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Florence Kelley and the Battle Against Laissez-Faire Constitutionalism

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FLORENCE KELLEY AND THE BATTLE AGAINST LAISSEZ-FAIRE CONSTITUTIONALISM¹

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We all know the story of the demise of substantive due process in the 1930s and our story usually features heroes such as Louis Brandeis and Felix Frankfurter and the great male legal progressives of the day who rose up from academia, the bench, and the bar, to put an end to what historians label “legal orthodoxy.” In this essay, I seek to demonstrate that Florence Kelley was a crucially important legal progressive who was at the front lines of drafting and defending new legislation that courts were striking down as violating the Fourteenth Amendment and state constitutions. Looking at who was drafting and lobbying for path breaking progressive legislation and how such legislation was being defended accomplishes a number of things. It uncovers how male legal actors at times worked closely and collaborated with women reformers. Furthermore, thinking about women reformers as central legal actors demands that we examine our own categorical thinking. Placing progressive era women reformers in a non-porous women’s sphere, while imagining that elite male legal thinkers were sealed within an all-male world of academics, lawyers and jurists, distorts late nineteenth and early twentieth century legal culture and leads to what we might call “intellectual segregation.”² This essay is thus a work of *bricolage* that brings together the scholarship on women’s leading roles in progressive era reform with mainstream narratives of legal history.

Situating Florence Kelley as a legal reformer further allows us to explore some of the significant differences between how men and women legal reformers approached the law. In part, male legal thinkers deeply struggled with questions involving legal rights, the common law, the role of judges, the redistribution of wealth, the Fourteenth Amendment, and the growth of an administrative state. Many women reformers did not have similar struggles and qualms. These women legal reformers had come to realize that custom, the common law, and courts had consistently thwarted women’s rights. Courts had failed to grant women the right to vote, found that the Fourteenth Amendment did not protect women from discrimination, and often negated the Married Women’s Property Acts. By the turn of the century, elite women reformers had few illusions about courts, the common law, the Constitution, and legal custom. Where men like Oliver Wendell Holmes, Jr. posited that custom and the common law served as a buffer between

¹ An earlier version of this essay, “Notes from the Margins: Florence Kelley and the Making of Sociological Jurisprudence” appears in ed. Daniel Hamilton and Alfred Brophy, *Transformations in American Legal History: Law, Ideology, and Methods v. II* (Cambridge: Harvard University Press, 2010), 239- 253. This essay is a work in progress and part of a larger project on progressive era women reformers as significant legal actors.

² Thank you to Alfred Brophy for using the phrase “intellectual segregation.”

the state and the individual, many women legal reformers understood that custom and the common law blocked women's struggles for rights and more generally for social reform.³ Having a stake in the system, many progressive male legal thinkers reached such critical assessments regarding courts, the Constitution, and the common law more slowly. In contrast, Florence Kelley radically reinterpreted the Constitution as placing affirmative duties on the state. These duties required the state to provide for those material conditions which would foster true democracy. This radical vision, which Kelley had already set forth by 1905, is exceedingly modern and it defined the ways in which she would defend legislation from Constitutional challenge and marry the philosophy of pragmatism, social science, on the ground reality, and law.

Kelley was born into an elite Pennsylvania family that had deep roots in various reform movements. Her father was a lawyer, judge, and long-time congressman, and her great-aunt was a Quaker abolitionist involved in women's rights struggles. Like Elizabeth Cady Stanton, who learned law from her attorney father, Kelley was immersed in law and political change from a young age. At Cornell College in the late 1870s, Kelley founded the Social Science Club. While spending a year with her father in Washington D.C., Kelley wrote her senior thesis, entitled "On Some Changes in the Legal Status of the Child since Blackstone." In the thesis, Kelley used traditional legal sources, statutes, and statistical data on children. From this very early period, Kelley was already attempting to combine law and empirical evidence.⁴

Having graduated from Cornell and unable to pursue an advanced degree in the United States because she was a woman, Kelley enrolled at Zurich University, where she spent three years studying government. During this period, she became immersed in socialism and was the first person to translate into English Friedrich Engels's *The Condition of the Working Class in England*. She also began a long-term personal acquaintance with Engels. Upon her return to the United States, Kelley worked on legislation in New York and Philadelphia that sought to limit working hours for women and minors. By 1891, Kelley had already authored twenty-five articles, which had appeared in national and international publications primarily focusing on labor questions.⁵ Kelley certainly

³ See Morton Horwitz, *The Transformation of American Law, 1870-1960: The Crisis of Legal Orthodoxy* (New York: Oxford University Press, 1992), 140.

