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# FROM FALSE PATERNALISM TO FALSE EQUALITY: JUDICIAL ASSAULTS ON FEMINIST COMMUNITY, ILLINOIS 1869-1895

*Frances Olsen\**

Feminist theorists seem to be obsessed by the question of whether women should emphasize their similarity to men or their differences from men. In discipline after discipline, the issue of sameness and differences has come to center stage.

This focus is not a new phenomenon. Early this century, suffragists fluctuated between claiming that it was important to let women vote because they were different from men — more sensitive to issues of world peace, the protection of children, and so forth — and claiming that it was safe to let women vote because they would vote the same way men did.<sup>1</sup>

In law, this obsession with sameness and difference has taken the form of a debate between formal equality for women and substantive equality for women — or between so-called “equal treatment” and so-called “special treatment.”<sup>2</sup> The contemporary question of maternity

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1. See Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1576 (1983); B. HARRISON, *SEPARATE SPHERES* 81, 84 (1978).

2. On the general question of equal treatment versus special treatment, see Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986); F. Olsen, *The Sex of Law* (1985) (unpublished manuscript; on file at the Michigan Law Review); Olsen, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 TEXAS L. REV. 387 (1984) [hereinafter cited as Olsen, *Statutory Rape*]; Williams, *The Equality Crisis: Some Reflections on Culture, Courts, and Feminism*, 7 WOMEN’S RTS. L. REP. 175 (1982); Kay, *Models of Equality*, 1985 U. ILL. L. REV. 39.

“Special treatment” is a term of derision used by proponents of “equal treatment” or formal

benefits offers a good example. Currently, a number of feminists seem to be opposing one another regarding state policy on this issue.<sup>3</sup> On one side, many feminists support maternity benefits:<sup>4</sup> current employment policies seriously disadvantage women who have children — and specifically disadvantage women who get pregnant and give birth.<sup>5</sup> Feminists point out that virtually every Western industrialized nation has some form of maternity benefits and argue that the United States should also. Obviously, childbirth and child nurture are essential to the continuation of society, and it is absurd for individual women to be expected to bear the entire cost and burden, when society in general benefits. Some feminists concede to their opponents that maternity benefits violate formalistic notions of equality but support them nonetheless; formalistic equality may be fine for upper-class and professional women, they argue, but working-class women — which means *most* women — need maternity benefits more than they need some abstract notion of equality. Some feminists also argue that although maternity benefits may seem to treat pregnant women as a “special class,” this “special treatment” is necessary in order for women to have an equal opportunity in the marketplace.<sup>6</sup> Moreover, the lack of adequate maternity leave can be said to reinforce the ideology that paid work is primarily for men and that women are marginal workers

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equality. For want of a better alternative, I shall generally use the more neutral term “different treatment.”

3. See generally Williams, *Equality's Riddle: Pregnancy and the Equal Treatment/Special Treatment Debate*, 13 N.Y.U. REV. L. & SOC. CHANGE 325 (1985) (defense of equal treatment position); Krieger & Cooney, *The Miller-Wohl Controversy: Equal Treatment, Positive Action and the Meaning of Women's Equality*, 13 GOLDEN GATE L. REV. 513 (1983) (special treatment, or “positive action,” approach).

Feminists generally agree that parental benefits — nurturing benefits not linked to pregnancy or lactation — should be made available on a gender-neutral basis. The most controversial question is whether pregnancy disability benefits may differ from other disability benefits.

4. See generally Krieger & Cooney, *supra* note 3; Scales, *Towards a Feminist Jurisprudence*, 56 IND. L.J. 375 (1981); Law, *Rethinking Sex and the Constitution*, 132 U. PA. L. REV. 955 (1984); Note, *Sexual Equality Under the Pregnancy Discrimination Act*, 83 COLUM. L. REV. 690 (1983) [hereinafter cited as Note, *Sexual Equality*]; Note, *Employment Equality Under the Pregnancy Discrimination Act of 1978*, 94 YALE L.J. 929 (1985); Note, *Equality in the Workplace: Is That Enough for Pregnant Workers?*, 23 J. FAM. L. 401 (1984-85); Kay, *Equality and Difference: The Case of Pregnancy*, 1 BERKELEY WOMEN'S L.J. 1 (1985); Dowd, *Maternity Leave: Taking Sex Differences into Account*, 54 FORDHAM L. REV. 699 (1986).

5. See Frug, *Securing Job Equality for Women: Labor Market Hostility to Working Mothers*, 59 B.U. L. REV. 55 (1979).

6. See Brief Amici Curiae of Coalition for Reproductive Equality in the Workplace et al. at 32-45, *California Fed. Sav. & Loan Assn. v. Guerra*, No. 85-494, *cert. granted*, 106 S. Ct. 783 (1986) (involving pregnancy disability leave); Krieger & Cooney, *supra* note 3, at 544-47; Note, *Sexual Equality*, *supra* note 4, at 714-21; see also Kay, *supra* note 4, at 32-34. See generally Wildman, *The Legitimation of Sex Discrimination: A Critical Response to Supreme Court Jurisprudence*, 63 OR. L. REV. 265, 304-07 (1984).

who should drop out of the marketplace when they begin to have children.

On the other side of the controversy, feminists who question maternity benefits make spirited arguments against short-run expediency and opportunism.<sup>7</sup> They claim that gender-specific maternity benefits are a snare and a delusion — just like the so-called “protective” labor legislation that excluded women from well-paying jobs during much of this century. These feminists link current gender-specific maternity leave with the “romantic paternalism” of the nineteenth and early twentieth centuries — a romantic paternalism that relegated women to their own “separate sphere” and placed them on a pedestal that turned out to be a cage. So too, they argue, will maternity benefits wind up hurting women. In particular, any form of mandatory employer-paid benefits will give employers too strong an incentive to circumvent present equal-employment laws in order to avoid hiring women of childbearing age. Moreover, opponents of maternity benefits argue, to single out pregnancy for special treatment — instead of providing a leave or other benefit to any worker who needs one — undermines working-class solidarity and reinforces the ideology that women are primarily childbearers and nurturers, and only secondarily workers.

This debate is sometimes conducted as though the issues had never come up before. Other times, participants in the current debate cite two early United States Supreme Court decisions to demonstrate the risks of paternalism and the importance of formal equality for women. In 1873 *Bradwell v. Illinois*<sup>8</sup> held that states could bar women from becoming lawyers, because the practice of law was not among the federal “privileges and immunities” protected by the fourteenth amendment. In 1908, *Muller v. Oregon*<sup>9</sup> let stand a law limiting the work hours of women, just three years after the Supreme Court had rejected as “paternalistic” similar legislation that would have limited men’s hours.<sup>10</sup> The history of gender-specific legislation raises more complicated and interesting questions than often recognized regarding paternalism and equality. A consideration of this history suggests the dangers of antipaternalism as well as the dangers of paternalism and the limitations as well as the virtues of formal equality. A more care-

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7. See Williams, *supra* note 3, at 325; Williams, *supra* note 2. Opponents of maternity benefits worry that community concern with mothering can slip into paternalism; supporters worry that too formalistic a concept of equality can degenerate into the kind of selfish individualism that is associated with laissez-faire capitalism.

8. 83 U.S. (16 Wall.) 130 (1873).

9. 208 U.S. 412 (1908).

10. See *Lochner v. New York*, 198 U.S. 45 (1905).

ful look at this history may shed useful light on the maternity benefits debate and on other controversies.

This essay will examine the "equal treatment" versus "special treatment" for women issue as it arose in Illinois in the late nineteenth century. In 1869 the Illinois Supreme Court barred Myra Bradwell from the practice of law on the basis that she was a married woman, and in 1870 it reaffirmed its exclusion of women in *In re Bradwell*,<sup>11</sup> the state decision the United States Supreme Court upheld in *Bradwell v. Illinois*.<sup>12</sup> This denial of equal treatment to women, especially the concurring opinion by United States Supreme Court Justice Bradley, appears to many to represent paternalism at its worst: the interest that individual, exceptional women might have in practicing law must give way to the community's interest in maintaining women's separate sphere of home and family.<sup>13</sup>

A quarter century after it had decided *Bradwell* and thirteen years before the United States Supreme Court decided *Muller v. Oregon*, the Illinois Supreme Court seemed to reject paternalism when it struck down a portion of protective labor legislation that had provided for an eight-hour workday for women in the garment industry. In *Ritchie v. People*<sup>14</sup> the Illinois Supreme Court asserted that a legislatively mandated eight-hour day for women violated the rights of working women, and stated that women were entitled to the same rights as men. The direct effect of the *Ritchie* decision, however, was to undermine the efforts of a community of women reformers who were struggling to improve working conditions. These reformers had supported the legislation in part to reduce the subordination of women and to promote gender equality.<sup>15</sup> From the point of view of the women most affected, the eight-hour law was not paternalistic, and the formal juridical equality promised in *Ritchie* would be unlikely to improve their working conditions.

