesticity and early child-bearing of the

109. Guttmacher et al., *supra* note 105, at 255 (ninety-six members in 1947).

110. Seymour & Koerner, *Artificial Insemination*, *supra* note 107, at 2749.

111. *Id.* at 2747.

112. For the response by lawyers, *see infra* text accompanying note 177.

113. Dickinson publically challenged the survey results as "extraordinary." *Chairman's Remarks*, preceding Alan F. Guttmacher, *IV. A Physician's Credo for Artificial Insemination*, 50 W. J. SURGERY, OBSTETRICS & GYNECOLOGY 357, 358 (1942) [hereinafter Guttmacher, *A Physician's Credo*]. He was joined by another New York doctor, who published attacks on the survey. Clair E. Folsome, *The Status of Artificial Insemination: A Critical Review*, 45 AM. J. OBSTETRICS & GYNECOLOGY 915, 916–17 (1943) [hereinafter Folsome, *Artificial Insemination*]; Clair E. Folsome, *Reply*, 47 AM. J. OBSTETRICS & GYNECOLOGY 726, 726–27 (1944).

114. *See, e.g.*, Alan F. Guttmacher, *The Role of Artificial Insemination in the Treatment of Sterility*, 120 J. AM. MED. ASS'N 442, 443 (Oct. 10, 1942) [hereinafter Guttmacher, *The Role of Artificial Insemination*] (65 percent success rate for artificial insemination attempts, combining his data with that of Cary). By 1950, other practitioners agreed, using a literature survey to claim a 50–60 percent success rate for 3–6 treatments per month over 2–4 months. Guttmacher et al., *supra* note 105, at 270. Reviewing his own experiences from 1937 to 1942, Weisman reported a success rate of over 85 percent and believed that 100 percent of fertile women could become pregnant using donor insemination. Weisman, *Studies*, *supra* note 67, at 127. As discussed *infra*, there are also indications that many doctors engaged in artificial insemination without ever publishing their results, making it possible that the published cases represented only a small fraction of such children, and thus that Seymour and Koerner's numbers were credible.

115. Guttmacher et al., *supra* note 105, at 266.

baby boom years increased the willingness of Americans to seek medical help for involuntary childlessness,[116] both popular demand for and the number of practitioners of artificial insemination continued to increase. The uncertain social status of artificial insemination did not prevent doctors from continuing to use the technique. It did, however, influence the way doctors discussed the treatment with patients and performed the treatment.

C. Access and Practice in the Shadows

Whether there were 10,000 "test tube babies" growing up in the United States by 1941 can never be ascertained because artificial insemination, both by husband and by donor, remained a clandestine practice. The way doctors practiced artificial insemination, the strictures placed on patients, and patient access to the treatment were all shaped by fear of social opprobrium.

Even doctors willing to perform the technique and to publish case studies firmly believed that no one other than the doctor, the patient, and the patient's husband should know that the procedure had occurred if donor sperm were used. The emphasis on secrecy was primarily motivated by the desire to protect the newly-formed family from emotional harm—not just the female patient, but also her husband and the resulting child. Seymour and Koerner, despite their public advocacy of donor insemination, believed that any revelation of the unusual origins of a donor child would present a "great danger."[117] Most doctors who published on the topic assumed that society at large would be so condemnatory that the artificially-formed family would be the subject of hurtful gossip. As one critical doctor described the risks of disclosure:

> [T]he woman, made pregnant by donor insemination, who even whispers out of turn, on a single occasion, becomes a medical curiosity. She is envied by the primitive and wanton-minded, pitied by those gifted with easy fertility, shunned by her relatives and perhaps unfortunately by her own child.[118]

Gossip might label her an adulterer, as her community might refuse to believe the story of assisted conception or consider it no better than adultery. Disclosure risked damaging the pride of her husband,

116. MAY, *supra* note 30, at 140–41, 147–48; MARSH & RONNER, THE EMPTY CRADLE, *supra* note 15, at 187–89.

117. Frances E. Seymour & Alfred Koerner, *Medicolegal Aspect of Artificial Insemination,* 107 J. AM. MED. ASS'N 1531, 1533 (Nov. 7, 1936) [hereinafter Seymour & Koerner, *Medicolegal Aspect*].

118. Folsome, *Artificial Insemination*, *supra* note 113, at 923–24.

whose sterility would thus be publicized. Because of the tight link in the public mind between male fertility and potency, the knowledge of his infertility would impugn his masculinity. It almost certainly would damage the child's psyche as well. According to Seymour and Koerner, if a donor child were to learn of her origins, "[a]n inferiority complex would be set up with a root that psychoanalysis could not destroy and the child's maladjustment to society would result."[119] Donor insemination was a secret that needed to be kept for the lifetime of the child.

This perceived need for long-lasting secrecy shaped the ways doctors practiced donor insemination. The subterfuge began with the selection of a donor. First, the would-be parents were kept completely ignorant of the identity of the donor. The selection was for the doctor alone.[120] The choice of the male biological parent was made into a matter of medical expertise, unsuitable for lay participation. Further, doctors exercised their expertise in a particular way. Rather than selecting the best available donor based on the contemporary criteria for the fittest baby, they usually sought to create the illusion of paternity by the husband.[121] As a "treatment" for infertility, donor insemination should produce, not just a healthy baby, but a baby that appeared to be the result of marital sexual relations. The husband's infertility was not so much cured, as masked by a "ghost father," who was ghostly because he never fully materialized, and was supposed to fade away as soon as conception occurred. As one practitioner rather dramatically explained it, "the donor must always remain the *forgotten man."*[122] To maintain the illusion, doctors sought donors whose hair, eye color, skin color and ethnic ancestry matched that of the would-be father, and sometimes sought blood type compatibility as well.[123] Given the un-

119. Seymour & Koerner, *Medicolegal Aspect*, *supra* note 117, at 1533.

120. Abner I. Weisman, *Selection of Donors for Use in Artificial Insemination,* 50 W. J. SURGERY, OBSTETRICS & GYNECOLOGY 142, 142 (1942) [hereinafter Weisman, *Selection of Donors*].

121. Note that this aspect of donor selection was not necessarily incompatible with eugenic goals, particularly for doctors who reserved artificial insemination for "fit" couples. *See infra* text accompanying notes 129–133 and Daniels & Golden, *supra* note 84, at 9–10.

122. Beardsley, *supra* note 102, at 96 (emphasis in original).

123. *See, e.g.,* R.T. Seashore, *Artificial Impregnation,* 21 MINN. MED. 641, 643 (1938); Cary, *supra* note 102, at 2184; Beardsley, *supra* note 102, at 96; S. Leon Israel, *The Scope of Artificial Insemination in the Barren Marriage*, 202 AM. J. MED. SCI. 92, 96 (1941); ABNER I. WEISMAN, SPERMATOZOA AND STERILITY: A CLINICAL MANUAL 172 (1941) [hereinafter WEISMAN, SPERMATOZOA]; Weisman, *Selection of Donors, supra* note 120, at 143–44 (1942); Guttmacher, *The Role of Artificial Insemination, supra* note 114, at 443. During this same period, the use of blood typing to determine the paternity of a child in divorce proceedings was just being accepted by the courts. *See, e.g.*, Schultz v. Schultz, 35 N.Y. Supp. 2d 218 (Sup. Ct 1942), as discussed in Augustin Derby, *Family Relations and Persons*, 1942 ANN. SURVEY AM. L. 772, 773 (1942). For the eugenic aspects of donor selection, *see* Daniels & Golden, *supra* note 84, at 9–11.

derstanding of race and genetics of the time, doctors also unquestioningly sought to match the father's race and religion. The goal was a baby who would elicit the life-long response: "s/he looks just like his father."[124] No one should suspect any "extramarital paternity."

While trusting their doctor to do his part to keep the secret through appropriate donor selection, patients had their own obligations. Doctors told their patients not to mention their treatment to friends, family, or the resulting child. To even admit seeking donor insemination would put the family at psychological risk.[125] For a woman who visited a doctor's office two to five times a month for inseminations around her predicted date of ovulation, and went back for treatments for months stretching into years, this prohibition must have been a serious burden. One practitioner even urged the couple not to discuss the matter with each other or their doctor: "after conception nothing should be said about it in order that the couple may more readily forget the artificial character of the conception."[126]

Because of their understanding of the need to keep donor insemination a life-long secret, practitioners deliberately made the treatment not only clandestine, but also exclusive. Having found a doctor who performed donor insemination, a couple needed to persuade him or her that they were appropriate candidates. Male sterility and female fertility were not sufficient. What else was required varied by doctor. Rohleder indicated that he supported donor insemination only in "desperate, exceptional cases, and to avoid greater disaster."[127] By disaster, he meant the situation in which "sterility had engendered grave psychic disturbances and dangerous depressive states which threatened to become severe and incurable psychoses, or to eventuate in suicide, or at least divorce."[128] Dr. Alan Guttmacher, an early artificial insemination advocate and Society member, while not painting such a dire picture, felt that "it is a technique which should be restricted to the deserving, exceptional couple," who have been able to convince their physician that they were emotionally stable and in a permanent marriage.[129] Guttmacher wanted to ensure that the couple could keep their

124. Beardsley, *supra* note 102, at 95.

125. Seashore, *supra* note 123, at 643 ("for the good of the child, he should be kept in ignorance of the affair").

126. *Id.*

127. ROHLEDER, *supra* note 15, at 170.

128. *Id.*

129. Guttmacher, *Practical Experience*, *supra* note 12, at 75–76.

secret, and that their marriage would not collapse when confronted daily with a "semi-adopted" child.

Before World War II, many practitioners were also explicit about eugenic goals, joining Davis in his program of helping the right sort of Americans to produce and rear the right sort of children. Guttmacher looked for the "exceptional couple." A Minnesota doctor suggested in 1938 that "we should use this procedure to practice good eugenics, and encourage the procedure only in those who are apt to improve society."[130] An Oregon doctor, who had been in communication with Frances Seymour on the subject, agreed that eugenic principles were appropriate, and considered the treatable couple one of "high moral and intellectual type, and financially able to give the child the educational advantages demanded of the social station."[131] Seymour evidently went even further, requiring "a minimum I.Q. of 120 in all receptive mothers, and . . . [requiring] prospective parents [to] take out an educational insurance policy" to ensure that their eugenic child was appropriate educated.[132] Using various selection criteria, some practitioners rejected as many as 50 percent of their patients who requested the procedure.[133]

Other doctors were not so particular, and indeed, regarded it as their professional duty to perform either donor insemination or husband insemination for patients who insisted, even when the doctor felt the procedure was not advisable.[134] If patients in the New York City region were not intelligent or wealthy enough to meet Seymour's criteria, they might meet with success at the public Sterility Clinic of the New York Hospital, where at least one patient unable to afford private treatment was successfully inseminated.[135] Still, access to the technique required persistence, and must have depended on luck and geography, as well as race and class. Even doctors who were not explicit about eugenic goals would have found it easiest to identify as deserving couples those who were white, native-born, well-educated and middle class.

130. Seashore, *supra* note 123, at 641.

131. Beardsley, *supra* note 102, at 95.

132. *Id.* (citing personal communication with Seymour).

133. Weisman, *Studies, supra* note 67, at 126 (reporting on cases from 1937 to 1942).

134. William Cary, although stating that he never recommended donor insemination, described cases in which he performed the technique against his better judgment, when he was concerned about the patient's mental or physical unsuitability. Cary, *supra* note 102, at 2185–86.

135. *Id.* at 2183. Note that John Rock in his Brookline clinic also offered a similar range of fertility treatments to poor charity cases as to his better-off private patients. MARSH & RONNER, THE EMPTY CRADLE, *supra* note 15, at 191.

By 1945, there was a nation-wide, albeit unpublicized and loosely connected, network of doctors who would attempt artificial insemination by husband and by donor, to aid childless couples. These doctors and their patients had a reasonable expectation of success, and each success reinforced the practice and the demand. While the technique was accepted enough to be the subject of published case studies and medical meetings,[136] the majority of doctors who practiced artificial insemination worked without any public admission of their participation in assisted conception, keeping their involvement quiet even as they urged secrecy on their patients. One result of the persistence of doctors in the face of uncertain social acceptance was that doctors established themselves as gatekeepers, with sole authority to select donors and patients. This role was closely analogous to the role doctors had assigned themselves in pregnancy termination by this period. Abortion had been criminalized in the second half of the nineteenth century at the urging of professional medical associations. Most state criminalization statutes provided exceptions for "therapeutic" abortions, and it was doctors who controlled who could receive such a safe and legal procedure.[137] Similarly, as they developed a successful technique of assisted conception, doctors assumed the power to choose who might access this novel means of parenthood. The gatekeeper role in conception must have seemed natural and familiar to mid-century doctors, as yet another way they used medical expertise to exert control over female reproduction. Even as he was advocating for careful selection of couples for donor insemination, Guttmacher was considering the question of abortion access, and by the 1950s, was a leader in a movement to use formal boards to determine eligibility for therapeutic abortion.[138] Doctors like Guttmacher exercised professional judgment when deciding whether to give anxious, even desperate, women the help they sought to control their parental status, seeing the doctor's role as supporting the emotional and mental stability of women, whether the issue was involuntary childlessness or an unwanted pregnancy.

136. *See, e.g., supra* notes 102 and 113.

137. REAGAN, *supra* note 2, at 5, 61–70; MOHR, *supra* note 2, at 147–70. Therapeutic abortions were usually defined as those necessary to preserve the health or life of the mother.

138. REAGAN, *supra* note 2 at 233.

II. MEDICAL WORRIES ABOUT LEGAL UNCERTAINTY

The parallel between medical control of artificial insemination and of safe, legal abortion is limited. The procedures differed in their legal status, as well as in other factors.[139] Unlike it had been earlier, and would be again by the late 1950s, pregnancy termination was not a medicolegal problem for doctors at this time. Abortion was clearly criminalized, yet the therapeutic exception to the abortion laws existed explicitly in nearly every state. Reputable doctors were rarely convicted of a crime for performing abortions as the abortions they performed were considered almost per se therapeutic, while legal crackdowns on non-mainstream practitioners varied by location and time.[140] Doctors and lawyers alike were largely satisfied with this state of affairs. Artificial insemination, however, was not only of questionable social acceptance, but had a very uncertain legal position. This uncertainty gave rise to worries about the gatekeeping role doctors were assuming. The combination of increased medical success with artificial insemination, growing, although limited, medical enthusiasm for the technique, and popular demand transformed this aspect of reproductive medicine not only into an accepted technique but also into a medicolegal problem by the 1940s.

A. Identifying Legal Problems

Once artificial insemination became a matter of discussion within the medical profession, rather than a topic too controversial to be addressed even in professional medical meetings, American doctors began to consider its legal implications. By the 1930s, they were already conscious of the risk of medical malpractice claims,[141] as well as accustomed to the idea that certain reproductive choices could be foreclosed by the law. Not only were most abortions illegal, but providing contraceptives to patients was illegal in some states.[142] As the medical com-

139. While the legal status of the procedures is of most relevance to this discussion, the options and health consequences to women denied access to the two procedures also differed. While doctors and patients often described the involuntarily childless as distraught and desperate, denial of access to artificial insemination did not involve life-threatening choices comparable to those among childbirth, safe abortion, or potentially unsafe self-abortion or criminal abortion.

140. REAGAN, *supra* note 2, at 116–18.

141. NEAL C. HOGAN, UNHEALED WOUNDS: MEDICAL MALPRACTICE IN THE TWENTIETH CENTURY 33 (2003).

142. *See* DAVID J. GARROW, LIBERTY AND SEXUALITY: THE RIGHT TO PRIVACY AND THE MAKING OF ROE V. WADE 10–15 (1994) (beginnings of advocacy campaign to legalize medically supervised birth control).

munity began to discuss the legal ramifications of artificial insemination, the general consensus was that artificial insemination using the husband's sperm did not pose any legal problems, even if it remained socially questionable and subject to religious condemnation.[143] Donor insemination, on the other hand, appeared to be a legal minefield. The medicolegal problem of artificial insemination was more accurately the problem of artificial insemination by donor.

Doctors developed a list of worries about donor insemination that they discussed in the medical literature of the 1930s and 1940s, often tucking a paragraph or two about legal concerns into an article focused on their technique of and results from artificial insemination.[144] The frequent reiteration of these concerns indicates that practitioners were constantly aware of the legal uncertainty. Some concerns were those familiar to obstetricians from a general medical malpractice perspective: What was the doctor's responsibility for the health of the resulting child? If he selected the donor, could he be sued for malpractice if the child was defective or undesirable in some way? What if a doctor told a couple the husband was sterile, and then, after successful donor insemination, the wife later bore a child without medical intervention?

These were questions to be answered by the applicable "standard of care," the age-old measuring stick for malpractice claims.[145] With respect to these questions, the uncertainty was largely what the standard of care for this procedure might be. This uncertainty began to dissipate by the early 1940s, as a standard of care was formulated through the medical literature. In articles, doctors discussed best practices for donor insemination, including donor selection guidelines and the recommended pre-insemination sterility work-ups of husband and wife, and the articles by individual practitioners were followed by discussion in standard treatises, reviewing and synthesizing the literature.[146]

Other questions were new, specific to assisted conception itself. The *Orford* court had concluded that the "essence of adultery" was the "surrendering [of the] reproductive capacity" of a wife "to another

143. Folsome, *Artificial Insemination, supra* note 113, at 922; FINEGOLD, *supra* note 13, at 77–80.

144. *See, e.g.*, Beardsley, *supra* note 102, at 97-98; WEISMAN, SPERMATOZOA, *supra* note 123, at 179–82; Folsome, *Artificial Insemination, supra* note 113, at 923.

145. HOGAN, *supra* note 141, at xii–xiii; KENNETH A. DEVILLE, MEDICAL MALPRACTICE IN NINETEENTH-CENTURY AMERICA: ORIGINS AND LEGACY 206 (2003) (use of standard throughout the nineteenth century).

146. *See, e.g.,* SAMUEL L. SIEGLER, FERTILITY IN THE FEMALE: CAUSES, DIAGNOSIS AND TREATMENT OF IMPAIRED FERTILITY 401–12 (1944).

man," "introducing a false strain of blood" into the family.[147] If this analysis was correct, then the married mother of a donor child was guilty of adultery, and perhaps the donor was as well. Maybe it was the doctor who committed adultery, as he injected the sperm. If he was not a direct party to adultery, perhaps the doctor's involvement might fit under the legal definition of conspiracy to commit a crime.

Such arguments appeared a bit farfetched to many doctors. After all, adultery was almost never criminally prosecuted in the United States, although laws against it remained on the books in many states.[148] And despite the dicta of the Canadian court, "adultery by test tube" seemed like a distortion of the law.[149] Many state adultery statutes focused on fornication and had been interpreted by courts such that extramarital sexual behavior other than intercourse was not adultery.[150] Further, doctors argued that extramarital sexual intercourse while using contraception was still adultery, so that the Canadian judge had clearly gotten it wrong—the essence of adultery was not reproduction but fornication.[151]

Perhaps the most troubling and unanswerable set of legal concerns surrounded the family law implications of a third party intervention in conception. It was simply not clear that by merely acting as if a donor child was their natural child, a couple could make that child legitimate at law. While there was a strong legal presumption that any child born to a married woman was legitimate, the presumption was rebuttable by proof of her husband's sterility.[152] In the event of divorce or death, such a child, if illegitimate, would be ineligible for support or inheritance from its supposed father.[153] In families with significant wealth, other relatives might have a strong incentive to use the child's artificial origins to argue for disinheritance.

Even more disturbing to doctors who believed they were fostering marital harmony by providing a donor child was the fact that at law, a

147. Orford v. Orford, [1921] 49 O.L.R. 15, 22.

148. Jeremy D. Weinstein, *Adultery, Law and the State: A History,* 38 HASTINGS L. J. 195, 225–26 (1986).

149. Beardsley, *supra* note 102, at 94.

150. *See, e.g.,* Note, *Legal and Social Implications of Artificial Insemination*, 34 IOWA L. REV. 658, 664 (1948–49) (discussing Iowa law of adultery); Tucker, *supra* note 3, at 62 (Illinois law of adultery).

151. Alan F. Guttmacher, *The Legitimacy of Artificial Insemination*, 11 HUMAN FERTILITY 16, 17 (1946) [hereinafter Guttmacher, *Legitimacy*].

152. Derby, *supra* note 123, at 773, 784; Susan Frelich Appleton, *Presuming Women: Revisiting the Presumption of Legitimacy in the Same-Sex Couples Era*, 86 B.U. L. REV. 227, 231–33 (2006).

153. An illegitimate child might also be barred from collecting in a wrongful death action. *See* Derby, *supra* note 123, at 778. *See also* GROSSMAN & FRIEDMAN, *supra* note 20, at 287–88.

child born to the wife of a sterile man was clear evidence of adultery, and adultery was grounds for divorce. As Mrs. Orford found in 1921, courts and others were disinclined to believe tales of donor insemination when adultery seemed so much more likely. In the event that a marriage collapsed after a donor insemination, the husband might deny any knowledge of the secret insemination and accuse his wife of adultery, a strategy to obtain a divorce and avoid support obligations.[154] The very secrecy that doctors practiced in order to protect the child from emotional harm might prove to be a legal obstacle, preventing mothers from proving non-adulterous origins, with devastating financial consequences.

Although their primary legal concern was the fate of the family they were creating, doctors also worried about potential legal exposure of the donors they recruited for this procedure. A donor might be named as a respondent in a divorce or sued for parental support. The child might seek a share of the donor's estate. The donor's wife, if he were married, might accuse him of adultery for fathering an extramarital child, as grounds for divorce. Or the donor might cause legal problems for the inseminating physician, later accusing the doctor of using his semen without his consent.[155]

The possible disasters seemed endless. Physicians contemplated not only lawsuits, but also the possibility that they were creating situations in which one party might blackmail another. The legal uncertainty surrounding the status of the child, in addition to the emotional reasons for keeping his or her origins secret, made the social parents vulnerable to blackmail by the donor, if he should know the child was his. Conversely, if the donor did not want it known that he had fathered an extramarital child, he was vulnerable to blackmail by the social parents.[156] In addition to worries about blackmail, doctors feared a transfer of affection of the wife to the donor. For this reason, doctors cautioned against using a family member, such as the husband's brother, as the donor.[157] To preclude all varieties of unpleasantness, the doctors again emphasized secrecy as an absolute requirement of donor

154. In subsequent decades, the status of donor insemination children was adjudicated most often in divorce cases, involving questions of support and custody. *See, e.g.,* Strnad v. Strnad, 190 Misc. 786, 78 N.Y.S.2d 390 (Sup. Ct. 1948); Doornbos v. Doornbos, 139 N.E.2d 844 (Ill. App. Ct. 1956); Gursky v. Gursky, 39 Misc. 2d 1083, 242 N.Y.S. 2d 406 (Sup. Ct. 1963).

155. WEISMAN, SPERMATOZOA, *supra* note 123, at 179.

156. Seymour & Koerner, *Medicolegal Aspect*, *supra* note 117, at 1533 (worries about blackmail).

157. Weisman, *Selection of Donors*, *supra* note 120, at 142–43; Seymour & Koerner, *Medicolegal Aspect*, *supra* note 117, at 1533.

insemination. Not only should the parents never mention the treatment, but they should have no opportunity to learn the identity of the donor, or vice versa. The medicalization of donor selection was not just a matter of medical authority, but an attempt to avoid legal complications.

B. Contemplating Solutions

Almost as soon as these legal worries began to surface in the medical literature, doctors began to propose solutions. Despite the perceived legal complexity, the doctors who were most prominent in advocating donor insemination also advocated for its legality. Even before Seymour and Koerner published their survey of artificial insemination practices, they published an article in 1936 in the *Journal of the American Medical Association* ("*JAMA*"), which focused on the medicolegal aspects of the technique. Koerner was a lawyer as well as a doctor and brought his legal expertise to bear to assure the medical community that the procedure could result in legitimate children if properly conducted.[158]

Their analysis depended on written consent forms and good recordkeeping. Both the husband and wife should sign forms detailing their consent to donor insemination. Seymour and Koerner recommended having the signatures notarized, as well as obtaining fingerprints, if the couple was unknown to the inseminating physician. These measures to prove the identity of the signatories were designed to preclude a woman from bringing an accommodating male friend, pretending to be her husband, in order to gain access to the technique without her husband's consent.[159] Seymour and Koerner argued that, provided the husband's consent was genuine, these signed papers, kept by the doctor, would allow the wife to defend herself in the event her husband accused her of adultery. By including a release from liability, the forms might also protect the doctor against malpractice claims in the event of an unsatisfactory child.

