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# Gender in the Construction of the Lawyer's Persona (Review Essay)

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## REVIEW ESSAY

### GENDER IN THE CONSTRUCTION OF THE LAWYER'S PERSONA

FLORENCE KELLEY AND THE NATION'S WORK: THE RISE OF WOMEN'S POLITICAL CULTURE, 1830–1900. By Kathryn Kish Sklar.\* New Haven, Conn.: Yale University Press. 1995. Pp. xviii, 436. \$40.00 (cloth), \$20.00 (paper).

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#### I. INTRODUCTION

The overarching question motivating this Review Essay is whether—and, if so, in what ways—we should understand lawyering roles to be gendered. I examine this question by reviewing Kathryn Kish Sklar's recent biography of Florence Kelley, an early "public interest" lawyer and social activist whom Felix Frankfurter described as the woman who had "the largest single share in shaping the social history of the United States during the first thirty years of this century."<sup>1</sup> Sklar's meticulous research provides us with new information about a dimension of Kelley's life that is overshadowed by Kelley's public persona as a social reformer who claimed special "feminine" moral insights: behind the scenes, Kelley operated as a shrewd and enormously proficient trained and licensed law-

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\*\* Assistant Professor of Law, American University, Washington College of Law. This Review Essay stems from a larger project investigating the construction of lawyering roles within nonprofit organizations during the Progressive Era, initial funding for which was provided through the W.M. Keck Foundation and the Georgetown University Law Center. Additional generous funding was provided by American University, Washington College of Law, whose research funds allowed me to benefit from the research assistance of Johnna Dumler, Robin Evans, Cathryn Flanagan, and Sue-Jean Kim. I would also like to thank Carrie Menkel-Meadow and Kathryn Kish Sklar, and my wonderful colleagues, Peter Cichino, Nancy Polikoff, Leti Volpp, and Joan Williams, for helpful comments on earlier drafts.

<sup>1</sup> LEONARD BAKER, *BRANDEIS AND FRANKFURTER* 8 (1984) (citing JOSEPHINE GOLDMARK, *IMPATIENT CRUSADER* v (1953)).

yer.<sup>2</sup> This Essay examines how Sklar's study of Kelley's life shows the interplay of gender and claims to lawyering authority. I suggest that certain of the methodologies Sklar uses in analyzing the effect of gender on Kelley's life should be imported by feminists in the legal academy to redirect their inquiry into the operation of gender in the legal profession.

Questions concerning gender and lawyering roles have proved hugely controversial. Gender infuses so much of social organization that it is implausible to maintain that gender has no influence on the way lawyers perform their roles; however, attempts to develop theories about how lawyering is gendered have met with immense opposition. Similar doubts have been raised about attempts to investigate the gendered underpinnings of the professional socialization of lawyers in law schools and beyond.<sup>3</sup>

Of the great many voices that have joined this debate, just a few can be briefly summarized by way of introduction here. The pioneer and most stalwart defender of the controversial view that lawyering is gendered is Carrie Menkel-Meadow, who deserves great credit for having forced the question of gender in lawyering into feminist legal discourse. Menkel-Meadow has described her position as follows:

Drawing on the work of the affiliational or relational feminist theorists, like [Carol] Gilligan . . . and others, I speculated that women who reason with ethics of care and concern, as well as justice, and who took account of relationships and context rather than searching for abstract principles to solve legal problems might structure the legal system and legal practice in different ways.<sup>4</sup>

As Menkel-Meadow explains above, her hypotheses about the possible relationship between gender and lawyering roles have been heavily influenced by the research of Carol Gilligan and other feminists working

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<sup>2</sup> One prominent male lawyer with whom Kelley worked closely claimed that her "lawyer's training" gave her a "disciplined and penetrating mind," which rendered her among "intellectually the greatest" women of her times. Newton D. Baker, Address at Memorial Service for Florence Kelley (Papers of Newton Baker, Reel 23, Frame 641, Library of Congress, Washington, D.C.).

<sup>3</sup> Compare LANI GUINIER ET AL., BECOMING GENTLEMEN: WOMEN, LAW SCHOOL, AND INSTITUTIONAL CHANGE (1997), with Linda Chavez, *Would-Be Women Lawyers Need to Quit Looking for Excuses and Get with the Program*, CHI. TRIB., Apr. 16, 1997, at 23, and Chris Klein, *New Studies: Female Students Do Just as Well as Men—Or Better*, NAT'L L.J., Sept. 22, 1997, at A20.

<sup>4</sup> Carrie Menkel-Meadow, *Exploring a Research Agenda of the Feminization of the Legal Profession: Theories of Gender and Social Change*, 14 L. & SOC. INQUIRY 289, 312-13 (1989) [hereinafter *Theories of Gender*]; see also Carrie Menkel-Meadow, *Portia in a Different Voice*, 1 BERKELEY WOMEN'S L.J. 39 (1985) [hereinafter *Portia I*] (considering implications for the legal profession of social psychology data revealing differences in male and female styles of moral reasoning); Carrie Menkel-Meadow, *Portia Redux*, 2 VA. J. SOC. POL'Y & L. 75 (1994) [hereinafter *Portia II*] (reassessing earlier article in light of decade's further insights).

within the "object relations" school of American psychology.<sup>5</sup> Gilligan's work, as I discuss in more detail below, posits that female subjects tend to place more emphasis on a "care" versus a "justice" approach to moral problem solving. Menkel-Meadow has extrapolated from this hypothesis to argue that gender differences in approaches to moral reasoning may result in differences in lawyering styles—suggesting, for example, that women may tend to be more "relational" than men or to work harder than men at being conciliators and creative problem solvers rather than gladiators in an adversarial system.<sup>6</sup>

Menkel-Meadow may have been the first, but she is far from the only, legal academic to advance such claims about the relationship between gender and lawyering roles. Some sociologists of law have drawn on Gilligan's work to support the thesis that women generally perform and experience work as legal professionals differently from men.<sup>7</sup> In a similar vein, constitutional law scholar Suzanna Sherry has suggested that women tend to exhibit a uniquely "feminine jurisprudence," characterized by a greater concern with connection and context, and that this different style of reasoning can be detected in the opinions of Justice Sandra Day O'Connor.<sup>8</sup> Sherry concludes that

recognition of Justice O'Connor's unique perspective, and the unique perspective of women in general, might aid us in ameliorating the distortions of an overly individualist liberal paradigm. Insufficient attention to connection promotes naked self-interest at the expense of altruism, impoverishes our self-perception, and stunts

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<sup>5</sup> This school traces its roots back to Freud and views the early attachments of the infant and young child within the family as the most significant influences on personality. See CAROL GILLIGAN, IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT (2d ed. 1993); see generally NANCY CHODOROW, THE REPRODUCTION OF MOTHERING: PSYCHOANALYSIS AND THE SOCIOLOGY OF GENDER (1978); DOROTHY DINERSTEIN, THE MERMAID AND THE MINOTAUR: SEXUAL ARRANGEMENTS AND HUMAN MALAISE (1976); JULIET MITCHELL, PSYCHOANALYSIS AND FEMINISM (1974); KAREN HORNEY, FEMININE PSYCHOLOGY (Harold Kelman ed., 1973 ed.).

<sup>6</sup> See Menkel-Meadow, *Theories of Gender*, *supra* note 4, at 312–13, 316.