I present a version of the events surrounding these two Illinois cases — *Bradwell* and *Ritchie* — to illustrate a way of looking at issues

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11. 55 Ill. 535 (1869). The Illinois Supreme Court issued its written opinion early in 1870. See 2 CHI. LEGAL NEWS 146 (1870). The court dated its opinion September Term, 1869, but published it with the opinions from the September 1870 term, stating that "[t]his application was finally heard and determined at the September Term, 1869, but was unavoidably omitted from its proper place in the report of the cases decided at that term." 55 Ill. 535, 535 n.\*. Several other Illinois reporters from the same period have opinions seemingly out of order in a similar manner. See, e.g., Illinois Reports vols. 50, 51, 54 & 56.

12. 83 U.S. (16 Wall.) 130 (1873).

13. See *Bradwell v. Illinois*, 83 U.S. at 139-42 (Bradley, J., concurring).

14. 155 Ill. 98, 40 N.E. 454 (1895).

15. See generally M. TAX, *THE RISING OF THE WOMEN: FEMINIST SOLIDARITY AND CLASS CONFLICT, 1880-1917* (1979).

of equality and paternalism. In the nineteenth century, as today, the choice between equal treatment and different treatment for women could not be made in the abstract, but only in context, case by case.<sup>16</sup> Gender-blind policies as well as gender-conscious policies can facilitate and perpetuate the subordination of women. Similarly, both kinds of policies can reduce the subordination of women. An emphasis on the choice between gender-blind policies and gender-conscious policies misfocuses attention. The particular context and meaning of policies are almost always more important than whether the policies specifically take gender into account.

Like equality, paternalism can be evaluated only in the particular contexts that determine its meaning. Paternalism recognizes the importance of the relationship between people, but it often assumes and ratifies an inequality within the relationship. A rejection of this inequality, under the rubric of antipaternalism, can run at least two risks: First, it may deny the importance of human relationship and treat people as isolated individuals. Further, antipaternalism may pretend an equality between people that does not actually exist. This pretense of equality may facilitate the continuation of actual inequality — for example, by encouraging an unrealistic faith in freedom of contract.<sup>17</sup>

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16. This position is sometimes misinterpreted to be opportunistic or unprincipled. For example, a similar argument that I made in Olsen, *Statutory Rape*, *supra* note 2, at 398-400, was recently characterized to be: “[O]nly the result matters — if it is good for women, as women define what they want, then the rationale is ultimately unimportant.” Dowd, *supra* note 4, at 740 n.212. This position was called “fundamentally inconsistent with the notion of a legal system.” *Id.* (characterizing argument of Sherry, *Judicial Activism in the Equal Protection Context: Democracy, Distrust, and Deconstruction*, 73 GEO. L.J. 89, 98-102 (1984)).

I do not agree that only the result, not the rationale, matters — even “[f]rom a practical perspective.” Dowd, *supra* note 4, at 740 n.212. Nor do I believe that the only way women can obtain change from the legal system is “to articulate the principles legitimizing equality goals.” *Id.* The idea that women should decide “what they want” and then “articulate . . . principles” to justify trying to get what they want from the legal system assumes a radical separation between what women want and the principles upon which women can justify what they want. The justifications and rationales affect what women conclude will be good for them, and any justifications and rationales that ignore the question of what would be good for women must be hollow and abstract indeed.

If we are to value principled decisionmaking, then “principled” must surely mean more than being able to come up with an abstract, general rule that will achieve the desired result in most cases. There is nothing unprincipled about trying to improve the lives of women.

The appeal to a broad abstract principle is too often an effort to avoid acknowledging and confronting some important moral and political choice. Abstractions do not constitute an ethical alternative to serious decisionmaking. See generally Olsen, *Socrates on Legal Obligations: Legitimation Theory and Civil Disobedience*, 18 GA. L. REV. 929 (1984).

17. See generally Sharp, *Fairness Standards and Separation Agreements: A Word of Caution on Contractual Freedom*, 132 U. PA. L. REV. 1399 (1984) (warning that freedom of contract for divorcing couples may result in agreements that ratify and perpetuate the inequality between husband and wife).

Also, paternalism may assume or pretend a relationship that does not exist and may be an aspect of what I have referred to as “forced community.” See Olsen, *Statutory Rape*, *supra* note 2, at 393-94; see also *id.* at 389 n.7.

I propose to evaluate decisions from the point of view of the people most directly affected by the issues. From this perspective, I argue that the paternalism of the *Bradwell* case — refusing to let women practice law — was a false paternalism. I also argue that the equality of the *Ritchie* case — throwing out the eight-hour day for women — was a false equality.

### I. FALSE PATERNALISM: THE *BRADWELL* CASES

After the Civil War, a number of women began to apply for licenses to practice law. At that time in the United States, one could be admitted to the bar by reading law in a law office and demonstrating one's proficiency to the court.<sup>18</sup> Myra Bradwell, like many of the other women who wanted to become lawyers, had read law in a relative's law office — in Bradwell's case, her husband's.<sup>19</sup> Many of the young men who ordinarily would have been helping out in the law offices while they read to become lawyers were off fighting the war. The absence of young men may have contributed to the willingness of male lawyers to have their wives and daughters come into their offices.<sup>20</sup> Like "Rosie the Riveter" of World War II, many women who filled in at "men's jobs" wanted to keep working after the war ended. Having read law in a relative's office, women then wanted to become lawyers.<sup>21</sup>

In 1869, Myra Bradwell applied to the Illinois Supreme Court for a license to practice law. The court did not question her professional qualifications, but refused her admission to the practice of law on the basis of her status as a married woman. Initially the court did not issue a formal written opinion but directed the clerk to notify Bradwell of its decision by letter — a letter which Bradwell promptly pub-

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18. In Illinois, for example, an applicant for a license to practice law was supposed to present "to any member of this court a certificate of qualification, signed by the Circuit Judge and State's Attorney of the circuit in which the applicant may reside, setting forth that the applicant has been examined and found qualified . . ." Ill. Sup. Ct. R. 76, *quoted in* 2 CHI. LEGAL NEWS 145 (1870).

19. See 1 THE BENCH AND BAR OF ILLINOIS 278 (J. Palmer ed. 1899) [hereinafter cited as BENCH AND BAR]; Robinson, *Women Lawyers in the United States*, 2 THE GREEN BAG 10, 14 (1890).

20. Cf. Robinson, *supra* note 19. The relationship between the Civil War and women entering the legal profession was first suggested to me by Carol Latham of the University of Wisconsin Law School. Bradwell herself was active in Civil War relief work and probably did not begin studying law until the end of the war. See BENCH AND BAR, *supra* note 19, at 278. In any event, the Civil War is likely to have raised the expectations of many women who worked at a variety of war jobs — nursing, serving on a sanitary commission and so forth. These raised expectations may account for the number of women entering or seeking to enter law.

21. Shortly after the war women also began to seek and occasionally obtain admission to law schools. See Part II *infra*.

lished.<sup>22</sup> At common law, married women were said to be under "coverture," or under the protection of their husbands. Before legislatures enacted reform statutes known as Married Women's Property Acts, a husband owned all the family property; a married woman could not own property and was unable to enter into contracts on her own behalf.<sup>23</sup> The justices of the supreme court apparently believed that under Illinois law a married woman would not be able to enter into contracts with her clients and therefore could not practice law.<sup>24</sup>

Bradwell responded with a brief to the court in which she presented strong arguments that the Illinois Married Women's Acts of 1861 and 1869, which allowed women to own property and to control their own earnings, enabled women to enter and be bound by contracts to the extent required to practice law.<sup>25</sup> The court then issued a written opinion in which it acknowledged that it had ignored the effect of the 1869 Act and, without conceding the contract-disability point, resorted to a discussion of legislative intent.<sup>26</sup> The court concluded that "the sex of the applicant, independently of coverture," was "a sufficient reason for not granting the license."<sup>27</sup> Although the statute empowering the supreme court to license attorneys did not "expressly require" the exclusion of women, the court asserted that the admission of women "was never contemplated by the legislature."<sup>28</sup> In Illinois, at the time the licensing statute was passed: "That God designed the sexes to occupy different spheres of action, and that it belonged to men to make, apply and execute laws, was regarded as an almost axiomatic

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22. See 2 CHI. LEGAL NEWS 145 (1870). The letter that Norman L. Freeman, the Illinois Supreme Court Reporter, sent to Myra Bradwell, in October 1869, said in part:

The court instruct me to inform you that they are compelled to deny your application for a license to practice as an attorney-at-law in the courts of this State, upon the ground that you would not be bound by the obligations necessary to be assumed where the relation of attorney and client shall exist, by reason of the disability imposed by your married condition — it being assumed that you are a married woman.