Seymour and Koerner also advocated consent forms for the donor and his wife. While the authors preferred married donors, as a protection against "promiscuity" (by which they probably meant sexually transmitted diseases), they also thought that the written consent of the donor's wife was "essential" to prevent the later collapse of that mar-

158. Seymour & Koerner, *Medicolegal Aspect*, *supra* note 117, at 1532.
159. *Id.* at 1531–32.

riage on the grounds of adultery by the husband.[160] The physician was responsible for keeping the executed forms in a safe place, and, given the long timescale of possible problems, providing for their custody and access after the physician's death, perhaps through the physician's attorney.[161] Seymour and Koerner included their model consent forms in their article, and the forms were then reprinted in the medical literature and espoused by other practitioners.[162]

In addition to the forms, Seymour and Koerner discussed their techniques for keeping donors and patients in mutual ignorance. They described how they required the donor to "deliver his specimen at a different address or apartment or at a different time than the arrival of the patient."[163] Finally, Seymour and Koerner also suggested that the delivering obstetrician should never be the inseminating doctor, so that the obstetrician could in good faith put the husband's name on the birth certificate as the father and "give that child a document irreproachable in the eyes of the law."[164] This recommended procedure for a legally binding donor insemination thus involved a large cast of consenting characters: husband, wife, inseminating doctor, donor, and donor's wife. All five had to agree on the production of the sixth, the hoped-for child, and then rely on the uninformed help of the inseminating doctor's attorney and the delivering obstetrician. Secrecy was the first defense, and should that fail, the carefully safeguarded papers could be produced to show the intent of all the parties.

Seymour and Koerner's advocacy of formal consents failed to quell medical worries. Despite their arguments, in 1939, *JAMA* published a much more negative assessment of the legal problems with artificial insemination in an unsigned editorial. *JAMA* opined that offspring resulting from donor insemination were illegitimate, regardless of intent or consent forms. According to *JAMA*, there was no way that a child could be the legitimate offspring of a man who knew he was not the father of that child, whether that child was the result of an adulterous liaison by the wife, or of a procedure in a doctor's office. The only possible solution was formal adoption by the intended father.[165] The in-

160. *Id.* at 1533.

161. According to Beardsley, Seymour & Koerner kept two copies, each in a separate safe deposit box. Beardsley, *supra* note 102, at 97; WEISMAN, SPERMATOZA, *supra* note 123, at 181.

162. *See, e.g.,* WEISMAN, SPERMATOZOA, *supra* note 123, at 179–80 (explaining purpose of forms and reprinting them).

163. Seymour & Koerner, *Medicolegal Aspect*, *supra* note 117, at 1533.

164. *Id.*

165. Editorial, *Artificial Insemination and Illegitimacy,* 112 J. AM. MED. ASS'N 1832–33 (May 6, 1939).

tended parents needed to set aside "false pride or considerations of delicacy" and manifest their intent in this legally binding manner.[166]

Adoption proceedings would defeat the secrecy of the procedure, as the adopting father would need to know the name of the donor, whose parental rights would be terminated by the adoption, and the donor would need to be notified and given a chance to object.[167] The whole procedure would become a matter of public record, greatly increasing the chance that the child, and/or family and friends, would learn of the child's origins. While the *JAMA* proposal would ensure legal certainty, many doctors who practiced donor insemination joined Seymour and Koerner in believing such a legal cure would destroy the value of the medical cure they were offering because of the social and emotional consequences of the loss of secrecy.

Supporters of the procedure varied in their response to the negative tone of the editorial. One doctor engaged in personal correspondence with the Bureau of Legal Medicine of the American Medical Association and managed to get the Bureau to admit that "no act is illegal unless it is prohibited by some law . . . and society has . . . enacted no law regarding artificial insemination." He then published excerpts from this correspondence in an article reporting on his experiences with donor insemination.[168] Legal uncertainty was not a reason to refrain from offering an effective "cure."

How best to proceed was an open question, however. Dr. Abner Weisman not only reprinted Seymour and Koerner's model consent forms in his treatise on sterility, but published his own systematic rules for donor selection in 1942, as he continued to practice and advocate for donor insemination after the editorial.[169] Guttmacher, who had practiced artificial insemination since the 1930s, declined to follow the Seymour/Koerner approach. He advocated for the use of "common sense" by the doctor when selecting appropriate couples, and "complete anonymity" of the donor. With these features, he preferred to "forget signed papers," which "simply act as a permanent reminder for something which should be forgotten as quickly and

166. *Id.* at 1833.

167. J.C. Schock, *The Legal Status of the Semi-Adopted*, 41 DICKINSON L. REV. 271, 275 (1941–42).

168. Beardsley, *supra* note 102, at 94 (quoting personal communication from Bureau).

169. Weisman, *Selection of Donors, supra* note 120, at 142–44; WEISMAN, SPERMATOZOA, *supra* note 123, at 164–82.

completely as possible."[170] The ghost father, according to Guttmacher, should leave no paper trail. In 1942, Guttmacher published his common sense approach as *A Physician's Credo for Artificial Insemination*,[171] both as a stand-alone article and as part of his own article in *JAMA*, thus allowing the countless doctors who had read the editorial to consider his robust response. His article, and the continuing inclusion of directions for the technique in medical treatises, made clear that some members of the medical profession continued to practice donor insemination despite the potential legal cloud over donor children, and ensured that the larger number of practitioners who kept quiet about their use of the technique had support and access to the latest information.

Weisman and Guttmacher, although they disagreed on the best approach, were both examples of doctors enthusiastic about donor insemination as a "cure" for the problem of infertility. The overall success rates for curing male infertility were so low,[172] that they, like many colleagues, were simply unwilling to disavow one clear way they had to provide some patients with what they most wanted—a baby of their own. Although the extreme secrecy surrounding the procedure makes it difficult to investigate the doctor-patient relationships in these cases, in justifying their actions, the doctors wrote about the pain their patients faced, and the psychological harm suffered by involuntarily childless couples. Even twenty years later, an Oregon physician, Dr. Grant S. Beardsley, described two successful inseminations he performed in the 1920s as among the most satisfactory cases of his career.[173] Guttmacher ended his "common sense" credo, as well as his *JAMA* article, with the following reflection:

> A successful artificial insemination is one of the most satisfying of all medical experiences. It would require a petrified heart not to warm to the scene of a sterile father doting on his two children, who, according to the neighbors, resemble him very closely.[174]

The medical interpretation of the legal risks of donor insemination was heavily influenced by doctors' perceptions of patient needs. Women wanted babies, and certainly it could not be illegal to provide a

170. Guttmacher, *A Physician's Credo*, *supra* note 113, at 358 (also published in Guttmacher, *The Role of Artificial Insemination, supra* note 114, at 445).

171. Guttmacher, *A Physician's Credo*, *supra* note 113, at 358; Guttmacher, *The Role of Artificial Insemination*, *supra* note 114, at 445.

172. *See supra* text accompanying notes 67–68.

173. Beardsley, *supra* note 102, at 98.

174. Guttmacher, *The Role of Artificial Insemination, supra* note 114, at 445; Guttmacher, *A Physician's Credo, supra* note 113, at 359.

couple with a wanted child. If it was, the doctors wanted the matter fixed, although in the absence of clear evidence of illegality, many were willing to forge ahead.

III. A PROBLEM 'IN THE HANDS OF THE LAW'

Until about 1945, the medical profession was able to maintain control of the discussion about artificial insemination. During the 1920s and 1930s, individual doctors had evidently discussed their worries about artificial insemination in private conversations with lawyers,[175] but it was doctors who argued the pros and cons of legality in the pages of *JAMA* and discussed how patients and donors should be selected. Although noting the possibility of legal problems, writers in the popular press did not challenge the assumption that artificial insemination was a medical procedure subject to the professional discretion of doctors.[176] This situation began to change in 1945 as the legal profession began to consider artificial insemination. The discussion of the legal ramifications of artificial insemination among lawyers was just beginning when the Chicago symposium was held in 1945. By that date, the medical profession had a core of practitioners who had already decided that the technique, both with husband sperm and donor sperm, was ethical, socially valuable, and should be legal, despite the disapproval of the official publication of the AMA. Within law, however, the practice was barely mentioned in the 1930s and 1940s. Lawyers found the topic new and shocking in 1945, and their hesitancy to embrace how doctors were making law on the ground was a harbinger of the broader social discussion that followed shortly thereafter, when the hypothetical situations which had worried doctors became judicial verdicts in the first American test tube baby cases.

A. Legal Discouragement

The first law review article on donor insemination, a student note in the *Dickinson Law Review* published in 1941, drew inspiration from Seymour and Koerner's survey results, citing the doctors' statistic of 10,000 test tube babies as evidence of the need for legal attention to

175. *See, e.g., Discussion and Question Period, in* SYMPOSIUM, *supra* note 1, at 67, 77.

176. *See, e.g.,* Anthony M. Turano, *Paternity by Proxy*, 43 AM. MERCURY 418, 421–22 (1938); Ray, *supra* note 4.

the practice.[177] Despite the decades of medical discussion of artificial insemination, the *Orford* case, and an existing European legal literature on the subject,[178] note author J.C. Schock described the practice as heretofore "unknown in the law," "a problem the solution of which lies not only in the minds of science, but also equally in the hands of the law, and into the law's lap science has unceremoniously dropped its burden."[179]

While agreeing with the medical consensus that artificial insemination using the husband's sperm did not pose any legal concerns, Schock foresaw "many problems" with donor insemination.[180] The chief question, however, could be stated succinctly: could the consent of the husband to the insemination suffice to create full legal legitimacy of a resulting child?[181] In addition to the discouraging *JAMA* editorial, Schock found a popular magazine article that quoted one New York magistrate as saying that she did not see how a child could be the legitimate offspring of a man who "knows that he is not the father."[182] The student author, however, was sympathetic to donor insemination as a "God-send to thousands of happy couples."[183] He therefore presented an argument in support of the Seymour/Koerner approach, using existing Pennsylvania case law to argue that a court could find donor offspring legitimate without formal adoption, as long as they were born to the wife of a consenting husband. Recognizing the general policy that adoption was based on positive law, he also proposed statutory changes to the Pennsylvania laws of adoption to make such children explicitly legitimate without formal adoption proceedings.[184]

Schock's goal was not only to establish the legitimacy of donor children, but to do so without the need for formal adoption. This budding lawyer agreed with the medical profession that the trouble with adoption was publicity:

> In all test-tube cases closest secrecy is the predominating feature. . . . In the usual course of events only the husband, the wife and the acting physician have any knowledge whatever that this process has

177. Schock, *supra* note 167, at 271. My description of the article as the first in a law review is based on electronic searches for articles with "artificial insemination," "artificial impregnation," "semi-adoption," or "test tube baby" in HeinOnline Law Journal Library electronic resource.

178. ROHLEDER, *supra* note 15, at 180–83, 185, 198–99.

179. Schock, *supra* note 167, at 271.

180. *Id.* at 271–72.

181. *Id.* at 272.

182. *Id.* at 272 (quoting 10 CORONET at 12).

183. *Id.* at 274.

184. *Id.* at 274, 279–80.

> been employed. The child, to his own belief and to that of his family's friends, is the offspring of his mother's husband.[185]

Because "the very life-blood of artificial insemination is secrecy," its "entire value" would be lost if a couple were forced to go through a traditional adoption proceeding. "The possible psychological repercussions are overwhelming to contemplate," and the effect of using the solution recommended by the AMA would be to return the procedure "to the laboratory whence it came."[186]

Despite Schock's impassioned analysis, a more senior scholar who reviewed his note in 1942 doubted that there was any problem. While agreeing that children born from donor insemination were probably bastards at law, New York University professor Augustin Derby doubted that there was need for the statutory revision Schock proposed. Pointing out that it would be difficult, years later, to disprove the natural origins of such a child, Derby also noted that no cases involving donor insemination had yet arisen.[187] Perhaps because of this absence of legal disputes, during the next few years no state legislature considered any bills such as Schock had suggested. In 1942, artificial insemination was not yet perceived as a pressing medicolegal problem among non-physicians.[188]

Still, the ongoing practice of donor insemination in New York City evidently drew the attention of city officials, at least one of whom spent some time thinking about the matter in the 1940s. Several of the most publicly visible practitioners of donor insemination practiced in the city, including William H. Cary, Abner Weisman, and Robert Dickinson. Perhaps the most famous New York-area practitioner was Seymour. In the early 1940s, Seymour was privately telling sympathetic doctors that she had successfully inseminated over 5,000 women.[189] It may have been her practice that was being disparaged when another New York City doctor referred to the known "abuses" of technique in New York City:

185. *Id.* at 273–74.

186. *Id.* at 274.

187. Derby, *supra* note 123, at 785.

188. *See* Turano, *supra* note 176, at 421–22 (discussing legal concerns as having little real world relevance).

189. Beardsley, *supra* note 102, at 95 (citing personal correspondence with Seymour). If she had only successfully inseminated thirteen women by 1934, as described in the newspaper coverage, *supra* note 90, this claim indicated staggering numbers of patients for the next ten years, lending support both to critics of her estimates, and to allegations of assembly-line insemination of multiple women.

> We have one place, and I would call it an institution, where the inseminations are made at the supposed proper interval by simply having a nurse go around with a syringe full of semen, injecting three or four or five women, as long as there is enough spermatic fluid in that syringe.[190]

Perhaps spurred by such rumblings among the medical community, Assistant Corporation Counsel of New York Sidney A. Schatkin made an analysis of the topic, which he published in the *New York Law Journal* in 1945.[191] Schatkin's article endorsed the decision of the Canadian judge in *Orford* that artificial insemination of a married woman without her husband's consent was adultery and the position of the *JAMA* editorial that even consent could not legitimate the resulting child.[192] Medical practice and legal opinion appeared to be on a collision course.

B. Professional Crosstalk

1. The Debate in *Human Fertility*

The endorsement of the *JAMA* position by a lawyer who was also a public official must have caused some consternation among doctors, particularly those who practiced in New York City. Schatkin's article stimulated the beginning of a public conversation between doctors and lawyers on the topic. The journal of the Planned Parenthood Association, *Human Fertility*, obtained permission to reprint Schatkin's article for its readers,[193] and then asked Guttmacher, a member of its editorial board,[194] to respond, which he did in an article entitled "The Legitimacy of Artificial Insemination."[195] Describing donor insemination as having become a "common tool" in the last three decades, Guttmacher rejected the reliance of the *Orford* court on what it called "Mosaic law" in order to discern the "essence of adultery." Calling the legal analysis "balderdash," he explained his perspective that "[a]dultery and artificial insemination are absolutely the antithesis of each other. One is done clandestinely to deceive and to enjoy carnal pleasure; the other decently and frankly to beget offspring without the emotional and physical enjoyment of coitus."[196] Guttmacher did not attempt to argue

190. Comments of Dr. George W. Kosmak in Weisman, *Studies, supra* note 67, at 130.

191. Sidney B. Schatkin, *Artificial Insemination and Illegitimacy*, 113 N. Y. L. J. 2432 (1945).

192. Sidney B. Schatkin, *Artificial Insemination and Illegitimacy*, 11 HUMAN FERTILITY 14, 15–16 (1946).

193. *Id.* at 14–16.

194. Guttmacher later became president of Planned Parenthood. Frederick S. Jaffe, *Alan F. Guttmacher, 1898–1974*, 6 FAMILY PLANNING PERSPECTIVES 1, 2 (1974).

195. Guttmacher, *Legitimacy, supra* note 151, at 16–17.

196. *Id.* at 17.

for a different interpretation of existing law, but, making his appeal based on the intent of the procedure and the full consent of the husband, predicted that some day the law would change to legitimate the procedure.[197]

By using Guttmacher to author a public response to Schatkin, *Human Fertility* was calling upon a prominent advocate of artificial insemination who had previously published on the subject and was a member of the American Society for the Study of Sterility. By the time Guttmacher directly attacked the legal reasoning of *Orford*, the *JAMA* editors, and Schatkin as "balderdash," he could claim three decades of common use of the practice. The legal profession inserted itself into what had been a purely medical discussion because by the 1940s, for every public advocate like Guttmacher, there were uncounted numbers of doctors across the country, some fertility specialists, others family doctors or obstetrician-gynecologists, who were performing artificial insemination with husband sperm and donor sperm, without any fanfare.

2. Chicago Symposium

The Chicago symposium, organized by local legal and medical organizations, revealed this world of silent practitioners.[198] To consider artificial insemination as a medicolegal problem, the symposium included presentations by a doctor on the medical aspects and by a lawyer on the legal aspects, and then a moderated discussion among the participants, who included both lawyers and doctors. The moderator was Dr. Morris Fishbein, the long-time editor of *JAMA* who had been involved in publishing the discouraging editorial in 1939.[199] The presenting doctor, J.P. Greenhill, was a local luminary, a senior member of the obstetrical community, a professor and a co-author of a textbook on obstetrics.[200] In his remarks, he revealed that he was also a silent practitioner of artificial insemination, including donor insemination, having performed his first successful artificial insemination in 1923. Pointing to recent articles in popular magazines like *Reader's Digest* as

197. *Id.*

198. The symposium was co-sponsored by the Chicago Bar Association and the Institute of Medicine of Chicago. Although Morris Fishbein, editor of the *Journal of the American Medical Association*, was asked to chair the session on artificial insemination, the American Medical Association was not a sponsor. SYMPOSIUM, *supra* note 1, at title page, xi, xv, xviii.

199. *Discussion and Question Period, in* SYMPOSIUM, *supra* note 1, at 70.

200. R.M. Wynn, *J.P. Greenhill: 1895–1975,* 186 ANATOMICAL RECORD 241 (1976). Greenhill's textbook was THE PRINCIPLES AND PRACTICE OF OBSTETRICS, co-authored with Joseph DeLee, and published in its eighth edition in 1944.

the cause, Greenhill claimed that the demand from patients was ever-increasing and that he turned down many couples as unsuitable candidates. Reviewing the medical discussions of the legality of the procedure, Greenhill concluded that doctors were "gambling."[201] For the present, however, Greenhill was willing to continue to gamble as he had been doing for twenty years. In fact, he challenged the lawyers present: "Regardless of what you lawyers believe unless you take some action artificial insemination will continue."[202]

Another unnamed doctor in the audience told the doctors and lawyers present that he, too, was a long-time practitioner of the technique, and that one of his earliest artificial insemination babies had married two years previously. After discussions with lawyers, he had decided to forget legal worries "and just take a chance," and he had continued to do so for many years, although without publishing any case reports. If that newly-married test tube baby had difficulty conceiving, he would be willing to inseminate her, just as he had inseminated her mother.[203]

Despite these untold numbers of silent practitioners, the medical profession was not unified on this issue. Greenhill made his challenge knowing that for every doctor like himself, quietly using the practice, there existed at least one other doctor who found the practice abhorrent and would not engage in it. He admitted that his textbook co-author "censored [him] severely" when he learned that Greenhill was practicing donor insemination.[204] Another doctor in the audience declared that he had not engaged in the practice and "would personally rather not do it."[205]

The presenting lawyer, James Wright, had also never written or spoken on artificial insemination. Confessing his ignorance of the topic until asked to present, Wright described his astonishment as he began to learn of the extent of the practice. Once word of his impending role in the symposium was announced, he was amazed to find himself stopped in the halls of the courthouse by other lawyers anxious to discuss the topic.[206] The extent of the practice, the popular discussions

201. Greenhill, *Medical Aspects, supra* note 6, at 56. *Discussion and Question Period*, *in* SYMPOSIUM, *supra* note 1, at 86–87.

202. *Discussion and Question Period*, *in* SYMPOSIUM, *supra* note 1, at 86.

203. *Id.* at 77.

204. *Id.* at 87.

205. *Id.* at 68.

206. James F. Wright, *Legal Aspects of Artificial Insemination, in* SYMPOSIUM, *supra* note 1, at 57, 65.

about the issue, and the interest of the bar had convinced him that there was a need for legislation—this medicolegal problem needed a legal solution. Wright recommended that the state legislature set up a committee to study the matter.

While he did not specify the nature of the legislation he would like to see, Wright was generally hostile to the technique, admitting only that there "may be some exceptional cases where artificial insemination is proper."[207] Reviewing the law of legitimacy, and the *Orford* decision, Wright agreed with previous legal commentators that a donor child would be a legal bastard, and that donor insemination was legally adultery.[208] His distaste for the procedure was clear when he argued that if the courts had not yet concluded that donor insemination was adultery, they should, on the grounds of public policy.[209] Wright linked his position to that of the law of abortion: "If it is wrong to artificially stop a life by abortion when no real medical need exists, then why is it not likewise wrong to start a life artificially? Certainly a human life is not a toy to be started or stopped through some whim or caprice."[210] He called for those present to consider the issue according to moral laws and holy scripture.

Wright thus set the controversy in a broader context. The question for him was not simply whether a feasible medical practice to relieve involuntary childlessness produced a legitimate or an illegitimate child, the narrow question defined by *JAMA* and the discussions in the medical literature. Wright argued beyond the technicalities of family law, focusing, as had the Catholic Church for decades, on the unnatural aspect of the practice. One lawyer in the audience sided with Wright, adding that as well as considering morality, policy makers needed to consider overpopulation as a social problem. He considered the desire of parents to go to such lengths to have child to be "an outgrowth of selfishness" that need not be supported by the law.[211] By the end of World War II, eugenics had faded in elite and popular discourse after it became associated with the policies of Nazi Germany, and this speaker reflected a general shift from discussions of race suicide to concerns

207. *Id.* at 57.
208. *Id.* at 60, 63.
209. *Id.* at 64.
210. *Id.*
211. *Discussion and Question Period, in* SYMPOSIUM, *supra* note 1, at 69–70 (comments of Royal W. Irwin).

about overpopulation.[212] The overpopulation discourse was not very powerful in 1945, however, with Europeans concerned with repopulating a war-ravaged continent, and Americans worried about the bomb and in the throes of the baby boom.[213] Unlike earlier popular and medical commentators in the 1930s, no one at the symposium raised the possibility of improving the human race through artificial insemination, nor did the suggestion that childless couples seeking fertility treatment were "selfish" garner much support.

The discussion following the formal papers revealed a gulf primarily between those with direct experience with infertile couples (some of the doctors present) and those without such experience (most of the lawyers and other doctors). Koerner had traveled from New York to attend the symposium and was the only identified participant, besides Fishbein, who had previously published on the subject. He spoke to remind the audience that one in ten couples were involuntarily childless, and that their distress needed to be considered in weighing the morality of the practice. "We who are doing this work [artificial insemination] . . . like to consider that at least one of the parties who comes to us is on the verge of despair, many on the verge of divorce."[214] Those who both faced the distress of the infertile and knew themselves to have the means of relieving that distress were much more sympathetic to the technique than those who considered the question in the abstract. Countering Koerner's plea to consider the plight of such couples, one lawyer responded that "the mere fact that a woman wants a child, that she longs for a child, is no reason she should be gratified."[215]

While Greenhill argued, as had other practitioners previously, that the happiness the technique brought to the involuntarily childless was all the justification doctors needed to continue the practice, the lukewarm reception of this attitude by lawyers reflected a social reality which the medical professionals had been ignoring. Most Americans

212. MAY, *supra* note 30, at 200; ANDREA TONE, DEVICES AND DESIRES: A HISTORY OF CONTRACEPTIVES IN AMERICA 207–08 (2001).

213. Seymour had suggested using artificial insemination to help repopulate postwar England. Martin Richards, *Artificial Insemination and Eugenics: Celibate Motherhood, Eutelegenesis, and Germinal Choice*, 39 STUD. HISTORY PHIL. BIOLOGY & BIOMEDICAL SCI. 211, 217 (2008); MARSH & RONNER, THE EMPTY CRADLE, *supra* note 15, at 167. The connection between fear of the bomb and artificial insemination was made explicit in the popular novel, *Mr. Adam*, published in the United States in 1946, which involved a plan to use to the sole remaining fertile male after a nuclear accident to produce the next generation of Americans. PAT FRANK, MR. ADAM (1946).

214. *Discussion and Question Period, in* SYMPOSIUM, *supra* note 1, at 72.

215. *Id.* at 79.

were like the Chicago lawyers. They had no direct experience of infertility. Further, most Americans lacked even second-hand knowledge of artificial insemination as a treatment for infertility. Because of the injunction of secrecy on patients, Americans must seldom have known friends, neighbors or relatives who had used donor insemination. Greenhill claimed that among his patients, families kept the secret of their children's origins even from the grandparents.[216] While women shared information about their abortions through informal information networks in order to help each other find abortion practitioners even when the procedure was largely criminalized,[217] discussions of donor insemination were taboo. Although such secrets must occasionally have been shared, the risk of a whispered discussion was exposure and harm to a much-wanted child. Due to the intense secrecy surrounding the practice, most Americans must never have knowingly encountered an artificially conceived child. While to Koerner and Greenhill donor insemination was common and familiar in 1945, most Americans, like the Chicago lawyers, found it startling and strange.

The medical community had been assuming that not only should it be the gatekeeper of this technique, but that it had the most authoritative perspective on the medicolegal and social questions surrounding it. One of the lawyers present flatly rejected the doctors' claim: "The doctors say they are ahead of the lawyers,. . . . [B]eing ahead of the lawyers, they are being apart from the human race. I think the lawyers are much closer to the people and to everyday life than the doctor or the scientist."[218] Test tube babies in 1945 were still not part of "everyday life." As artificial insemination became broadly perceived not just as a futuristic or fringe medical technique, but as a feasible and common means of family formation, its social and legal aspects began to dominate the discussion. Its use was no longer a matter to be determined solely based on medical expertise. When the medical profession had been unable to achieve an internal consensus on the issue, it was no wonder that artificial insemination as a sociolegal problem appeared unresolvable.