⁴ Kathryn Kish Sklar's, *Florence Kelley and the Nation's Work: The Rise of Women's Political Culture, 1830-1900* (New Haven, CT: Yale University Press, 1995) is probably the definitive biography of Kelley up until 1899. My goal here is not to bring new bibliographical information to light but rather to emphasize Kelley's legal work and how it fits in to the larger narrative of legal progressivism. In this essay, I draw heavily upon Sklar's work.

⁵ See Sklar; See also Louise Knight, *Citizen: Jane Addams and the Struggle for Democracy* (Chicago: University of Chicago Press, 2005), 229.

understood herself as an intellectual, socialist, and reformer with a keen interest in using law to better the conditions of labor.

After the dissolution of her marriage, Kelley arrived at Jane Addams's Hull House in Chicago, where Julia Lathrop, one of the few women members of the Illinois bar, was already a resident. Although Kelley envisioned becoming a university professor and hoped that Richard Ely would aid her in obtaining such a position at the University of Wisconsin, he was no help.⁶ Ely's rebuff was not surprising, given that the doors of the academy (with the exception of women's colleges) were essentially closed to women. Thus Kelley immersed herself in Hull House, seeking to combine her legal and theoretical knowledge with firsthand experience regarding workers' lives. Describing her Hull House experience, Kelley wrote to Engels, "I am . . . learning more in a week of actual conditions of proletarian life in America than in any previous year."⁷

In multiple ways, Hull House participated in creating the new practice of social science and marrying it with the emerging philosophy of pragmatism. At the center of Jane Addams and Hull House's philosophy and methodology stood this rejection of certainty and the embrace of material, on-the-ground study, and action. As pragmatist philosopher George Mead remarked, "The settlement embodied the ideal of an engaged 'social' science guided by 'working hypotheses'—provisional rather than absolute or dogmatic knowledge."⁸ Addams called for settlement houses to be sites of experimentation that would continually adjust their methods and goals as conditions required.⁹ One of the important contributions of settlement houses was their often path breaking social science research. As Addams wrote, "We were the actual pioneers in field research."¹⁰ Josephine Goldmark further remarked that "The settlements antedated by ten years the establishment of the first foundation for social research."¹¹

Addams and Hull House also participated in the development and lived experience of pragmatism. John Dewey was extraordinarily close to Addams and deeply involved in Hull House. He also readily acknowledged the settlement's influence on his thoughts and actions.¹² Furthermore Hull House was a center of intellectual life through which the leading intellectuals and reformers of the day passed, including Ernst Freund and Roscoe Pound. When Pound was teaching in

⁶ Sklar, *Florence Kelley*, 206.

⁷ Knight, *Citizen*, 232.

⁸ Andrew Feffer, *The Chicago Pragmatists and American Progressivism* (Ithaca, NY: Cornell University Press, 1993), 114.

⁹ Knight, *Citizen*, 257.

¹⁰ Goldmark, *Impatient Crusader*, 31, quoting Jane Addams, *The Second Twenty Years at Hull-House* (New York: Macmillan, 1930), 405.

¹¹ Goldmark, *Impatient Crusader*, 31.

¹² Knight, *Citizen*, 240, 258, 325–26.