*Id.* (emphasis deleted).

23. See H. CLARK, THE LAW OF DOMESTIC RELATIONS IN THE UNITED STATES §§ 7.1-7.2, at 219-29 (1968). A few states did not adopt these common law rules but instead followed community property principles, under which a husband and wife are joint owners of property. See generally *id.*; W. REPPY & C. SAMUEL, COMMUNITY PROPERTY IN THE UNITED STATES 1-11 (1982).

24. See *In re Bradwell*, 55 Ill. 535, 535-37 (1869). The court may also have been deeply affected by the concept of coverture and have found it fanciful to contemplate a married woman becoming a lawyer, quite aside from her inability to form contracts.

25. 55 Ill. at 536-37; 2 CHI. LEGAL NEWS 145-46 (1870). On the appeal to the United States Supreme Court, Bradwell's attorney argued also that the court's supervisory power over attorneys made attorney-client contracts unnecessary. See *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 136 (1872).

26. 55 Ill. at 536-38.

27. 55 Ill. at 537.

28. 55 Ill. at 538.



truth. It may have been a radical error, but that this was the universal belief certainly admits of no denial."<sup>29</sup> Regardless of the "individual opinions" the justices might have with respect to the admission of women to the bar, the court asserted that it did not deem itself at liberty to exercise its power to license attorneys in a mode "never contemplated by the legislature":<sup>30</sup>

For us to attempt, in a matter of this importance, to inaugurate a practice at variance with all the precedents of the law we are sworn to administer, would be an act of judicial usurpation, deserving of the gravest censure. If we could disregard, in this matter, the authority of those unwritten usages which make the great body of our law, we might do so in any other, and the dearest rights of persons and property would become a matter of mere judicial discretion.<sup>31</sup>

The court claimed to "entertain a profound sympathy" with efforts "to reasonably enlarge the field for the exercise of woman's industry and talent."<sup>32</sup> "If the legislature shall choose to remove the existing barriers, and authorize us to issue licenses equally to men and women, we shall cheerfully obey."<sup>33</sup> Until then, the court would not allow Myra Bradwell to practice law.

Myra Bradwell engaged Senator Matthew Hale Carpenter — a family friend and a famous constitutional lawyer — to appeal her case to the United States Supreme Court.<sup>34</sup> He obtained a writ of error from the Court on August 16, 1870, and presented oral argument January 18, 1872.<sup>35</sup> The Court ruled against Bradwell on April 15, 1873, the day after the Court rendered its decision in the famous *Slaughter-House Cases*.<sup>36</sup> In both cases the majority held that the "privileges

29. 55 Ill. at 539.

30. 55 Ill. at 539.

31. 55 Ill. at 541. The court illustrated its position by drawing a comparison to the court-made practice of transferring title to a wife's property to her husband upon their marriage. The courts created this rule but, according to the Illinois Supreme Court, a change in the rule could properly come only from the legislature — as with the enactment of the Married Women's Property Acts — not through the courts. See 55 Ill. at 540.

32. 55 Ill. at 541-42.

33. 55 Ill. at 542. The court also suggested that it would trust to women's good sense and sound judgment to practice in those areas of legal practice suitable to them. Although the court's "cheerfully obey" language may sound like deference to the legislature, the deference could also be seen as a form of footdragging.

34. See H. KOGAN, *THE FIRST CENTURY: THE CHICAGO BAR ASSOCIATION, 1874-1974*, at 28 (1974).

35. See 2 E. STANTON, S. ANTHONY & M. GAGE, *HISTORY OF WOMAN SUFFRAGE* 614-15 (1882).

36. 83 U.S. (16 Wall.) 36 (1873). The decision in the *Slaughter-House Cases* was announced April 14, 1873. See 6 C. FAIRMAN, *HISTORY OF THE SUPREME COURT IN THE UNITED STATES* 1349 (1971). *Bradwell* was announced April 15. See *id.* at 1364. E. Bruce Thompson has asserted that *Bradwell* followed the *Slaughter-House Cases* by two days. See E. THOMPSON, *MATTHEW HALE CARPENTER: WEBSTER OF THE WEST* 102 (1954). Babcock, Freedman, Norton & Ross assert that *Bradwell* was scheduled to be handed down at the same time as *Slaughter-House*,

and immunities” clause of the fourteenth amendment did not limit the power of states to control and regulate activities that states had traditionally regulated, such as the licensing of attorneys.

The *Slaughter-House Cases* upheld a Louisiana state law regulating the slaughter of livestock in and around New Orleans against a challenge by independent butchers who argued that the law would put them out of work. The legislation required all butchering to be carried on in a single slaughterhouse, run by a private corporation, and required the corporation to provide space to all comers at prices fixed by the legislature.

The *Slaughter-House* decision raised important questions of judicial restraint and federalism. The idea that *courts* could threaten the people’s liberty was important to many people at this time — just as it had been important to the justices of the Illinois Supreme Court in the *Bradwell* case. During the nineteenth and early twentieth centuries, the United States Supreme Court and most other courts were generally regarded as more conservative than legislatures. Judicial restraint was thus not the conservative doctrine that it seems to be today but was a doctrine largely advocated by liberals.<sup>37</sup>

The federalism issue played a somewhat more complicated role. The fourteenth amendment reflected and ratified the Civil War victory of the Union over the Confederate States. Yet, in the *Slaughter-House Cases*, John Campbell, a famous Southern Confederate lawyer who might have been expected to support states’ rights against federal encroachment, represented the independent butchers and opposed the state legislation, which had been passed by a carpetbag legislature in Louisiana. Campbell lost the *Slaughter-House Cases* for the butchers, but he won for Southern Confederates both a weakened fourteenth amendment and a relatively activist Supreme Court.<sup>38</sup>

The Unionists who argued in favor of the state legislation in the *Slaughter-House Cases* included Matthew Carpenter, the lawyer who represented Myra Bradwell. The Unionists were interested in limiting

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but was actually announced the next day.” B. BABCOCK, A. FREEDMAN, E. NORTON & S. ROSS, *SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES* 8 (1975). Several sources refer to the decisions as having been made in May, 1873.

37. For somewhat later, striking examples of liberals advocating judicial restraint, see the opinions of Justice Brandeis in *International News Serv. v. Associated Press*, 248 U.S. 215, 264-67 (1918) (Brandeis, J., dissenting), and of Judge Learned Hand in *Cheney Bros. v. Doris Silk Corp.*, 35 F.2d 279 (2d Cir. 1929). The classic statement is Oliver Wendell Holmes’ dissent in *Lochner v. New York*, 198 U.S. 45, 75-76 (1905).

38. See Franklin, *The Foundations and Meaning of the Slaughter-House Cases* (pts. 1 & 2), 18 TUL. L. REV. 1, 78-88 (1943), 18 TUL. L. REV. 218 (1943). The case was activist insofar as it asserted a pivotal role for the courts in enforcing the fourteenth amendment rather than treating the amendment as primarily enabling federal legislation.

judicial review, not in supporting states' rights against federal encroachment; and along with their other arguments, they attempted to support the state legislation as a health measure, clearly within the police power of the state.<sup>39</sup> Had the *Slaughter-House* decision been based upon a reasonably broad understanding of police power instead of upon a narrow interpretation of the privileges and immunities clause of the fourteenth amendment, the Supreme Court could more easily have decided in favor of Myra Bradwell. The Court might then have had to face the question of whether the police power enabled Illinois to bar women from the practice of law. As it was, the majority of the United States Supreme Court — five Justices — held that *Bradwell* was governed by the *Slaughter-House Cases* and turned Bradwell down because they thought the issue should be decided by the state legislature, not by the federal courts.<sup>40</sup>

Four Justices dissented in the *Slaughter-House Cases* and asserted that courts should play a more active role; they claimed to be concerned with the ways in which legislatures (not courts) posed a threat to the people's liberty.<sup>41</sup> These four Justices argued that courts should protect citizens against legislation that infringed basic rights, such as the right to work. An activist judiciary that will protect the rights of minorities sounds good to many feminists and liberals today; but the main "minority" the judicial activists of the nineteenth and early twentieth centuries seemed to worry about was not women or people of color, but the minority of wealthy people. A common interpretation is that the *Slaughter-House* dissenters wanted to protect the rich against the leveling tendencies of the democratic majority.<sup>42</sup> When

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39. From this perspective, there was little or no inconsistency between the position Matthew Hale Carpenter took opposing the independent butchers and his position in support of Bradwell. Justice Bradley opposed Carpenter's position on both cases.

40. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 137-39 (1873). The attorney who represented Bradwell before the U.S. Supreme Court, Matthew Hale Carpenter, had also represented the State of Louisiana's side against the independent butchers in the *Slaughter-House Cases*, so that his victory in the the *Slaughter-House Cases* seems to have contributed to his defeat in *Bradwell*.

41. See 83 U.S. at 83-111 (Field, J., dissenting) (Justices Swayne and Bradley and Chief Justice Chase joining Field's opinion); 83 U.S. at 111-24 (Bradley, J., dissenting); 83 U.S. at 124-30 (Swayne, J., dissenting).

42. The plight of the independent butchers in the *Slaughter-House Cases* may seem to provide a counter-example to the statement in the text. One might well feel sympathy and concern for these displaced workers and their families, who hardly seem like rich people being protected against any leveling tendencies of a democratic majority. Most of them were even Gascons, Louisianians of French ancestry who on occasion were subjected to anti-Gascony sentiment not unlike racism. See Franklin, *supra* note 38, at 34 & n.110.

Yet, it would seem important to recognize also that the independent butchers constituted a closely organized group which may well have conspired to keep newcomers out of the butchering trade and to keep meat prices high. See *id.* Moreover, the ability of the butchers to work was not at stake in these cases. The legislation that required all slaughtering to take place in a single slaughterhouse, and thus created a monopoly, also required the corporation that operated the

these four Justices finally became a majority of the Court, they began what has come to be known as the *Lochner* era, throwing out as unconstitutional one reform measure after another.<sup>43</sup>

At the time the *Bradwell* appeal was decided, these four Justices were a minority. Only one of them — Chief Justice Chase — took a position that twentieth-century feminists would support. He dissented from the majority opinion<sup>44</sup> and presumably would have ordered the state of Illinois to let Myra Bradwell practice law. The other three Justices — Justices who claimed to believe courts should protect individual rights — disagreed with Chief Justice Chase. They sided with the majority in refusing to grant relief to Bradwell,<sup>45</sup> but they disagreed with the majority's reasons. The concurring opinion of these three Justices, written by Justice Bradley, is the obnoxious sexist opinion so frequently quoted:

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband. . . . The

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slaughterhouse to provide butchering space to everyone at prices set by the legislature. See 83 U.S. at 40, 42; Brief for the Defendants, reported in 21 L. Ed. 395, 401. The independence of the butchers, their status as entrepreneurs rather than mere workers or "wage slaves," may well have been an important aspect of what was at stake. See Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 WIS. L. REV. 767, 776-77. The famous short telegram by which Matthew Carpenter, one of the attorneys who represented the state-created monopoly, notified his clients in New Orleans of their victory in the case reflects this attitude toward the monopolistic tendencies of the independent slaughterers: "The banded butchers are busted." Ashley, *Matthew Carpenter as a Lawyer*, 1 W. VA. BAR 197, 199 (1894).

In fact, however, it would seem that at least some of the banded butchers were not busted. The displaced slaughterers had formed a corporation among themselves and, on March 15, 1871, joined forces with the state-created monopoly. A motion was made but denied to dismiss the *Slaughter-House Cases* as moot on the basis that the original parties to the lawsuit had reached an agreement after the case went to the Supreme Court. See Franklin, *supra* note 38, at 225 & nn.230-31.

43. The era received its name from the 1905 case of *Lochner v. New York*, 198 U.S. 45 (1905). For general discussions of the *Lochner* era, see E. CORWIN, *LIBERTY AGAINST GOVERNMENT* 149-53 (1948); A. PAUL, *CONSERVATIVE CRISIS AND THE RULE OF LAW: ATTITUDES OF BAR AND BENCH, 1887-1895*, at 221-37 (1976); L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 4-6, 427-50 (1978); B. TWISS, *LAWYERS AND THE CONSTITUTION, HOW LAISSEZ FAIRE CAME TO THE SUPREME COURT* 110-253 (1942); D. Kennedy, *The Rise and Fall of Classical Legal Thought* (October 1975) (unpublished manuscript; on file at *Michigan Law Review*).

44. See 83 U.S. at 142.

45. 83 U.S. at 139-42 (Bradley, J., concurring).

paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother. This is the law of the Creator.<sup>46</sup>

## II. THE COMMUNITY OF WOMEN LAWYERS

The reluctance of courts to admit women to the practice of law may well have slowed the process of women becoming lawyers, but it could not keep the legal profession all male. In state after state, courts' refusals to admit women were followed by organizing efforts culminating in legislation specifically permitting women to join the profession.<sup>47</sup>

While it is of course always difficult to know how seriously to take such judicial expressions, it is interesting to note that the Illinois Supreme Court in *Bradwell* stated: "Of the qualifications of the applicant we have no doubt, and we put our decision in writing in order that she, or other persons interested, may bring the question before the next legislature."<sup>48</sup> If the court was not serious, it should have known better than to issue such an invitation. Myra Bradwell edited a widely read law weekly in Chicago, and she had not only lobbied for but had herself drafted the bill of 1869, extending the scope of the Married Women's Act of 1861.<sup>49</sup>

While Bradwell's appeal to the United States Supreme Court was pending, a young unmarried woman named Alta M. Hulett qualified for the bar and was refused admission. With Myra Bradwell's assistance, Hulett shepherded a reform bill through the legislature granting women substantially equal employment rights with men.<sup>50</sup> Hulett and Bradwell's bill, passed on March 22, 1872, was later quoted in the *Ritchie* case to justify overturning the gender-specific eight-hour-day legislation.<sup>51</sup> The bill took effect on July 1, 1872, nine and a half months before the United States Supreme Court decided *Bradwell*.

46. 83 U.S. at 141.

47. See Robinson, *supra* note 19; see also *In re Leach*, 134 Ind. 665, 34 N.E. 641 (1893), quoted at note 89 *infra*. The Federal Act of February 15, 1879, made women eligible to practice before the United States Supreme Court. Act of Feb. 15, 1879, ch. 81, 20 Stat. 292.

48. 55 Ill. at 536. Writing in 1890, Myra Bradwell characterized this statement as a suggestion by the court that the legislature should act. See 22 CHI. LEGAL NEWS 264 (1890).

49. See 1 CHI. LEGAL NEWS 212 (1869); see also *id.* at 172.

50. See H. KOGAN, *supra* note 34, at 28-29; Robinson, *supra* note 19, at 15-16.

51. See *Ritchie v. People*, 155 Ill. 98, 112, 40 N.E. 454, 458 (1895). When Susan B. Anthony went to the election polling place and tried to cast her ballot — before women were allowed to vote — she was arrested and prosecuted for interfering with an election, a federal offense. The law under which she was prosecuted had been enacted after the Civil War to discourage white terrorist disenfranchisement of the newly freed black men. See M. KELLER, *AFFAIRS OF STATE* 159 (1977). We recognize that in prosecuting Susan B. Anthony the state officials were misusing the law; we do not conclude that we made a mistake in passing the statute — that no matter how wise it looked when it was enacted, the statute was really a snare and a delusion.

Myra Bradwell never reapplied to the bar but continued to edit her influential weekly newspaper, *The Chicago Legal News*.<sup>52</sup> On June 4, 1873, Alta Hulett became the first woman lawyer in Illinois.<sup>53</sup>

In 1890, a lawyer named Lelia Robinson wrote a biographical and professional description of all the women lawyers she could find in the United States.<sup>54</sup> To gather material for her article, Robinson undertook extensive correspondence, writing to the deans of law schools<sup>55</sup> and to every woman lawyer for whom she could find an address.<sup>56</sup> Her article describes several small, loosely knit communities of women lawyers, the largest and most formal of which was the Equity Club.

The Equity Club was formed at the University of Michigan Law School in the fall of 1886 by five of the seven women students then in attendance and two alumnae who lived in town. It developed into a correspondence club open to all women law students and lawyers. By 1890 it had forty members and published an *Equity Club Annual*, consisting of letters from the members.<sup>57</sup>

In August 1893, the Law Department of the Queen Isabella Club held a three-day meeting in Chicago. Women lawyers presented papers on topics ranging from the *Bradwell* case and the Populist Movement to "Women Lawyers in Ancient Times." A paper on Sunday closing laws written by Elizabeth Cady Stanton was to be "probably . . . read by another." Those present formed a National League of

52. In 1890, a few years before her death in 1894, the Illinois Supreme Court admitted Ms. Bradwell to the bar on its own motion. See 22 CHI. LEGAL NEWS 263 (1890). Bradwell was also admitted to practice before the United States Supreme Court on March 28, 1892. See 26 CHI. LEGAL NEWS 296 (1894).