216. *Id.* at 85.
217. REAGAN, *supra* note 2, at 21, 23–32 (abortion as an "open secret").
218. *Discussion and Question Period, in* SYMPOSIUM, *supra* note 1, at 78.

CONCLUSION: ARTIFICIAL INSEMINATION AS A SOCIOLEGAL PROBLEM

By their persistence and success in performing artificial insemination, and especially, donor insemination, doctors drew the attention of the legal profession to the problems that doctors themselves had been unable to resolve. As the technique became more widely known in the 1940s, it became clear that legal uncertainty had been no bar to developing a new medical technique that many doctors used to respond successfully to pressing patient demand. Babies were being born as a result of this practice, and litigation would surely follow. There was a medicolegal problem in need of a solution. As legal certainty became more desirable, the uncertain social acceptance of the practice presented an obstacle. Practitioners of artificial insemination understood it as a medical treatment that reinforced traditional notions of femininity, motherhood, and families. It was, to doctors who performed it, socially supportive rather than subversive. Men and women achieved happiness and marriages were saved when doctors made it possible for barren wives to bear children. In the first tentative conversations across professional boundaries in the mid-1940s, however, fertility specialists learned that what they had come to accept as an established practice and a social good appeared to many others as new, threatening, and a social ill.

When doctors worried about the legal status of assisted conception, they focused on the relatively narrow medicolegal problem of the legitimacy of the child resulting from donor insemination. After 1945, as artificial insemination became more widely discussed, first in court cases and newspapers, and then in state legislatures, artificial insemination became recognized as a broader sociolegal problem which was not solely within the boundaries of medical expertise. To determine whether family law needed to be adjusted to recognize the legitimacy of such children, Americans first needed to find consensus on whether they wanted to live in a society that accepted assisted conception and recognized a separation of biological and social paternity in ways that felt uncomfortably different from traditional adoption. The question "who decides?" which reemerged in abortion politics in the 1950s, would also become a question for assisted reproduction. As the social and legal questions surrounding artificial insemination were debated and resolved, the medical practice would also change as the medical assumptions of secrecy and control were reexamined and challenged.

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LEBRON V. GOTTLIEB AND NONECONOMIC DAMAGES FOR MEDICAL MALPRACTICE LIABILITY: CLOSING THE DOOR ON CAPS, BUT OPENING IT TO NEW POSSIBILITIES

JACQUELYN M. HILL*

INTRODUCTION

In May 2005, the Illinois General Assembly succeeded in passing a new tort reform law aimed at addressing a perceived medical malpractice crisis in the state.[1] Officially called "An Act Concerning Insurance," Public Act 94-677 ("P.A. 94-677") reformed medical malpractice law by focusing on legal change, medical discipline, and insurance regulations.[2] One particular reform capped noneconomic damages in medical malpractice and wrongful death actions.[3] Specifically, the statute limited the total noneconomic damages to $1,000,000 for all plaintiffs in a case of an award against a hospital and its personnel or hospital affiliates.[4] In a case of an award against a physician or his business, a corporate entity or personnel, or a health care professional, the cap limited the total amount of noneconomic damages to $500,000.[5]

Just one year later, Abigaile Lebron and her mother, Frances Lebron, filed a medical malpractice action in the Cook County circuit court against Gottlieb Memorial Hospital and two of its medical personnel.[6] The plaintiffs alleged that as a result of certain acts and omissions by the defendants during and after Abigaile's birth, Abigaile suffered from severe brain injury, mental impairment, and inability to develop normal neurological functions.[7] Simultaneously, the Lebrons sought a declaration that the new damage limitations imposed by P.A. 94-677 were unconstitutional.[8] On February 4, 2010, the case reached

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1. 735 ILL. COMP. STAT. ANN. 5/2-1706.5 (West, Westlaw through P.A. 96-1496 of the 2010 Reg. Sess.), *invalidated by* Lebron v. Gottlieb Mem'l Hosp., 930 N.E.2d 895 (Ill. 2010).
2. *Id.*
3. *Id.* at (a)(1).
4. *Id.*
5. *Id.* at (a)(2).
6. *Lebron*, 930 N.E.2d at 899.
7. *Id.* at 900.
8. *Id.*

the Supreme Court of Illinois. The Court found in favor of the Lebrons, holding that the cap on noneconomic damages was unconstitutional because it violated the Illinois Constitution's separation of powers clause.[9]

Many other state supreme courts have addressed the constitutionality of statutory caps on noneconomic damages. These courts have based their decisions on various grounds; some jurisdictions focus on the special legislation doctrine, others explore challenges based on the right to a jury trial, a few focus on equal protection, and still others use a due process analysis.[10] The Illinois Supreme Court, however, solely utilized the remittitur doctrine to come to its conclusion.[11]

This case comment addresses the *Lebron* decision and its rationale, particularly its focus on the remittitur doctrine. Additionally, this comment addresses the following concepts: 1) the background and history of attempts to limit common law liability in tort law in Illinois; 2) the remittitur doctrine; 3) other jurisdictions' responses to statutory caps; 4) the majority's distinctions regarding the General Assembly; and 5) alternatives to the tort system of medical malpractice liability which might receive more attention after *Lebron*.

I. BACKGROUND AND HISTORY OF THE HEALTH CARE CRISIS IN ILLINOIS

A. Prior Medical Malpractice Insurance Crisis and Subsequent Legislation

In the years prior to 1975, Illinois underwent a perceived medical malpractice insurance crisis.[12] In response, the Illinois General Assembly enacted legislation limiting medical malpractice recovery, particularly noneconomic damages.[13] The legislation implemented a $500,000 maximum recovery for injuries resulting from "medical, hospital, or other healing art malpractice."[14] One year after the legislation was passed, Jean Mary Wright brought action in the circuit court of Cook County against Central Du Page Hospital Association.[15]

9. *Id.* at 917.

10. *See generally* Carolyn Victoria J. Lees, *The Inevitable Reevaluation of Best v. Taylor in Light of Illinois' Health Care Crisis*, 25 N. Ill. U. L. Rev. 217, 225 (2005).

11. *Lebron*, 930 N.E.2d at 901.

12. Lees, *supra* note 10, at 224.

13. *Id.*

14. 73 ILL.REV.STAT. § 401(a) (West 1975), *invalidated by* Wright v. Central Du Page Hosp. Ass'n, 347 N.E.2d 736 (Ill. 1976).

15. *Id.*

Wright sought to recover damages from the hospital and some of its medical personnel for personal injuries suffered while she was confined to the hospital as a patient.[16] In the plaintiff's complaint, Wright challenged multiple provisions of the new legislation, including the cap on noneconomic damages.[17] The case ultimately reached the Illinois Supreme Court, which found that the $500,000 cap violated the Illinois Constitution under the equal protection and due process clauses.[18]

After considering several other provisions of Public Act 79-960, the Court began its analysis of the fourth section, which limited the maximum recovery for medical malpractice injuries.[19] Wright argued that by denying recovery for losses in excess of $500,000, the General Assembly had arbitrarily classified and unreasonably discriminated against the most seriously injured victims of medical malpractice.[20] Citing a previous case that dealt with the Illinois Wrongful Death Act, the defendants countered that the General Assembly could set limits on recoveries—even if the result was to deny certain plaintiffs full compensation for their injuries.[21] The Court rejected the defendants' arguments, noting that the medical malpractice limitation was distinguishable because the action for medical malpractice had a common law basis.[22] According to the majority, when the legislature creates the right and the remedy for an action, it has the authority to limit those remedies.[23] When the right arises from the common law, however, the General Assembly does not possess the same privilege.[24] In addition, the Court found that the limitation arbitrarily limited recovery in actions for medical malpractice, thereby granting a special privilege for certain tortfeasors in violation of the Illinois Constitution.[25]

B. Best v. Taylor and the Illinois Tort Reform Acts of 1995

Despite the result in *Wright*, Illinois legislators again attempted to enact tort reform in the early 1990s.[26] In 1995, the legislature signed

16. *Wright*, 347 N.E.2d at 737.
17. *Id.*
18. *Id.* at 744.
19. *Id.* at 741.
20. *Id.*
21. *Id.*
22. *Id.* at 741–742.
23. *Id.*
24. *Id.*
25. *Id.* at 743.
26. *See* Lees, *supra* note 10, at 225.

into law the Civil Reform Amendments of 1995.[27] The legislation covered several areas of tort law, including products liability, joint and several liability, jury instructions, and damages.[28] The damages provision, however, remained the biggest source of debate and critique. The provision introduced a statutory cap for both punitive and noneconomic damages, which the Act defined as "damages which are intangible, including but not limited to damages for pain and suffering, disability, disfigurement, loss of consortium, and loss of society."[29] Specifically, the noneconomic damages provision limited recovery to $500,000 per plaintiff in any of the actions listed in the Amendments.[30]

In *Best v. Taylor Machine Works*, plaintiff Vernon Best challenged the constitutionality of the Civil Justice Reform Amendments of 1995.[31] Best, after suffering an accident while operating a forklift, brought a products liability action against the forklift manufacturer and a hydraulic fluid manufacturer.[32] Best sought noneconomic damages in excess of $500,000, asserting that he suffered severe and disfiguring injuries and that he would continue to suffer grievous pain and anguish.[33] The circuit court consolidated the case with a separate case, in which the estate of a deceased truck driver brought a negligence suit against the owner and operator of the train that killed him.[34] The Madison County circuit court found that fifteen specific provisions of the Civil Justice Reform Amendments were unconstitutional.[35]

The Illinois Supreme Court, on appeal, focused heavily on the $500,000 cap on noneconomic damages. The defendants characterized the Act as "a legitimate reform measure that is within the scope of the Illinois General Assembly's power to change the common law, shape public policy, and regulate the state's economic health."[36] On the other side, the plaintiffs argued that the reforms erected arbitrary barriers to meritorious claims, and that the Act violated several provisions of the Illinois Constitution: the special legislation clause, the equal protection and due process clause, the separation of powers clause, the right to

27. 735 ILL. COMP. STAT. ANN. 5/2-1115.05(a)-(e) (West, Westlaw through P.A. 96-1496 of the 2010 Reg. Sess.), *invalidated by* Best v. Taylor Mach. Works, 689 N.E.2d 1057, 1063 (Ill. 1997).

28. *Id.*

29. *Id.*

30. *Id.*

31. *Best*, 689 N.E.2d at 1062–1063.

32. *Id.* at 1064.

33. *Id.*

34. *Id.*

35. *Id.* at 1065.

36. *Id.* at 1063.

jury clause, and the right to a certain remedy.[37] After a lengthy analysis, the Court concluded that the Act violated the Illinois Constitution's special legislation and separation of powers clauses.[38]

The Court began its analysis of the damages cap by examining the Illinois Constitution's prohibition on special legislation.[39] The specific clause provides that the General Assembly "shall pass no special or local law when a general law is or can be made applicable."[40] This provision prohibits the General Assembly from conferring, without a sound and reasonable basis, a special benefit or privilege on a person or group of persons to the exclusion of others similarly situated.[41] Under this standard, a court must determine whether the state's statutory classification is rationally related to a legitimate state interest.[42] Applying this test, the court found that that the statutory cap was irrational and not legitimately related to the state's proclaimed interest in reducing the systemic costs of tort liability.[43]

Next, the court analyzed the plaintiff's argument that the damages cap violated the Illinois Constitution's separation of powers clause.[44] The clause holds that "the legislative, executive, and judicial branches are separate" and that "no branch shall exercise powers properly belonging to another."[45] Best argued that the statutory cap "improperly delegat[ed] to the legislature the power of remitting verdicts and judgments, which is a power unique to the judiciary."[46]

Under the remittitur doctrine, the judiciary retains the power, in limited circumstances, to correct an excessive jury verdict by reducing a damage award.[47] The plaintiff must consent, or the court will order a new trial.[48] Generally, a damage award "will be deemed excessive if it falls outside the range of fair and reasonable compensation or results from passion or prejudice."[49] The court noted that the practice of or-

37. *Id.*
38. *Id.* at 1064, 1106.
39. *Id.* at 1069.
40. ILL. CONST. of 1970, art. IV, § 13.
41. Petition of the Vill. of Vernon Hills, 658 N.E.2d 365, 367 (Ill. 1995).
42. *Id.*
43. *Best*, 689 N.E.2d at 1077. The court cited three types of such irrational discrimination: discrimination between individuals slightly and severely injured; discrimination among individuals with identical injuries; and discrimination among types of injuries. *Id.*
44. *Id.* at 1078.
45. ILL. CONST. of 1970, art. II, § 1.
46. *Best*, 689 N.E.2d at 1078.
47. *Id.* at 1079.
48. *Id.* at 1080.
49. *Id.* at 1079.

dering a remittitur "has long been recognized and accepted as part of Illinois law" and that it prompts "the administration of justice and the conclusion of litigation."[50] The majority concluded that the statutory cap functioned as a "legislative remittitur" by overriding the jury's careful deliberative process without regard to the specific circumstances of a particular plaintiff's injuries.[51]

Critics of the decision in *Best* attacked the majority's holding on several grounds. Many argued that the damage caps, rather than acting as a legislative remittitur, merely set an outer parameter by which wholly subjective damages would be limited.[52] Such opponents asserted that the General Assembly has the right to change or alter the common law if that change is rationally related to a legitimate state interest.[53] To critics, the heightened medical malpractice insurance crisis constituted such a legitimate state interest.[54] Critics also claimed that *Best*'s holding impaired the legislature's role to evaluate and determine issues of public policy.[55] Despite the criticism, however, the Illinois Supreme Court's holding remained intact for almost a decade.

C. A New Cap: Public Act 94-677

In 2004, new legislative efforts to reform tort law emerged. Proponents of reform argued that medical malpractice litigation greatly increased the premiums for malpractice insurance and forced many physicians to leave Illinois.[56] Critics questioned the extent of the crisis as well as the effectiveness of damage caps as a means of addressing the high malpractice insurance premiums.[57] Eventually, the Illinois General Assembly sided with the proponents, passing Public Act 94-677 on May 23, 2005.[58]

Unlike the Civil Justice Reform Amendments of 1995, which were aimed at several areas of tort law, Public Act 94-677 focused only on medical malpractice law.[59] The Act capped noneconomic damages, but

50. *Id.*
51. *Id.* at 1080.
52. Lees, *supra* note 10, at 231.
53. *Id.* at 230.
54. *Id.*
55. *Id.* at 232.
56. *Id.*
57. David Goldhaber & David J. Grycz, *Illinois Adds Fuel to the Fiery National Healthcare Debate: Supreme Court Strikes Damage Caps and Other Healthcare Reforms*, 22 HEALTH LAW., no. 5, June 2010 at 19.
58. *See id.*
59. *See id.*

did not include any caps for punitive damages.[60] The Act declared that "in a case of an award against a hospital and its personnel or hospital affiliates," the total noneconomic damages were limited to $1,000,000 for all plaintiffs in any civil action arising out of the care of the hospital personnel or affiliates.[61] In a case of an award against a physician or his business, a corporate entity and personnel, or a health care professional, the reform limited the total amount of noneconomic damages to $500,000 for all plaintiffs in any civil action arising out of the care of such entity.[62]

The General Assembly cited several reasons and underlying rationales for passing Public Act 94-677. Among those reasons, the General Assembly listed:

> (1) The increasing cost of medical liability insurance results in increased financial burdens on physicians and hospitals.
>
> (2) The increasing cost of medical liability insurance in Illinois is believed to have contributed to the reduction of the availability of medical care in portions of the State and is believed to have discouraged some medical students from choosing Illinois as the place they will receive their medical education and practice medicine.
>
> (3) The public would benefit from making the services of hospitals and physicians more available.
>
> (4) This health care crisis, which endangers the public health, safety, and welfare of the citizens of Illinois, requires significant reforms.

P.A. 94-677, Art. 1, § 101.[63] Despite the consideration and research that went into Public Act 94-677, the reforms were not destined to last very long.

II. *LEBRON V. GOTTLIEB:* THE DEATH OF PUBLIC ACT 94-677

A. Case Background and Amicus Curiae Briefs

In November 2006, plaintiffs Abigaile Lebron and her mother, Frances Lebron, filed a medical malpractice and declaratory judgment

60. *See id.*

61. 735 ILL. COMP. STAT. ANN. 5/2-1706.5(a)(1).

62. *Id.* at (a)(2). This amount, $500,000, was the same amount of the cap for noneconomic damages that was listed in the Civil Justice Reform Amendments of 1995. 735 ILL. COMP. STAT. ANN. 5/2-1115.05(a)–(e). Other provisions of the Act included: a law elevating standards for experts; an extension for "Good Samaritan" immunity for physicians providing free care; and a rule which permitted doctors and hospitals to apologize to patients and their families, and prohibited that apology from being admitted during trial as an admission of liability. Additionally, the Act provided Illinois officials with greater abilities to discipline physicians and amended several portions of the Illinois Insurance Code for medical liability insurers. *Id.*

63. *Id.*

action in the Cook County circuit court against Gottlieb Memorial Hospital and some of its personnel.[64] The Lebrons alleged that Abigaile sustained numerous permanent injuries during her birth at the hospital, including severe brain injury, cerebral palsy, cognitive mental impairment, and the inability to be fed normally.[65] The Lebrons sought a judicial determination of their rights with respect to Public Act 94-677, as well as a declaration that certain provisions of the Act violated the Illinois Constitution.[66] Citing *Best*, the Lebrons argued that the limitation on noneconomic damages violated the separation of powers clause.[67]

Before the case reached the Illinois Supreme Court, several parties filed amicus curiae briefs. The Illinois Hospital Association and other hospital associations filed a brief on behalf of the defendants on May 20, 2009.[68] The hospital associations first argued that P.A. 94-677 represented the Illinois legislature's "careful and constitutional solution to a problem with which nearly every state legislature in the nation has grappled: preserving access to health care in the face of skyrocketing medical liability costs."[69] The hospital associations feared that if the Act were overturned, "unchecked medical liability costs will undoubtedly begin their rapid climb to the disadvantage of all Illinoisans," and that all members of the public would pay the price for this decision.[70]

The hospital associations' brief also maintained that the recovery of noneconomic damages is not "so important that the legislature is constitutionally prevented from imposing generous limitations on the . . . liability of hospitals and physicians."[71] In their view, the alternative position would place the court directly into the role of the legislature—a role for which the court lacks policy-making standards and resources.[72] The associations additionally argued that assessing of the impact of medical liability costs is a legislative task, and that "it is not the role of the judiciary to declare that there is a *better way* to address

64. *Lebron*, 930 N.E.2d at 899.

65. *Id.* at 900.

66. *Id.*

67. *Id.* In particular, they believed that Abigaile's damages for her injuries would greatly exceed the $500,000 cap on noneconomic damages. *Id.*

68. Brief for Ill. Hosp. Ass'n as Amicus Curiae Supporting Defendant-Appellant, Lebron v. Gottlieb Mem'l Hosp. at 3, 930 N.W.2d 895 (Ill. 2010) (Nos. 105741, 105745).

69. *Id.* at 3.

70. *Id.*

71. *Id.* at 5.

72. *Id.*

the problem."[73] Finally, the hospital associations declared that the trial court erred by placing the interests of the plaintiffs over the interests of the public in general.[74]

On the opposite side of the spectrum, the American Bar Association (ABA) and the Illinois AFL-CIO wrote briefs in support of the plaintiffs. According to the ABA, caps on noneconomic damages "discourage lawyers from taking meritorious cases where economic damages are low, and thus, undermine the ability of a significant number of injured persons to seek redress in the courts."[75] The ABA argued that instead of imposing a ceiling on pain and suffering damages, trial and appellate courts should make greater use of the power of remittitur or additur.[76] They also declared that the caps "discriminate against the relatively small number of accident victims who suffer the most devastating physical and psychological injuries."[77]

The Illinois AFL-CIO and the Chicago Federation of Labor, in their brief, focused on the arbitrariness of the cap itself, claiming that "the Legislature picked a number out of a hat."[78] The AFL-CIO also believed that the Act constituted special legislation by conferring a benefit on one group of persons but denying that benefit to others who are similarly situated.[79]

B. The Court's Rationale: Remittitur and Best

Finally, in February 2010, the Illinois Supreme Court reached a decision. The court relied heavily on *Best*, concluding that P.A. 94-677 infringed upon the inherent power of the judiciary to order a remittitur, thereby violating the Illinois Constitution's separation of powers clause.[80] The circuit court had previously determined that the statutory cap operated as a legislative remittitur and focused only on that argument.[81] Therefore, the Illinois Supreme Court considered only a

73. *Id.*

74. *Id.* at 6.

75. Brief for Am. Bar Ass'n as Amicus Curiae Supporting Plaintiffs-Appellees, Lebron v. Gottlieb Mem'l Hosp. at 1, 930 N.W.2d 895 (Ill. 2010) (Nos. 105741, 105745).

76. *Id.* at 3.

77. *Id.* at 4.

78. Brief for Ill. AFL-CIO as Amicus Curiae Supporting Plaintiffs-Appellees, Lebron v. Gottlieb Mem'l Hosp. at 7, 930 N.W.2d 895 (Ill. 2010) (Nos. 105741, 105745). The ABA found that the primary impact of damage caps falls on cases involving women, children, and the elderly, especially in death cases involving those groups. *Id.*

79. *Id.* at 3–4.

80. *Lebron*, 930 N.E.2d at 917.

81. *Id.* at 901.

separation of powers challenge without inquiring into any of the plaintiffs' other arguments.[82]

First, the court rejected the defendants' argument that P.A. 94-667 was distinguishable from the statute at issue in *Best*.[83] The Civil Justice Reform Amendments of 1995, at the heart of the problem in *Best*, covered "all common law, statutory or other actions that seek damages on account of death, bodily injury, or physical damage to property based on negligence, or product liability."[84] P.A. 94-677 was limited to "any medical malpractice action or wrongful death action based on medical malpractice."[85] The court restated, however, that the purpose of the separation of powers clause is to "ensure that the whole power of two or more branches of government shall not reside in the same hands."[86] Thus, the legislature "is prohibited from enacting laws that unduly infringe upon the inherent powers of judges."[87] The *Lebron* court concluded that although the scope of the statute at issue in *Best* was much broader than Public Act 94-677, "the encroachment on the inherent power of the judiciary is the same."[88]

The *Lebron* court found fault with Public Act 94-677 primarily because it capped noneconomic damages without regard to the particular facts and circumstances of a case.[89] Under the Act, a court "is required to override the judiciary's deliberative process and reduce any noneconomic damages in excess of the statutory cap, irrespective of the particular facts and circumstances, and without the plaintiff's consent."[90] This process "unduly encroaches upon the fundamentally judicial prerogative of determining whether a jury's assessment of damages is excessive within the meaning of the law."[91] Whereas the court must carefully examine the particular circumstances of a case when utilizing a remittitur, no such deliberative process occurs when applying a damages cap.[92] In addition, a plaintiff traditionally must

82. *Id.* Based on the Act's inseverability provision, the circuit court had invalidated the act in its entirety. *Id.*

83. *Id.* at 907–908.

84. 735 ILL. COMP. STAT. ANN. 5/2-1115.05(a)–(e).

85. 735 ILL. COMP. STAT. ANN. 5/2-1706.5(a).

86. *Lebron*, 930 N.E.2d at 905 (quoting *Best*, 689 N.E.2d at 1057).

87. *Id.*

88. *Id.* at 908.

89. *Id.*

90. *Id.*

91. *Id.* (quoting *Best*, 689 N.E.2d at 1057).

92. *Id.*

either consent to the remittitur or accept a new trial, but the damage cap from Public Act 94-677 applied unconditionally.[93]

Next, the court addressed the defendants' arguments regarding the authority of the Illinois General Assembly. The defendants declared that since the General Assembly has the right to alter the common law, Public Act 94-677 represented a valid exercise of that power.[94] To support their argument, the defendants cited previous decisions which upheld statutes limiting a plaintiff's damages.[95] In *Unzicker v. Kraft Food Ingredients Corp.*, for example, the Illinois Supreme Court rejected a separation of powers challenge to a provision of the Illinois Code which modified the common law rule of joint and several liability.[96] The majority, however, held that the statute in *Unzicker* "required the court to enter judgment in conformity with the jury's assessment of fault where the defendant was minimally responsible."[97] The statute in *Lebron*, on the other hand, "require[d] the court to enter a judgment at variance with the jury's determination and without regard to the court's duty to consider, on a case-by-case basis, whether the jury's verdict is excessive as a matter of law."[98]

The court also distinguished caps on punitive damages from caps on noneconomic damages. The defendants argued that since the Illinois Supreme Court had previously upheld statutory limits on punitive damages, the cap on noneconomic damages in P.A. 94-677 was valid.[99] Specifically, the defendants cited *Siegall v. Solomon* and *Smith v. Hill*, two cases which dealt with the constitutionality of a cap on punitive damages.[100] In *Smith*, the court rejected a separation of powers challenge to a ban on punitive damages for breach of promise to marry.[101] However, the majority distinguished *Smith* by declaring that "a ban on punitive damages is not akin to a cap on noneconomic damages" because punitive damages are awarded in the interest of society and not to recompose solely an individual.[102]

93. *Id.*

94. *Id.* at 912.