Chicago (1907–10), the very period during which he called for a sociological jurisprudence, his former student Edith Abbott, then a resident at Hull House, introduced Pound to Jane Addams and Hull House. It is here that Pound became interested in social work.¹³

Kelley was immersed in this environment. It provided an exceptional space from which she could develop and combine her interest in law, political economy, and fieldwork. With Addams's help, Kelley obtained a position with the Bureau of Labor Statistics of Illinois, where she primarily concentrated on women's factory work and an anti-sweating campaign. This work led Carroll Wright, head of the U.S. Census Bureau, to hire Kelley to lead the Chicago portion of a federal study on urban slums. Kelley thus began the process of canvassing Chicago's neighborhoods, eliciting responses to questions that in part surveyed respondents for nationality, conditions of labor, wages, and health. Where Wright used such information to produce *The Slums of Baltimore, Chicago, New York and Philadelphia*, Kelley and other Hull House residents created the groundbreaking Hull House maps. As Kelley's biographer writes, "By defining spatial relationships among human groups, they vividly depicted social and economic relationships."¹⁴ Urban space, ethnicity, race, health, housing, and their relationship to poverty were denaturalized and contextualized. During this part of Kelley's career, she was functioning as a social scientist, collecting and analyzing facts, while showing their relationship to poverty and the conditions of labor. The maps, along with essays by Kelley, Addams, and other settlement house residents, would appear in Richard Ely's series *Library of Economics and Politics*.

Other work that Kelley accomplished consisted of examining the working conditions of 5,099 women. Data collected from such women and employers included pay, length of working days, periods of unemployment, nationality, information on home life, expense budgets, and family background. This study dramatically demonstrated that working women often supported themselves and their families and sought to vividly show the necessity of women receiving living wages.¹⁵ Kelley subsequently conducted a study on the conditions of sweatshops in which women worked. Her 1892 report found that women worked from ten hours to sixteen hours a day at extremely low wages and often in horrendous conditions. The report recommended groundbreaking legislation that would require the licensing of manufacturers, the prohibition of garment manufacturing in tenements, the regulation of child labor, maximum-hours laws, and regular inspections. Kelley, along with others, then drafted a legislative bill that provided for maximum hours for women workers and a ban

¹³ N. E. H. Hull, *Roscoe Pound and Karl Llewellyn: Searching for an American Jurisprudence* (Chicago: University of Chicago Press, 1997), 72.

¹⁴ Sklar, *Florence Kelley*, 229.

¹⁵ *Ibid.*, 232.

on child labor. It also proposed the creation of an office of Illinois factory inspector.

Kelley understood well that such labor legislation was redistributive as well as groundbreaking. Her focus on women and children was a strategic and realistic appraisal of what the public and legal precedent would support. As Kelley reasoned, the public was much more likely to support legislation involving women and children, whom the public understood as helpless, than men, whom the public construed as being able to care for themselves. Furthermore, she was keenly aware that the common law traditionally construed women's contracts rights narrowly, as evidenced by coverture. Finally, Kelley firmly believed that the reduction of women's hours would have the material effect of reducing men's hours as well. Importantly, from this early date, Kelley tied together law on the books with law in action. As she wrote, "Mere enactments are idle in the face of a menace like this. The delinquent must be confronted not only with the law on the statute book but the law-officer at his door."¹⁶ She and other legal progressives would spend the next forty years fighting for and defending protective workers legislation. Kelley's work in 1892 essentially set forth the manner in which she would operate for close to forty years—investigate, draft laws, lobby for such laws, and work on developing a regulatory state that would enforce such laws. It is difficult not to see that Kelley provided much of the groundwork for what Pound would much later call sociological jurisprudence.

Kelley's successful work, along with the influence of Addams, led the Illinois governor to appoint Kelley to the newly created post of Illinois factory inspector. At approximately this time, Kelley enrolled in and quickly graduated from Northwestern Law School. As chief factory inspector, Kelley had the principal responsibility for enforcement of the law that she had drafted. Kelley's office quickly began prosecuting manufacturers, and at one point Kelley boasted that her office was averaging one indictment per day.¹⁷ Thus by 1893, Kelley was fully functioning as an attorney at the forefront of interpreting, enforcing, and expanding new state regulatory powers. Simultaneously, Kelley and her staff engaged in significant investigation, collecting and interpreting empirical evidence on the conditions of labor, including child labor, workplace injuries, and the importance of the eight-hour work day. Kelley's methodology continued to combine what was now even more detailed statistical work with law. For example, Kelley wrote, "It is my ambition to make the most thoroughly specialized study of statistics of child labor that has ever been made."¹⁸ Such

¹⁶ Ibid., 233, quoting Kelley's report for the Bureau of Labor Statistics of Illinois, "Working Women in Chicago," in *Seventh Biennial Report* (1892), 402.