53. Interestingly, Hulett may also have been the youngest person to become a lawyer in Illinois. She joined the bar on her nineteenth birthday. Males did not reach the age of majority until twenty-one, and the court suggested that minors would not be allowed to practice law. See 2 CHI. LEGAL NEWS 145 (1870) (Freeman's letter to Bradwell, quoted at note 22 *supra*) ("Applications [to the bar] have occasionally been made by persons under twenty-one years of age, and have always been denied upon the same ground — that they are not bound by their contracts, being under a legal disability in that regard."). Women achieved their majority at age eighteen. See text at note 93 *infra*.

54. Robinson, *supra* note 19.

55. *Id.* at 11. Many law schools, including Harvard, Yale, and Columbia, refused to admit women. In 1886, however, Yale had granted a Bachelor of Laws degree to one woman, Miss Alice R. Jordan, who had studied a year at Michigan and then gone to Yale for a year. Shortly thereafter the Yale University Catalogue provided, "It is to be understood that the courses of instruction above described are open to persons of the male sex only, except where both sexes are specifically included." 1886-87 YALE U. CATALOGUE 24. According to the dean of the law school the paragraph was intended "to prevent a repetition of the Jordan incident." Robinson, *supra* note 19, at 12-13.

Other law schools did admit women. The University of Michigan, for example, admitted Miss Sarah Kilgore in 1870 and granted her a degree in 1871. By 1890, Michigan had graduated more women than any other law school in the country. *Id.* at 17.

56. See *id.* at 11.

57. See *id.* at 17.

Women Lawyers.<sup>58</sup>

Some of these early women lawyers specialized in fields such as juvenile crime, that were unthreatening to men, and may have enjoyed a "remarkably smooth arrival into a professional middle class."<sup>59</sup> For others the arrival was a bit more rocky.<sup>60</sup> Whether they remained within "[t]acit, mutually accepted limits"<sup>61</sup> or went beyond such limits, a number of these women lawyers struggled to advance the interests of women and of society in general.<sup>62</sup>

## III. PATERNALISM VERSUS SOLIDARITY

Bradley's opinion in *Bradwell* is often referred to as "paternalistic,"<sup>63</sup> but this seems to me to be a mischaracterization. The concurrence may well have treated Bradwell as a subordinate, and it did overrule her own decision to practice law; but it did not control Bradwell in a fatherly or caring manner. No serious claim could be advanced that Justice Bradley was trying to promote Myra Bradwell's

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58. 25 CHI. LEGAL NEWS 451 (1893); *see also id.* at 421.

59. R. WEIBE, *THE SEARCH FOR ORDER* 122-23 (1967). Weibe asserts that the trickling admission of women into law was a less important advance than women's entry into professions such as teaching and social work. He also argues that the "token integration" of women into law was greeted by their male colleagues with "a warm sense of paternal tolerance." *Id.*

60. *See Equity Club Annual* (available at the Schlessinger Library, Radcliffe College, Cambridge, Mass.); Robinson, *supra* note 19, at 17.

61. R. WEIBE, *supra* note 59, at 123.

62. *See* Robinson, *supra* note 19. The issue is of course complicated. For example, Myra Bradwell would certainly be listed among the women lawyers who struggled for social reform and tried to expand the roles available to women. *See, e.g.,* Minow, "Forming Underneath Everything That Grows:" *Toward a History of Family Law*, 1985 WIS. L. REV. 819, 840-51. Yet Bradwell also printed racist jokes in the *Chicago Legal News*. *See* 24 CHI. LEGAL NEWS 294 (1891); *see also id.* at 141. She warmly endorsed the reelection of Illinois Supreme Court Justice Benjamin Magruder shortly after he upheld, in *The Anarchists' Case* (*Spies v. People*), 122 Ill. 1, 12 N.E. 865, *error dismissed*, 123 U.S. 131 (1887), the popular but legally dubious convictions of the Haymarket anarchists. *See* 21 CHI. LEGAL NEWS 315 (1888). By the time Magruder issued his opinion, September 14, 1887, (dated "September 15" in the *Illinois Reporter*), the public hysteria that had initially followed the Haymarket bombing had subsided, and many progressive and pro-labor people were deploring the unfairness of the trial and asserting that the anarchists had been convicted for their beliefs. *See* P. AVRICH, *THE HAYMARKET TRAGEDY* 300-12 (1984). In her endorsement, Bradwell appeared to refer to the *Anarchists' Case* when she complimented Magruder's "decisions within year" for making "every citizen within the great State of Illinois feel that . . . his life and property is a little safer, that law and order will be preserved." 21 CHI. LEGAL NEWS 315 (1888). John Peter Altgeld, Illinois' reform governor, based his pardon of the Haymarket anarchists on his conclusion that the initial trials were grossly unfair and illegal. J. ALTGELD, *REASONS FOR PARDONING FIELDEN, NEEBE AND SCHWAB* (Chicago 1893). Not long after Altgeld's pardon, Magruder decided *Ritchie v. People*, 155 Ill. 98, 40 N.E. 454 (1895), which overturned a pro-labor measure Altgeld supported.

63. *See, e.g.,* *Frontiero v. Richardson*, 411 U.S. 677, 685 (1973) (Brennan, J., plurality opinion); *Lewis v. Cohen*, 417 F. Supp. 1047, 1054 (E.D. Pa. 1976), *vacated sub nom. Lewis v. Cowen*, 547 F.2d 1162 (3d Cir. 1977); *United States v. Reiser*, 394 F. Supp. 1060, 1061 (D. Mont. 1975), *revd.*, 532 F.2d 673 (9th Cir.), *cert. denied*, 429 U.S. 838 (1976); *Smith v. City of E. Cleveland*, 363 F. Supp. 1131, 1138 (N.D. Ohio 1973), *affd. in part and revd. in part sub nom. Smith v. Troyan*, 520 F.2d 492 (6th Cir. 1975), *cert. denied*, 426 U.S. 934 (1976).

true best interests. Bradley favored overruling Bradwell's choice not for her sake but rather to advance other goals.

The stance taken by Bradley seems to me to be no more paternalistic than Petruchio in Shakespeare's *Taming of the Shrew*. When he was trying to "tame" his new wife Katharina, Petruchio starved her and kept her in rags. He did it by sending away the food and clothing as "not good enough" for her.<sup>64</sup> We do not say he was being paternalistic; he was being disingenuous.

When men claim that policies that harm women have been enacted for their own good, women may find it easier simply to condemn the policies as "paternalistic" without disputing the factual claim that the policies would be good for women. There is less resistance to an abstract complaint of "paternalism" than there would be to a serious discussion of the actual effects the policies advanced could be expected to have on the lives of women. A major problem with taking this easy route of condemning "paternalism" is that it tends to disable us from our own efforts at collective action.<sup>65</sup> Whenever people try to bring about change they are likely to employ policies that depart from isolated individualism. Any attempt we make to act together to improve our lives can be labeled paternalistic.

A good example of this problem arises with protective labor legislation. Historically, women have often supported such legislation. From as early as 1790 workers in the United States were demanding a shortened workday. The ten-hour workday was won through general strikes in 1835, although it was then lost in the depression of 1837-41.<sup>66</sup> In 1844, the first unions for factory workers in the United States — Female Labor Reform Associations — joined with male workers to petition legislatures to enact ten-hour laws. As a result of their efforts, ten-hour laws were passed in New Hampshire, Pennsylvania, and

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64. See W. SHAKESPEARE, *THE TAMING OF THE SHREW*, act iv, scenes i & iii. Some would argue that Petruchio's overall plan to "tame" his wife was indeed intended to be for her own good and thus classically paternalistic. My point here is a narrower one. When Petruchio sent the food and clothing away he was not attempting to obtain better food and clothing but intentionally depriving Katharina of food and clothing. Whether the deprivation was supposed to be for her own long-range good is another question.

65. This easy feminist talk against "paternalism" is like easy feminist talk against "outmoded stereotypes." Women make a mistake and "giv[e] up the battle," Polan, *Toward a Theory of Law and Patriarchy*, in *THE POLITICS OF LAW* 294, 300 (D. Kairys ed. 1982), when they soothe feelings and try to limit conflict by pretending that various negative views of women were once acceptable but are now "outmoded." Such easy talk of "outmoded stereotypes" also slips one into the position of categorically denying that "outmoded stereotypes" have any current factual accuracy. By basing their attack on the *falseness* of a stereotype, women make it more difficult to admit the partial truth of some stereotypes and to work to end that partial truth. See generally Olsen, *Statutory Rape*, *supra* note 2, at 428 n.197.