95. *Id.* Defendants also relied upon Bernier v. Burris, 497 N.E.2d 763 (Ill. 1986); Siegall v. Solomon, 166. N.E.2d 5 (Ill. 1960); and Smith v. Hill, 147 N.E.2d 321 (Ill. 1958). In the court's analysis, it distinguished all three cases from Public Act 94-677 because all three dealt with punitive damages, rather than noneconomic damages. *Id.*

96. Unzicker v. Kraft Food Ingredients Corp., 783 N.E.2d 1024, 1043 (Ill. 2002).

97. *Lebron*, 930 N.E.2d at 911.

98. *Id.*

99. *Id.* at 912.

100. *See* Siegall v. Solomon, 166. N.E.2d 5 (Ill. 1960); Smith v. Hill, 147 N.E.2d 321 (Ill. 1958).

101. *Smith*, 147 N.E.2d at 327.

102. *Lebron*, 930 N.E.2d at 912.

The defendants also argued that if Section 2-1706.5 of the Act (the cap on noneconomic damages) was invalidated, other statutes limiting common law liability could not survive.[103] Among others, the defendants mentioned the Good Samaritan Act, the Innkeeper Protection Act, the Emergency Medical Services Systems Act, and the Probation Community Service Act.[104] The court refused to comment on the constitutionality of such legislation, but noted that none of the statutes cited "reduce[s] a jury's award of noneconomic damages to a predetermined limit, irrespective of the facts of the case."[105] The court also declined to comment on other similar legislation in other jurisdictions, but sniped that " 'everybody is doing it' is hardly a litmus test for the constitutionality of the statute."[106]

C. Dissent : An Attack on Remittitur, Best, and the Lack of Deference to the General Assembly

In his dissent, Justice Karmeier gave a lengthy opinion in which he questioned several aspects of the majority's rationale.[107] Karmeier argued that the malpractice reforms like P.A. 94-677 might have a "salutary effect" on the perceived national medical malpractice crisis.[108] He also declared that public policy determinations are better left to the legislature, and that the court should grant deference to these determinations.[109] Karmeier then argued that the General Assembly had made progress in tailoring P.A. 94-677 since its last attempt at tort reform, and that this difference rendered the majority's reliance on the *Best* holding inappropriate.[110] The substantive bulk of Justice Karmeier's argument, however, criticized the *Best* decision itself as well as the doctrine of remittitur.[111]

103. *Id.* at 913.

104. *Id.* All of these statutes limit common law liability in various fields, including negligence liability for health care professionals, liability for hotels, and liability for emergency providers of medical services. *See infra,* footnotes 216–229.

105. *Id.*

106. *Id.* The court did note that the statutes cited by defendants from other states varied widely, "not only in the amount of the cap, but in other specifics." It also declared that "although decisions from other jurisdictions can provide guidance . . . we do not write today on a blank slate. Our decision in *Best* guides our analysis." *Id.*

107. *Id.* at 917–922.

108. *Id.* at 917.

109. *Id.* at 920.

110. *Id.* at 927.

111. *Id.* at 927–931.

Justice Karmeier noted that *Best*'s holding—that legislative caps on noneconomic damages offends the separation of powers clause—rests entirely on the idea that caps are a legislative remittitur.[112] The remittitur, he argued, is "not a power specifically vested in the courts by our constitution or the Constitution of the United States."[113] The majority had not explicitly addressed the constitutionality of remittitur, but merely stated that "the application of [the] doctrine has been a traditional and inherent power of the judicial branch."[114] Justice Karmeier, on the other hand, declared that the remittitur doctrine has been challenged as unconstitutional as an abridgement of the right to trial by jury.[115] He also argued that the remittitur "cannot, in any meaningful way, be viewed as an essential component of the judicial power vested in those courts by the Illinois Constitution of 1970."[116]

According to Karmeier, when the legislature imposes a damages cap, it is not the equivalent of a legislative remittitur; a court that reduces the jury award to comply with the cap is simply implementing a legislative policy decision to reduce the amount recoverable to one that the legislature finds reasonable.[117] He claimed that the cap is simply "a determination that a higher award is not permitted as a matter of law" and is "not a remittitur at all."[118] Karmeier also argued that the cap was constitutional because the General Assembly is fully empowered to alter common law remedies.[119] In addition, Karmeier noted that the General Assembly has the authority to simply eliminate all noneconomic damages in medical malpractice cases.[120] If the majority refused to accept a cap, he argued, this drastic measure might become reality and "for those committed to insuring that victims of medical malpractice receive the maximum possible compensation for their injuries, these loom as sobering possibilities."[121]

112. *Id.* at 927.
113. *Id.* at 927–928.
114. *Id.* at 905.
115. *Id.* at 928. He cites to the case of *Dimick v. Scheidt*, which questioned the doctrine's constitutionality. 293 U.S. 474, 484 (1935).
116. *Lebron*, 930 N.E.2d at 928.
117. *Id.* (quoting Estate of Sisk v. Manzanares, 270 F.Supp.2d 1265, 1277–78 (D. Kan. 2003)).
118. *Lebron*, 930 N.E.2d at 928.
119. *Id.* at 931.
120. *Id.* at 933.
121. *Id.*

Finally, Justice Karmeier criticized the majority's quick disregard of similar caps and cases from other jurisdictions.[122] He critiqued the majority's attempts to create "obstacles" to legitimate efforts by the legislature to find an answer to what the legislature deems a serious problem in the health care industry.[123] If the courts exceed their constitutional role, he posited, "they not only jeopardize the system of checks and balances" but they also "put at risk the welfare of the people the government was created to serve."[124]

III. *LEBRON* AND REMITTITUR: A SOLID RATIONALE?

Lebron's majority based its decision primarily on the concept of the remittitur.[125] Some authorities, both before the court's decision and after, have questioned the constitutionality of the doctrine.[126] Nonetheless, many states have upheld the doctrine of remittitur, and some have even used it to strike down statutory caps on noneconomic damages in medical malpractice actions. This section addresses the history of the remittitur doctrine, examines decisions of other states regarding the constitutionality of statutory caps, and briefly looks into some of the problems and criticisms associated with the remittitur doctrine.

A. History of Remittitur

The remittitur doctrine was first recognized in the United States in a case called *Blunt v. Little*.[127] In the opinion, Justice Story stated a court could order a new trial if damages were excessive as a result of gross error on the part of the jury.[128] Justice Story, citing two English cases, declared that "if it should clearly appear that the jury have committed a gross error, or have acted from improper motives, or have given damages excessive in relation to the person or the injury, it is as

122. *Id.* at 932. He wrote, "In the matter before us, no one is suggesting that our view of the separation of powers clause of the Illinois Constitution be predicated on anything other than the intent of those who framed and adopted the Constitution. The preeminence of that intent, however, does not preclude reference to how other courts have analyzed similar provisions under similar circumstances." *Id.*

123. *Id.* at 934.

124. *Id.*

125. *Id.* at 910-917.

126. *See* Suja A. Thomas, *Re-examining the Constitutionality of the Remittitur under the Seventh Amendment*, OHIO ST. L. J. 731, 750–760 (2003).

127. 3 F. Cas. 760 (D. Mass. 1822).

128. *Id.* at 762.

much the duty of the court to interfere, to prevent the wrong, as in any other case."[129]

Since this decision, both federal and state courts have recognized the practice of remittitur. In 1886, the United States Supreme Court officially recognized the remittitur in *Northern Pacific R.R. v. Herbert*, where it upheld a lower court's order that the plaintiff, an injured brakeman, remit a portion of his damage award or to consent to a new trial.[130] The court, however, failed to provide a rationale for its holding, merely citing to *Blunt* and a few other cases.[131]

Dimick v. Scheidt, a Supreme Court case from 1935, finally shed some substantive light on the remittitur doctrine.[132] In *Dimick*, the Supreme Court considered the constitutionality of an additur, an increase of a jury verdict, in the context of the Seventh Amendment's right to a trial by jury.[133] Specifically, the Court's analysis dealt with the re-examination clause, or the clause which provides that "no fact tried by jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law."[134] The court declared that a practice was constitutional under a re-examination clause of the Seventh Amendment if it existed at the time the amendment was adopted.[135] Thus, the court looked to whether the practice existed at English common law in 1791.[136]

In its analysis, the Supreme Court found no evidence of additur, but noted that federal courts since *Blunt* had frequently utilized the remittitur doctrine to decrease jury verdicts.[137] The Court was able to cite to a few English common law cases in support of the remittitur, but, finding no precedent for the additur, declared it unconstitutional.[138] In dicta, the Court suggested that courts in the future should not revisit the constitutionality of remittitur.[139] The Court conceded, how-

129. *Id.* Justice Story then ordered that the case be submitted to another jury unless the plaintiff would remit $500 of his damages. *Id.*

130. *Id.*

131. *Id.*

132. Dimick v. Scheidt, 293 U.S. 474 (1935).

133. *Id.* at 475.

134. *Id.* at 476 (quoting U.S. CONST. amend. VII).

135. *Id.* The Seventh Amendment was adopted in 1791.

136. *Id.*

137. *Id.* at 476–488. The court looked at the remittitur as a sort of companion to additur to determine the additur's constitutionality. The defendants had argued that if remittitur was constitutional, the additur should be found constitutional as well. *Id.*

138. *Id.* at 486–487.

139. *Id.* at 484–485.

ever, that "if the question of remittitur were now before us for the first time, it would be decided otherwise."[140]

B. State Court Decisions Regarding Statutory Caps on Noneconomic Damages

Many other states have addressed the constitutionality of caps on noneconomic damages. Plaintiffs have attacked statutory caps on a variety of bases, including violations of the following provisions of a state's constitution: the prohibition against special legislation, the equal protection clause, the guarantee to a trial by jury, the due process clause, and the separation of powers analysis.[141] The state supreme court decisions generally vary widely, but no other state court has relied exclusively on the remittitur doctrine in the same manner as the *Lebron* majority. This section analyzes and compares a few state decisions which have addressed the constitutionality of statutory caps on noneconomic damages.

1. States Upholding Statutory Caps on Damages

One recent case that dealt with statutory caps on noneconomic damages, and came to the opposite conclusion of *Lebron*, is *Gourley v. Gourley*, a Nebraska case decided in 2003.[142] The statute at issue in *Gourley* was the Nebraska Hospital-Medical Liability Act, which provided that the total amount recoverable from all health care providers in a medical malpractice action could not exceed $1,250,000.[143] The Nebraska Supreme Court found that the statutory cap did not constitute special legislation in violation of the state constitution, did not violate principles of equal protection, did not violate the open courts or right to trial by jury provision, and did not act as a legislative remittitur.[144]

The *Gourley* court, in contrast to the *Lebron* majority, advocated the idea of legislative deference and explicitly rejected the idea that the Act constituted a legislative remittitur.[145] "It is not this court's place," the majority held, "to second-guess the Legislature's reasoning behind

140. *Id.* at 485.

141. *See* Matthew M. Light, *Who's the Boss?: Statutory Damage Caps, Courts, and State Constitutional Law*, 58 WASH. & LEE. L. REV. 315, 318–320 (2001).

142. 265 Neb. 918 (Neb. 2003).

143. *Id.* at 937 (citing NEB. REV. STAT. § 44-2801 et seq. (1998)). Section 44-2825 of the Act is discussed in this section.

144. *Id.* at 957.

145. *Id.* at 956.

passing the act."[146] The court noted that the Legislature may abolish a common-law right or remedy, and stated that a cap therefore does not act as a legislative judgment of damages.[147] The court explicitly rejected the rationale in *Best*, declaring that "the cap does not ask the Legislature to review a specific dispute and determine the amount of damdamages."[148] Instead, the majority believed that "the cap imposes a limit on recovery in all medical malpractice cases as a matter of legislative policy."[149]

Another state decision regarding the constitutionality of statutory caps is *Arbino v. Johnson & Johnson*.[150] The Ohio statute at issue in *Arbino*, R.C. 2315.18, held that a court must limit recovery for noneconomic damages at $250,000 or at three times the economic damages determined by the jury.[151] The *Arbino* majority upheld the statute and, like the court in *Gourley*, deferred heavily to legislative judgment.[152] The majority rejected Arbino's separation of powers challenge, but did not mention or address the doctrine of remittitur.[153] The court did hold, however, that the separation of powers argument "lack[ed] merit" because the judicial function of deciding facts in a case "is not so exclusive as to prohibit the General Assembly from regulating the amount of damages available in certain circumstances."[154]

In the Alaska case of *Evans ex rel. Kutch v. State*, the Alaska Supreme Court upheld a statutory cap on noneconomic damages for personal injury cases.[155] The plaintiffs had argued that the legislature, by enacting the cap, usurped the power of the judiciary to remit excessive damages.[156] The Alaska Supreme Court rejected plaintiffs' argument,

146. *Id.* at 943.

147. *Id.* at 956. The court also cited to several decisions from other states (such as Kirkland v. Blaine County Medical Center, 134 Idaho 464, 471 (Idaho 2000)). It explicitly rejected the *Best* decision and noted that it was the only court to hold that a cap on damages improperly delegates to the legislature the power to remit verdicts and judgments. *Id.* at 955.

148. *Id.*

149. *Id.*

150. 116 Ohio St. 3d 468, 468 (Ohio 2007).

151. *Id.* at 474 (quoting OHIO REV. CODE ANN. § 2315.18 (B)(2) (West, through 2010 File 58 of the 128th GA (2009–2010))). The statute does not apply to tort actions in the Court of Claims or to actions for wrongful death, medical or dental malpractice. *Id.* The statute also provided that these limits did not apply if the plaintiff suffered permanent physical deformity, loss of the use of a limb or a bodily organ, or permanent physical injury that prevented him from being able to care for himself independently. *Id.*

152. *Id.* at 491.

153. *Id.* at 483–484.

154. *Id.* at 483.

155. 56 P.3d 1046, 1070 (Alaska 2002).

156. *Id.* at 1055.

declaring that "the damage caps cannot violate the separation of powers, because the caps do not constitute a form of remittitur."[157] The court stated that the legislature has the power to modify or alter the common law, and that this power includes the ability to set reasonable limits on recoverable damages.[158]

2. States Striking Down Statutory Caps as Unconstitutional

Other state decisions, like *Lebron*, have struck down caps on noneconomic damages for medical malpractice actions. However, none of these states have exclusively relied upon the remittitur doctrine to overturn the cap in the same manner as the *Lebron* majority. More commonly, plaintiffs attack statutory caps on violations of right to trial by jury or on equal protection grounds. A recent case in Georgia, *Atlanta Oculoplastic Surgery, P.C. v. Nestlehutt*, for example, held that a statute limiting awards of noneconomic damages in medical malpractice cases violated the right to a jury trial.[159]

The relevant Georgia statute provided that in an action for medical malpractice, the total amount recoverable for noneconomic damages was limited to $350,000, regardless of the number of defendants.[160] The Court noted that the amount of damages sustained by a plaintiff is ordinarily an issue of fact, and the right to a jury trial thus includes the right to have a jury determine the amount of damages.[161] The majority held that "by requiring the court to reduce a noneconomic damages

157. *Id.*

158. *Id.* at 1055–1056. The following decisions have adopted a similar rationale in regards to the remittitur and the separation of powers analysis: Polland v. E.I. DuPont de Nemours Co., 213 F.3d 933, 945–46 (6th Cir. 2000), *rev'd on other grounds*, 532 U.S. 843 (2001) (holding that federal Title VII damages cap did not violate separation of powers because Congress created the remedies under Title VII, and may therefore limit them as well); Kirkland v. Blaine County Med. Ctr., 4 P.3d 1115, 1121–22 (Idaho 2000) (holding that noneconomic damages cap did not violate separation of powers because Idaho Constitution grants the legislature the power to modify or abolish common law causes of action); Edmonds v. Murphy, 325 Md. 342 (Md. 1992) (holding that noneconomic damages cap did not violate separation of powers because the legislature has the power to provide for or repeal remedies); Pulliam v. Coastal Emergency Servs. of Richmond, Inc. 509 S.E.2d 307, 319 (Va. 1999) (holding that medical malpractice damages cap did not violate separation of powers, because under Virginia law the legislature "has the power to provide, modify, or repeal a remedy"); Verba v. Ghaphery, 552 S.E.2d 406, 411 (W. Va. 2001) (holding that medical malpractice damages cap did not violate separation of powers because, under West Virginia law, the legislature has the power to alter the common law, and damages cap is mere limitation of common law remedies).

159. 691 S.E.2d 218 (Ga. 2010).

160. *Id.* (quoting GA. CODE ANN. § 51-13-1(c)) (West, through 2010 Reg. Sess.)). The Act also limited noneconomic damage awards against a single medical facility to $350,000 , and limited awards to $1,050,000 for actions against multiple health care providers and medical facilities. *Id.* at (c), (d), (e).

161. *Id.* at 222.

award determined by the jury that exceeds the statutory limit," the Act "clearly nullifies the jury's findings of fact regarding damages and thereby undermines the jury's basic function."[162]

In *Moore v. Mobile Infirmary Ass'n.*, the Alabama Supreme Court struck down a statutory cap on noneconomic damages and briefly mentioned remittitur, but only in the context of the right to trial by jury.[163] The Court held that the statute setting a $400,000 limit on noneconomic damages in medical malpractice cases violated the right to trial by jury and the equal protection guarantees under the Alabama Constitution.[164] The Court briefly reviewed remittitur as it had been used in Alabama history, and stated that "the court has often cautioned against interference with a jury's damages assessment unless the particular assessment is flawed by bias, passion, prejudice, corruption, or other improper motive."[165] It continued that "the soundness of a jury's findings on the issue of damages must be evaluated on a case by case basis."[166]

The court then held that the right to trial by jury does cover the right to have a jury make a factual assessment of damages.[167] The Alabama statute violated this right, because when a jury's assessment exceeds the predesignated ceiling, it "allows no consideration for exigencies presented by each case."[168] According to the majority, "such a requirement has no parallel in the jurisprudence of [Alabama] and is patently inconsistent with the doctrines of remittitur or new trial."[169] Thus, although the Court discussed the remittitur doctrine, it was not used as grounds for ruling the caps unconstitutional—as it was in *Lebron*.

162. *Id.* at 223.

163. 592 So.2d 156, 171 (Ala. 1991)

164. *Id.*

165. *Id.* at 161. The defendant had argued that the legislative cap on damages impaired the right to a jury trial no more than traditional forms of judicial supervision, such as the remittitur. The court, however, noted that the remittitur actually does implicate a plaintiff's right to trial by jury. However, the doctrine is permitted because the court only issues remittitur if the verdict is so excessive or inadequate to indicate that it was produced by passion or prejudice or improper motive. *Id.*

166. *Id.* at 162.

167. *Id.* at 163.

168. *Id.* at 163.

169. *Id.*

C. Problems with Remittitur

Despite the *Lebron* majority's reliance on the remittitur, some sources question the doctrine's constitutionality. Since *Dimick*, the Supreme Court has not explicitly ruled one way or another on the constitutionality of the remittitur. Some criticize the *Dimick* decision itself, arguing that under the English common law prior to 1791, the remittitur was not used in the same way that the doctrine is utilized now (which indicates that the remittitur is unconstitutional under a Seventh Amendment analysis).[170] The *Lebron* majority accepted the remittitur doctrine based simply on its continued and uncontested existence in Illinois.[171] Justice Karmeier, on the other hand, attacked the remittitur doctrine and directly questioned its constitutionality.[172] Although it seems that the remittitur will remain intact in Illinois, other states have spent more time grappling with the doctrine's constitutionality.

Some critics have attacked the constitutionality of the remittitur in the context of a plaintiff's right to a trial by jury. For example, a judge ordering the remittitur decides the maximum amount that a jury could have found, and his decision on the matter cannot be appealed.[173] The plaintiff must either accept the remittitur or consent to a new trial, and if the plaintiff accepts the remittitur he loses the right to appeal the issue.[174] At the next trial, the plaintiff will presumably put on the same evidence, and the plaintiff must assume that a judge will reduce damages again if he receives a higher amount than the remittitur. [175] Critics argue that this process effectively destroys a plaintiff's right to have damages determined by a jury.[176]

170. Thomas, *supra* note 126, at 750–760. Thomas argues that at English common law in 1791, the plaintiff proactively used remittitur to cure a defect in the record, rather than being forced to agree to a remittitur instigated by the judiciary. She also notes that English courts could not reduce verdicts with the consent of only one party, and that courts did not state the maximum sum that a jury could find. Those that did use the remittitur only did so if the damages were generally calculable, such as in a contracts case. The courts never used remittitur for a case that had an uncertain damages determination, such as a torts case. In sum, she argues, the federal courts today practice a remittitur that did not have a English common law analogue in 1791. In her view of seventh amendment analysis, this makes the doctrine unconstitutional. *Id.*

171. *Lebron,* 930 N.E.2d at 910–915.

172. *Id.* at 928.

173. *See* Thomas*, supra* note 126, at 739–741. The plaintiff cannot appeal this decision, because it is a final judgment.

174. *Id.*

175. *Id.* Thomas notes that it will be the same judge deciding the second trial, and that judge has already determined that the remitted amount was the maximum under the facts. She believes that a judge will automatically remit the damages if the jury returns a higher amount, or else that judge would have to admit that his previous ruling on the same facts was incorrect. *Id.*

176. *Id.*

One state which had previously abolished the remittitur doctrine has since readopted it by statute. In *Firestone v. Crown Development Corp.*, the Missouri Supreme Court explicitly abolished the remittitur doctrine, holding that the practice of remittitur was not a provision of any statute or rule in the state.[177] The court also claimed that since the doctrine's inception, courts questioned remittitur as an invasion of a party's right to trial by jury and as an assumption of a power to weigh the evidence—a function reserved to the trier of fact.[178] The court abolished the remittitur, noting that a Missouri court could still order a new trial for "good cause" or on the grounds that the verdict was against the weight of the evidence.[179] However, the Missouri legislature reinstated the remittitur by statute just two years after *Firestone*, and the Missouri legislature declined to address any of the Supreme Court's arguments from the case.[180]

IV. *LEBRON'S* RELIANCE ON REMITTITUR: LOOKING TOWARDS THE FUTURE

The *Lebron* majority analyzed the statutory caps on noneconomic damages solely in the context of the separation of powers clause.[181] Although courts such as *Gourley* also discuss the remittitur in relation to statutory caps,[182] no other state court has exclusively relied upon it to strike down tort reform legislation. *Lebron*'s decision indicates that the Illinois Supreme Court will not budge on the issue of statutory caps on noneconomic damages for causes of action that were created by the common law. This section makes the following conclusions: 1) the *Lebron* Court made a sound decision in light of its remittitur analysis; 2) most of the currently enacted Illinois statutes limiting common law liability will survive a separation of powers challenge; and 3) after *Lebron*, the General Assembly might delve into other methods of re-

177. 693 S.W.2d 99, 110 (Mo. 1985) (en banc).

178. *Id.*

179. *Id.* The court then affirmed the verdict of the jury and ordered that the verdict of $15,000,000 be re-instated for the plaintiff. *Id.*

180. *See* MO. ANN. STAT. § 537.068 (West through end of 2010 First Extraordinary Sess. of the 95th Gen. Assembly). The Missouri legislature enacted its remittitur statute on July 1, 1987. The statute provides that "a court may enter a remittitur order if after reviewing the evidence in support of the jury's verdict, the court finds that the jury's verdict is excessive because the amount of the verdict exceeds a fair and reasonable compensation for plaintiff's injuries and damages." *Id.*

181. *Lebron*, 930 N.E.2d at 911–917. As noted in this comment, the Lebrons brought several other arguments regarding the caps but the court declined to address these arguments, since the lower court focused only on the remittitur.

182. 265 Neb. 918, 955 (Neb. 2003).

forming medical malpractice liability that do not implicate the remittitur—particularly those involving contract law.

A. Why the Majority "Got it Right": Distinctions Regarding the Power of the General Assembly

1. Authority of the General Assembly: Caps vs. Abolishing Causes of Action

The *Lebron* majority correctly concluded that although the General Assembly has the authority to change or alter the common law by abolishing a cause of action, it may not place a cap on noneconomic damages.[183] When the General Assembly eliminates a cause of action entirely, the legislature does not interfere with the powers of the judicial branch. For example, if a potential plaintiff cannot bring a cause of action for noneconomic damages, a jury would never make a determination of noneconomic damages. The remittitur doctrine, then, could never be implicated; there would be no damage award, let alone an excessive award, that the judge could reduce. Thus, although the elimination of a cause of action might implicate other constitutional issues, it would pass a separation of powers challenge.

Critics of *Lebron* argue that instituting a damage cap is no different from abolishing a certain cause of action, because a cap simply eliminates a cause of action for a verdict past a certain number.[184] Justice Karmeier, for example, believes that "reduction of an award to comport with legal limits does not involve a substitution of the court's judgment for that of the jury, but rather is a determination that a higher award is not permitted as a matter of law."[185] This assertion, however, makes little sense in light of the remittitur analysis.