<sup>7</sup> See, e.g., Dana Crowley Jack & Rand Jack, *Women Lawyers: Archetype and Alternatives*, 57 FORDHAM L. REV. 933 (1989) (applying Gilligan's framework to women lawyers); see also Kathleen E. Hull & Robert L. Nelson, *Gender Inequality in Law: Problems of Structure and Agency in Recent Studies of Gender in Anglo-American Legal Professions*, 23 L. & Soc. INQUIRY 681 (1998) (reviewing recent additions to this literature).

Other sociologists, including Cynthia Fuchs Epstein, have disputed the existence of any firm empirical foundation for conclusions that women experience or approach law practice differently from men. See, e.g., Cynthia Fuchs Epstein, *Faulty Framework: Consequences of the Difference Model for Women in the Law*, 35 N.Y.L. SCH. L. REV. 309 (1990) (reporting on empirical findings establishing no clear correlation between gender and lawyering approaches).

<sup>8</sup> Suzanna Sherry, *Civic Virtue and the Feminine Voice in Constitutional Adjudication*, 72 VA. L. REV. 543 (1986).

our capacity for growth. Merely communicating a feminine emphasis on connection may be enlightening . . . .<sup>9</sup>

Other leading feminist scholars, such as Naomi Cahn, have taken issue with the arguments of Menkel-Meadow and others, but have proposed their own variants of the thesis that certain positive qualities attributed to women can form the basis of a distinctive approach to lawyering.<sup>10</sup> Cahn has called on feminist legal scholars to "transcend the difficulties of difference and move towards a feminist lawyering process, rather than a feminine lawyering process."<sup>11</sup> Still other scholars of the lawyering process have called for the adoption of an "ethic of care" modeled after the female voice Gilligan attributes to women and girls in her studies.<sup>12</sup>

On the other side of the debate, leading feminist legal theoreticians such as Joan Williams and Margaret Radin have strongly dissented from arguments for change within the legal profession based on purported differences between the lawyering styles of men and women. These commentators caution that the use of any generalizations about gender-linked lawyering approaches, even positive ones, risks creating stereotypes that will do great harm to women's attempts to advance in the legal profession.<sup>13</sup>

In short, examination of the relationship between gender and lawyering roles has become mired in disagreement about the usefulness of social psychology perspectives.<sup>14</sup> With some notable exceptions,<sup>15</sup> the study of

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<sup>9</sup> *Id.* at 615.

<sup>10</sup> See Naomi R. Cahn, *Styles of Lawyering*, 43 HASTINGS L.J. 1039 (1992); cf. Ann Shalleck, *The Feminist Transformation of Lawyering*, 43 HASTINGS L.J. 1071 (1992) (arguing that the search for shared understandings of how gender operates in the lawyering process should begin with the examination of one's own particular lawyering experiences).

<sup>11</sup> Cahn, *supra* note 10, at 1042.

<sup>12</sup> See, e.g., Theresa Glennon, *Lawyers and Caring: Building an Ethic of Care into Professional Responsibility*, 43 HASTINGS L.J. 1175 (1992); Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers*, 81 GEO. L.J. 2665 (1993); Paul J. Zwier & Ann B. Hamric, *The Ethics of Care and Reimagining the Lawyer/Client Relationship*, 22 J. CONTEMP. L. 383 (1996).

<sup>13</sup> See, e.g., Joan C. Williams, *Deconstructing Gender*, 87 MICH. L. REV. 797 (1989) (arguing against embrace of "stereotypes" about how women's personalities differ from men's on grounds that these marginalize women); Margaret Jane Radin, *Reply: Please Be Careful With Cultural Feminism*, 45 STAN. L. REV. 1567 (1993).

<sup>14</sup> In turn, the dispute just summarized is woven into a much larger debate about "difference" in feminist theory generally. The history and complexity of this debate defies any attempt at quick summary; for some classic contributions, compare Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 14 (1988) (arguing that women have a sense of connectedness to others based on their experience as mothers), with Williams, *supra* note 13 (arguing against any such generalizations). More recent theoretical work has sought to move beyond this "differences" debate. See, e.g., Martha Albertson Fineman, *Feminist Theory In Law: The Difference It Makes*, 2 COLUM. J. GENDER & L. 1 (1992) (proposing the concept of "gendered lives"). However, such movement does not yet appear to have taken place with respect to the study of gender and lawyering.

<sup>15</sup> The most notable of these exceptions is Virginia Drachman's research on the handful of women who practiced as lawyers in the late 19th and early 20th centuries, recently pub-

gender and lawyering has languished in this unproductive theoretical impasse.

This Review Essay argues for a new approach that would borrow its methodologies from feminist scholars working in disciplines other than social psychology. Specifically, I point to the insights achieved by a group of feminist historians, sociologists, and political scientists who have been investigating the gendered construction of American social welfare policy.<sup>16</sup> Scholars working within this school, including Linda Gordon, Kathryn Kish Sklar, and Theda Skocpol, have convincingly documented the connections between the gender ideologies of the Victorian Era, the women's social reform culture of the first decades of this century, and the eventual structure and unique nature (and, one might also argue, special vulnerability) of our New Deal welfare state.<sup>17</sup> Through meticulous attention to detail and to the paradoxes and surprises that emerge from a fine-grained focus on their subject, these scholars have succeeded in tracing how new generations of women received, transmitted, and transformed ideas from previous generations and used those ideas in fashioning new roles by which they could insert themselves into the realms of civil society, politics, and policy.

This Essay argues that a similar focus by legal academics investigating the effect of gender in the construction of lawyering roles could produce enormous payoffs in understanding the transmission and transformation of gendered ideas about how professional roles should be performed. This approach would substitute a painstaking examination of the operation of gender in specific historical and social contexts for sweeping brushstrokes of theory and generalization. Appreciating that our ideas about the nature of observed differences between men and women are loaded with historically and culturally contingent understandings, the approach I advocate would stop debating the "truth" of such perceptions,

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lished as a book. See VIRGINIA G. DRACHMAN, *SISTERS IN LAW: WOMEN LAWYERS IN MODERN AMERICAN HISTORY* (1998), on which this Essay will rely extensively; see also Barbara Allen Babcock, *Feminist Lawyers*, 50 STAN. L. REV. 1689 (1998) (book review).

<sup>16</sup> This is sometimes described as "maternalist" history, but there are differences between these historians in the emphasis they place on maternalist ideologies in explaining the power of women's reform movements in the Progressive Era. See Kathryn Kish Sklar, *Two Political Cultures in the Progressive Era: The National Consumers' League and the American Association for Labor Legislation*, in U.S. HISTORY AS WOMEN'S HISTORY: NEW FEMINIST ESSAYS 36, 41-42 (Linda K. Kerber et al. eds., 1995) (discussing some of these differences).

<sup>17</sup> A number of the classic articles in this genre are compiled. See *MOTHERS OF A NEW WORLD* (Seth Koven & Sonya Michel eds., 1993); *WOMEN, THE STATE, AND WELFARE* (Linda Gordon ed., 1990). A sampling of other influential work from a variety of disciplinary perspectives includes THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* (1992); Linda K. Kerber, *Separate Spheres, Female Worlds, Woman's Place: The Rhetoric of Women's History*, 75 J. AM. HIST. 9 (1988); Ann Shola Orloff, *Gender in Early U.S. Social Policy*, 3 J. POL'Y. HIST. 249 (1991); and ROBYN MUNCY, *CREATING A FEMALE DOMINION IN AMERICAN REFORM: 1890-1935* (1991).

and would instead treat all such observations as data reflecting socially constructed ideas.<sup>18</sup> This approach would avoid the false dichotomy between an outright denial that gender operates in constructing lawyering roles and an analysis focusing on women's "differences" as lawyers. Instead, this approach would acknowledge gender as a powerful force in creating social roles, but would search for its influence in the context-specific negotiations women—and men—have engaged in to reconcile their gendered identities with lawyering norms.