66. See P. FONER, *MAY DAY* 8-9 (1986).



Maine. Employers, however, were able to insert provisions into the laws that permitted longer hours by special contract, and workers who refused to agree to such special contracts were fired and often black-listed.<sup>67</sup> Illinois passed an eight-hour bill in 1867, but this law also provided an exception when there was a "special contract to the contrary," and was therefore of little or no effect.<sup>68</sup> In the 1880s ten-hour, six-day workweeks were standard, and working days were often twelve to fifteen hours long.

Without an eight-hour law or strong labor unions, most workers had to work long hours or lose their jobs. Individually, a worker did not have the choice of working only eight hours a day. Poor pay and competition from other workers forced individual workers to work longer hours than they wanted to. The eight-hour movement was an effort to limit this competition so that no one would be forced to work longer than eight hours. In an important sense, it was a form of solidarity.<sup>69</sup>

The charge — made by conservative courts during the *Lochner* era — that all protective labor legislation is paternalistic is false. Most protective labor legislation can be better understood as a form of collective action. It does not prevent workers from doing what they want to do; rather, it *enables* workers to do what they want — to work fewer hours for more pay and under better conditions.<sup>70</sup>

Protective labor legislation helps workers by limiting competition. But when so-called protective labor legislation applies to only one group of workers — for example, only to women — it sometimes ceases to have this effect. It may help only *men* workers by limiting the competition of *women* but not improve working conditions in general.<sup>71</sup> When women were first entering the job market in large numbers, before men and women competed for the same jobs, protective labor legislation tended to improve work conditions, whether it ap-

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67. *See id.*

68. Eight Hour Law, ILL. REV. STAT., ch. 48, §§ 1-2 (Hurd 1885).

69. *See generally* Altgeld, *The Eight-Hour Movement*, in *THE PROGRESS OF LABOR* 37 (A. Beatty ed. 1892).

70. For the most interesting, though I believe mistaken, liberal argument that protective labor legislation of general application is paternalistic, see Shiffrin, *Liberalism, Radicalism, and Legal Scholarship*, 30 UCLA L. REV. 1103, 1161 (1983) (arguing, in opposition to Ronald Dworkin, that "[a] major argument of the state in defending the law at issue in *Lochner* was that anyone who wanted to work more than ten hours in a bakery had an inadequate conception of the good life; that it was, in fact, a dangerous life").

71. It is well known that "protective" labor legislation was used at times in the twentieth century to keep women out of certain desirable jobs. *See* J. BAER, *THE CHAINS OF PROTECTION* (1978). Less well known is the support that some male unionists who were opposed to women in the work force gave to the concept of equal pay for equal work, with exactly the same goal of keeping women out of desirable jobs. *See* A. KESSLER-HARRIS, *OUT TO WORK* 156 (1982).

plied to men and women or just to women.<sup>72</sup> When, however, men and women were in job competition, gender-specific legislation could be and sometimes was used to exclude women or to hurt them vis-à-vis men, rather than to improve conditions for all workers. To call such legislation "paternalistic" misses the point. What is wrong with such legislation is not that it takes away or overrules, assertedly for her own good, a woman's choice to work longer hours, but rather that the legislation will not improve work conditions. The legislation sacrifices women's choices for the benefit of men and reduces women's options instead of expanding them. The effect of gender-specific labor legislation depends entirely upon the particular context in which it is enacted. It cannot be judged *a priori*.

#### IV. THE COMMUNITY OF WOMEN REFORMERS

In Illinois in the late nineteenth century there was broad-based support for protective labor legislation, especially among women. In 1888, thirty women's groups formed the Illinois Women's Alliance, a cross-class coalition that included trade unions, women's clubs, suffrage groups, temperance unions, and professional groups.<sup>73</sup> The constitution of the Illinois Women's Alliance stated as among its goals: "to agitate for the enforcement of all existing laws and ordinances that have been enacted for the protection of women and children"; "[t]o secure enactment of such laws as shall be found necessary"; and "to investigate all business establishments and factories where women and children are employed."<sup>74</sup> Although Hull House was not a member of the Illinois Women's Alliance, Jane Addams, Florence Kelley, and other residents of the famous settlement house worked very effectively for many of the same goals.

This coalition of women secured passage in 1893 of a bill to outlaw sweatshops and regulate working conditions in the garment industry.<sup>75</sup> Section five enacted the eight-hour day for women working in "factories or workshops."<sup>76</sup> Section nine provided for the appointment of a

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72. See Brandeis, *Labor Legislation*, in J. COMMONS ET AL., 3 THE HISTORY OF LABOR IN THE UNITED STATES 1896-1932, at 397 (1935); see also THE CASE FOR THE FACTORY ACTS 209 (S. Webb 2d ed. 1902) (England); E. CADBURY, WOMEN'S WORK AND WAGES 36-43 (1907) (England); E. BAUER, THE NIGHT-WORK OF WOMEN IN INDUSTRY 38 (1903) (Switzerland).

73. See M. TAX, *supra* note 15, at 66-68.

74. Newspaper clipping, box 4, vol. 2, Thomas J. Morgan Papers (November 1888) (available at University of Illinois at Champaign-Urbana), quoted in Sklar, *Hull House in the 1890s: A Community of Women Reformers*, 10 SIGNS: J. WOMEN IN CULTURE & SOCY. 658, 665 (1985).

75. See Sklar, *supra* note 74; M. TAX, *supra* note 15, at 25-89.

76. After an extensive investigation of the sweatshop system, the Illinois legislature enacted in 1893 a bill entitled, "An Act to regulate the manufacture of clothing, wearing apparel, and other articles in this State, and to provide for the appointment of State inspectors to enforce the

chief factory inspector, an assistant factory inspector, and ten deputy factory inspectors, "five of whom shall be women."<sup>77</sup> Florence Kelley, who had drafted the bill, was named chief factory inspector. She gathered around her a group of committed deputies, several of them socialists, and undertook rigorous enforcement of the law.<sup>78</sup> The community of women reformers at Hull House became the center of enforcement activities.

Although the effects of gender-specific legislation may be difficult to evaluate, the available evidence suggests that in Illinois in 1893, the eight-hour day for women did not exclude them from jobs or hurt women vis-à-vis men. Instead, it tended to secure the eight-hour day for all workers. The work done by men and by women was separate but interrelated in a manner that made it difficult not to limit men also to eight hours.<sup>79</sup> Kathryn Kish Sklar, who is preparing a biography of Florence Kelley, has concluded that Kelley and her staff probably adopted a deliberate policy of extending the eight-hour day *de facto* to men.<sup>80</sup> Kelley wrote to Friedrich Engels on New Year's Eve, 1894:

We have at last won a victory for our 8 hours law. The Supreme Court has handed down no decision sustaining it, but the Stockyards magnates having been arrested until they are tired of it, have instituted the 8 hours day for 10,000 employees, men, women and children. We have 18 suits pending to enforce the 8 hours laws and we think we shall establish it permanently before Easter. It has been a painful struggle of eighteen months and the Supreme Court may annul the law. But I have great hopes that the popular interest may prove too strong.<sup>81</sup>

Whether there was insufficient popular support for the law or whether the court was unmoved by public sentiment, Kelly's hopes were dealt

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same, and to make an appropriation therefor." Act of June 17, 1893, 1893 Ill. Laws 76 (Bradwell). Section 5 of the act provided: "No female shall be employed in any factory or workshop more than eight hours in any one day or forty-eight hours in any one week." Act of June 17, 1893, 1893 Ill. Laws 76, 77 (Bradwell).

77. Act of June 17, 1893, 1893 Ill. Laws 76, 77 (Bradwell); see *Ritchie v. People*, 155 Ill. 98, 40 N.E. 454 (1895).

78. See Sklar, *supra* note 74, at 671 (letter from Florence Kelley to Friedrich Engels, Nov. 21, 1893).

79. See *id.* at 675. Interestingly, it was a gender-neutral provision of the law, not a gender-specific one, that probably did benefit men at the expense of some women, at least in the short run. The act outlawed child labor and the manufacture of garments in tenement dwellings, which tended to move manufacturing work out of the sweatshops and into the factories. Men held about 75% of factory jobs, while women and children did most of the work in sweatshops. See Sklar, *supra* note 74, at 672-75.

80. See *id.* at 675; see also K. SKLAR, FLORENCE KELLEY AND THE FEMALE WORLD OF PROGRESSIVE REFORM 1830-1930 (forthcoming).