In the first scenario, when the General Assembly eliminates a cause of action, a jury never makes a damages determination. With a statutory damage cap, on the other hand, a jury still determines an amount of damages. If the jury's determination exceeds a certain number ($500,000 under the statute in *Lebron*), the court must automatically reduce it to the set value of the statutory cap. A judge thereby loses the ability to examine the particular facts of the case to determine whether the award was actually excessive as a matter of law.[186] Con-

183. *Lebron*, 930 N.E.2d at 911–917.
184. *See id.* at 930–931.
185. *Id.* at 928.
186. *See id.* at 908.

sequently, as the majority correctly pointed out, the cap does infringe upon the judiciary's right to remit an excessive damage award.

The majority also accurately distinguished the case of *Unzicker*, which dealt with altering the rules of joint and several liability.[187] In *Unzicker*, the General Assembly changed the previous rule of joint and several liability so that if the jury found a tortfeasor less than twenty-five percent liable, that tortfeasor would be severally liable only for that percent of the damage. [188] The changes, as the *Lebron* majority correctly stated, were not the equivalent of a numeric cap. [189] A cap requires that the court enter a judgment that "disagrees" with the jury's determination of damages (because the jury's award automatically gets reduced, regardless of the facts of the case, if it surpasses a certain number).[190] The altered rule of joint and several liability, on the other hand, still allows for a case-by-case analysis of "how liable" each defendant is. A jury, and not the legislature, makes the initial determination of a defendant's percentage of fault and the damage award will essentially match what the jury finds.

In addition, the changed rule at issue in *Unzicker* did not substantially affect the judiciary's right to order remittitur. The statute in *Unzicker* required the court to enter judgment in conformity with the jury's assessment of fault when the defendant was minimally responsible (less than twenty-five percent).[191] The jury's verdict in such a case will not be excessive, because the jury has to first determine that a tortfeasor is less than twenty five percent liable for the total amount of damages in order for the change to occur. In that sense, the court's right to remit the amount of damages (when that number is grossly excessive) will not be infringed. If the jury finds a tortfeasor more than twenty-five percent liable for the total amount of damages, the tortfeasor may then be liable for the full amount, but the court can still remit the verdict if it becomes excessive. The *Lebron* majority, then, properly concluded that Public Act 94-677 was distinct from the statute in *Unzicker*.

187. *Id.* at 910–911.

188. *See id.* at 910. Before the change, regardless of "how liable" the fact finder found a tortfeasor to be, a plaintiff could receive all of his damages from that defendant. *See id.*

189. *Id.* at 911.

190. *See id.*

191. *Id.* at 911.

2. Caps: Punitive Damages vs. Noneconomic Damages

The *Lebron* majority properly distinguished between capping noneconomic damages and capping punitive damages.[192] Part of this distinction reflects the difference between rights that the General Assembly has created and rights that have existed at the common law. The General Assembly may limit the maximum recovery for rights they have created.[193] The Illinois Supreme Court noted in *Wright* that when the legislature creates both the right and the remedy (as in the Wrongful Death Act), the legislature's power to limit the maximum recovery in the action that it created cannot be questioned.[194] In many causes of action that cap punitive damages, the legislature created, by statute, the right to recover. The right to recover for injuries arising from medical malpractice, on the other hand, existed at the common law.[195] Consequently, the legislature lacks the same authority to limit certain remedies for medical malpractice actions.

According to the Illinois Supreme Court, plaintiffs have no vested right to exemplary, punitive, vindictive or aggravated damages.[196] As the *Lebron* majority correctly noted, punitive damages are not given to recompense the individual (like noneconomic damages).[197] Rather, the legislature and the Illinois Supreme Court allow recovery of punitive damages in the interest of society.[198] More generally, punitive damages are often available for willful or intentional violations of a common law or statutory duty.[199] A court grants punitive damages to deter future misconduct or wrongdoing rather than to compensate the individual for actual wrong or damage that he suffered.[200] Acts that bar punitive damages, then, "merely establish a 'public policy' that in the interest of society in the particular class of cases such damages should not be awarded."[201]

192. *Id.* at 912.

193. *See Smith*, 147 N.E.2d at 325.

194. *Wright*, 347 N.E.2d at 742.

195. *Id.*

196. *See Smith*, 147 N.E.2d at 325.

197. *Lebron*, 930 N.E.2d at 912 (quoting *Smith*, 347 N.E.2d at 326–327).

198. *Id.*

199. *See generally* Majorie A. Shields, *Construction and Application of State Statutory Cap on Punitive Damages in Tort Cases Exclusive of Medical Malpractice Actions*, 8. A.L.R. 6th 439 (2005) (summarizing the basic theories of exemplary, punitive or vindictive damages).

200. *Id. See also* 15 ILL. LAW AND PRAC. DAMAGES § 56 (discussing the purposes for awarding punitive damages). For more information regarding caps on punitive damage awards, see also 103 A.L.R. 5th 379 (originally published in 2002) (discussing the validity of state statutory caps on punitive damages).

201. *Lebron*, 930 N.E.2d at 912, (quoting *Smith*, 147 N.E.2d at 326–327).

As a result, the legislature may restrict or deny the allowance of punitive damages.[202] In pragmatic terms, a jury may, in certain circumstances, "punish" the wrongdoer with punitive damages, but the injured plaintiff is not entitled to those damages in the same way the plaintiff is entitled to compensatory damages.[203] As the Illinois Supreme Court stated in *Smith*, denying punitive damages "cannot be said to deny any constitutional right or to encroach upon any judicial function" (such as the remittitur).[204] The fact that punitive damages are not tied to the severity of a plaintiff's injury, but rather to the culpability of the defendant's conduct, indicates that a state can cap them. The Court in *Lebron*, by striking down the cap on noneconomic damages, simply complied with its own precedent.

B. Lebron's Implications for the Future: the Innkeeper Protection Act, Contractual "Loopholes," and Alternative Solutions to Statutory Caps

1. Current Statutes Limiting Common Law Liability in Illinois

Illinois currently has several other statutes that limit common law liability. In *Lebron*, the defendants voiced their concern that these statutes could no longer survive if the court struck down Public Act 94-677.[205] The majority did not thoroughly address these arguments, merely stating that "none of the statutes defendants cite requires a court to reduce a jury's award of noneconomic damages to a predetermined limit, irrespective of the facts of the case."[206] However, an examination of such statutes reveals most of these enactments are safe from the kind of attack faced by Public Act 94-677.

Most of these statutes, as the *Lebron* majority pointed out, do not set numeric limits or caps for causes of action. The Good Samaritan Act, for example, exempts persons who give emergency telephone instructions from civil liability altogether, but does not set a cap.[207] Similarly, the Emergency Medical Services (EMS) Systems Act declares that any persons, agencies, or governmental bodies that provide emergency

202. *Id.*
203. *See* Wabash, St. Louis & Pac. Ry. Co. v. Rector, 104 Ill. 296, 303–304 (Ill. 1882).
204. *Smith*, 147 N.E.2d at 327.
205. *Lebron* , 930 N.E.2d at 913.
206. *Id.*
207. 745 ILL. COMP. STAT. ANN. 49/5 (West through P.A. 96-1382 of the 2010 Reg. Sess.). Also known as the "Good Samaritan Act."

services in good faith shall not be civilly liable as a result of their acts unless such acts constitute willful and wanton misconduct.[208]

A third Act mentioned by the *Lebron* defendants, the Probation Community Service Act, eliminates negligence liability for organizations and individuals who agree to accept community service from offenders.[209] All of these statutes, then, simply eliminate certain causes of action completely rather than setting statutory damage limitations. Since the Illinois Supreme Court has differentiated between eliminating causes of action and setting statutory caps, these statutes appear to be "safe" from a separation of powers analysis; they do not interfere with the judicial right to remit excessive verdicts.[210]

One statute mentioned by the *Lebron* defendants that might be subject to scrutiny is the Innkeeper Protection Act.[211] The Act limits a hotel's liability for loss or damage to guest property.[212] If a hotel provides a safe or vault for valuables and provides notice to the guests that the vault exists, and if those guests fail to use the vault for their valuables, the hotel will not be liable for more than $250 in loss or damage to guests' property.[213] The statute also provides that this limit applies "regardless of whether such loss or damage is occasioned by theft, the fault or negligence of such proprietor or manager or of his agents."[214] The Act further states that if the guests do utilize the vault or safe for valuables, the hotel shall not be liable for more than $500 for loss or damage to the guest's property.[215] The final sentence of the Act, however, provides that the proprietor or manager of the hotel may enter into a "special agreement" in writing with the guest where the manager agrees to assume additional liability.[216]

208. 210 ILL. COMP. STAT. ANN. 50/3.150 (West through P.A. 96-1382 of the 2010 Reg. Sess.). Also known as the "Emergency Medical Services (EMS) Systems Act."

209. 730 ILL. COMP. STAT. ANN. 115/1 (West through P.A. 96-1382 of the 2010 Reg. Sess.). Also known as the "Probation Community Service Act."

210. This scope of this comment is limited to a potential separation of powers challenge to such statutes. The statutes limiting common law liability may nonetheless be subject to any of the following challenges (which were brought up in both *Best* and *Lebron*): equal protection, due process, right to trial by jury, and right to certain remedy.

211. 740 ILL. COMP. STAT. ANN. 90/1 (West through P.A. 96-1382 of the 2010 Reg. Sess). Also known as the "Innkeeper Protection Act."

212. *Id.*

213. *Id.* The Act states that the liability in such a case—when the hotel provides notice of the vault and the guest does not use it—is limited to liability that results from negligence or fault of the proprietor or manager. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

The Innkeeper Protection Act raised heated debate even before the *Lebron* case made it to the Illinois Supreme Court. The defendants previously argued that the Innkeeper Protection Act embodied proof that the General Assembly may limit common law liability with caps.[217] The *Lebron* majority disagreed, stating that the Innkeeper Protection Act does not parallel P. A. 94-677 because the last provision of the Innkeeper Protection Act allows parties to contract around the statutory limit.[218] While it is true that the Innkeeper Protection Act provides for such a "special agreement," the Act still sets statutory limits on liability.[219] Unlike the other statutes, which abolish causes of action altogether, the statutory cap in the Innkeeper Protection Act could affect the judiciary's power to remit.

The *Lebron* majority seemingly overlooked the fact that the cause of action against a hotel or "innkeeper" was not created by the General Assembly, like actions for Worker's Compensation. As such, the General Assembly does not possess the same power to limit the damages to be awarded; the General Assembly lacks unquestionable authority to limit remedies for causes of action established by the common law.[220] In addition, the cap in the Innkeeper Protection Act deals with compensatory damages, rather than punitive damages. Thus, the General Assembly cannot necessarily place a cap on the damage award and avoid constitutional scrutiny, because plaintiffs have a right to compensatory damages.[221]

The ability to contract around the statutory limit, then, may fail to save the Innkeeper Protection Act from judicial scrutiny, or at least from a separation of powers challenge. The numeric cap can still prevent the judiciary from remitting an excessive damage award given to the plaintiff in such a case. For example, imagine a scenario where a hotel guest foregoes the "special agreement" and presents his valuables to the hotel proprietor for placement in the vault. The hotel management then acts negligently and loses the valuables. Under the statute, the plaintiff in an ensuing lawsuit can recover only an amount up to $500.[222] Therefore, if the jury determines that the hotel is liable

217. Brief of Defendants-Appellants Gottlieb Mem'l Hosp. at 4–6, 930 N.W.2d 895 (Ill. 2010) (Nos. 105741, 105745).

218. *Lebron*, 930 N.E.2d at 913.

219. *See* 740 ILL. COMP. STAT. ANN. 90/1.

220. *See Lebron*, 930 N.E.2d at 912. *See also Wright*, 347 N.E.2d at 741–742.

221. *Id.*

222. 740 ILL. COMP. STAT. ANN. 90/1. This cap limits only the amount recoverable from the hotel itself.

for any amount over $500, the judiciary has lost the ability to remit that award. Instead, the award automatically gets reduced to comply with the statute. If, on the other hand, the ability to contract around the statutory limit indicates that the legislature has not infringed upon the judiciary's sphere of authority in enacting the statute, this "contractual loophole" may stir up other theories about how to reform medical malpractice liability.

2. Contracting out of Liability: A Feasible Alternative to Statutory Caps?

The "special agreement" provision of the Innkeeper Protection Act allows the individual and the hotel proprietor or manager to contract around the statutory cap so that the hotel manager agrees to assume additional liability.[223] The Illinois Supreme Court has never addressed the constitutionality of the Innkeeper Protection Act. If the Act remains intact, the idea of a contractual loophole may present a viable option for those desiring medical malpractice liability reform. The theory of contracting out of medical malpractice liability is not new; both constitutional and tort law scholars have proposed ideas as extreme as replacing the tort-based medical malpractice liability system with one based on contract law.[224] However, even a brief exploration of this idea reveals that certain issues that might arise in its implementation.[225]

Richard Epstein is one of many prominent scholars who have advocated a conversion to contract-based liability for medical malpractice.[226] When it comes to reforming liability, Epstein believes that "the key error is to treat this as a *tort* problem when designing a governance regime calls for a contractual response."[227] He theorizes that a tort liability system makes sense when the plaintiff and defendant are strangers, because the tort system adopts a high standard of care in order to deter the harms one person causes another.[228] When physical injuries arise out of a consensual arrangement between a patient and a

223. *Id.*

224. *See generally* Jennifer Arlen, *Contracting over Liability: Medical Malpractice and the Cost of Choice*, 158 U. PA. L. REV. 957 (2010).

225. This section of the comment focuses solely on the feasibility of adapting the current tort system to one based on, or implementing, contract law. This comment in no way concludes as to whether this type of system would be preferable to the one currently enacted.

226. *See generally* Richard A. Epstein, *Contractual Principle versus Legislative Fixes: Coming to Closure on the Unending Travails of Medical Malpractice*, 54 DEPAUL L. REV. 503 (2005).

227. *Id.* at 505.

228. *Id.* at 506.

doctor, however, the traditional system of tort liability is an imperfect match.[229]

For Epstein, the objectives of the individuals in the medical malpractice context are too different from the basic tort context; the goal of a patient "is not to keep a supplier or physician at bay" but rather "to maximize the joint gains from trade through the delivery and receipt of goods and services."[230] In the medical malpractice context, Epstein would prefer a contract-based system, where physicians are liable only to parties that have contracted for liability.[231] Essentially, patients would contract for the right to sue a doctor.[232]

Proponents of a contract-based system of medical malpractice liability claim that the reform can come in two ways: patients can contract individually with physicians, or patients could contract with their health care providers.[233] Generally, the patient would agree to waive the right to sue for negligence, and the physician or insurance carrier could offer that patient a lower price for health care.[234] Courts have previously disallowed waivers of medical malpractice liability by patients, declaring that they are against public policy.[235] Additionally, theorists recognize that "courts will block any deal between patients and providers that exchanges lower-cost treatment for a waiver of the patient's right to sue."[236] Nonetheless, proponents still urge for a contract based system, arguing that it would reduce medical malpractice liability costs in a way that still benefits patients.[237]

One potential problem that could arise in this context is the imposition of the traditional fiduciary duty that physicians owe to pa-

229. *Id.* at 507.

230. *Id.*

231. *Id.* at 509.

232. *Id.* Epstein also theorizes as to how this new system might look in practice. He believes that any new arrangements would involve a different standard of care, might restrict the use of *res ipsa loquitor*, could involve expedited arbitration procedures, and might even place some caps on damages. *Id.*

233. Arlen, *supra* note 224, at 960.

234. RICHARD A. THALER & CASS. R. SUNSTEIN, NUDGE 208–209 (2008).

235. *Id.* at 209.

236. *Id.* at 210.

237. *Id.* at 205–210. *See also* Duncan MacCourt & Joseph Bernstein, *Medical Error Reduction and Tort Reform Through Private, Contractually-Based Quality Medicine Societies*, 35 AM. J.L. & MED. 505 (2009); *Fixing Medical Malpractice Through Health Insurer Enterprise Liability,* 121 HARV. L. REV. 1192, 1193 (2008) (discussing medical malpractice reform and insurer enterprise liability). Other proposed alternatives to the current tort system for medical malpractice liability are a legislatively created system of special "health courts" to handle claims, insurer enterprise liability, and alternative dispute resolution.

tients.[238] Physicians generally have a duty to not take advantage of patients, because the physicians have higher bargaining power.[239] The better informed provider, the doctor, has the duty to act in the patient's best interests.[240] This duty already plays a large role in several aspects of the patient-doctor relationship, including fiduciary disclosure of risks and benefits of procedures.[241] With this understanding of fiduciary duty, one can see where problems might arise in a situation where a patient agrees to waive the right to sue for malpractice liability. Courts will likely find that a physician who creates a contract with a patient where the patient foregoes the right to sue for malpractice has breached his fiduciary duty.[242]

Regardless of other potential issues that could arise with a reformed malpractice liability system, the idea may present a way for the General Assembly to avoid the remittitur (and therefore separation of powers) analysis. The contractual loophole to a statutory cap might additionally be easier to implement than a complete state-imposed alteration of the medical malpractice liability system (from tort to contractual). One possible and important difference between the Innkeeper Protection Act and the methods discussed by proponents of reform, however, is that the "special agreement" in the Act allows the hotel proprietor to assume additional liability.[243] The advocates of reform, on the other hand, envision scenarios where the physician "gets out of" liability.[244] While this distinction may not matter in terms of a remittitur analysis, it would certainly raise concerns regarding patients' bargaining power and might seem contrary to public policy.

CONCLUSION

In *Lebron v. Gottlieb*, the Illinois Supreme Court made a definitive statement about statutory caps on noneconomic damages in medical malpractice lawsuits. Any future attempts to limit noneconomic dam-

238. Maxwell J. Mehlman, *Fiduciary Contracting Limitations on Bargaining Between Patients and Health Care Providers*, 51 U. PITT. L. REV. 365, 366–367 (1990).

239. *Id.* at 390.

240. *Id.*

241. *Id.* at 391–393.

242. As Mehlman points out, at least one case has ruled that, as a matter of law, a patient can waive the right to sue a provider for malpractice. *See* Schneider v. Revici, 817 F.2d 987 (2d Cir. 1987) (court ruled that patient Schneider was barred from suing for malpractice liability because she had waived the right to complain that the defendant physician used an unorthodox procedure for her breast augmentation).

243. 740 ILL. COMP. STAT. ANN. 90/1.

244. *See* THALER & SUNSTEIN, *supra* note 234, at 208–209.

ages in medical malpractice cases will meet a roadblock in the form of a separation of powers challenge. The *Lebron* majority accurately distinguished between certain actions and caps, and complied with its own precedent, when overturning Public Act 94-677. *Lebron*'s reliance on remittitur, despite receiving criticism, also signifies that the Illinois Supreme Court will not address the constitutionality of the remittitur doctrine in the future.

The Illinois Supreme Court has now made several important distinctions regarding the power of the General Assembly and the remittitur. When the General Assembly has created the right and the remedy for a cause of action, it may limit the remedy for the cause of action with a statutory cap.[245] The General Assembly may also cap punitive damage awards in any cause of action, because the plaintiff has no vested right in punitive damages the same way a plaintiff has a right to compensatory damages.[246] Finally, the General Assembly may abolish a cause of action, whether created by statute or derived from the common law, without implicating the remittitur doctrine.

The majority of the currently enacted statutes in Illinois which limit common law liability will be relatively unaffected by the *Lebron* decision. These statutes generally abolish causes of actions altogether, rather than setting statutory caps,[247] and will therefore be exempt from the same separation of powers analysis. The only statute which might receive future attention is the Innkeeper Protection Act, because it does set a monetary limit for a damage award against a hotel.[248] The potential "saving grace" for the Act remains in the fact that parties may contract around the statutory limit.[249] The idea of contracting around or out of a statutory cap could represent a feasible solution for those wishing to reform medical malpractice liability.

Proponents of such reform, which would allow individuals to contract with either their physicians or their health care insurers, believe that it would solve many of the economic problems that exist in the current liability system.[250] The system would transform into one consisting of default rules, and patients who want to contract out of those rules (and therefore contract for the right to sue a doctor) must take

245. *See Lebron*, 930 N.E.2d at 912.
246. *Id.*, quoting *Smith*, 147 N.E.2d at 326–327.
247. *See supra* notes 207–211.
248. 740 ILL. COMP. STAT. ANN. 90/1.
249. *Id.*
250. *See* THALER & SUNSTEIN, *supra* note 234, at 205–210.

the initiative to do so.[251] Such a theory sounds simple enough, but research shows that the rules of fiduciary duty might interfere with the imposition of contract-based liability.[252] Nonetheless, those frustrated with the Illinois Supreme Court's decision in *Lebron* may have discovered a viable way to reform medical malpractice without implicating the remittitur.

251. *Id.* at 208–209.
252. *See* Mehlman, *supra* note 238, at 366.

DUELING VALUES: THE CLASH OF CYBER SUICIDE SPEECH AND THE FIRST AMENDMENT

THEA E. POTANOS*

INTRODUCTION**

> Societies now face a grave ethical dilemma in relation to the internet. Western societies pride themselves on freedom of speech, yet here we have a medium which has the potential to circumvent the traditional social controls.1

Late on March 9, 2008, Canadian college student Nadia Kajouji left the warmth of her Carleton University dorm room, walked to a nearby bridge, and jumped to her death in the icy Rideau River.2 Six weeks later, during the spring thaw, her body was found.3 She was not yet nineteen.4 In the days before her death, Kajouji, who had spiraled into depression after a romantic breakup and a miscarriage, researched suicide methods online.5 A forensic search of her computer later revealed that she had asked for advice at the pro-suicide newsgroup alt.suicide.holiday, writing that she had been depressed for as long as she could remember, was terrified her suicide attempt would fail, and wanted a "quick out" with "the highest chance of success."6

Cami, a young and sympathetic nurse, also suicidal, was one of those who responded. Cami proposed that she and Nadia enter into a

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1. Pierre Baume, Christopher H. Cantor & Andrew Rolfe, *Cybersuicide: The Role of Interactive Suicide Notes on the Internet*, 18 J. CRISIS INTERVENTION & SUICIDE PREVENTION 73, 78 (1997).

2. Beth Johnston, *Man Allegedly Coaxed Canadian's Suicide*, OTTAWA SUN, Feb. 26, 2009, http://cnews.canoe.ca/CNEWS/Crime/2009/02/26/8538881-sun.html.

3. *Id.*

4. State v. Melchert-Dinkel, No. 66-CR-10-1193, slip op. at 15 (D. Minn. Mar. 15, 2011).

5. *Kajouji's Video Diary Shows Path to Suicide*, CBC NEWS CANADA, http://www.cbc.ca/news/canada/ottawa/story/2009/10/09/ottawa-kajouji-fifth-estate-diary-suicide.html (last updated Oct. 9, 2009).

6. *Melchert-Dinkel*, No. 66-CR-10-1193, at 15–16.

suicide pact and tried hard to persuade Nadia to hang herself.[7] It was quick, painless and effective.[8] She told Nadia what kind of rope to buy and where to get it, and said that if Nadia had a web cam, she, Cami, could watch to make sure that Nadia positioned the rope just right.[9] Once Nadia was dead, Cami would hang herself.[10]

Eventually, the police discovered that "Cami" was one of several online aliases used by William Melchert-Dinkel, a forty-seven year old nurse from Minnesota who has characterized himself as having an "obsession" with suicide.[11] Some two years after Nadia Kajouji died, the state of Minnesota charged Melchert-Dinkel with two counts of assisted suicide in connection with her death and the 2005 death of Mark Drybrough, a British man who hanged himself by following detailed instructions allegedly provided by Melchert-Dinkel in an email.[12]

In the past decade, thousands of readily-accessible, suicide-related web sites have proliferated on the internet.[13] Many of these sites are "pro-suicide"—that is, they do not seek to prevent suicide but accept it as a viable life choice, may facilitate suicide pacts, and may allow the exchange of detailed information on suicide methods to flow un-

7. *Id.* at 16–19.
8. *Id.* at 23.
9. *Id.* at 21.
10. State's Omnibus Brief at 2, *Melchert-Dinkel* (No. 66-CR-10-1193).
11. Complaint & Statement of Probable Cause at 3, *Melchert-Dinkel* (No. 66-CR-10-1193).
12. *Id.* at 1. In March 2011, the trial court convicted Melchert-Dinkel of two counts of assisted suicide under Minnesota Statute 609.215, rejecting the argument that his speech was protected by the First Amendment. *Melchert-Dinkel*, No. 66-CR-10-1193, at 31–32, 41–42. On November 4, 2011, Melchert-Dinkel filed an appeal with the Minnesota Court of Appeals. He argues that "the trial court created a new category of prohibited speech, in violation of U.S. Supreme Court rulings." *Ex-nurse Appeals Encouraging Suicides Conviction,* CBS MINNESOTA.COM, Nov. 4, 2011 http://minnesota.cbslocal.com/2011/11/04/ex-nurse-appeals-encouraging-suicides-conviction/. The case is State v. Melchert-Dinkel. *See* Minn. App. Ct. Case Mgmt. System, http://macsnc.courts.state.mn.us/ctrack/publicLogin.jsp, Case No. A110987.
13. Adekola O. Alao et al., *Cybersuicide: Review of the Role of the Internet on Suicide*, 9 CYBERPSYCHOL. & BEHAV. 489, 490 (2006) (stating that "[t]here are more than 100,000 web sites on the internet that deal with methods of committing suicide"); *see also* Recupero et al., *Googling Suicide: Surfing for Suicide Information on the Internet*, 69 J. CLINICAL PSYCHIATRY 878, 878 (2008) (stating that "[t]he internet . . . features numerous resources for the suicidal person, ranging broadly from support groups or crisis intervention sites discouraging individuals from committing suicide to pro-suicide groups and how-to-suicide instructions that would not otherwise be easily accessible to the average suicidal person"); Lucy Biddle et al., *Suicide and the Internet*, 336 BRIT. MED. J. 800 (2008). Biddle and her colleagues hypothesized that "most people use [popular] search engines" and "rarely look beyond the first page of results," and conducted simple searches for suicide methods using several popular search engines. A review of the first ten hits from each search yielded 240 discrete sites, ninety of which "were dedicated suicide sites. Half of these were judged to be encouraging, promoting or facilitating suicide."

checked through message boards, chats and emails.[14] Disturbing as this is, no current law explicitly prohibits it, even though media reports and small-scale case studies in the psychiatric literature suggest a direct link between visits to suicide chat rooms and completed suicides.[15]

This Note will explore how some speech which would otherwise be punishable currently flourishes unchecked on the internet, thus "circumvent[ing] [] traditional social controls."[16] Application of assisted suicide laws to cyber speech may occur infrequently. But where it does, punishment of this speech should not automatically be foreclosed by the First Amendment. Assisted suicide is currently unlawful in the majority of states, as it has been for hundreds of years in Anglo-American society. The First Amendment has never protected speech which is an integral part of criminal conduct,[17] and that principle should not be changed for cyber speech.