¹⁷ Sklar, *Florence Kelley*, 248.

¹⁸ Ibid., 279, quoting a letter from Kelley to another woman reformer.

information was then used to both educate the public and create an agenda for future legislation.

In 1894, Kelley warned manufacturers that her office would begin prosecuting employers who employed women for over eight hours a day. As she began such prosecutions, she confronted the newly formed Illinois Manufacturing Protective Association, which was created to challenge the constitutionality of the Illinois maximum-hours law for women. A prosecution of nine manufacturers brought by Kelley's office resulted in the courts confronting the constitutional issue of whether the law violated the Fourteenth Amendment. Kelley, along with two others, wrote the state's brief. The brief is quite remarkable for its compendium on the multiple ways in which the state already regulated industry and individuals pursuant to the police power. Indeed it seemed to be saying that state action was everywhere. The brief further claimed that "Labor in factories of more than eight hours a day deprives the average woman . . . of their health . . . so that in the end they are *deprived* of labor by a long day; and obtain more labor, and the results of labor, by a short day."¹⁹ Pursuant to this argument, worthy of the best legal realist, only state action could produce actual freedom of contract.

The brief also cited a wide variety of experts regarding the health effects of long hours on women. For example, it quoted the Massachusetts Bureau of Labor, the U.S. Commissioners of Labor, a report to the British Board of Local Government, and a report to the Royal Commission on Labour of England. As the brief argued, such authorities agreed that workers' nerves and health were damaged "by the constant tension of factory work, the machine-like method of toil, and the accompanying tremendous strain on the female system."²⁰ This, of course, would become one of the main arguments used fourteen years later in the *Muller* brief. Even more importantly, the *Ritchie* brief was already experimenting with the use of medical and sociological data.

As we are well aware, in *Ritchie v. Illinois* (1895), the Illinois Supreme Court unanimously struck down the eight-hour law for women as a violation of the Fourteenth Amendment. The decision did not, however, strike down the prohibition against child labor. Kelley criticized the court as follows:

The judicial mind has not kept pace with the strides of industrial development in Illinois, and in this decision the Supreme Court shows that Illinois is in law to-day what it was in fact when the Constitution was adopted in 1870—an agricultural State. . . . It may be that the Court is as advanced as that part of the community which is not yet thoroughly aware that Illinois is now one of the great manufacturing States. When the observation of a few more years has convinced the

¹⁹ *Ritchie v. Illinois*, Brief and Argument of the Defendant in Error, Illinois Supreme Court (1894), 46.

²⁰ *Ibid*, 15.

medical profession, the philanthropists, and the educators as experience has already convinced factory employees themselves, that it is a life and death matter . . . to have a working day of reasonable length guaranteed by law, it will be found possible to rescue the Fourteenth Amendment to the Constitution of the United States from the perverted application upon which this decision rests.²¹

The judgment that courts were significantly out of touch with reality would become one of the constant complaints made by legal progressives following *Lochner*, ten years later. Here Kelley not only fully articulated the problem of courts adherence to abstract principles that did not conform to on-the-ground facts but also understood that it was the duty of experts from a wide variety of disciplines to educate courts.