My approach would further search for the routes through which gender-linked ideas about professional roles are transmitted to and transformed by successive generations. The approach I advocate would thus investigate how women have used, modified, and resisted gender-related ideas in legal careers as a continuing, historically contingent process. I focus especially on the difference between what individuals *claim* to be doing with reference to gender ideologies and what they *actually* do—a difference far too often ignored in discussions about how gender ideologies motivate behavior within the legal profession and elsewhere.

To illustrate my suggestions, I focus on one recent contribution to the growing body of historical literature on the role of women's culture in shaping American social policy which may be of special interest to scholars of the legal profession: Kathryn Kish Sklar's biography entitled *Florence Kelley and the Nation's Work*. Sklar's book constitutes the first volume of her long-term biographical project<sup>19</sup> on Florence Kelley, who served as head of the National Consumers' League ("NCL") from 1908 until 1932, and led this organization in its many famous battles for protective labor legislation that paved the way for the New Deal.

Sklar's biography makes obvious the great effect Kelley's legal training had on her work as a social reformer. Sklar's research thus reveals (often incidentally, because exploring Kelley's identity as a lawyer is not one of Sklar's main objectives) much about how gendered conceptions of lawyering roles were negotiated during the early part of the twentieth century, as well as how these negotiations affected the shape, strategies, and results of the women's social reform movement of this same era.

The first volume of Sklar's biography ends just prior to Kelley assuming leadership of the NCL, the organization that would provide Kelley

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<sup>18</sup> See generally JOAN WALLACH SCOTT, GENDER AND THE POLITICS OF HISTORY 28-67 (1988).

<sup>19</sup> Sklar's involvement in the writing of Kelley's life has spanned decades, resulting not only in this first volume of a biography but also in a series of earlier publications related to Kelley and the NCL. See, e.g., NOTES OF SIXTY YEARS: THE AUTOBIOGRAPHY OF FLORENCE KELLEY (Kathryn Kish Sklar ed., 1986) [hereinafter, AUTOBIOGRAPHICAL NOTES]; Kathryn Kish Sklar, *Coming to Terms with Florence Kelley: The Tales of a Reluctant Biographer* 17-33, in THE CHALLENGE OF FEMINIST BIOGRAPHY: WRITING THE LIVES OF MODERN AMERICAN WOMEN (Sara Alpern et al. eds., 1992) (describing special tortures of undertaking a biographical project as ambitious as this one) [hereinafter WRITING WOMEN'S LIVES].

with the platform from which to exert her profound influence on the shape of United States social policy. The outlines of Kelley's career at the NCL are well known, however, and with further archival research of my own provide ample material to fill out and assess the story of Kelley's life as a whole.

The centerpiece of that story concerns Kelley's involvement in overseeing the legal work for which the NCL is remembered today, including her supervision of the female assistants who drafted the famous but misnamed "Brandeis" brief in *Muller v. Oregon*<sup>20</sup> and a host of other cases. The documentary evidence reveals that Kelley played a key role in planning and overseeing the legal work of the NCL on many other fronts as well. But despite the major role she played in overseeing the NCL's legal strategy, Kelley avoided claiming the identity of "lawyer," preferring to hide her legal handiwork under the imprimatur of leading male attorneys. Kelley's choices in this regard reveal the interplay of powerful social forces related to gender in the construction of a particular type of elite public-interest lawyering role.

This Essay seeks to explore such forces and to relate them to current questions about how gender operates within the legal profession. In Part II, I provide an overview of Sklar's research on the first half of Kelley's life, supplemented with my own research in progress on Kelley's later life as the director of the NCL. Focusing on the question of Kelley's agency, I explore Sklar's analysis of how gender affected Kelley's life path, presenting both limits and opportunities. In Part III, I elaborate on a question to which I argue Sklar pays too little attention, namely, how Kelley's training and skills as a lawyer interacted with her gender in shaping her public persona. I further suggest that some of the factors that shaped Kelley's relationship to law still operate in shaping the "gendered lives"<sup>21</sup> women lead as lawyers today. Thus, I suggest, even though large gains have been made in women's opportunities as lawyers, Kelley's example may help illuminate the ways in which gender continues to affect the performance of lawyering roles today.

A clarifying note is in order here: the question of how gender affects lawyering can be asked on several levels. First, gender can determine who gets to perform what work, what one might call "ascription." Second, gender can influence how work is performed, the level of analysis I am intending to capture when I use the term "role." Finally, gender can influence how work performances are judged, through the operation of "norms." Even though ascriptive barriers based on gender are largely a thing of the past in the legal profession, the empirical data show links between gender and lawyering roles and norms (as reflected in gender-

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<sup>20</sup> 208 U.S. 412 (1908). That Kelley's lieutenant, Josephine Goldmark, is the true author of the Brandeis brief has been long recognized by feminist legal historians.

<sup>21</sup> On the concept of gendered lives, see Fineman, *supra* note 14.



linked differentials in advancement and status within the profession, for example). My argument is that these data mandate a continued focus on the many complex ways in which gender operates in the legal profession.

In Part IV, I offer some more specific preliminary thoughts on how the historical and context-specific examination I am urging could advance the legal academy's appreciation for the operation of gender in the construction of lawyering roles.

## II. THE STORY OF FLORENCE KELLEY

### A. *Beginnings and Transitions*

Sklar begins her biography by tracing the influences that contributed to Kelley's development of an acute social conscience during her childhood and early adult years. One of these influences was Kelley's maternal great-aunt, Sarah Pugh, a leading Quaker abolitionist and advocate of women's suffrage.<sup>22</sup> Through her examination of Kelley's relationship with this aunt, Sklar brilliantly traces the links between the oppositional women's political culture in which Sarah Pugh was involved, based in the antebellum abolitionist and women's suffrage movements, and the development of the women's political culture of the Progressive Era many decades later. Sklar thus demonstrates how a "women's culture" can be transmitted from generation to generation, through specific relationships and role models. The high-powered lens Sklar focuses on Kelley's early life—finely tuned and sensitive to specific social and historical contexts—thus captures the gendered transmission of ideas while avoiding the tendency towards essentialism that sometimes mars such inquiries.

Sklar documents, for example, how Sarah Pugh greatly impressed Kelley by refusing to take sugar in her coffee and wearing only linen because sugar and cotton came from slave labor. These ideas, Sklar argues, foreshadowed the consumer boycott strategies with which Kelley and the NCL would later experiment.<sup>23</sup> Pugh was a close friend of Lucietta Mott and other leading social reform figures of her time, and Kelley grew up surrounded by the influence of these visionaries' thoughts. In Kelley's words, "moving through a child's imagination were Free Soilers and Revolutionary ancestors, Quakers and Abolitionists and Non-Conformists, family figures who had put their consciences to the test both of endurance and action."<sup>24</sup>

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<sup>22</sup> KATHRYN KISH SKLAR, *FLORENCE KELLEY AND THE NATION'S WORK: THE RISE OF WOMEN'S POLITICAL CULTURE* 4 (1995). Citations to the book being reviewed will hereafter be given in the notes by page number only. See also AUTOBIOGRAPHICAL NOTES, *supra* note 19, at 29–40.