Part I of this Note provides background information on suicide-related cyber space. Part II summarizes relevant First Amendment and assisted suicide law. Part III analyzes two kinds of suicide-related cyber speech—encouraging suicide, and assisting or "teaching" suicide by providing detailed suicide methods—and explores how they fare under several traditional First Amendment doctrines. It concludes that suicide-related cyber speech should not be analyzed under the Court's test for illegal advocacy; rather, speech which counsels or encourages suicide—including cyber-suicide speech—should be identified as a traditional category of unprotected speech, or, alternatively, analyzed under strict scrutiny. Part IV presents a brief conclusion.

14. *See, e.g.*, Recupero, *supra* note 13, at 879 (noting the existence of "pro-suicide or 'pro-choice' suicide forums that not only avoid discouraging [users] from suicide, but sometimes go so far as to provide them with step-by-step suicide instructions or with the necessary means and encouragement to carry out a suicide attempt."); Baume, *supra* note 1, at 77 (hypothesizing that young man participating in suicide newsgroup "may have felt compelled by his internet participation to follow through with suicide," and positing that "were it not for his public commitments he might have been able to adopt a more constructive approach to problem-solving without losing face."). *See also About ASH*, http://ash2.wikkii.com/wiki/About_ASH (last visited Oct. 4, 2010) (stating that purpose of the web site is "to provide suicidal people and those suffering from a severe physical illness with the ability and freedom to make a fair, well-informed and unforced choice about whether they should live or die.").

15. *See generally* Brian L. Mishara & David N. Weisstub, *Ethical, Legal and Practical Issues in the Control and Regulation of Suicide Promotion and Assistance over the Internet*, 37 SUICIDE & LIFE-THREATENING BEHAV. 58 (2007) (stating that although anecdotal evidence links visits to suicide chat rooms with completed suicides, causation issues may limit application of existing assisted suicide laws to the internet; and noting that there are free speech concerns with controlling access to suicide chat rooms).

16. Baume, *supra* note 1.

17. Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949).

I. SUICIDE ON THE INTERNET

Web sites, chat rooms and forums in suicide-related cyber space are examples of "extreme communities" online. Researcher Vaughan Bell, who has studied the link between the internet and mental health. theorizes that because internet speech is uncensored, widely-separated and formerly-isolated people with "views considered extreme or unacceptable" can now form communities with like-minded others.[18] Some extreme communities are centered on bizarre beliefs or self-destructive activities.[19] Such groups may give members the impetus and information needed to accomplish self-destructive acts that result in illness, severe injury or death.[20]

Cyber space is brimming with web sites, newsgroups, message boards, forums and chat rooms devoted to suicide-related information and discussions.[21] Researchers generally characterize web sites and chat rooms[22] as "pro-suicide" if they seem to be "encouraging, promoting or facilitating suicide."[23] Sites categorized as pro-suicide take the position that all people should have the right to end their lives at any

18. Vaughan Bell, *Online Information, Extreme Communities and Internet Therapy: Is the Internet Good for Our Mental Health?,* 16 J. MENTAL HEALTH 445, 449 (2007).

19. *Id.* at 450. For example, one community of "likely-psychotic" people "reject[s] any medical explanation of their experiences and instead argue[s] that they are the [sic] subject to 'mind control' technology."

20. *Id*. Bell notes the extreme case of "a middle-aged male who self-amputated both legs after expressing a lifelong desire to be an amputee (a condition named apotemnophilia). The man in question reported that his participation with other members of an online discussion group (for those wanting to be amputees) 'deepened his motivation, developed the means, and finalized his determination to act on his desire.'" *Id.*

21. Alao, *supra* note 13, at 490; *see also* Susan Thompson, *The Internet and its Potential Influence on Suicide*, 23 PSYCHIATRIC BULL. 449 (1999). Speech on pro-suicide web sites and forums may be roughly divided between non-interactive web site content maintained by a site administrator, and interactive, user-generated content. Interactive content could include message board or newsgroup postings, and chat room, forum, text and email messages, e.g., messages of personal support; general discussion unrelated to suicide; philosophical conversation about suicide; offers and specific plans to enter into suicide pacts; speech encouraging suicide; and speech which could assist another in committing suicide by providing specific details on suicide methods.

22. This Note uses the term "web site" to refer to non-interactive internet sites where information and links are posted. Although there are technically differences among them, I use the terms "chat room," "newsgroup," "message board," and "forum" somewhat interchangeably to refer to sites where users can interact with each other, either by posting messages that others can reply to at their leisure, or in real time chats.

23. *See, e.g.*, Biddle, *supra* note 13, at 800. *See also* Recupero, *supra* note 13, at 882. Recupero and her colleagues studied the availability and type of suicide-related sites on the internet; they found that approximately 11% of sites reviewed had "a pro-suicide bias or slant," approximately 31% were "neutral" or balanced between pro- and anti-suicide views, and 29% were suicide-prevention or anti-suicide sites. The numbers do not total 100% because 9% of the sites would not load and 20% of the sites were only peripherally related to suicide "(eg [sic], rock band's homepage, movie or novel with suicide in the title)."

time, regardless of whether they are terminally ill,[24] and may post "methods files" containing detailed instructions on how to commit suicide.[25] In addition, "how-to" information may be traded on message boards, in private chats or in emails.[26] As a result, anyone can easily access suicide methods online, either by asking for advice and information on suicide forums or by searching "methods files" archived on a web site or 'wiki.'[27] For example, one young woman sought and received tips from members of a suicide forum enabling her to pose as jeweler and purchase poison that she later used to kill herself.[28] In another case, a young husband came home to find his wife dead and the computer still on, with detailed instructions on hanging still up on the screen.[29]

Although there are many reported case studies and newspaper articles linking individual suicides to participation in suicide chat rooms or to detailed suicide methods information posted on web sites, there is no evidence which conclusively supports this.[30] However, given the "near-ubiquitous" internet use in adolescents and young adults as well as a significant suicide rate in these age groups, it is easy to see why mental health professionals are alarmed.[31] Perhaps the strongest of

24. *About ASH*, *supra* note 14 (stating that purpose of the web site is "to provide suicidal people and those suffering from a severe physical illness with the ability and freedom to make a fair, well-informed and unforced choice about whether they should live or die.").

25. *See, e.g.*, *Archive*, ALT.SUICIDE.METHODS, http://archive.ashspace.org/asm_guide/ (last visited Nov. 28, 2011). To access, go to http://en.wikipedia.org/wiki/Alt.suicide.holiday, scroll to External Links section, click on link for ashspace.org (http://ashspace.org/), scroll down, and click on link for alt.suicide.methods_reference.

26. *See., e.g.,* Alao, *supra* note 13 (discussing availability of suicide information in chat rooms and web sites); *see also* State v. Melchert-Dinkel, No. 66-CR-10-1193, slip op. at 6–25 (D. Minn. Mar. 15, 2011) (detailing email correspondence and chat room conversations between William Melchert-Dinkel and victims Nadia Kajouji and Mark Drybrough). Forensic searches of Kajouji's and Drybrough's computers showed that after they posted requests for advice on killing themselves online, Melchert-Dinkel communicated with them via chat rooms and email.

27. *See, e.g.*, *Archive*, *supra* note 25.

28. Ellen Luu, Note, *Web-Assisted Suicide and the First Amendment*, 36 HASTINGS CONST. L.Q. 307, 308 (2009).

29. *Id.*

30. Ajit Shah, *The Relationship Between General Population Suicide Rates and the Internet: A Cross-National Study*, 40 SUICIDE & LIFE-THREATENING BEHAV. 146, 147 (2010). Shah conducted a broad-based study which attempted to correlate the prevalence of a country's internet users with its general suicide rates. He reviewed data from seventy-five countries, and concluded that there was a positive correlation for both sexes (i.e., that countries with the highest percentage of internet users also had the highest suicide rates). However, he cautioned that more research was needed before drawing conclusions on causality. *Id.* at 149.

31. A December 2009 survey by Pew Research Organization found that 74% of all Americans use the internet. Among Americans 30–49, the figure is 81%; among young adults 18–29, that figure rises to 93%. Lee Rainie, *Internet, Broadband and Cell Phone Statistics* 2, PEW INTERNET & AM. LIFE PROJECT (Jan. 5, 2010), http://www.pewinternet.org/~/media//Files/Reports/2010/PIP_December09_update.pdf.

their concerns is the presence of "vulnerable populations"—minors and persons with psychiatric disorders—with uncontrolled access to pro-suicide web sites.[32] In these sites, suicide may be encouraged or taken for granted as a rational problem-solving method.[33] The sites—or the users themselves—may prohibit or reject messages discouraging suicide,[34] thus creating an unbalanced environment that could trigger suicidal behavior in a vulnerable person.[35] Sometimes, discussion begun in online chats or message boards is continued in private emails. For example, in response to a posting by Mark Drybrough requesting "details of hanging methods where there isn't access to anything high up to tie the rope to," William Melchert-Dinkel sent Drybrough several emails with detailed information on how to successfully hang himself.[36]

Suicide chat rooms also serve as meeting places for individuals who want to enter into suicide pacts.[37] The resulting number of suicides seems to be increasing: In the past ten years, multiple deaths

Among teens 12–17, the figure is also 93%. Amanda Lenhart, Kristen Purcell, Aaron Smith & Kathryn Zickuhr, *Social Media and Mobile Internet Use Among Teens and Young Adults* 4 PEW INTERNET & AM. LIFE PROJECT (Feb. 3, 2010), http://pewinternet.com/~/media//Files/Reports/2010/PIP_Social_Media_and_Young_Adults_Report_Final_with_toplines.pdf (figures for teens 12–17 as of September 2009). According to the American Association of Suicidology, the 2007 suicide rate for all Americans was 11.5 deaths per 100,000 persons. *Suicide in the U.S.A. Based on Current (2007) Statistics*, AM. ASSOC. SUICIDOLOGY (2010), http://www.suicidology.org/c/document_library/get_file?folderId=232&name=DLFE-244.pdf. Suicide is the third leading cause of death among those 15–24, accounting for 12.2% of all deaths in that age group. *Youth Suicide Fact Sheet* 1, AM. ASSOC. SUICIDOLOGY (2010), http://211bigbend.net/PDFs/YouthSuicideFactSheet.pdf. One out of every twelve college students has made a suicide plan, and at least 1,000 of them follow through annually. *Id.* at 4. Even younger children are not immune: In 2007, the deaths of 119 American children between the ages of ten and fourteen were attributed to suicide. *Id.* at 2. Most adolescents who kill themselves do so at home after school. *Id.* at 3.

32. Mishara, *supra* note 15, at 63.

33. *About ASH*, *supra* note 14. *See also* Rebecca Sinderbrand, *Q&A: 'Groups Like Ours Will Always Exist,* NEWSWEEK WEB EXCLUSIVE, Nat'l Aff., June 24, 2003, *available at* LEXIS (quoting SR-71A, administrator of ASH Web site, as saying that "[t]he main purpose of the site is rational, open discussion about suicide, with an emphasis on individual liberty and autonomy.").

34. Baume, *supra* note 1, at 75; Thompson, *supra* note 21, at 450 (noting that the newsgroup alt.suicide.holiday "specifies that messages of discouragement or religious disapproval will not be tolerated.").

35. *See, e.g.*, Recupero, *supra* note 13, at 879 (noting the concern that "pro-suicide attitudes endorsed by groups in chat rooms or online suicide forums may lead vulnerable individuals ambivalent about suicide to decide to attempt suicide rather than to seek help"). *But see* Sinderbrand, *supra* note 33 (quoting SR-71A as saying that "[t]he media presents suicide cases as if they have been caused by online forums. In reality, if you have a forum of suicidal people then some will commit suicide, regardless of the subject. The real question is whether the rate of suicide on online forums is less or greater than the rate of suicide for people who are suicidal yet do not have or find access to such forums.").

36. State v. Melchert-Dinkel, No. 66-CR-10-1193, slip op. at 7–14 (D. Minn. Mar. 15, 2011).

37. Mishara, *supra* note 15, at 59.

have been reported in Asia and Europe as a result of suicide pacts originating online.[38] Perhaps more frightening—if less common—is the existence of online predators in suicide forums. William Melchert-Dinkel told police that "he most likely encouraged dozens of persons to commit suicide, and characterized it as the thrill of the chase."[39] Melchert-Dinkel seems almost benign compared to Gerald Krein, who was charged in 2005 with solicitation to commit murder when he tried to set up a Valentine's Day mass suicide online.[40] In contrast, however, some researchers believe that suicide forums can actually offer positive benefits for suicidal people,[41] and some suicide forum users have reported finding a valuable sense of support and community.[42]

38. *Id.* One source reports that between 2003 and 2005, "180 people died in 61 reported cases of Internet-assisted group suicide in Japan." David Samuels, *Let's Die Together: Why is Anonymous Group Suicide so Popular in Japan*, ATLANTIC (May 2007), http://www.theatlantic.com/magazine/archive/2007/05/let-8217-s-die-together/5776/. In England, one seventeen-year-old entered into a suicide pact with girls she met in a suicide forum and successfully completed suicide. Jonathan Owen, *Teens Die After Logging into 'Suicide Chat Rooms,'* INDEPENDENT (London), Sept. 10, 2006, http://www.independent.co.uk/news/uk/this-britain/teens-die-after-logging-into-suicide-chat-rooms-415386.html. In 2003, a Scottish man who entered into a suicide pact with a stranger he met online was charged with aiding and abetting suicide. Mishara, *supra* note 15, at 59.The Scot was talked out of killing himself at the last minute, but his companion completed suicide. *Id.*

39. Statement of Probable Cause, *supra* note 11, at 4.

40. Mishara, *supra* note 15, at 59; Rukmini Callimachi, *Man has History of Trying to Organize Suicides, Police Say*, FORT WORTH STAR-TELEGRAM, Feb. 14, 2005, *available at* 2005 WLNR 2059229.

41. *See, e.g.,* Darren Baker & Sarah Fortune, *Understanding Self-Harm and Suicide Web Sites*, 29 CRISIS 118, 119 (2008) (noting the tendency of researchers to ignore the positive aspects of suicide web sites unless they are "the *right sort* of web sites, such as those which advise acutely suicidal people to seek professional help.") (emphasis in original).

42. *Id. See also* Sinderbrand, *supra* note 33 (quoting SR-71A as saying that "I, personally, am alive because of the existence of the site and the channel. Being accepted by persons intrinsically understanding my thoughts and emotional pain made it much easier to talk about them."); Christiane Eichenberg, *Internet Message Boards for Suicidal People: A Typology of Users*, 11 CYBERPSYCHOL. & BEHAV. 107, 108 (2008). To assess whether suicide forums are actually harmful, Eichenberg studied 164 users of a popular German suicide forum. Using a detailed questionnaire, she identified three user types. Type 1, the "ambivalent help-seeking" group, comprised 21% of the sample. These users had the highest level of destructive (i.e. suicidal) motives, but also sought to participate in the forum for constructive reasons. Type 2, the "unspecifically motivated type," comprised 31% of the sample. These users were not strongly focused "on themselves or on others in connection with suicidal problems." Type 3, the "constructive help-seeker" group, comprised 48% of the sample. These users had virtually no destructive motives and were constructively motivated to seek and provide support with others sharing similar thoughts and feelings. Thus, Eichenberg concluded that for the large majority of users, this suicide forum appeared to provide some benefit in managing suicidal thoughts rather than increasing the risk of suicide. *Id* at 111–112.

II. LEGAL BACKGROUND

A. Suicide and Assisted Suicide

> Opposition to and condemnation of suicide—and, therefore, of assisting suicide—are consistent and enduring themes of our philosophical, legal, and cultural heritages.[43]

Assisted suicide is a criminal offense in the majority of states, as it has been for hundreds of years in Western society.[44] At common law, those who encouraged or assisted a suicide were viewed as principals in the second degree if they were present at the suicide, and as accessories before the fact if they were not.[45] The Model Penal Code criminalizes assisted suicide because of the potential deterrent effect.[46] Moreover, a law permitting a person to take another's life, even with consent, would threaten the state's interests in protecting "the sanctity of life," and would be inconsistent with laws criminalizing homicide.[47]

In contrast, suicide is no longer a statutory crime in the United States,[48] although it is still considered wrongful.[49] The decriminalization of suicide occurred gradually. In sixteenth-century England, suicide was considered "an Offence against Nature, against God, and against the King"[50]; it was a felony punishable by "ignominious burial" and forfeiture of one's land and goods to the Crown[51]; and was considered a form of murder.[52] The same approach was adopted in the early American colonies; however, common-law penalties were abandoned over time as states acknowledged the futility of imposing sanctions on the suicide and her family.[53] The last U.S. conviction for attempted suicide occurred in North Carolina in 1961[54]; the last U.S. statute rec-

43. Washington v. Glucksberg, 521 U.S. 702, 711 (1997).

44. *Id.*

45. Catherine D. Shaffer, *Criminal Liability for Assisting Suicide*, 86 COLUM. L. REV. 348, 349 (1986).

46. MODEL PENAL CODE § 210.5(2) cmt. at 100 (1980).

47. *Id.*

48. Shaffer, *supra* note 45, at 348. Suicide is still a common law crime or a crime of moral turpitude in a tiny minority of states, but it is rarely, if ever, punished. *See* 83 C.J.S. *Suicide* § 5 (2010).

49. *Glucksberg*, 521 U.S. at 714. An action is unlawful, or "wrongful" in this sense when it is "contrary to moral standards." SHORTER OXFORD ENGLISH DICTIONARY 3446 (6th ed. 2007). This Note assumes that suicide is unlawful (contrary to moral standards) but not illegal.

50. *Glucksberg*, 521 U.S. at 712, n.10 (quoting Hales v. Petit, 1 Plowd. Com. 253, 261, 75 Eng. Rep. 387, 400 (1561–1562)).

51. MODEL PENAL CODE § 210.5(2) cmt. at 91–92.

52. *Id.* at 92, nn.1–2.

53. *Glucksberg*, 521 U.S. at 713.

54. *See* MODEL PENAL CODE § 210.5(2) cmt. at 94, n.11 and accompanying text.

ognizing attempted suicide as a crime was repealed in 1976 by the state of Oklahoma.[55] Similarly, the Model Penal Code does not criminalize suicide[56]; according to the drafters, the threat of punishment is unlikely to deter someone from taking her own life.[57]

The decriminalization of suicide has led some people to call for the decriminalization of assisted suicide. Most of the debate has centered in the area of physician assisted suicide. In 1997, the Supreme Court upheld two assisted suicide laws against constitutional challenges. Both cases arose in the context of end-of-life considerations for terminally ill, suffering people. In *Washington v. Glucksberg*, the respondents, physicians who wanted to assist these patients in ending their lives, sought a declaratory judgment that Washington's assisted suicide statute was unconstitutional on its face.[58] They argued that a mentally competent, terminally ill person's right to choose physician-assisted suicide is a protected liberty interest under the Fourteenth Amendment.[59] In *Vacco v. Quill,* the petitioners, also physicians, argued that New York's assisted suicide law violated the Equal Protection Clause, because terminally ill patients on life support had the right to refuse or terminate life-saving medical treatment, while all other terminally ill patients were denied the right to active assistance in ending their lives.[60]

The Court rejected both arguments, holding in *Glucksberg* that the right to assistance in suicide is not a fundamental liberty interest protected by the Fourteenth Amendment,[61] and holding in *Vacco* that because the right to refuse or terminate life-saving medical treatment can be distinguished from the right to active assistance in ending one's life, assisted suicide laws do not violate the Equal Protection Clause.[62]

In rejecting the claimants' arguments, the Court reaffirmed the State's strong interests in preserving life and protecting vulnerable people from harm, while clarifying that the individual's constitutional liberty interest in refusing unwanted medical treatment is qualitatively different from a right to assistance in committing suicide. The Court grounded its analysis of both issues in America's history and tradi-

55. *Id.* at n.10.
56. *Id.* at 93.
57. *Id.* at 94.
58. *Glucksberg*, 521 U.S. at 707–708.
59. *Id.* at 708.
60. Vacco v. Quill, 521 U.S. 793 (1997).
61. *Glucksberg*, 521 U.S. at 705–706.
62. *Vacco*, 521 U.S. at 796–797.

tion.[63] It explained that assisted suicide bans "are longstanding expressions of the States' commitment to the protection and preservation of human life,"[64] deeply rooted in 700 years of "Anglo-American common-law tradition."[65] While noting that suicide is no longer harshly punished,[66] it explained that the lessening of penalties for suicides had resulted, not from any acceptance of suicide, but from a "growing consensus" that harsh sanctions do not deter suicides and are unfair to the survivors.[67]

The Court noted that attitudes toward *assisted* suicide had not undergone a similar transformation. Although advancements in medical technology have prompted many states to reexamine their assisted suicide bans and enact Death with Dignity acts,[68] almost all states continue to criminalize assisted suicide.[69] Thus, in view of the "consistent and almost universal tradition that has long rejected [assisted suicide] . . . and continues explicitly to reject it today," assisted suicide is not a fundamental liberty interest, and Washington's law does not violate the Fourteenth Amendment.[70] "To hold for respondents," the Court added, "we would have to reverse centuries of legal doctrine and practice, and strike down the considered policy choice of almost every State."[71]

In sum, after *Glucksberg* and *Vacco*, it is clear that states have a fundamental interest in protecting life, that suicide, though no longer a statutory crime, is still "unlawful" in a moral sense, and that there is a long-standing, Anglo-American tradition which disapproves of suicide and assisted suicide. In First Amendment jurisprudence, similar traditions determine whether speech is protected or wholly unprotected.[72]

63. *Glucksberg*, 521 U.S. at 710 ("We begin, as we do in all due-process cases, by examining our Nation's history, legal traditions, and practices."). In *Vacco*, handed down the same day, the Court did not engage in an extended historical analysis. Rather, Chief Justice Rehnquist, who wrote both opinions, incorporated the *Glucksberg* analysis by reference. *Vacco*, 521 U.S. at 796, n.1.

64. *Glucksberg*, 521 U.S. at 710.

65. *Id.* at 711.

66. *Id.* at 713.

67. *Id.*

68. *Id.* at 716.

69. *Id.*

70. *Id.* at 723.

71. *Id.*

72. In preparing the following overview of First Amendment law, the author referred to materials prepared by Professor Steven J. Heyman in 2009 (on file with the author) as well as the references cited below.

B. The First Amendment

1. Overview

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of the speech."[73] It protects expressive conduct as well as spoken and written words,[74] and it covers political, social, artistic, literary, and other forms of speech. Although Justice Black considered this language "absolute,"[75] in practice, the Court has "consistently held" that it is subject to interpretation, and that the freedom of speech may be restrained "'for appropriate reasons.'"[76]

Scholars cite three major rationales underlying the Court's freedom of speech jurisprudence.[77] First, the search for truth is best "reached by free trade in ideas" rather than by repressing bad ideas.[78] Second, in a democracy, all citizens must be able to criticize the government and freely express their views, no matter how unpopular.[79] Third, government limitations on speech can "[stunt] people's lives, their abilities to define and express who they are," and "[impoverish] the national culture."[80]

First Amendment analysis distinguishes between content-based and content-neutral regulations, and employs a dizzying variety of tests to review them. A law which is enacted to regulate conduct that has an incidental impact on speech is considered content-neutral. A law which is enacted to regulate speech because of what it communicates is a content-based regulation.