In 1899, Kelley accepted a position as head of the newly created National Consumers League (NCL) in New York. Through her work with the NCL, she came into close contact with a slew of male legal reformers, economists, and progressives, including John Graham Brooks, Richard Ely, E. R. A. Seligman, Louis Brandeis, Felix Frankfurter, and Benjamin Cohen, just to name a few. Although in its early years the NCL concentrated on influencing the purchasing habits of consumers, Kelley soon expanded its work to focus primarily on legal reform, lobbying, and defending protective legislation for workers against constitutional challenges. Kelley and her female employees, including Josephine Goldmark, drafted model bills regarding maximum hours, prohibitions on night work for women, and child labor laws. Kelley played a leading role in selecting the cases in which the NCL would become involved and negotiated with states to allow the NCL to intervene in court proceedings. She also “planned and oversaw the development of the legal briefs drafted by her female assistants at the NCL and recruited prominent male attorneys to serve as legal figureheads in these cases.”²²

While at the NCL, Kelley published her first full-length book, *Some Ethical Gains through Legislation* (1905). In it, she argued that the Fourteenth Amendment did not prohibit protective legislation for workers. Instead of freedom of contract, Kelley framed the work around a constellation of rights including the right to childhood, the right to leisure, and the rights of purchasers. In contrast to the laissez-faire state, Kelley advocated an activist state that pursuant to the Fourteenth Amendment had affirmative duties to its citizens. For Kelley, rights arose from the needs of

²¹ *Third Annual Report of the Factory Inspectors of Illinois for the Year Ending December 15 1895* (1896), 7.

²² Susan D. Carle, “Gender in the Construction of the Lawyer’s Persona: Florence Kelley and the Nation’s Work,” *Harvard Women’s Law Journal* 22 (1999): 258. Carle offers an excellent discussion of Kelley and her professional identity, although we ultimately draw different conclusions.

a democratic society, and it was the state's obligation to foster the health and well-being of its citizens. Thus a right to childhood existed so that children could attend school and become productive citizens. Such a right required the state to prohibit child labor and institute compulsory education. A right to leisure allowed workers to rest and "undo the damage wrought in the working-hours, so that the worker could remain fit for citizenship in the Republic."²³ Furthermore, leisure promoted the preservation of health, which was necessary for the overall well-being of society. As Kelley wrote, "To be deprived of leisure is to be deprived of those things worth living."²⁴ Individual rights, for Kelley, were tied to what she called social rights—those rights of the entire society—for society could not flourish if individuals did not flourish. One way in which Kelley demonstrated the interconnectedness of individuals and the larger society was by uniting production and consumption. Without the worker having a right to leisure, health, and decent working conditions, the consumer never could be sure of the origin or cleanliness of commodities that she purchased. The ill worker, exhausted and sick from overwork in unsanitary conditions, would spread germs to the consumer in the goods that she made. As Kelley wrote, "Before the individual purchaser can vindicate his own personal rights, the whole body of purchasers are constrained to save childhood for the children, and home life for the workers."²⁵

In *Ethical Gains*, Kelley surveyed and discussed relevant court cases regarding the regulation of work and she weaved an argument for the constitutionality of such laws under the police power. As she articulated, liberty of contract meant nothing to the worker who did not have bargaining power. Engaging in a realist-type argument, Kelley posited that liberty of contract was itself an unconstitutional form of class legislation, as it increased the power of manufacturers and correspondingly harmed workers. She also engaged in a critique of actual power recognizing that those industries that restricted hours of labor generally involved male skilled workers who were voters. Often through unions, they were able to negotiate with employers for limited hours. In contrast, the weakest in society, those who had the least political and economic bargaining power, such as children, poor women, and unskilled workers, were most exploited and in need of state protection – only with state intervention could liberty of contract have substantive meaning. Thus in *Ethical Gains*, Kelley

²³ Florence Kelley, *Some Ethical Gains through Legislation* (New York: Macmillan, 1905), 142–43.

²⁴ *Ibid.*, 111.

²⁵ *Ibid.*, 230.

makes a highly sophisticated argument through the interrogation of rights, power, contract and the needs of a democratic society.