81. Letter from Florence Kelley to Friedrich Engels (Dec. 31, 1894), quoted in Sklar, *supra* note 74, at 675. Florence Kelley began correspondence with Friedrich Engels in 1884, when she decided to translate his classic work, *CONDITION OF THE ENGLISH WORKING CLASS IN 1844* (1887). Kelley's was the only English translation until 1958. See Sklar, *supra* note 74, at 661 n.8.

a setback by the Illinois Supreme Court in *Ritchie v. People*.<sup>82</sup>

## V. FALSE EQUALITY: THE *RITCHIE* CASE

A group of employers organized the Illinois Manufacturers Alliance (which became the model for the National Association of Manufacturers)<sup>83</sup> for the explicit purpose of obtaining a court ruling against the eight-hour day provision of the sweatshop act.<sup>84</sup> In their internal organizing efforts, they made it clear that they feared the eight-hour day for women would be the opening wedge for the eight-hour day for everyone.<sup>85</sup>

The Illinois Manufacturers Alliance was successful, and in 1895 the Illinois Supreme Court in *Ritchie v. People* declared the law unconstitutional — as a violation of due process and women's rights. The language was stirring. Justice Magruder wrote for the court that “woman is entitled to the same rights, under the constitution, to make contracts with reference to her labor as are secured thereby to men.”<sup>86</sup> He referred to the United States Supreme Court case of *Minor v. Happersett*<sup>87</sup> as holding that a woman was both a “person” and a “citizen” within the meaning of the first section of the fourteenth amendment:

As a citizen, woman has the right to acquire and possess property of every kind. As a “person,” she has the right to claim the benefit of the constitutional provision that she shall not be deprived of life, liberty or property without due process of law. . . . The law accords to her, as to every other citizen, the natural right to gain a livelihood by intelligence, honesty and industry in the arts, the sciences, the professions or other vocations. Before the law, her right to a choice of vocations cannot be said to be denied or abridged on account of sex.<sup>88</sup>

82. 155 Ill. 98, 40 N.E. 454 (1895).

83. See Sklar, *supra* note 74, at 674; Papers of the Illinois Manufacturers Association, Chicago Historical Society [hereinafter cited as IMA Papers].

84. See Minutes, August 24, 1893, IMA Papers, *supra* note 83, at box 1, folder 1 (1893). The organization originally went by the name Illinois Manufacturers Protective Association. At its second meeting the organization dropped the “Protective” from its name. The minutes of the organization do not reflect whether that change was motivated by a concern that it might seem ingenuous for the Illinois Manufacturers Protective Association to be arguing that protective labor legislation was ill-advised and paternalistic. See Minutes, August 29, 1893, IMA Papers, *supra* note 83, at box 1, folder 1 (1893).

85. This view of the Illinois Manufacturers Association appears in many sources in its papers. It is particularly apparent in its opposition to a later proposal for the eight-hour day for women. See Pamphlet opposing the Eight-Hour Day, IMA Papers, *supra* note 83; Letter from Secretary of the Illinois Manufacturers Association to William J. Brown, April 17, 1909, *id.* at box 161, Folder 1 (1909); see also Brief of Plaintiffs in Error at 61, *Ritchie v. People*, 155 Ill. 98, 40 N.E. 454 (1895) (arguing against eight-hour law that it “necessarily forces a reduction of the hours of work of the male co-laborer”).

86. *Ritchie v. People*, 155 Ill. 98, 111, 40 N.E. 454, 458 (1895).

87. 88 U.S. (21 Wall.) 162 (1875).

88. *Ritchie*, 155 Ill. at 112, 40 N.E. at 458.

Magruder cited with approval *In re Leach*, an 1893 case from Indiana that disagreed with Illinois' *Bradwell* decision and held that women could not be barred from practicing law in Indiana.<sup>89</sup> Magruder continued:

The tendency of legislation in this State has been to recognize the rights of women . . . . An act approved March 22, 1872, entitled "An Act to secure freedom in the selection of an occupation," etc., provides that "no person shall be precluded or debarred from any occupation, profession or employment (except military) on account of sex."<sup>90</sup>

Moreover, Magruder found it irrelevant that the Act of March 22, 1872, made an exception for military service and provided "that nothing in the Act shall be construed as requiring any female to work on streets, or roads, or serve on juries." Magruder argued that the question before the court was "whether, in an employment which is conceded to be lawful in itself and suitable for woman to engage in, she shall be deprived of the right to determine for herself how many hours she can and may work during each day."<sup>91</sup> Finally, in an antipaternalistic vein, Magruder asserted that it was "questionable" whether the police power of the state could ever "be exercised to prevent injury to the individual" worker or instead could be exercised only to promote the broader interests of society or the public.<sup>92</sup>

Unfortunately, there is no reason to believe that the court's language had any beneficial effect on the actual conditions of women. Women in Illinois did not enjoy formal juridical equality; for example, the age of majority for females was eighteen, for males twenty-one.<sup>93</sup>

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89. 134 Ind. 665, 34 N.E. 641 (1893). *Leach* was a more difficult case for the woman applicant than *Bradwell*. The Indiana statute provided: "Every person of good moral character, being a voter, on application, shall be admitted to practice law in all the courts of justice." 134 Ind. at 666, 34 N.E. at 641 (emphasis added). Women were not allowed to vote in Indiana, but the court decided that the statute did not limit their right to practice law in the state. The court did not refer to the *Bradwell* case by name, but the reference is unmistakable.

We are not unmindful that other States, notably Illinois, Wisconsin, Oregon, Maryland, and Massachusetts, have held that in the absence of an express grant of the privilege [to practice law] it may not be conferred upon women. In some instances the holding has been upon constitutional provisions unlike that of this State, and in others upon what we are constrained to believe an erroneous recognition of a supposed common law inhibition. However, each of the States named made haste to create, by legislation, the right which it was supposed was forbidden by the common law, and thereby recognized the progress of American women . . . .

134 Ind. at 668, 34 N.E. at 642.

90. 155 Ill. at 112, 40 N.E. at 458. Justice Magruder was referring to the bill passed by the efforts of Myra Bradwell and Alta M. Hulett. See text at notes 50-51 *supra*.

91. 155 Ill. at 113-14, 40 N.E. at 459.

92. 155 Ill. at 114, 40 N.E. at 459.

93. See *Sayles v. Christie*, 187 Ill. 420, 437, 58 N.E. 480, 485 (1900); *Stevenson v. Westfall*, 18 Ill. 209, 211 (1856). The discrimination that such legislation represents and the harm it can cause women are suggested in *Stanton v. Stanton*, 421 U.S. 7, 14-17 (1975) (forbidding Utah to enforce different ages of majority for males and females). Of course, a lower age of majority may also benefit women in some cases. See, e.g., note 53 *supra*.

Nor did women enjoy equality in the workplace. Jobs were segregated by sex, and women were paid considerably lower wages than men.<sup>94</sup> Court opinions in Illinois were not particularly pro-women. Although child custody law was thought to be better for women in Illinois than in some other states, Justice Magruder in one case took one of a mother's two sons away from her because she worked.<sup>95</sup> On the topic of married women's rights, Illinois was barely less grudging than any other state in its enforcement of statutory reform.<sup>96</sup>

Meanwhile, the actual effect of the *Ritchie* case was to overturn a law that was supported by women and seemed to be operating for their benefit. It was not until thirteen years later, when the United States Supreme Court in *Muller v. Oregon*<sup>97</sup> upheld a general ten-hour day for women in Oregon, that a serious split among women developed on the issue of gender-specific hours legislation.<sup>98</sup> Even then, the actual effect of Oregon's ten-hour law was more good than bad, and it was only a scattering of voices that objected or believed that there was an important risk that the measure would work to disable women vis-à-vis men.<sup>99</sup> Most commentators saw the ten-hour law upheld in *Muller* as an opening wedge — just as the Illinois Manufacturers Alliance saw

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94. See REPORT AND FINDINGS OF THE JOINT COMMITTEE TO INVESTIGATE THE "SWEAT SHOP" SYSTEM, TOGETHER WITH A TRANSCRIPT OF THE TESTIMONY TAKEN BY THE COMMITTEE (Springfield, Ill. 1893).