Historically, the content of some speech was considered of such "low value" that it was outside the protection of the First Amendment.[81] Categories of unprotected speech included obscenity, libel,

73. U.S. CONST. amend. I.

74. Texas v. Johnson, 491 U.S. 397, 404 (1989).

75. GEOFFREY R. STONE, ET AL., THE FIRST AMENDMENT 3 (3d ed. 2008) (quoting Hugo L. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 874, 879 (1960)).

76. *Id.*

77. *Id.* at 8–13.

78. *Id.* at 9 (citing Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes & Brandeis, JJ., dissenting)). Holmes wrote that "the best test of truth is the power of the thought to get itself accepted in the competition of the market."

79. *Id.* at 11 (discussing the work of Alexander Meiklejohn: "'the vital point . . . is that no suggestion of policy shall be denied a hearing because it is on one side of the issue rather than another. [Citizens] may not be barred [from speaking] because their views are thought to be false or dangerous. . . . When men govern themselves, it is they—and no one else—who must pass judgment upon unwisdom and unfairness and danger.'"). *See also* DANIEL A. FARBER, THE FIRST AMENDMENT 5 (2d ed. 2003).

80. FARBER, *supra* note 79, at 3–4.

81. *See* Chaplinsky v. New Hampshire, 315 U.S. 568, 571–572 (1942).

true threats, fighting words and illegal advocacy.[82] However, in the past forty years the Court has adopted an extremely speech-protective stance, and now accords protection even to some "low value" speech.[83] As a result, the government is generally prohibited from discriminating against speech based on its content or the viewpoint expressed, with two exceptions.[84] First, the constitutionality of laws regulating low-value speech may be upheld under tests developed by the Court. Second, even speech which is normally accorded full First Amendment protection may be regulated if the government can demonstrate that the law is the least restrictive means of achieving a compelling state interest.[85]

In *Brandenburg v. Ohio*, the Court significantly increased protection for one category of low-value speech, illegal advocacy,[86] with far-reaching consequences. The *Brandenburg* test states that the government cannot "forbid or proscribe advocacy of the use of force or of law violation" unless it is "directed to initiating or producing imminent lawless action" and is likely to produce it.[87] *Brandenburg* concerned political advocacy—specifically, advocacy of violence against the government to effect political change. However, because the Court did not precisely define the limits of "advocacy," lower courts have since applied the *Brandenburg* test to a broad variety of cases where speech advocates, encourages, or aids and abets an unlawful action. Nevertheless, because the imminence prong of *Brandenburg* is difficult to satisfy outside the context of public, political speech, some courts have declined to apply it in other contexts.

In keeping with the Court's speech-protective stance, it has rarely acknowledged new categories of low-value speech. However, in 1982 it announced in *New York v. Ferber* that child pornography was unprotected as a category.[88] How does the Court decide that a certain category of speech is unprotected? Its statement in *Chaplinsky v. New Hampshire* gives some guidance. In *Chaplinsky*, the Court noted that

> the right of free speech is not absolute at all times and all circumstances. There are certain well-defined and narrowly limited classes

82. *Id.* at 572.

83. FARBER, *supra* note 79, at 1.

84. *Id.* at 21.

85. Burson v. Freeman, 504 U.S. 191, 210–211 (1992) (holding that law prohibiting political campaigning within 100 feet of polls did not violate First Amendment).

86. Brandenburg v. Ohio, 395 U.S. 444 (1969); *see also infra* Part III.A.

87. *Brandenburg*, 395 U.S. at 447.

88. New York v. Ferber, 458 U.S. 747 (1982).

> of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and insulting or "fighting" words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.[89]

Two things are notable about the Court's comment. First, it suggested that low-value speech represents a societal balancing act, a concept which has since been firmly rejected.[90] Second, in indicating that the regulation of low-value speech "ha[d] never been thought to raise any Constitutional problem,"[91] the Court implied that it was merely stating a principle long-since recognized at common law and by earlier courts.

The Court elaborated on both of these concepts in *United States v. Stevens*. In *Stevens*, the Court rejected the government's argument that the test for First Amendment protection "depends upon a categorical balancing of the value of the speech against its societal costs."[92] It explained that its previous references to a First Amendment balancing test were merely descriptive[93]; the decision in *Ferber* to ban pornographic images of children resulted, not from the slight social value of the speech itself, but from the direct harm suffered by the child and the state's compelling interest in preventing abuse.[94] Moreover, the Court said, its holding in *Ferber* was firmly grounded in "a previously recognized, long-established category of unprotected speech" that is "used as an integral part of conduct in violation of a valid criminal statute."[95] In concluding his discussion, Chief Justice Roberts indicated that the Court might yet identify new "categories of speech that have been historically unprotected, but have not yet been specifically identified or discussed as such in our case law."[96] Thus, *Stevens* teaches that one of the defining characteristics of unprotected speech is its historically disfavored status.

89. Chaplinsky v. New Hampshire, 315 U.S. 568, 571–572 (1942).
90. *See* United States v. Stevens, 130 S. Ct. 1577, 1585–1586 (2010).
91. *Chaplinsky*, 315 U.S. at 571–572.
92. *Stevens*, 130 S. Ct. at 1585.
93. *Id.* at 1586.
94. *Id.*
95. *Id.*
96. *Id.*

2. Speech in Cyber Space

Speech in cyber space raises special concerns. The Court heard its first internet-related First Amendment case, *Reno v. American Civil Liberties Union*, in 1997.[97] In *Reno*, the Court struck down a federal statute intended to protect minors from obscene or indecent speech on the internet.[98] The Court held that although the government's interest was compelling, the challenged provisions of the Communications Decency Act (CDA) violated the First Amendment because they were overly broad, had a chilling effect on adult internet speech, and burdened an adult's right to receive legal information.[99] Because internet filtering and blocking software represented less restrictive alternatives, the CDA was unconstitutional.[100]

The Court analyzed the CDA under traditional First Amendment principles. It explained that the factors which had historically justified heavy regulation of the broadcast industry, such as a "scarcity of available frequencies" and "its 'invasive' nature," were not present on the internet.[101] The Court further explained that unlike radio or television, the internet is not "invasive" or intrusive.[102] Because users are required to seek out content, harmful material does not appear by accident.[103]

The Court did not have occasion to consider anonymous speech on the internet, which has changed the way people communicate with each other. Thus, it could not have anticipated the harm that can sometimes result from participation in extreme communities[104] or social networking sites such as MySpace. For example, in 2006, thirteen-year old Megan Meier committed suicide after being harassed by "a teenage mob" on MySpace.[105] An eighteen-year-old boy named Josh told Megan that "the world would be better off without her," and she apparently agreed.[106] Weeks later, her family learned that Josh was not a real boy but the fictional creation of Lori Drew, a neighbor who lived four hous-

97. Reno v. Am. Civil Liberties Union, 521 U.S. 844, 844 (1997).
98. *Id.* at 849.
99. *Id.* at 875.
100. *Id.* at 877.
101. *Id.* at 868–869.
102. *Id.* at 869.
103. *Id.*
104. *See supra* Part I.
105. Sarah Jameson, Comment, *Cyberharassment: Striking a Balance Between Free Speech and Privacy*, 17 COMMLAW CONSPECTUS 231, 231 (2008).
106. Betsy Taylor, *Missouri Prosecutor: Law Doesn't Allow for Charges in MySpace Teen Suicide Case*, ASSOCIATED PRESS, Dec. 4, 2007, *available at* WL 12/4/07 APWORLD 00:00:55.

es away.[107] Because Megan and Drew's daughter Sarah were no longer friends, Drew allegedly wanted to find out what Megan was saying about Sarah.[108] No federal internet law explicitly prohibited Drew's alleged behavior, and because it did not rise to the level of stalking or harassment in Missouri, no criminal charges were filed.[109] It is doubtful that an adult woman would have engaged in such speech if her identity had been known to the minor and the minor's family.

In sum, the Court's decision in *Reno* and the cautionary tale of Megan Meier together illustrate the difficulties of regulating harmful speech on the internet. In *Reno*, the Court clearly stated that the government cannot totally ban speech on the internet that is lawful for adults, even where the government has a compelling interest in preventing harm to vulnerable minors. Moreover, because cyber bullying is a new phenomenon, there were no laws under which Lori Drew could properly be charged. In contrast, it may be possible to apply existing assisted suicide laws like Minnesota's to prohibit online speech which assists or encourages people to commit suicide.

III. ANALYSIS

This analysis will focus on two kinds of suicide-related cyber speech—speech which assists or "teaches" suicide by providing detailed information on suicide methods, and speech which encourages suicide. Although the analysis is not state-specific, it uses Minnesota's assisted suicide law—which punishes anyone who aids a suicide by "intentionally advis[ing], encourag[ing], or assist[ing] another in taking the other's own life"[110]—as a model for a hypothetical assisted suicide statute in the State of X.[111] The analysis also assumes that State X has decriminalized suicide.

107. Matthew C. Ruedy, Comment, *Repercussions of a MySpace Teen Suicide: Should Anti-Cyberbullying Laws Be Created?*, 9 N.C. J.L. & Tech. 323, 324 (2008).

108. Taylor, *supra* note 106.

109. *Id.*

110. Minn. Stat. § 609.215 (2011). The *Melchert-Dinkel* Court has construed this statute to require imminence. State v. Melchert-Dinkel, No. 66-CR-10-1193, slip op. at 32–33 (D. Minn. Mar. 15, 2011).The State X statute has not been similarly narrowed.

111. It should be noted that in some states, laws prohibit "aiding" suicide, while in other states, laws prohibit "assisting," "soliciting," or "encouraging" suicide. Minnesota defines aiding suicide to encompass advising, encouraging or assisting a person to commit suicide. At least six states define assistance to require "providing the physical means" or participating in the "physical act." Wayne R. LaFave, 2 SUBSTANTIVE CRIMINAL LAW § 15.6 , n.29 (2d ed 2010). Thus, this analysis would not apply in states which require physical assistance of some sort.

Part III.A explores the parallels between speech which assists suicide and speech which aids and abets crimes. It concludes that speech which is an integral part of a criminal action is not protected, and that because a state can constitutionally outlaw assisting suicide, it can do so whether the assistance comes in the form of speech or conduct. Part III.B first considers what issues arise if speech which encourages suicide is analyzed under the *Brandenburg* test. Next, it argues that *Brandenburg* is not the appropriate standard for analyzing speech which encourages suicide. It then argues that under *United States v. Stevens*, speech which encourages suicide is a traditional, unprotected category of speech. Finally, it argues that even if speech which encourages suicide is not a category of unprotected speech, an assisted suicide statute as applied to cyber speech should be upheld under strict scrutiny because of the state's compelling interests in preserving life, preventing suicide, and protecting vulnerable persons from abuse.

It should be noted that this analysis does not consider the First Amendment doctrines of overbreadth or vagueness.[112] In addition, it does not consider ideological discussions related to suicide—such as whether suicide is a rational choice in response to life's problems—because it assumes they are protected speech under the First Amendment.

A. Speech Which Assists or "Teaches" Suicide

Suppose that A, who lives in State X, responds to a forum posting by B, who indicates that she is suicidal, wants a quick and painless death, and asks for advice and information. A sends B an email "advis[ing] her to use morphine for a painless death, [explaining] how to falsify a prescription to buy the drug, the dose needed, and how to find a secluded place to avoid someone trying to save her."[113] B follows A's instructions, successfully purchases the correct dose of morphine, and completes suicide in a secluded place.[114] Without the information in A's email, B would have not have known what dose to use, or how to successfully falsify the morphine prescription. Therefore, A has aided

112. The *Melchert-Dinkel* Court ruled that Minnesota's assisted suicide statute is not unconstitutionally vague as applied to internet speech, because the language is clear and unambiguous, and an ordinary person would know what conduct it prohibits. Omnibus Order & Memorandum, *Melchert-Dinkel*, No. 66-CR-10-1193, at 15.

113. These facts are taken from a French case. *See Prison Sought in French Internet Suicide Case*, AGENCE FRANCE PRESSE ENGLISH WIRE, *available at* 9/23/08 AGFRP 03:00:00 (Sept. 23, 2008) (Westlaw).

114. *Id.*

B's suicide by assisting, or "teaching" her how to commit suicide by falsifying a prescription and buying the correct dose of morphine.

If A is charged with assisting suicide in connection with B's death, he will probably argue that his expression is protected by the First Amendment. Specifically, A is likely to argue that assisting suicide is a form of encouragement, or advocacy, and that he cannot be held responsible for B's suicide unless all elements of the *Brandenburg* test for illegal advocacy are met.[115] However, this is not the case.

Every court which has considered the question of a defendant's criminal liability for aiding others in the commission of a crime has concluded that the defendant's speech is not categorically protected by the First Amendment.[116] These courts have found *Brandenburg* inapplicable where the speech itself constitutes the aiding and abetting—that is, where it is "simply means to get a crime successfully committed."[117]

Justice Black first outlined the contours of this "speech-act doctrine" in *Giboney v. Empire Storage & Ice Co*.[118] In *Giboney*, the Court considered whether the First Amendment protected "peaceful" picketing by a labor union, which was trying to force an ice manufacturer to stop selling ice to non-union peddlers.[119] The ice manufacturer, Empire, charged that the union's actions violated Missouri's restraint of trade laws.[120] The union argued that because it was merely trying to publicize true facts about the labor dispute, its picketing was protected expression under the First Amendment.[121] The Court disagreed, finding that the union's speech was part of "a single and integrated course of conduct" aimed at violating Missouri's valid law, and holding that the First Amendment does not protect "speech or writing used as an integral part of conduct in violation of a valid criminal statute."[122] The Court added that if speech incidental to illegal conduct was protected, the government would find it impossible to punish many of "the most

115. *See infra* Part III.B.
116. Rice v. Paladin Enters. Inc., 128 F.3d 233, 244 (4th Cir. 1997).
117. *Id.*
118. Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949).
119. *Id.* at 491–492.
120. *Id.* at 493.
121. *Id*. at 497–498.
122. *Id.* at 498.

pernicious criminal acts and civil wrongs,"[123] such as solicitation, threats, bribery, perjury, harassment and forgery.[124]

The Court has affirmed the principle set forth in *Giboney* many times,[125] and lower courts have applied it in a variety of criminal aiding and abetting cases.[126] Where defendants have been charged with aiding and abetting a crime through speech or writing, these courts have distinguished *Brandenburg*, holding that the defendant's speech is not categorically protected by the First Amendment.[127]

For example, in *United States v. Buttorff*, the defendants were charged with aiding and abetting tax fraud by conducting public seminars where they encouraged others to file fraudulent tax returns and avoid paying taxes.[128] The Eighth Circuit held that the First Amendment did not automatically bar prosecution because

> [a]lthough the speeches here do not incite the type of imminent lawless activity referred to in criminal syndicalism cases, the defendants did go beyond mere advocacy of tax reform. They explained how to avoid withholding and their speeches and explanations incited several individuals to activity that violated federal law.[129]

The court reached this conclusion despite the apparent ideological basis for the defendants' speeches.[130] Moreover, although the defendants were not personally involved in preparing any false returns (and in fact, did not even know whether any false returns had been filed), people had testified to preparing false tax returns as a result of attending the meetings.[131]

In *United States v. Barnett*, the Ninth Circuit relied on *Buttorff* in holding that the First Amendment did not shield Barnett from liability for aiding and abetting illegal drug manufacture.[132] In *Barnett*, police searching the home of Hensley, who operated a PCP factory, found material Hensley had ordered by mail from Barnett, including instructions for the "Synthesis of PCP—Preparation of Angel Dust" and information on where to buy necessary ingredients.[133] When police later

123. Rice v. Paladin Enters. Inc., 128 F.3d 233, 244 (4th Cir. 1997).
124. *Id.* at 243–44 (citations omitted).
125. *See id.*
126. *Id.* at 244–246.
127. *Id.*
128. United States v. Buttorff, 572 F.2d 619, 622 (8th Cir. 1978).
129. *Id.* at 624.
130. *Id.* at 622 (noting testimony recalling that defendants' speeches dealt mainly with "the Constitution, the Bible, and the unconstitutionality of the graduated income tax.").
131. *Id.* at 623.
132. United States v. Barnett, 667 F.2d 835, 842–843 (9th Cir. 1982).
133. *Id.* at 838.

searched Barnett's home, they found documents for his mail-order business, which consisted of supplying instructions for manufacturing illegal drugs and information on where to buy the raw materials.[134] Barnett's sole contact with Hensley was through the mail, and he argued that the warrant failed to state facts sufficient to connect him to the illegal conduct. However, the court disagreed, finding sufficient evidence to sustain a charge of aiding and abetting the manufacture of illegal drugs.[135] It rejected Barnett's claim that the seized items—printed instructions for making illegal drugs—were protected by the First Amendment simply because they consisted of printed words,[136] and noted that if someone aids and abets a crime that is later carried out, it is irrelevant how much time elapses from the time the principal receives the instructions or advice and the time she actually commits the crime.[137]

At least one court has extended the speech-act doctrine to a civil case. In *Rice v. Paladin*, the Fourth Circuit relied heavily on *Barnett* in holding that the First Amendment did not shield Paladin, the publisher of the book *Hit Man,* from civil liability for aiding and abetting murder.[138] *Rice*, a wrongful death suit brought against Paladin, alleged that James Perry had committed three brutal murders by closely following *Hit Man*'s explicit instructions for becoming "a professional killer."[139] For the purposes of the summary judgment motion, Paladin stipulated that in marketing *Hit Man*, it had targeted would-be killers; that it had known and intended that the book's explicit instructions for becoming "a professional killer" would immediately aid and abet murderers; and that it had aided and abetted Perry in committing three murders.[140]

Since the facts stipulated to by Paladin were sufficient as a matter of law to establish its liability, the sole issue before the court was whether the First Amendment was an absolute bar to imposing that liability.[141] The district court, applying *Brandenburg*, granted Paladin's summary judgment motion, and held that *Hit Man* was protected speech under the First Amendment.[142] The Fourth Circuit reversed.

134. *Id.* at 840.
135. *Id.* at 841.
136. *Id.* at 842. ("The First Amendment does not provide a defense to a criminal charge simply because the actor uses words to carry out his illegal purpose.").
137. *Id.* at 841.
138. Rice v. Paladin Enters. Inc., 128 F.3d 233, 242–243 (4th Cir. 1997).
139. *Id.* at 241. Perry had already been convicted of the murders in a criminal trial.
140. *Id.*
141. *Id.*
142. *Id*. at 250.

Judge Luttig acknowledged the importance of the freedoms protected by *Brandenburg*.[143] However, he rejected the application of *Brandenburg* to the case before him, reasoning that where the defendant intentionally aided and abetted murder for commercial gain, those freedoms were not implicated.[144]

Because Justice Luttig found *Barnett* "indistinguishable in principle" from the case before him, he chose to rely primarily on criminal aiding and abetting law in his analysis, reasoning that the principles were equally applicable to civil cases.[145] Like Barnett, Paladin's only contact with the criminal occurred when it responded to his order and payment by mailing printed material. However, this material consisted of detailed, highly specific written instructions which assisted or "taught" the criminal how to commit the particular crime. If the First Amendment did not bar punishment of Barnett's speech-act in a criminal case, Judge Luttig concluded that there was no reason why it could not be applied in a civil context.[146]

Judge Luttig also noted that consistent with the position of these courts, the Department of Justice had advised Congress that *Brandenburg*, and the "imminence requirement in particular," was not applicable to criminal aiding and abetting, because an aiding and abetting charge is not directed to advocacy of criminal conduct, "but on defendants' successful efforts to assist others by" instructing them in committing a crime.[147] Thus, Justice Luttig concluded that the First Amendment was not an absolute bar to Paladin's liability for the wrongful death suit.[148]

In sum, *Giboney* and the cases that rely on it teach that the First Amendment does not bar enforcement of valid criminal laws simply because speech might somehow be implicated, and that courts considering aiding and abetting cases involving speech may properly analyze them under the principles announced in *Giboney* rather than applying the *Brandenburg* test. Moreover, several courts have concluded that a lack of personal contact or a gap in time from receipt of instructions to

143. *Id.* at 243.

144. *Id.* at 242–243.

145. *Id.* at 244–247 (discussing the speech-act doctrine in criminal aiding and abetting cases, and concluding that if the First Amendment does not bar liability for speech acts in criminal cases, there is no reason not to extend the principle to civil cases).

146. *Id.* at 247–248. The court did note that a heightened intent requirement might apply in civil cases, but felt that it would be met on the facts before it. *Id.*

147. *Id.* at 246 (quoting DEP'T OF JUSTICE 1997 REP. ON THE AVAILABILITY OF BOMBMAKING INFO., at 37 (Apr. 1997)).

148. *Id.* at 243.

the commission of the crime does not invalidate a charge of aiding and abetting.

A would probably argue that speech which assists suicide is distinguishable from speech which aids and abets criminal actions for one critical reason: suicide is not an illegal action in State X. Because suicide is not illegal, an aiding and abetting analysis should not apply, and punishment of A's speech should be foreclosed by the First Amendment.

In this case, A would be wrong because he aided and abetted B in falsifying a prescription for a controlled substance, which is surely unlawful. Therefore, A would probably be charged with aiding and abetting B's illegal drug purchase, and A's action would fall squarely within the bounds of aiding and abetting cases as exemplified by *Barnett*. Since the end result of B's illegal action was B's suicide, A's speech would not be protected by the First Amendment.

Now assume instead that A sends B an email with very detailed instructions on how to successfully hang herself. Specifically, A's email details the exact kind of rope B should buy, exactly how to tie the knot, and exactly where B should place the rope around her neck to assure that she dies quickly and with the least possible discomfort.

Since completing suicide via hanging is not illegal, A's speech does not fall within the aiding and abetting category exemplified by *Barnett*. However, A's contention that his speech is protected can be addressed in two different ways. First, a court might consider that suicide, though no longer a statutory crime, is still considered "wrongful" in Western society.[149] Suicide was not decriminalized because the practice of killing oneself became acceptable, but out of respect for the suicide's family.[150] If suicide were not still in some way "wrongful," assisted suicide would not be criminalized. Therefore, a court might find that suicide is a morally wrong, "quasi-unlawful" act, and an aiding and abetting analysis could properly be applied, with the result that A's speech would not be protected by the First Amendment.

A court unwilling to stretch the concept of an unlawful act to encompass suicide as a wrongful, quasi-unlawful act, could instead consider that although the principle announced in *Giboney* has been *applied* to cases of aiding and abetting criminal actions, it is not *limited* to cases of criminal aiding and abetting. In fact, there is nothing in

149. *See supra* note 49.
150. Washington v. Glucksberg, 521 U.S. 702, 713 (1997).

Giboney which requires one person's speech to aid and abet another person in completing an illegal action. *Giboney* simply says that speech which is an integral part of criminal conduct is not protected. Thus, if a state has enacted a valid criminal law of general applicability, it can punish violations of that law whether the violation occurs as conduct or speech.

Since the Supreme Court upheld the constitutionality of assisted suicide laws in *Glucksberg*,[151] State X can apply the principle set forth in *Giboney* and validly punish speech which assists suicide of a specific person, in violation of its valid statute. By sending B detailed instructions on how to hang herself, A has intentionally assisted or "taught" B, a specific person, to commit suicide. Since B has completed suicide, the requirements of State X's statute are fulfilled, and A's speech will fall outside the protection of the First Amendment.

Assume, however, that A is a web master for a pro-suicide web site, and that he has written and posted a file with very detailed instructions on completing various methods of suicide, including hanging. There is no accompanying material advocating the right to choose suicide. B accesses A's "how to hang yourself" instructions and completes suicide using the method A describes. The computer in the room where B is found is still on, with A's instructions still on the screen.[152] Whether A's speech is protected will turn on whether he has violated the assisted suicide statute.

Both *Barnett* and *Buttorff* endorse the notion that if A intends the instructions to be used to complete suicide, it is irrelevant how long B waits after reading the material before she completes suicide. Further, it is not important if A has had much personal contact with B, and it does not even matter if A knows whether B has successfully completed suicide. However, State X's statute requires A to assist a specific person, B, in successfully completing suicide. Under these facts, it is doubtful that A would be found to have violated State X's statute, because while A may intend that the instructions be used to complete suicide, he probably does not intend that B, specifically, use them. Therefore, in this scenario, A's speech is most likely protected by the First Amendment.

In sum, in interactive situations (such as an email, chat, text message, or forum posting), where A provides B with specific suicide in-

151. *See supra* Part II.A.

152. These facts are taken from a Florida case. *See* Rebecca Sinderbrand, *Point, Click and Die*, NEWSWEEK (U.S. Ed.), June 30, 2003, (Nat. Affairs), at 28, *available at* LEXIS.

structions, which B then uses to complete suicide, A's speech is almost certainly unprotected under the First Amendment. However, if B accesses A's instructions through a non-interactive format such as a methods file posted on a web site, A will most likely escape any charges under an assisted suicide statute which requires intent to aid a specific person in committing suicide.