<sup>23</sup> AUTOBIOGRAPHICAL NOTES, *supra* note 19, at 38.

<sup>24</sup> GOLDMARK, *supra* note 1, at 10. Kelley's early life had its dark side as well. Though

In short, through her close relationship with her great-aunt, Kelley benefited from the experiences of politically active women two generations before herself. The example set by Sarah Pugh and her associates, Sklar suggests, gave Kelley a model for voluntary civic activism that guided her later leadership of the NCL.<sup>25</sup>

The other strong influence in Kelley's childhood on which Sklar focuses is Kelley's father, William Kelley, a lawyer, state judge, and powerful U.S. Congressman. Sklar details William Kelley's political involvement in the public issues of the day, which included not only abolitionism but also industrial development and trade.<sup>26</sup> William Kelley was devoted to his young daughter and actively sought to instill in her a knowledge of public affairs and an acute social conscience.<sup>27</sup> Kelley later attributed "everything that [she had] ever been able to learn to do"<sup>28</sup> to her father's efforts to educate her about the political affairs in Congress, and she "cherished his charge that it was for his generation to create the great industry and for ours to devise methods of just distribution of its products."<sup>29</sup>

In 1876, Kelley applied to and was granted admission at Cornell University, a land-grant college established in 1865 through legislation her father had helped to enact.<sup>30</sup> These land-grant colleges were required to be "open for all," and they, along with elite eastern women's colleges such as Smith and Wellesley, first opened avenues of higher education to substantial numbers of white middle-class women in the United States.

At Cornell, Kelley entered a period of great intellectual activity. Surrounded by other serious and intellectually gifted young women, Kelley

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born to affluence, Kelley's childhood and early adult years were plagued by disease and the threat of illness and death. Her mother, Caroline, lost five of her eight children to infant diseases and was often consumed with melancholy as a result, and Kelley was allowed to attend school for only a few short stints during her childhood because of her parents' fears for her health. Kelley thus spent her childhood in virtual isolation from her peers, educated through self-guided reading from her father's extensive library, with direction from loving adults surrounding her. Pp. 27-35.

<sup>25</sup> See AUTOBIOGRAPHICAL NOTES, *supra* note 19, at 4, 13-18, 26.

<sup>26</sup> See *id.* at 25-49.

<sup>27</sup> Even teaching Kelley to read presented William Kelley with opportunities for indoctrination. As Kelley reported:

Father had taught me to read when I was seven years old, in a terrible little book with woodcuts of children no older than myself, balancing with their arms heavy loads of wet clay on their heads, in the brickyards in England . . . When my mother and grandmother remonstrated with him for darkening the mind of a young child with such dismal ideas, he replied seriously that life can never be right for all the children until the cherished boys and girls are taught to know the facts in the lives of their less fortunate contemporaries.

AUTOBIOGRAPHICAL NOTES, *supra* note 19, at 26.

<sup>28</sup> GOLDMARK, *supra* note 1, at 6.

<sup>29</sup> AUTOBIOGRAPHICAL NOTES, *supra* note 19, at 62.

<sup>30</sup> See GOLDMARK, *supra* note 1, at 11.

joined reading groups and helped found the first Cornell Social Science Club.<sup>31</sup> Serious illness forced Kelley to withdraw from Cornell for her senior year, however, and Kelley returned to her father's care in Washington, D.C. There, she wrote her senior thesis, titled "On Some Changes in the Legal Status of the Child Since Blackstone," researched largely at the Library of Congress. Devoting long hours to a painstaking analysis of classic legal authorities, U.S. statutes on children's legal status, and statistical data on children's health and economic status, Kelley's thesis combined legal research with empirical inquiry, presaging, Sklar suggests, the style of legal research for which the NCL's protective labor briefs would later acquire renown.

After graduating from Cornell in 1882, Kelley encountered the gap between rising expectations created by newly opened opportunities in higher education for white middle-class women and barriers that remained to block these women's entry into traditional professions such as law. Sklar graphically documents this reality as it affected Kelley and her classmates. Most of Kelley's classmates entered teaching, some at women's colleges after obtaining advanced degrees.<sup>32</sup> A handful became doctors or dentists.<sup>33</sup> But among Kelley's cohorts there were "no lawyers" (except, eventually, Kelley herself).<sup>34</sup>

Kelley did not escape this plight. Applying for admission to the classics department at the University of Pennsylvania, whose dean was a distant relative of hers, Kelley hoped to study advanced Greek as a means of gaining entry to the University's law school.<sup>35</sup> Kelley's ambitions were thwarted by the University's general policy of refusing to admit women, however; she was disappointed to find herself denied admittance even after her father intervened on her behalf.<sup>36</sup>

As did many of the women of Kelley's generation caught in this gap between educational qualifications and access to the professions, Kelley chose to pour her frustrated energies into the thriving middle-class women's social reform movement taking place around her.<sup>37</sup> Kelley be-

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<sup>31</sup> See AUTOBIOGRAPHICAL NOTES, *supra* note 19, at 49.

<sup>32</sup> See p. 67.

<sup>33</sup> See *id.*

<sup>34</sup> See *id.* This is not to say that there were no women lawyers during this period. There were some: approximately 200 in 1880. See RONALD CHESTER, *UNEQUAL ACCESS: WOMEN LAWYERS IN A CHANGING AMERICA* 8 (1985). A fascinating account of the correspondence between a group of these early pioneers can be found in DRACHMAN, *supra* note 15, at 64-97; see also Virginia Drachman, *Women Lawyers and the Quest for Professional Identity in Late Nineteenth Century America*, 88 MICH. L. REV. 2414 (1990).

<sup>35</sup> See AUTOBIOGRAPHICAL NOTES, *supra* note 19, at 54.

<sup>36</sup> See pp. 66-67; GOLDMARK, *supra* note 1, at 13. Elite law schools strongly resisted and were hostile towards the admission of women. See DRACHMAN, *supra* note 15, at 41-51.

<sup>37</sup> A burgeoning literature investigates the influence of these women's reform movements on United States law. See, e.g., Jane E. Larson, "Even a Worm Will Turn at Last": Rape Reform in Late Nineteenth-Century America, 9 YALE J. L. & HUMAN. 1 (1997) (documenting legislative reform activities of the Women's Christian Temperance Union).

came active in a number of women's voluntary associations in Philadelphia, taught evening classes for working girls and women, worked as a librarian for a women's club, and found time to publish her first articles melding social science research with a call for political activism on behalf of working women.<sup>38</sup>

Kelley's opportunities for further education soon broadened, however, after her father arranged for her to travel overseas as a companion and nurse to her older brother, William, who was ill. (William recovered and returned home to become a lawyer and politician in the mold of his father.) Still in pursuit of the advanced degree in law that she coveted, Kelley gained admittance to a government studies program at the University of Zurich and became one of a small group of women studying there. Kelley soon joined a circle of young socialist political reformers and became a passionate socialist herself, hearing in this political philosophy the strains of the radical egalitarianism preached by her great-aunt Sarah Pugh.<sup>39</sup> Kelley remained a committed socialist throughout her life, despite the political vulnerability this caused her in her work for social reform.