95. See *Umlauf v. Umlauf*, 128 Ill. 378, 21 N.E. 600 (1889). The identity of the individual justice who wrote an opinion would seem to have been particularly important at this time in Illinois judicial history. The Supreme Court met in three different cities during the year, and relatively little consultation took place among the various justices. Each case was assigned to an individual justice to write a draft opinion without the court having heard oral argument and usually, if not always, prior to any discussion of the case by the court. The draft opinion usually became the final opinion, and dissents were rare. One of the justices, responding to a complaint from the bar that the Illinois Supreme Court was issuing "single judge opinions," suggested that "many opinions" would be revised after the court discussed the case: "[Q]uite often [opinions] are re-written more than once." Carter, *The Supreme Court and its Method of Work*, 1 ILL. L. REV. 151, 153 (1906); see also Woodward, *The "One-Judge Opinions" of our Supreme Court* (Editorial Note), 1 ILL. L. REV. 392 (1906); Correspondence, *Comment on Mr. Justice Carter's Defense of the Supreme Court's Method of Work*, 1 ILL. L. REV. 273 (1906).

96. See, e.g., *Snell v. Snell*, 123 Ill. 403, 14 N.E. 684 (1888). I would not want to discount possible ideological benefits of Magruder's opinion. His decision could play a role in constituting a more juridically equal regime. Formal equality, which often benefits women, can be and sometimes is advanced by judicial assertions that women are equal to men and have equal rights to men. On the other hand, Magruder's opinion may also have ideological disadvantages: formal equality could be a setback and discredited by decisions that hurt women in the name of equality.

97. 208 U.S. 412 (1908). I have benefited from reading unpublished manuscripts, including S. Levin, *The Protection Paradox: The History of Protective Labor Legislation for Women, 1780-1930*; D. Gelon, *Muller v. Oregon: A Feminist Decision* (July 1, 1985).

98. See Lehrer, *Protective Labor Legislation for Women*, 17 REV. RADICAL POL. ECON. 187, 187 (1985).

99. See, e.g., *Against Justice Brewer's Decision*, 25 WOMAN'S TRIBUNE 19 (1908); *Unjust to Working Women*, 25 WOMAN'S TRIBUNE 17 (1908); Harding, *Pertinent Queries*, 25 WOMAN'S TRIBUNE 19 (1908); *Special Legislation for Women*, 25 WOMAN'S TRIBUNE 16 (1908); Harding, *Male Socialism*, *The Woman's Standard*, Apr. 1908, at 2, col. 2.

the eight-hour day in Illinois.<sup>100</sup> Gender-specific legislation, legitimated in *Muller v. Oregon*, was later used to exclude women from desirable jobs,<sup>101</sup> but that does not mean that the *Ritchie* case was right. The equality promoted in *Ritchie v. People* was a false equality.

Gender-based labor legislation has complex and ambiguous implications. The conservative judicial attack on protective legislation of general application and the standard arguments in favor of laissez-faire usually assert that protective labor legislation is bad for society and that it does not really help its intended beneficiaries. *Muller v. Oregon* admitted what *Lochner v. New York* had tried to deny — that protective labor legislation can benefit the protected workers and society in general. Protective labor legislation — even if it is limited by its terms to women — “delegitimizes” the autocratic power of employers and legitimates the basic notion that social controls on the marketplace are appropriate.<sup>102</sup>

Yet, protective labor legislation limited to women may also offer ideological support to the proponents of laissez-faire. By identifying protective labor legislation with the special problems and disabilities of women, gender-specific legislation may make protective legislation seem unmanly. *Muller v. Oregon* can be read to support the assertion that protective legislation is paternalistic. Women were more often than men considered to be appropriate beneficiaries of paternalism.

Finally, in those fields in which men and women did compete, gender-specific legislation might well exclude rather than benefit women. Thus, the failure of such legislation to protect its supposed beneficiaries in these particular cases could reinforce the argument that such legislation in general does not protect the workers it is supposed to benefit. Moreover, insofar as gender-specific labor legislation pits men against women, it may undermine working-class solidarity and thus reinforce the power of the employers.

The 1893 sweatshop bill would likely have been considerably more controversial if section five had enacted the eight-hour day for men as

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100. See text at note 85 *supra*.

101. See J. BAER, *supra* note 71.

102. Historically, altruism has been linked with hierarchy — a hierarchy that places women below men. In the nineteenth and again in the twentieth century, when women demanded equality they by and large used a marketplace model of equality and allowed the equality claim to be linked with assertions of individualism. Women were not only seeking both equality and independence at approximately the same time, but in many ways their demand for equality was based upon (or dependent upon) their claim to be independent. See Olsen, *supra* note 1.

Within liberal society, notions of contractual freedom and autonomy play an important role. Women's ability to form contracts was contested and important. It may be that the social and political meaning of the notion of freedom of contract was significantly different as applied to women than as applied to men in the late nineteenth and early twentieth centuries.

well as for women. Limiting the reform to women may well have seemed politically necessary. Once a reform is accepted, it may be possible to extend its coverage to men.<sup>103</sup>

Writing in 1924, Florence Kelley justified gender-specific labor legislation against claims that it violated women's rights to equality with men. She wrote:

The struggle for every gain in statutes and judicial decisions for women and girls in industry has been hard fought and costly in money, time and effort.

[Women's] oldest, most wide-spread, and most insistent demands have been for seats, for more adequate wages, and short, firmly regulated working hours. . . . Whenever union men feel no need of laws, well and good. No one wishes to interfere with them any more than professional women are interfered with today by labor legislation.<sup>104</sup>

If they were not able to enact gender-specific labor legislation, according to Kelley, "women could change their hours and other working conditions by law only when men were ready and willing to make the changes for themselves. This would be a new subjection of wage-earning women to wage-earning men, and to that subjection we are opposed on principle and in practice."<sup>105</sup>

As long as women were segregated into different jobs from men, it was not very meaningful to insist that labor legislation apply equally to both sexes. As women were slowly allowed to work at "men's jobs," these women would no longer benefit from or desire protective legislation unless it applied to men as well as to women.

## VI. CONCLUSION

The parallel that feminists who question maternity benefits draw

103. See Brandeis, *supra* note 72.

104. Kelley, *Why Other Women Groups Oppose the Amendment*, GOOD HOUSEKEEPING, Mar. 24, 1924, at 19, 164-65.

105. *Id.* For a more recent statement in a similar vein, consider the testimony opposing the Equal Rights Amendment in 1970, given by Myra Wolfgang, vice-president of the Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO:

My concern is for the widowed, divorced mothers of children who are the heads of their families and earn less than \$3,500 a year working as maids, laundry workers, hospital cleaners, or dishwashers. . . .

. . . .  
Representing service workers gives me a special concern over the threat that an equal rights amendment would present to minimum labor standards legislation. . . . I am sure you are aware that many such laws apply to women only.

. . . .  
. . . Should women workers be left without any legislation because of State legislature's failure and unwillingness to enact such legislation for men?

*The "Equal Rights" Amendment: Hearings Before the Subcomm. on Constitutional Amendments of the Senate Comm. of the Judiciary*, 91st Cong., 2d Sess. (1970), quoted in WOMEN AND THE "EQUAL RIGHTS AMENDMENT" 91-93 (C. Stimpson ed. 1972).



between maternity benefits and protective labor legislation is more apt than supporters of maternity benefits often acknowledge. The arguments now being advanced to support maternity benefits are very similar to those that were advanced to support protective labor legislation. The arguments were generally persuasive then, and they are generally persuasive now.

Brandeis' brief in *Muller v. Oregon* spent two pages establishing that men and women were not in job competition and that protective labor legislation would therefore not hurt women vis-à-vis men. Initially, protective legislation limited to women tended to bring their wages and working conditions up to the level of men's.<sup>106</sup> When this situation changed and protective labor legislation was used to exclude instead of to benefit women, it became important to change or eliminate the gender-specific legislation.

Pregnancy disability leave seems at this time to be an important employee benefit for women. In time, this situation could change. Even now, it would probably be better to have a broader leave policy that would cover a wide variety of reasons for leaving work. It may turn out to be important that the government, not individual employers, bear the costs of maternity benefits. We should approach the question of maternity benefits as a collective process of working out and describing desirable ends. We should not try to endorse either equal treatment or different treatment as any kind of overarching principle.

This analysis has more general implications regarding the issue of sameness and differences and the question of whether women should emphasize their similarity to men or their differences from men. Men should be neither a model nor a contrast. Women should not have to claim to be just like men to get decent treatment, nor should they have to focus on *their* differences from men to justify themselves whenever they demand a policy different from the present treatment afforded to men. Women can be hurt by false paternalism and by false equality. We should not let these concepts divide us. We can and should advance the concrete interests of society through feminist organizing and through building coalitions with other groups — beginning from a base of feminist solidarity.

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106. See Brief for Defendant in Error at 82-84, *Muller v. Oregon*, 208 U.S. 412 (1908) (the "Brandeis Brief"). Louis Brandeis was also one of the signers of the more conventional brief filed in the case on behalf of the State of Oregon. See Brief for the State of Oregon, *Muller v. Oregon*, 208 U.S. 412 (1908).

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