B. Speech Which Encourages Suicide

Whether a state can punish cyber speech which merely encourages suicide is less clear. First, because encouragement is a form of advocacy, many courts will apply the *Brandenburg* test, and as set forth below, under a strict application of *Brandenburg*, an assisted suicide statute would almost certainly be held unconstitutional as applied to cyber speech. Second, "encouragement" is a broad and somewhat amorphous concept. While it is clear that the statement "I think you should kill yourself," is a direct encouragement to suicide, encouragement may also be indirect, or discernible only through a pattern of repeated statements. For example, a suicidal person who is repeatedly told that "suicide is the only way to end your pain," or "I don't know why you're still alive," may eventually take those statements as encouragement to commit suicide.

Charges for encouraging suicide through speech are extremely rare and convictions are almost non-existent. However, in a 1984 incident, a California man was charged with encouraging suicide for yelling "Jump!" to a woman who was about to leap from a water tank.[153] Similarly, in 1990, a Canadian man was charged with aiding suicide for encouraging a patron in a bar to shoot himself.[154] It is un-

153. *Around the Nation: Man is Held for Telling Student on Tank to Jump*, N.Y. TIMES, Dec. 8, 1984.

154. *Man Charged with Aiding Suicide*, GLOBE & MAIL (Toronto), July 16, 1990, at A7, *available at* WLNR 4557115. For other cases, *see China Scene: East*, CHINA DAILY, *available at* 2009 WLNR 4303799 (Mar. 3, 2009) (Chinese man arrested for encouraging man to jump from roof); *Teenagers in German Town Urge Woman Threatening Suicide to Jump*, IRISH TIMES, Nov. 8, 2006, *available at* 2006 WLNR 19343148; *Trial Delayed for Montreal Dad Charged With Pushing Kids to Commit Suicide*, CANADIAN PRESS, Oct. 24, 2006, 10/24/06 AP Alert-Crime 02:23:07, *available at* WESTLAW; Thom Mrozek, *Defendant in Assisted-Suicide Trial Knew of Victim's Past*, LOS ANGELES TIMES, May 27, 1994, *available at* 1994 WLNR 4169359 (California man who knew roommate had made previous suicide attempt on trial for assisted suicide for handing roommate shotgun and telling him "Just do it."); Inga Saffron, *Bar Bet Was After Hours,* PHILADELPHIA INQUIRER, Dec. 24, 1986, http://articles.philly.com/1986-12-24/news/26071465_1_bet-john-williamson-bar (officials considering assisted suicide or manslaughter charges against bar patrons and employees after $70 bet led bar manager to drink himself to death); *Teen-ager Sentenced on Charge of Aiding in Suicide*, ASSOCIATED PRESS, Jan. 7, 1985, 1/7/85 AP Online 00:00:00, *available at* WESTLAW

known whether either case resulted in a conviction. However, in 2002, a Welsh teenager was convicted of encouraging his girlfriend to commit suicide by jumping from a cliff.[155] According to the girl, who survived her attempted suicide, the boy told her that "my life was crap and he didn't know why I was still alive. *He was just going on and digging at me*—telling me he wanted me to be free."[156] He also encouraged her to jump off the bridge so that she could join the friend who had previously died there.[157] In contrast, no charges were brought in two sensational cases where people watched suicides broadcast live on the internet—and encouraged the suicidal people to go through with the acts.[158]

Now assume that A, who lives in State X and knows B is suicidal, sends B several emails over the period of a few days, encouraging her to jump from the bridge near her house, and assuring her that suicide is the only way to end her pain. Assume that the day after B receives A's last email, she reads it again and, leaving it up on her computer screen, goes to the bridge and jumps, successfully completing suicide. In this scenario, A will argue that he cannot be held responsible for B's death unless all elements of the *Brandenburg* test are met.

1. Illegal Advocacy

In *Brandenburg v. Ohio*,[159] the Court overturned the conviction of a Ku Klux Klan leader for violating Ohio's criminal syndicalism statute, holding that a state cannot "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."[160] Brandenburg was convicted of advocating the

(teenager who helped classmate prepare suicide note sentenced to year of probation and $2500 fine after pleading no contest).

155. Tania Branigan, *Schoolboy Guilty of Trying to Get Girlfriend to Commit Suicide,* GUARDIAN (U.K.), June 29, 2002, *available at* http://www.guardian.co.uk/uk/2002/jun/29/taniabranigan/print.

156. Tania Branigan, *Suicide Case Boy 'Thrilled by Death,'* GUARDIAN (U.K.), June 18, 2002, *available at* 2002 WLNR 15228303. (emphasis added). She also remembers him "pushing her towards the edge of the cliff." *Id.*

157. *Id.*

158. *See* Jonathan Abel, *As Teen Died, They Just Watched. How?* ST. PETERSBURG TIMES, Nov. 29, 2008, at 1B, *available at* 2008 WLNR 22999461; Steven Wright, David Wilkes, & Beth Hale, *Chatroom Users 'Egged on Father to Kill Himself Live on Webcam*,' MAIL ONLINE, last updated Mar. 23, 2007, http://www.dailymail.co.uk/news/article-444182/Chatroom-users-egged-father-kill-live-webcam.html."

159. Brandenburg v. Ohio, 395 U.S. 444 (1969).

160. *Id.* at 447–448.

use of violence against the government at a Klan rally for stating that if the government "continues to suppress the white, Caucasian race, it's possible that there might have to be some revengeance taken."[161] The Court criticized the Ohio statute for punishing the "mere advocacy" of violence or the "teaching" of criminal syndicalism to achieve political reform, as distinguished from advocacy that incites "imminent lawless action."[162] It explained that while "preparing a group for violent action and steeling it to such action" can lawfully be punished, "the mere abstract teaching . . . [of the] moral necessity for a resort to force and violence" cannot.[163]

Because of the Court's failure to narrowly define the scope of "advocacy," lower courts have since applied the principle announced in *Brandenburg* to facts far removed from political advocacy.[164]

In the scenario set forth above, A has encouraged B via email to commit suicide by jumping off a bridge. The first prong of *Brandenburg* requires that the speaker advocate "the use of force or of law violation." While it is possible that A could encourage someone to commit suicide using a violent method (say shooting) or an unlawful method (say purchase and use of a controlled substance), here A has encouraged B to jump off a bridge, a method which is arguably neither violent nor unlawful. Similarly, if A encourages B to commit suicide without recommending a particular method, no matter how persistently or persuasively, A would not be liable for B's suicide, because suicide itself is not a "law violation" anywhere in the United States.[165] However, although suicide is no longer criminal, it is still disfavored and "wrongful." This presents a dilemma. The act of encouraging a suicide is illegal, yet if the encouragement takes the form of speech, it is not illegal under *Brandenburg*. This is a wrong result, because it is inconsistent with the intent of the law.

161. *Id.* at 446.

162. *Id.* at 448–449.

163. *Id.* at 448 (citing Noto v. United States., 367 U.S. 290 (1961)).

164. *See, e.g.,* Entertainment Software Ass'n v. Foti, 451 F. Supp. 2d 823 (M.D. La. 2006) (granting preliminary injunction barring enforcement of a statute criminalizing distribution of video and computer games that appeal to minors' morbid interest in violence, on grounds that they are protected expression under *Brandenburg*); Herceg v. Hustler Magazine, Inc., 814 F.2d 1017 (5th Cir. 1987) (applying *Brandenburg* and holding that magazine article did not incite adolescent to perform act that led to death by hanging); *but see* Rice v. Paladin Enters. Inc., 128 F.3d 233 (4th Cir. 1997) (declining to apply *Brandenburg* and holding that book *Hitman* was a criminal instruction manual not protected by First Amendment).

165. *See supra* Section III.A.

As set forth in Part III.A, courts could relax the "illegal action" prong so that it includes the "quasi-unlawful" act of suicide. This would not be a great stretch. Suicide has been disfavored in western culture for more than 700 years, and has been illegal for much of that time. The fact that it is no longer illegal reflects a policy decision—that criminalizing suicide will not effectively deter it, and will only burden the suicide's family. If suicide were not still in some way "wrongful," assisted suicide would not be criminalized. Therefore, modifying *Brandenburg* to allow the "quasi-unlawful" action of suicide to fulfill the unlawful action requirement would be consistent with the historical understanding of suicide as a crime, even though suicide today is no longer criminalized.

However, even assuming the problem of "unlawful" action is overcome, a problem with the imminence requirement will remain. A's advocacy must be "directed to initiating or producing imminent lawless action." To "direct" in this sense means to "cause (someone or something) to move on a particular course."[166] Thus, A's speech must encourage B to commit suicide "imminently."[167] The *Brandenburg* Court gave no guidance on what qualifies as "imminent" action. However, in a later case the Court narrowed the time frame considerably,[168] and Kent Greenawalt calculates that "imminence" cannot be more than a few hours.[169] Thus, under the second prong of *Brandenburg*, by sending B an email, A must intend to encourage B to commit suicide within a few hours, at most. While it is possible that this might occur in some situations, under the facts assumed here it is not clear that A has a specific time frame in mind. A further complication is that while speech in a chat room is in real time, the recipient of an email may not read it immediately—possibly not for days. This could potentially invalidate even a clear attempt to encourage a specific person to commit suicide quickly. As discussed more fully in Section III.B.2, below, while an "imminence" requirement makes absolute sense if the Court's goal is to allow political speech the maximum latitude possible

166. BLACK'S LAW DICTIONARY 491 (8th ed. 2004).

167. According to BLACK'S, an imminent danger is "an immediate, real threat to one's safety that justifies the use of force in self-defense." *Id*. at 421. It does not define "imminent" separately. The SHORTER OXFORD ENGLISH DICTIONARY 1331 (6th ed. 2007) defines "imminent" as "impending, soon to happen."

168. Hess v. Indiana, 414 U.S. 105, 108–109 (1973) (reversing the disorderly-conduct conviction of a demonstrator who yelled, "We'll take the fucking street later.").

169. KENT GREENAWALT, SPEECH, CRIME, & THE USES OF LANGUAGE 209 (1989).

before restraining it through criminal sanctions, it means little in the context of a private email which advocates suicide.

Finally, under the third and final prong of *Brandenburg,* A's encouragement must be "likely to incite" B's suicide. How is this to be judged? Because there is really no objective standard, a court would have to determine it on a case-by-case basis. Thus, while some encouragements might satisfy this prong, it is clear that many of them probably would not. On the facts assumed here, it is arguable that A's emails, taken as a whole, would be likely to encourage B, as a suicidal person, to commit suicide.

Now assume that A, the webmaster of a pro-suicide forum, has written and posted content on the site which encourages suicide. If *Brandenburg* is strictly applied, it would be nearly impossible for the State X statute to survive all three prongs of the test. In addition, A's posting would probably not meet the requirements of the statute itself. First, the statute requires intent to aid a specific person in taking her life, and *Brandenburg* requires that the encouragement be directed to encouraging unlawful action. Neither of these requirements is likely to be satisfied by A's general statement, posted on a web site, encouraging suicide. Second, if A posts content encouraging suicide on his web site, he is likely to do so in the context of advocating for a specific cause. For example, A's web site might encourage terminally ill persons in great pain to end their lives rather than continuing to suffer. This kind of speech would fall into the category of abstract advocacy, which is protected under *Brandenburg*. Third, even if B reads A's web page and immediately commits suicide, the timing and the connection would be difficult to prove. Fourth, as previously discussed, a court would have to be persuaded to modify the unlawful act requirement to include the "quasi-illegal" act of suicide. Finally, A's encouraging web page must be likely to cause suicide imminently. While it might be possible to show that B, for example, actually committed suicide within a very short time after reading A's web page, the test requires that A's encouragement be *likely* to cause suicide. Without a statistical study, likelihood would be difficult to prove at best.

In sum, it is clear that if *Brandenburg* is strictly applied, only a very small percentage of cyber suicide encouragements, if any, would survive the analysis. Under *Brandenburg*, application of an assisted suicide statute to cyber speech encouraging suicide is likely to be held unconstitutional. However, there is a strong argument to be made that

Brandenburg should not apply to non-ideological speech like the private emails between A and B.

2. Brandenburg Should Not Be Applied to Cyber Suicide Speech

Kent Greenawalt believes that "the values and dangers of encouragements to criminal behavior depend greatly on the context in which they are uttered and on the reasons given to support them."[170] He contends that a stringent test such as the one set forth in *Brandenburg* appropriately protects public, ideological speech which encourages specific crimes, because the First Amendment value of such speech is high.[171] As Justice Luttig noted in *Rice*, the "right to advocate lawlessness is, almost paradoxically, one of the ultimate safeguards of liberty. . . . Without the freedom to criticize that which constrains, there is no freedom at all."[172] Thus, public, ideological speech implicates one of the fundamental rationales for protecting freedom of expression—the right to self-governance.[173] Moreover, unless the speaker is inciting the imminent commission of a crime, the listener will most likely have the opportunity to listen to opposing points of view and form her own opinion on the course of action being advocated.

In contrast, Greenawalt believes that there is little reason to protect private, non-ideological encouragements to crime.[174] For example, if A privately encourages B to kill C, the communication has little expressive value, especially when weighed against the danger to C.[175] Moreover, since B is unlikely to discuss what A has said to anyone else, there will probably be no counter-speech which could influence B's thinking.[176] Since the opportunity for counter-speech is virtually nil, the rationale for the *Brandenburg* imminence requirement becomes essentially meaningless.[177] Therefore, Greenawalt suggests that a more appropriate way to evaluate whether a private, non-ideological encouragement to crime should be protected is simply to determine whether A actually intended to encourage B in the commission of a crime, and if so, whether he has effectively communicated that to B.[178]

170. *Id.* at 260.
171. *Id.* at 266.
172. Rice v. Paladin Enters. Inc., 128 F.3d 233, 243 (4th Cir. 1997).
173. *See supra* note 79 and accompanying text.
174. GREENAWALT, *supra* note 169, at 261.
175. *Id.*
176. *Id.*
177. *Id.*
178. *Id.* at 262.

Although Greenawalt's analysis is confined to private speech which encourages the commission of a crime, it can appropriately be applied to private speech in which A encourages B to commit suicide through a series of emails. Although suicide is no longer illegal, it is still morally disfavored, and A is engaging in a criminal action by counseling suicide. Counseling suicide does not implicate one of the core First Amendment rationales any more than counseling murder does. Thus, the expressive value of A's communication urging B to commit suicide is no greater than it would be if A were urging B to commit murder. Similarly, the danger to B is great, especially in view of the fact that she may feel incapable of or unwilling to discuss the idea of committing suicide with anyone else. Moreover, even if B does discuss the idea of committing suicide with someone else, she may be too fragile, vulnerable or depressed for counter-speech to impact her thoughts or feelings. Thus, there would be no reason to impose an imminence requirement on A's communication to B.

Under Greenawalt's standard for private non-ideological speech, as long as A's emails to B demonstrate a clear intention to encourage B to commit suicide, A's speech would not be protected under the First Amendment. Therefore, A could be held liable under an assisted suicide statute such as State X's, consistent with the legislature's intent. Since the State X statute requires A to intentionally encourage B to commit suicide, Greenawalt's test is also consistent with the statutory requirements set forth by the state. In contrast, as demonstrated above, strict application of the *Brandenburg* test to speech which encourages suicide would fail, thwarting the legislature's intent to punish assisted suicide.

Another approach courts might take to evaluating speech which encourages suicide is to consider whether it is a new category of unprotected speech.

3. United States v. Stevens: Historically Unprotected Speech

In *United States v. Stevens*, Chief Justice Roberts intimated that if the Court were ever to recognize a new category of unprotected speech, it would be one which had been "historically unprotected, but [which had] not yet been specifically identified" as such by the Court.[179] In *Stevens*, the Court considered whether a federal statute criminalizing the commercial creation, distribution, or possession of

179. United States v. Stevens, 130 S. Ct. 1577, 1586 (2010).

certain depictions of animal cruelty was facially invalid under the First Amendment.[180] Although Congress had enacted the statute to prohibit "crush" videos, which showed small animals being tortured and killed to satisfy a specific sexual fetish,[181] Stevens had been convicted for distributing videos of dogfights.[182]

On appeal, the Third Circuit vacated Stevens' conviction and struck down the statute, holding that it could not survive strict scrutiny.[183] The Supreme Court affirmed on the grounds that the statute was substantially overbroad, and thus invalid under the First Amendment.[184] The government argued that depictions of animal torture should be recognized as a new category of unprotected speech because they had little or no redeeming value.[185] It proposed to evaluate whether speech should be categorically unprotected by balancing "the value of the speech against its societal costs."[186] The Court rejected the government's "startling and dangerous" proposal for evaluating unprotected speech in the strongest possible terms,[187] explaining that whenever "we have identified categories of speech as fully outside the protection of the First Amendment, it has not been on the basis of a simple cost-benefit analysis."[188] Rather, when determining that speech is categorically unprotected, the Court "ground[s] its analysis in a previously recognized, long-established category of unprotected speech," that is, speech which is "used as an integral part of conduct in violation of a valid criminal statute."[189] Thus, if speech which encourages suicide is to become a new category of unprotected speech under the First Amendment, it must fall into a category of speech which has historically been recognized as unprotected.

As the Court acknowledged in *Glucksberg*, assisted suicide has been illegal for more than 700 years, and suicide itself was once considered "an Offence against Nature, against God, and against the King."[190] However, *Stevens* teaches that even if assisted suicide has historically been prohibited, this alone is not enough to warrant a new

180. *Id.* at 1582.
181. *Id.*
182. *Id.* at 1583.
183. *Id.* at 1584.
184. *Id.* at 1592.
185. *Id.* at 1584.
186. *Id.* at 1585.
187. *Id.*
188. *Id.* at 1586.
189. *Id.*
190. Washington v. Glucksberg, 521 U.S. 702, 712, n.10 (1997).

category of speech. Rather, the speech itself must also have been traditionally unprotected. As an example, the *Stevens* Court acknowledged that animal cruelty had historically been prohibited.[191] However, because there was no evidence that *depictions* of animal cruelty were historically unprotected, the Court declined to recognize depictions of animal cruelty as a new category of speech.[192]

At common law, suicide was a grievous wrong which "by [] example and evil [] threaten[ed] and endanger[ed] the subversion of all civil society."[193] Life was a gift from God, who alone had the power to destroy it. Thus, a person who committed suicide was guilty of self-murder, "a double offense"—one against God, and the other "against the king, who [had] an interest in the preservation of all his subjects."[194] As a result, suicide was ranked "among the highest crimes . . . [as] a peculiar species of felony."[195] At common law it was unlawful to "counsel and solicit another to commit a felony or other aggravated offense," even if the crime was not committed.[196] Today, counseling or soliciting a felony is still recognized as a substantive crime by most courts.[197]

Because suicide was historically a felony, one who advised or counseled another to commit suicide was traditionally committing a substantive crime. Although suicide is no longer a felony, it continues to be "wrongful." Because suicide, though no longer illegal, is still highly disfavored in our society, it is fair to class speech counseling or encouraging suicide with speech counseling a felony—as a traditionally unprotected category of speech.

Since both assisted suicide and speech which counsels suicide have been traditionally unlawful, based on the criteria laid out by Chief Justice Roberts in *Stevens*, there is a strong possibility that the Court would consider identifying speech which counsels suicide as categorically unprotected under the First Amendment.

191. *Stevens*, 130 S. Ct. at 1585.
192. *Id.*
193. 4 WILLIAM BLACKSTONE, COMMENTARIES *176, *176.
194. *Id.* at *189.
195. *Id.*
196. United States v. De Bolt, 253 F. 78, 81 (S.D. Ohio 1918).
197. *Construction & Effect of Statutes Making Solicitation to Commit a Crime a Substantive Offense*, 51 A.L.R.2d 953 § 2(a).

4. Strict Scrutiny

An assisted suicide statute as applied to cyber suicide speech has a good chance of being upheld under strict scrutiny. In order to survive strict scrutiny, the government must show that a content-based regulation is narrowly tailored to achieve a compelling government interest.[198] For example, in *Burson v. Freeman*, a plurality of the Court upupheld a Tennessee statute which prohibited campaigning within 100 feet of a polling place.[199] The challenger, a politician, asserted that it limited her ability to communicate with voters.[200] The state argued that the statute advanced its compelling interests in "protecting the rights of its citizens to vote freely" and ensuring the integrity of its election process.[201] The plurality agreed that the state's interests were compelling.[202] In addition, after a historical review of election proceedings, it concluded that "restricted areas in or around polling places" were necessary.[203]

For an assisted suicide statute to withstand strict scrutiny, the state's interests in preserving life, preventing suicide and protecting abuse of vulnerable persons must be "compelling." Because neither *Glucksberg* nor *Cruzan* was decided under strict scrutiny, the Court did not use the word "compelling" in describing the state interests asserted in these cases. Nevertheless, in considering whether Missouri had a right to require clear and convincing evidence of Cruzan's wishes before withdrawing her from life support, the Court stated that

> there can be no gainsaying [Missouri's] interest [in the protection and preservation of human life]. As a general matter, the States—indeed, all civilized nations—demonstrate their commitment to life by treating homicide as a serious crime. Moreover, the majority of States in this country have laws imposing criminal penalties on one who assists another to commit suicide. We do not think a State is required to remain neutral in the face of an informed and voluntary decision by a physically able adult to starve to death.[204]

Similarly, the *Glucksberg* Court stated that

> [i]n almost every State—indeed, in almost every western democracy—it is a crime to assist a suicide. The States' assisted suicide bans are not innovations. Rather, they are longstanding expressions of the

198. Burson v. Freeman, 504 U.S. 191, 198 (1992).
199. Id.
200. Id. at 194.
201. Id. at 198–199.
202. Id. at 199.
203. Id. at 200.
204. Cruzan v. Director, Missouri Dept. of Health, 497 U.S. 261, 280 (1990).

> States' commitment to the protection and preservation of all human life. . . . [O]pposition to and condemnation of suicide—and, therefore, of assisting suicide—are consistent and enduring themes of our philosophical, legal, and cultural heritages.[205]

Reading the language of these opinions, with its emphasis on "longstanding" and "enduring" values shared by "all civilized nations," it is hard to see how the Court today could decide that the preservation of life and prevention of suicide are less than "compelling" state interests. However, establishing the existence of a compelling state interest is just the first step; the government would still have the burden of proving that its assisted suicide laws were narrowly tailored to advance its interests.

State X's assisted suicide law punishes anyone who aids a suicide by "intentionally advis[ing], encourag[ing], or assist[ing] another in taking the other's own life."[206] As applied, then, this law punishes speakers who intentionally advise, encourage or assist suicide, and then only if the suicide is actually attempted or successfully completed. Thus, it does not cover anyone who *unintentionally* encourages or assists a suicide, even if a suicide is completed. Nor would it punish a speaker if no link at all could be drawn between the speech and the suicidal.[207] Similarly, it would not cover anyone who intentionally encourages or assists a suicide, unless suicide is attempted or completed. Thus, this law would seem to be narrowly tailored to preserve the life of vulnerable, suicidal persons by punishing only the most serious cases of assisting suicide—those which are actually intended to, and do result in, a completed or attempted suicide. However, the Court might take the analysis a step farther, by analyzing whether there are less restrictive means available to advance the government's stated interests.

Because the Court considers the internet a public forum, it might look to see if suicide prevention programs or blocking or filtering software would be reasonable, less restrictive alternatives to punishing suicide-related speech. These alternatives might achieve the government's interests by insulating vulnerable people from harmful speech, rather than by punishing it. However, while suicide prevention efforts are important and families have some responsibility to protect their most vulnerable members, the fact is that many of these protective

205. Washington v. Glucksberg, 521 U.S. 702, 710–711 (1997).

206. Minn. Stat. § 609.215(1) (2011).

207. It is not clear whether State X courts would require the speech to be the "but for" cause of the suicidal act. It can certainly be argued that narrow tailoring would demand this.

measures are already in place, and have not effectively prevented vulnerable populations from easily accessing suicide-related cyber space. Therefore, application of assisted suicide laws to cyber speech which encourages suicide could have an incremental effect on saving lives and preventing suicide. Above all, if states have decided to punish assisting, encouraging or advising suicide, that behavior should not go unpunished simply because it occurs in the form of online speech.

CONCLUSION

In the past decade, thousands of readily-accessible, pro-suicide web sites have proliferated on the internet, allowing the exchange of detailed information on suicide methods to flow unchecked through message boards, chats and emails. Disturbing as this is, no current law explicitly prohibits it. Unless action is taken, speech which would otherwise be punishable will continue to flourish on the internet, circumventing traditional social controls. The majority of states have assisted suicide statutes which could be used to prosecute cyber speech that assists or encourages suicide. However, cyber suicide speech does not fit neatly into existing categories of unprotected speech, and under the current First Amendment test for illegal advocacy, punishment of cyber-suicide speech is likely to be foreclosed by the First Amendment. Because speech which is an integral part of a criminal action is not protected, speech which aids suicide by teaching or instructing methods of suicide can constitutionally be punished. Because assisted suicide has been illegal for more than 700 years, and speech counseling suicide was a felony at common law, courts should acknowledge speech which counsels or encourages suicide as a traditional category of unprotected speech. Finally, because states have compelling interests in preserving life, preventing suicide and protecting vulnerable persons from abuse, an assisted suicide statute as applied to cyber suicide speech will have a good chance of surviving strict scrutiny.