Repeatedly Kelley took some hope in the U.S. Supreme Court's decision in *Holden v. Hardy* (1898), which upheld a law regulating the hours of miners in Utah. If such a dangerous occupation could be regulated, Kelley reasoned, then it was just a matter of demonstrating that essentially all unregulated manual work had serious health implications for the worker and the public. Thus the regulation of hours of work could almost always be construed as a matter of health, fitting squarely within the police power. As she argued, workers in factories were subject to increased mechanization, which often required significantly greater speed, taxing eyes and the physical and mental well-being of the worker. Tenement house workers suffered from extreme fatigue, which resulted in multiple diseases such as tuberculosis. She also ingeniously interpreted court precedent as requiring broader rather than narrower regulation. For example, she agreed with the New York Court of Appeals' *in re Jacobs* (1885) decision, which struck down a law prohibiting the making of cigars in tenement houses as class legislation. Kelley explained that the law was class legislation, as it only prohibited cigar making rather than all tenement house work. Thus the problem with the law was that it was too narrow and the solution was legislation prohibiting all tenement house work as a matter of public health. Furthermore, on empirical grounds, Kelley asserted that the decision was outdated, as a great deal more evidence existed regarding the health effects of tenement house work on society as a whole. As she wrote, the "health of the worker is an important part of the health of the public."²⁶ It was now just a matter of courts taking notice of facts.

Again, setting the groundwork for later legal progressives, Kelley emphasized that the question was "How can the courts be enlightened and instructed concerning conditions as they exist? This is the burning question which confronts both the purchasers and wage earners."²⁷ Part of the solution was for courts to defer to legislatures. As she wrote, it was legislatures that had the "apparatus for investigating the conditions of industry."²⁸ Thus Kelley essentially called for a fact-based jurisprudence. Demonstrating Kelley's understanding of the importance of law and the courts, the appendix to *Ethical Considerations* is comprised of the most important court decisions regarding worker legislation. Where many male legal progressives primarily wrote for an audience of lawyers, Kelley wrote for a wider audience of concerned citizens, whom she hoped to educate and inform regarding the actions and failures of courts.

²⁶ *Ibid.*, 233.

²⁷ *Ibid.*, 254.

²⁸ *Ibid.*, 254.

In 1906, a New York appellate court ruled that a statute prohibiting women's night work was unconstitutional.²⁹ In part, Kelley blamed the result on the poor lawyering of attorneys in the New York attorney general's office. In one memorandum, Kelley railed that despite her efforts to make the case a priority, the attorney for the state had not even attended the oral argument. She continued that the brief was a "disgraceful exhibition of ignorance of the law on the subject."³⁰ This memorandum is a clear reminder that Kelley was an attorney deeply involved in legal strategy. Even more importantly, Kelley vowed that the NCL would partake in the legal defense of challenged labor statutes and that a prime goal of its involvement would be to force the courts to recognize the realities of industrial work.³¹ As Josephine Goldmark remembered, the loss in *Williams* on the ground that there was no relationship between night work and women's health and welfare made it clear that "The question was no longer abstract and legal, but rather in a deep sense social and medical. It followed that the purely legal defense of these laws was falling wide of the mark. . . . The men upon the bench needed for their guidance the empirical testimony of the working woman's physician, the factory inspector, and the economist. They needed, in a word, to know the facts."³² Kelley and Goldmark waited for the next case.

One of the few places where it is widely acknowledged that the world of women reformers interacted with the world of male legal progressives is the *Muller* brief (1908) written by Josephine Goldmark and Louis Brandeis. It was Kelley, with the input of Goldmark, who decided to involve Louis Brandeis. Brandeis and Kelley in fact occupied overlapping worlds. For example, the Brandeis' were neighbors of and close to Glendower Evans, a Boston women's reformer and one of Kelley's dearest friends. Furthermore, Josephine and Pauline Goldmark kept Brandeis abreast of the work of the National Consumers League.

Yet the *Muller* brief, often lauded as the first work of sociological jurisprudence, needs to be more fully contextualized. Brandeis, as reported by Josephine Goldmark, requested a brief filled with facts, and Goldmark, under the supervision of Kelley, produced a prodigious amount of research on women workers and health. Yet there is good reason to believe that Goldmark wrote the entire brief with very little input from Brandeis.³³ Furthermore, the idea of

²⁹ *People v. Williams*, 101 NYS 562 (1906).