This period of Kelley's life also saw her disastrous marriage to a young Russian socialist doctor. Summarized briefly, over the next eight years, Kelley gave birth to three children and focused her energy on family life (while still finding time to translate into English a major treatise by Frederick Engels and to publish various political analyses in magazines in the United States and Europe).<sup>40</sup> Kelley's relationship with her father deteriorated, partly as a result of the embarrassment she caused him in embracing socialism and partly because she began to make increasingly desperate demands on him for financial support for her family. Facing the stress of economic hardship after her father severed relations with her, Kelley's young family moved to New York City, where she and her husband became active in the internal machinations of the Socialist Labor Party until they were expelled over petty charges of having failed to adhere to the correct party line.<sup>41</sup> Kelley's relationship with her husband deteriorated to the point of physical abuse, and in 1892 Kelley fled, penniless, from New York City with her three children.

Although Kelley had by this time started to mend relations with her family, she did not return to them. Instead, Kelley arrived at the doorstep of Hull House, a social settlement in the heart of one of Chicago's poorest tenement districts. Kelley remained at Hull House for the next nine years, developing the base within its community of like-minded women

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<sup>38</sup> See pp. 69–85.

<sup>39</sup> See pp. 83–84; AUTOBIOGRAPHICAL NOTES, *supra* note 19, at 74. Sklar has analyzed Kelley's contributions to American socialism in an introduction to Kelley's autobiographical writings. See *id.* at 1–16.

<sup>40</sup> See pp. 95–100.

<sup>41</sup> See pp. 120–29.

devoted to social reform. From that base, she would later launch her career as one of the most important national reformers of the Progressive Era.

### *B. Years at Hull House*

Sklar's treatment of Kelley's years at Hull House focuses on how Kelley's agency developed through her interaction with the women's reform culture within which she situated herself. Because Sklar relies heavily on the concept of agency throughout her narrative, but never explicitly addresses what she intends by this term, it is worth pausing to consider the general theoretical work that has been done in this area.

The concept of agency has long been problematic in feminist theory. Considerable recent work in critical and feminist theory has focused on the question of how women or other oppressed people can be understood to achieve creative, willful ends while at the same time being "constituted" and oppressed by their social worlds. That work has arrived at a fairly clear consensus rejecting "strong" theories of agency based in liberal political ideologies that posit the existence of transcendent, "free" individuals who are somehow capable of rising above their life circumstances and patterns of socialization in achieving self-willed ends.<sup>42</sup> Less agreement has been achieved about what conceptualization of agency should take its place. Feminist theorists today appear to be spread across a continuum of positions recognizing stronger or weaker versions of "partial agency," that is, conceptions of agency within social constraints.<sup>43</sup>

In her work, Sklar appears to endorse a fairly strong view of agency conceived of in this way.<sup>44</sup> Her conclusions arise from her analysis of the

<sup>42</sup> See, e.g., James Boyle, *Is Subjectivity Possible? The Postmodern Subject in Legal Theory*, 62 U. COLO. L. REV. 489 (1991).

<sup>43</sup> The key theoretical reformulation of the concept is Judith Butler's work proposing that "agency[ ] . . . is to be located within the possibility of a variation [on repeated significations of gender] . . . . [I]t is only *within* the practices of repetitive signifying that a subversion of identity becomes possible. The injunction *to be* a given gender produces necessary failures, a variety of incoherent configurations . . . [and] the coexistence or convergence of such discursive injunctions produces the possibility of a complex reconfiguration . . . ." JUDITH P. BUTLER, *GENDER TROUBLE: FEMINISM AND THE SUBVERSION OF IDENTITY* 145 (1990). For other work demonstrating feminists' agency in reconceptualizing the concept of agency, see, for example, Joan Scott, *Book Review*, 15 SIGNS 848-60 (1990) (debating proper understanding of women's agency in historical analysis); Kathryn Abrams, *Sex Wars Redux: Agency and Coercion in Feminist Legal Theory*, 95 COLUM. L. REV. 304 (1995) (contrasting agency critique with sexualized dominance paradigm in feminist theory and arguing for a synthesized "partial agency" theory); Susan H. Williams, *A Feminist Reassessment of Civil Society*, 72 IND. L.J. 417 (1997) (proposing new feminist theory of "autonomy" developed through women's participation in constitutive communities); Kathryn Abrams, *Redefining Women's Agency: A Response to Professor Williams*, 72 IND. L.J. 459 (1997).

<sup>44</sup> See also Sklar, *supra* note 16 (comparing capacity for agency of female and male social reformers working within different organizations).

possibilities offered Kelley by virtue of her political base in a women's community formed through networks of social reformers and settlement house workers. Kelley obtained this springboard for her political agency through her residency at Hull House. Founded in 1889 by Jane Addams and Ellen Gates Starr, Hull House was one of the first social settlements that emerged at the beginning of the Progressive Era in the northeastern and midwestern cities of the United States.<sup>45</sup> These social settlements were inspired partly by the progressive religious movement known as Social Gospel, partly by the more charity-oriented social settlement movement taking place in England, and partly by the growth in the class of educated women without access to traditional professional careers who wanted to work for social reform.<sup>46</sup> Hull House was particularly fortunate in being financially self-sufficient, funded by the considerable personal fortunes of Jane Addams and several other women from wealthy families.<sup>47</sup> As Sklar convincingly argues, this rare financial independence ensured that the character of Hull House could freely reflect the ideology of its leadership. It also allowed the women residents of Hull House to escape the economic necessity of marriage and develop new politically conscious, reform-oriented professional commitments.<sup>48</sup>

Thus, class, a positionality with respect to which Kelley was strongly advantaged, was key to Kelley's agency. Sklar describes the class commonalities underlying the friendships Kelley formed with Hull House leaders Jane Addams and Julia Lathrop. All three were daughters of prominent politician fathers, came from upper-class families with strong abolitionist principles, benefited from college education, and spent years struggling to find occupations commensurate with their training.<sup>49</sup> But even more importantly, Sklar argues, all three shared a common commitment to what they viewed as a uniquely feminine political vision for social reform.

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<sup>45</sup> See pp. 171–286; see also Kathryn Kish Sklar, *Hull House in the 1890s: A Community of Women Reformers*, 10 *SIGNS* 658 (1985). On the social settlement movement generally, see CLARKE A. CHAMBERS, *SEEDTIME OF REFORM* 107–29 (1963).

<sup>46</sup> See generally ALLEN F. DAVIS, *SPEARHEADS FOR REFORM: THE SOCIAL SETTLEMENTS AND THE PROGRESSIVE MOVEMENT: 1890–1914* (1967); MUNCY, *supra* note 17.

<sup>47</sup> In its early years, the financial obligations of Hull House were shared between Addams and Ellen Gates Starr. In later years Addams's intimate companion, Mary Rozet Smith, helped shoulder the financial burden of keeping Hull House going. P. 192. In one of the many generous acts of personal kindness that allowed Kelley to keep her family intact, Smith quietly funded the education of Kelley's three children. Pp. 286–90; see also Sklar, *supra* note 45, at 660.

<sup>48</sup> Indeed, women involved in social settlements helped develop new professions aimed at raising the fortunes of the working classes, such as social work and the new field of industrial medicine invented by Hull House resident Alice Hamilton. See, e.g., Barbara Sicherman, *Working It Out: Gender, Profession, and Reform in the Career of Alice Hamilton*, in *GENDER, CLASS, RACE, AND REFORM IN THE PROGRESSIVE ERA* 127 (Noralee Frankel & Nancy S. Dye eds., 1991).

<sup>49</sup> See Sklar, *supra* note 45, at 662–63; GOLDMARK, *supra* note 1, at 29–30.

In this final emphasis Sklar introduces one of the most provocative aspects of her book. Sklar argues that Kelley's agency arose not only from her class advantages, but also from her gender, an axis on which traditional feminist theory would posit she was unequivocally *disadvantaged*.

Sklar promises her readers that a chief aim of her book is to explore the contours of the women's political culture that supported Kelley and her peers.<sup>50</sup> One of the few significant flaws of the book, however, is a lack of extended discussion about how Kelley and her colleagues thought about gender. Sklar gives us only limited data on this issue, but we can fill in Sklar's picture by drawing on other scholarship about the "separate spheres" ideology underlying the women's political culture at the turn of the century and earlier.<sup>51</sup>

That culture, as Sklar notes briefly, espoused a vision of women as possessing certain qualities of "virtue" lacking in men.<sup>52</sup> Kelley and her fellow women social reformers believed that they possessed special insights into public policy by virtue of their "feminine" experiences, especially their traditional roles as nurturers (although, ironically, as we have seen, most of these women achieved the freedom to devote themselves to social reform by eschewing marriage and motherhood). These claims to a special "feminine" knowledge deserving of attention from politicians gained further legitimacy from women's electoral disenfranchisement: women reformers could point to women's exclusion from the political realm as a reason for the appalling disregard in public policy for the conditions under which the poor lived and new generations of citizens were being raised.<sup>53</sup>

Kelley and her peers thus claimed a special duty to attend to, and special moral authority to speak about, social welfare policy reform. Hull House became a testing ground for these beliefs, offering social services such as schools, day care, and vocational training to members of the surrounding impoverished communities, while also engaging in local political activism aimed at reforming the conditions under which these individuals worked and lived.

Although Hull House was a female-dominated community, guided strongly by the personality and values of Jane Addams, it was not a sepa-

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<sup>50</sup> See pp. xii-xv.

<sup>51</sup> See, e.g., Paula Baker, *The Domestication of Politics*, 89 AM. HIST. REV. 620 (1984) (discussing "separate spheres" ideology underlying turn-of-the-century women's political culture); Estelle Freedman, *Separatism as Strategy: Female Institution Building and American Feminism, 1870-1930*, 5 FEMINIST STUDIES 512 (1979) (same); MUNCY, *supra* note 17 (same); Kerber, *supra* note 17 (same).

<sup>52</sup> See p. xiii.

<sup>53</sup> See, e.g., Florence Kelley, *Persuasion or Responsibility?*, 2 POL. EQUALITY SERIES n.p. (n.d.), on file at Schlesinger Library, Harvard University (arguing that social problems such as illiteracy were worst where women had least power, that these problems would not occur if women could vote, and that women must in the meantime use "persuasion and publicity as [a] means of gaining protection for the weaker classes in the community").

ratist one. Most of its residents were unmarried women, but some single men—typically clergy or men with strong religious motivations—lived at Hull House as well. Hull House served as a lively social and cultural forum for Chicago's progressive elite, drawing to its dinner parties and other social events many of the city's most notable intellectuals, including University of Chicago professors and lawyers, such as Clarence Darrow and Henry Demarst Lloyd. Kelley would later call on many of these contacts as political allies and consultants. Thus, Sklar argues, Hull House offered not only a supportive female-dominated environment that allowed women to escape the economic necessity of marriage and pursue public lives devoted to social reform, but also provided a base from which these women could interact with the male world of power and privilege from a position of respect, independence, and strength.

Sklar describes how Kelley achieved stature as one of Chicago's leading social reformers through her location within this women's reform culture (combined with her enormous personal talent and considerable luck). Kelley first found work for herself at Hull House by founding a labor bureau to train women to do domestic work for Chicago's upper-class households. In 1892, Kelley secured, with Addams's help, a job working for the Illinois Bureau of Social Statistics on a survey of industrial working conditions in Chicago. That position led Kelley to additional appointments on other social surveys, in connection with which Kelley wrote a detailed report describing the working conditions faced by women and children in Chicago's sweatshops and making recommendations for remedial protective labor legislation. The publication of this report coincided with the election in Illinois of a radical governor, John Peter Altgeld, along with a progressive state legislature. Through this turn of events Kelley's report became the basis for proposed legislation to restrict the number of hours women and children could work in factories and to establish a state agency to monitor employers' compliance with such mandates. Kelley's draft legislation was quickly enacted into law, and in 1893 Kelley found herself appointed by Governor Altgeld to the position of Chief Factory Inspector for Illinois. In this position, Kelley directed a staff of twelve, including two lawyers who worked full-time in prosecuting violations of the newly enacted maximum-hours law.

At around the same time that Kelley became Chief Factory Inspector, she enrolled in night classes at the law school at Northwestern University. One of the most fascinating parts of Sklar's biography is its documentation of details concerning the little-explored facts about Kelley's law training and brief period of legal practice. Kelley began attending lectures at Northwestern in the evenings in 1893, and graduated with her law degree the next year (having received credit for the reading in law she had done with her father in 1882 and for her government studies in



Zurich).<sup>54</sup> Sklar's research shows that Kelley appeared in court to argue several cases on behalf of her office prior to her law school graduation, but that after she graduated, Kelley curiously delegated all the work of appearing publicly as a lawyer to her male legal deputies.<sup>55</sup>

Sklar convincingly argues, however, that Kelley's strong intellectual influence can be detected in the content and structure of the briefs these male lawyers signed and submitted for Kelley's office. Sklar's detective work thus captures the picture of Kelley directing the legal show behind the scenes, while ceding the public role of lawyer to her male lieutenants. Kelley continued to use this strategy throughout her career. Although Sklar does not pursue the matter, Kelley's conduct—quite striking, to contemporary eyes—provides telling clues about the operation of gendered norms in the construction of the lawyer's persona, as will be discussed in greater detail in Part III.

It would, of course, be easy to jump to the conclusion that Kelley's choice not to present herself publicly as a lawyer was simply a sign of her oppression. But Sklar's portrayal of Kelley's agency presents a more complicated picture. Sklar examines the "gendered construction of political options" at the beginning of the Progressive Era and concludes that Kelley was in some respects *advantaged* by virtue of her gender.<sup>56</sup> To undertake this examination, Sklar compares Kelley's political projects and options with those of Kelley's close male friend and political associate—also a lawyer—Henry Demarst Lloyd.<sup>57</sup> Sklar arrives at the provocative conclusion that Kelley was the more politically advantaged figure in her specific social context.

Sklar describes the close similarities in Kelley's and Lloyd's political commitments: both saw themselves as engaged in "a national struggle for control of the social consequences of industrial growth;" both were "wedded . . . to labor's side of the industrial struggle[;]" and both considered "the state as the chief defender of civil, political, and economic rights."<sup>58</sup> But while Kelley flourished within the supportive environment of Hull House, Lloyd's efforts to find a similarly comfortable institutional affiliation met only with repeated frustration. Thus, Sklar con-

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<sup>54</sup> GOLDMARK, *supra* note 1, at 44.

<sup>55</sup> Pp. 256–58.

<sup>56</sup> Pp. 225–28, 276; *see also* Sklar, *supra* note 16.