³⁰ Clement E. Vose, "The National Consumers' League and the Brandeis Brief," *Midwest Journal of Political Science* 1 (1957): 283 (quoting memorandum by Florence Kelley, Nov. ? 1906, NCL Papers).

³¹ Josephine Goldmark, *Fatigue and Efficiency: A Study in Industry* (New York: Charities Publication Committee, 1912), 244.

³² *Ibid.*, 250.

³³ Carle, "Gender," 258. For a wonderfully insightful work on *Muller* and its historical context see Nancy Wolloch, *Muller v. Oregon: A Brief History with Documents* (Boston: Bedford Books, 1996).

combining law and facts was clearly not new to Kelley, who had spent her life immersed in collecting facts and using such facts to support new laws. Importantly, the earlier brief in *Ritchie* (1894) had already incorporated sociological data regarding women workers' health and is a clear precursor to and model for the *Muller* brief. This is a crucial fact that has been too often overlooked. Moreover, in *Ethical Considerations* (1905), Kelley had already recognized that the key element to convincing courts to sustain workers' protective legislation was to educate judges with facts—a position that she had already articulated in her 1895 criticism of *Ritchie*.

In 1910, Goldmark and Brandeis once again put together a fact-filled brief, this time for the Illinois Supreme Court in *Ritchie v. Wayman*.³⁴ To Kelley's great relief, the court upheld the law. With its victories in *Muller* and *Ritchie*, the NCL widely distributed its briefs to college professors, lawyers, economists, and others. State's attorneys in Virginia, Michigan, and Louisiana used the briefs as models in their own attempts to uphold workers' legislation.³⁵ In connection with the NCL's brief in *Bunting v. Oregon* (1917), it raised \$5,000 specifically so that four thousand copies could be distributed. Josephine Goldmark wrote that the goal of such wide distribution was to reach those in law schools and economic departments.³⁶

The NCL also received a grant from the Russell Sage Foundation to begin an intense study of workers, fatigue, and protective legislation that resulted in Goldmark's tome-like *Fatigue and Efficiency* (1912). The first part of the book details the nature of and physiological effects of fatigue, the multiple harms that occur from overwork, and the results from numerous studies of industrial workers' fatigue in specific industries. It is full of statistics, charts, and opinions from experts. It then documents the long history of worker legislation in other countries and more recent attempts to create labor laws in the United States. The second part of the book is comprised of material contained in the four briefs that Goldmark and Brandeis had submitted to various courts. In discussing how courts used freedom of contract to strike down workers' protective legislation, Goldmark writes, "[S]ince employees do not stand upon an equality in bargaining power with their employers, the so-called 'right' to contract for a day of any length is purely theoretical. The worker in fact obeys the compulsion of circumstances. . . . They have, in fact, no choice or freedom in the matter. The alternative is to work or starve. To refuse means to be dismissed. Modern industry has reduced 'freedom of contract' to a paper privilege, a mere figure of rhetoric."³⁷ This absolute refutation of the meaning of freedom of contract by

³⁴ 244 Ill. 509 (1910).

³⁵ Vose, "National Consumers' League," 287.

³⁶ *Ibid.*, 288.

³⁷ Goldmark, *Fatigue and Efficiency*, 244.

placing it into the context of the reality of workers' lives represents the epitome of progressive legal thought. Moreover, Goldmark wrote *Fatigue* in order to provide readily usable material for lawyers and activists advocating and defending protective labor laws. Thus the NCL, under Kelley's leadership, must be recognized as one of the most active, central, and consistent sites of legal progressivism and the fight over the meaning of the Fourteenth Amendment. The NCL's remarkable activism continued without rupture well into the 1920s.