<sup>57</sup> Kelley's relationship with Lloyd had a further twist that bears mention. In a detail that foreshadows the contradictions between Kelley's publicly espoused ideology and her private self, we learn that Lloyd and his wife were the ones that provided Kelley with the freedom to carry out her political work while raising three children, by agreeing to serve as substitute guardians for her offspring. Lloyd's wife served as a second mother to Kelley's children and allowed them to grow up in much the same privileged and nurturing surroundings, complete with "unimagined experiences of country freedom and outdoor winter play," that Kelley had enjoyed, while their mother tackled the gritty urban surroundings of Hull House, reuniting with her children on weekends. AUTOBIOGRAPHICAL NOTES, *supra* note 19, at 82.

<sup>58</sup> P. 226.

cludes, although the two friends' "political beliefs were very similar," they experienced "quite different opportunities to translate their ideas into practical results. Kelley's relationship with women's public culture carried her into direct action; Lloyd's relationship with men's public culture muted his influence."<sup>59</sup>

This example is one of several Sklar uses to illustrate that Kelley's capacity for agency was in many respects supported, rather than undermined, by the female public culture with which she was affiliated. Kelley made use of the particular cultural, social, and ideological resources at her command—including claims to a distinctive feminine vision—to achieve agency in ways that some of her male counterparts could not. This example, as I will argue in Part IV.B.2, belies claims that the social attribution of gendered "voices" must always have negative consequences for women. Sklar's work suggests that the picture is sometimes more complicated and context-specific.

It cannot, however, be denied that Kelley faced great disadvantages because of her gender. Kelley's political position as a leading Chicago social reformer was far from secure. In a legal setback that would foreshadow Kelley's later frustrations with the legal system, her child-protective legislation was struck down as unconstitutional.<sup>60</sup> Altgeld lost his re-election bid soon afterwards, and in August 1897, Kelley found herself unemployed. Kelley then tried, not for the first time, to gain an appointment to the faculty at the University of Wisconsin, but was rebuffed despite her accomplishments. Kelley was thus forced to turn to the occupations open to women in her circumstances, taking a job as a library assistant and working long hours after the close of business to continue her social-science reports.<sup>61</sup> Kelley's network of political connections in the women's social reform community came to her rescue, however, and in January 1899, Kelley was offered the top staff position at the newly founded National Consumers' League.

### *C. Kelley at the NCL*

The first volume of Sklar's biography ends with Kelley leaving Hull House for New York City to take up the challenge of serving as the General Secretary (executive director) of the NCL. Sklar's volume thus ends right before the real action begins—before Kelley takes over the reins of the organization through which she would earn her historical reputation. The broad outlines of Kelley's later career at the NCL are far better known than the early material Sklar has presented in the volume under

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<sup>59</sup> P. 228.

<sup>60</sup> *Ritchie v. People*, 40 N.E. 454 (Ill. 1895).

<sup>61</sup> Pp. 286–98.

review here, however. We thus need not wait for Sklar to complete her ambitious biographical undertaking to evaluate the import of her research to our central question concerning the gendered construction of lawyering roles.

The outlines of Kelley's work with the NCL are as follows: In 1899, Kelley took over the running of the NCL. Kelley continued in this position for the next thirty-two years, until shortly before her death in 1932.<sup>62</sup> During this time, the NCL played a leading role in the enactment of more than a dozen state laws providing for protective labor standards in industry, most of them limited to women and children, but some also encompassing male workers where political conditions allowed. The NCL participated in scores of appellate cases defending these statutes from constitutional attack. It also played a large role in orchestrating legislation that would serve as a harbinger of the New Deal, including the bill establishing a federal Children's Bureau in 1911, which would be staffed by activists from the NCL and other women's reform groups, and the federal Sheppard-Towner Maternity and Infancy Protection Act of 1923.

Structurally, the NCL was organized into regional chapters, most located in the Northeast and Midwest.<sup>63</sup> Never an organization with a mass membership base, it achieved its political clout by virtue of the special nature of its membership: primarily educated, upper-middle-class white women married to some of the nation's most politically and socially prominent men. Some men, many of them clergy, belonged to the NCL, but most of the male involvement in the organization was in an advisory capacity, as local legal counsel, strategic consultants, financial managers, and the like.

In many respects, the philosophy and direction of the NCL combined the female-oriented, consumer focus of Kelley's great-aunt Pugh with the political savvy of Kelley's father.<sup>64</sup> In its earliest years, the NCL focused on fact-gathering and education campaigns aimed at persuading consumers to patronize only those businesses that adhered to humane labor stan-

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<sup>62</sup> It also bears note that Kelley was unlike a great many other white social reformers of her era in being a strong advocate of racial equality. Kelley lent her time and connections to the NAACP as one of that organization's few active white board members, prompting W.E.B. DuBois to deliver a moving eulogy for her when she died in 1932. See Benno C. Schmidt, *Principle and Prejudice: The Supreme Court and Race in the Progressive Era*, 82 COLUM. L. REV. 444, 524 (1982) (describing Kelley's consultations with Brandeis on behalf of the NAACP in developing the factual record of discrimination by railroads for presentation to Interstate Commerce Commission); W.E.B. DuBois, Eulogy of Florence Kelley at her Memorial Service (NAACP Papers, Folder 51, Library of Congress, Washington, D.C.).

<sup>63</sup> See generally Allis Rosenberg Wolfe, *Women, Consumerism and the National Consumers' League in the Progressive Era, 1900-1923*, 16 LABOR HIST. 378 (1975).

<sup>64</sup> The organization's "thesis," in Florence Kelley's words, was "that the responsibility for bad conditions rests largely with the consumers; that ignorance is no excuse; that silence gives assent; that useful protest rests always upon carefully sifted facts; that trade unions and philanthropic organizations can only supplement social legislation, not take its place." Kelley, *Thirty Years of the Consumers' League*, SURVEY 210, 211 (Nov. 15, 1929).

dards. One such initiative was a "White Label" campaign, through which the NCL granted upscale women's undergarment manufacturers permission to sew NCL labels into their merchandise in return for their agreement to subscribe to the NCL's standards for humane treatment of women workers. Another was a campaign urging women consumers to do their holiday shopping early, in order to protect the largely female sales staff from rush conditions.<sup>65</sup> Committees of regional chapters also kept themselves busy inspecting the health and sanitation of local food establishments and monitoring state and local legislation on the NCL's issues, especially child labor laws.<sup>66</sup>

This type of voluntary consumerism work provided opportunities for elite white women to become involved in work intended to improve the plight of the less fortunate without shaking their basically conservative political orientations. Over time, however, it became increasingly apparent to Kelley that this focus could produce only limited returns: in the White Label campaign alone, performing inspections to add manufacturers to the NCL's "approved" list, monitoring subsequent compliance, and stopping cheating by nonsubscribing manufacturers proved a monumental undertaking, yet addressed conditions in only a fraction of one small manufacturing sector. Kelley, therefore, began to steer her organization—sometimes against strong resistance by the more conservative members of local chapters<sup>67</sup>—towards a greater focus on state and national legislation to establish and enforce mandatory labor standards in industry.

Here Kelley's considerable legal skills came into play. Kelley played a lead role in choosing the cases in which the NCL would become involved, negotiated with the states to allow the NCL's intervention, 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 the legal figureheads for these cases.