In the early 1920s, Molly Dewson succeeded Goldmark in preparing the social and economic data that would go into NCL briefs. Dewson is an excellent example of the second generation of women social scientists who were mentored, in part, by Kelley. At the NCL, Dewson worked closely with Felix Frankfurter and it was she who compiled the massive facts that went into the *Adkins* brief while Frankfurter worked on the legal sections. While the *Muller* brief was approximately 108 pages, the *Adkins* brief was over 1,100 pages long. The NCL had perfected the art of the sociological brief, always believing that given enough facts, courts would understand that workers' protective legislation fell within the police power. The U.S. Supreme Court's decision in *Adkins* was a devastating blow for Kelley and instituted a serious split within the NCL, which had participated in at least fifteen court cases regarding the constitutionality of workers legislation since 1908. Kelley, reasonably frustrated with courts, began advocating a constitutional amendment that would protect such legislation. Frankfurter, Roscoe Pound, and other male lawyers opposed any such amendment as too radical. Instead Frankfurter and his allies argued that the NCL should continue to draft legislation around court decisions. When Kelley would not accept such advice, the Frankfurter contingent refused to further participate in her efforts.³⁸ In part, this split within the NCL may hearken back to the difference between those male legal progressives and realists who were so steeped in law that they could not abandon the common law and traditional Constitutional arguments, and the many women legal reformers who, from their own experience, viewed courts, the common law, and even the Constitution as significant obstacles to reform.³⁹

Recognizing and incorporating women as legal reformers allows us to reexamine, reinterpret, and expand traditional narratives of legal history. For example, the sociological jurisprudence that Roscoe Pound called for was well underway in the work that women reformers and others were doing. By the late 1890s, Kelley had developed a methodology that united law and facts. We can see this in her numerous efforts to draft and lobby for new laws that drastically expanded state power, and the ways in which she connected such laws to on-the-

³⁸ Carle, "Gender," 259–61.

³⁹ For a similar story of growing frustration with courts and the common law, see John Fabian Witt, "Crystal Eastman and the Internationalist Beginnings of American Civil Liberties," *Duke Law Review* 54 (2004): 705–63.

ground facts. From the mid-1890s on, she identified “liberty of contract” as an empty phrase for workers without bargaining power, and she sought to restructure a system of rights based upon the needs of a democratic industrial society. She further recognized that the key to legal reform was presenting facts of industrial life to judges. In part, we might understand the work of Brandeis, Pound, and Frankfurter as bringing to the more conservative bar and legal academy the legal progressivism that already existed within more radical circles of legal reform, in which women comprised a significant component. N. E. H. Hull writes of Pound, “As committed as he was to reform, it was a muted commitment, muted by his legalism, by his native caution, and by his ambition for a prize beyond the Midwest.”⁴⁰ Women legal progressives such as Kelley, who stood outside legal academia and who devoted their lives to legal reform, functioned without such constraints, for they were already outsiders.

To acknowledge that some women must be recognized as crucial legal actors who were at the very center of Constitutional litigation and the creation of new understandings of the meaning of substantive due process, challenges us to ask ourselves whom we imagine to be our historical actors and whom we are excluding. To dismiss Kelley as a groundbreaking legal thinker and litigator because she spent more time advocating for legal change and participating in the everyday work of drafting, defending, and enforcing laws rather than writing for an academic audience hampers our full understanding of legal history and the fight against laissez faire understandings of the Constitution. As Judge Charles F. Amidon, a federal district court judge, wrote to Kelley, “The conversations we had together in my home while you were here have been one of the liberalizing forces in my life. . . . During the last twelve or fifteen years of my active work on the bench I never decided a lawsuit without immersing myself at first hand with the life out of which it arose. You were one of the persons who got that lesson home in my life.”⁴¹ As Frankfurter wrote of Kelley, she played, “a powerful . . . role in securing legislation for the removal of the most glaring abuses of our hectic industrialization following the Civil War. But we owe her an even deeper and more enduring debt for the continuing process she so largely helped to initiate, by which social legislation is promoted and eventually gets on the statute books.” From Frankfurter’s words, we can see that he recognized Kelley’s decisive role in the battle against laissez-faire. Yet this recognition has dropped out of much mainstream legal history. Part of the future agenda for legal historians might entail writing a narrative that would allow us to see how the work of male legal progressives and women reformers was a joint enterprise. In doing so, the

⁴⁰ Hull, *Pound and Llewellyn*, 75.

⁴¹ Goldmark, *Impatient Crusader*, 176.

separate spheres of women's activism and male legal reform may begin to look not so separate.