The most famous of these involvements by the NCL was *Muller v. Oregon*, in which the NCL saved from constitutional challenge an Oregon labor law that prescribed maximum hours of work for women in

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<sup>65</sup> For a detailed discussion of these activities of the NCL and the NCL's early focus on inducing voluntary compliance by employers, see MAUD NATHAN, *THE STORY OF AN EPOCH-MAKING MOVEMENT* xiii, 2–44, 60–78 (reprint 1986) (1926).

<sup>66</sup> See, e.g., Papers of Massachusetts Consumers' League, Box 1, Folder 9 (Schlesinger Library, Radcliffe College, Cambridge, Mass.).

<sup>67</sup> For some examples of the friction within the NCL Kelley encountered as she steered the organization in the direction of broader social reform, see NATHAN, *supra* note 65 (complaining about Kelley's too-progressive politics); Minutes of Executive Committee (Feb. 16, 1918) (Massachusetts Consumers' League Papers, Box 1, Folder 10, *supra* note 65) (debate about suspension of White Label campaign); *id.* (Mar. 4, 1920) (Kelley urging chapter to spend more time on federal matters); *id.* (Nov. 1, 1922) (vote not to send delegate to annual meeting because of switch in focus away from local concerns); *id.* (Oct. 3, 1923) (committee plan to meet with Kelley to express dissatisfaction with national office undertaking projects that require help from constituent leagues without the committee's consent).

laundry establishments. Much has been written criticizing the NCL's substantive position in that brief, and I do not intend to add to that well-developed literature here.<sup>68</sup> What cannot pass without note in this Essay is the fact, already well-recognized among feminist historical scholars, that the famous "Brandeis" brief was drafted, not by Brandeis, but by Josephine Goldmark, Kelley's research assistant.<sup>69</sup> Brandeis' name, not Goldmark's, appears on the cover of the brief, and Brandeis probably wrote a short introduction, but Goldmark's work constitutes the entirety of the brief, with very minimal, if any, editing.<sup>70</sup> This working arrangement once again manifested the curious relationship between male "lawyer" figures and female "not-lawyers" that Kelley first established during her tenure as Chief Factory Inspector in Illinois.

Over the next nine years, Goldmark and Brandeis engaged in similar collaborations on a number of other briefs defending various states' protective labor legislation.<sup>71</sup> In all of these cases, it was Goldmark who gathered and synthesized the relevant social science data and drafted the great bulk of these briefs, while Brandeis claimed principal authorship and conducted oral argument in court.<sup>72</sup>

In 1917, after Brandeis' appointment to the Supreme Court, Felix Frankfurter assumed Brandeis' role as the NCL's chief legal figurehead, this time receiving research and writing assistance from a new assistant to Kelley, Molly Dewson. Dewson, representing the next generation of women who

<sup>68</sup> See, e.g., Anne Dailey, *Favorite Case Symposium: Lochner for Women*, 74 TEX. L. REV. 1217 (1996) (disputing conventional view of *Muller* as inaugurating new Progressive jurisprudence); Julie Novkov, *Liberty, Protection, and Women's Work*, 21 L. & Soc. INQUIRY 857 (1996) (arguing that case law upholding protective labor legislation reflected courts' conceptions of men's and women's liberty interests as differing); Mary Becker, *From Muller v. Oregon to Fetal Vulnerability Policies*, 53 U. CHI. L. REV. 1219, 1219-25 (1986) (pointing out examples of sex stereotyping in NCL's briefs).

<sup>69</sup> General accounts of the working relationship between Brandeis and Goldmark in *Muller* and other cases are presented in PHILIPPA STRUM, LOUIS D. BRANDEIS: JUSTICE FOR THE PEOPLE 114-31 (1984). Goldmark was Brandeis's daughter-in-law and gives in her biography of Kelley a first-hand account of the meeting in which Kelley and Brandeis negotiated over the terms under which Brandeis agreed to participate in the *Muller* case. See GOLDMARK, *supra* note 1, at 155.

<sup>70</sup> This assertion can be confirmed by comparing Josephine Goldmark's draft of the brief, contained in the NCL's files at the Library of Congress, with the final version filed by Brandeis. Even Goldmark herself, who is excessively (and thus sometimes maddeningly) modest in describing her own role within the NCL, admits as much. See GOLDMARK, *supra* note 1, at 155-58.

<sup>71</sup> Cases in which Goldmark and Brandeis worked together in this way include *Miller v. Wilson*, 236 U.S. 373 (1915); *People v. Charles Schweinler Press*, 214 N.Y. 395 (1915) (529-page "Summary of Facts of Knowledge"); *People v. Elerding*, 98 N.E. 982 (Ill. 1912); *Hawley v. Walker*, 232 U.S. 718 (1914) (500-page summary of facts); and *Bosley v. McLaughlin*, 236 U.S. 385 (1915).

<sup>72</sup> Brandeis did, however, take the unusual step of listing Goldmark's name on the brief beneath his, despite the fact that she was not a lawyer. See briefs in cases cited in note 71.

The literature on Brandeis, his lawyering style, and his numerous public interest involvements is vast. A particularly thoughtful account is Clyde Spillenger's *Elusive Advocate: Reconsidering Brandeis as People's Lawyer*, 105 YALE L.J. 1445 (1996) (critiquing Brandeis's desire for lawyerly independence and detachment from his clients' interests).

transmitted women's political culture into American social policy, would go on to become Eleanor Roosevelt's close friend and a member of Franklin Roosevelt's inner political circle, from which position she—along with Francis Perkins and other NCL graduates—exerted a powerful influence on New Deal politics.<sup>73</sup>

Dewson and Frankfurter collaborated on three briefs in the *Adkins* case,<sup>74</sup> which sought to defend a statute establishing minimum-wage protections for women workers in Washington, D.C. Dewson and Frankfurter reportedly met in person for only one hour at the initial stage of their project, but corresponded regularly. Frankfurter enthusiastically praised Dewson's talents to Kelley, apparently well-satisfied with her legal work, which included drafting a final brief totaling 1,138 pages.<sup>75</sup>

Despite this work, however, the NCL was devastated to lose the *Adkins* case before the Supreme Court, which held, by a vote of 5 to 3 (with Brandeis recused), that the challenged statute violated adult women's rights to freedom of contract.

The *Adkins* catastrophe forced Kelley and the NCL to confront the changing political climate that accompanied the end of the Progressive Era. By 1923, women had won suffrage, as the Court pointed out in rejecting the NCL's claims that women required special legislative protection.<sup>76</sup> The composition of the Court had also shifted, and a more conservative political tenor sounded throughout the country. The NCL thus faced the discouraging prospect that *Adkins* would precipitate the invalidation of all the protective labor statutes it had worked for decades to enact and defend across the nation.<sup>77</sup> The critical question became what steps to take in response. Here Kelley and her male legal consultants clashed in a manner that exposed the vulnerability in Kelley's strategy of relying on male lawyers as her public legal figureheads.

My own research provides further details about Kelley's struggle to maintain control over legal strategy within the NCL. Consistent with the direction in which her political vision had developed—which had started

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<sup>73</sup> Dewson's life is chronicled in SUSAN WARE, PARTNER AND I: MOLLY DEWSON, FEMINISM, AND NEW DEAL POLITICS (1987). According to Ware, Dewson shared similar views to Kelley's on the question of women's differences from men, believing that women shared a stronger interest in social betterment and humanitarian justice, and that the "outstanding feminine contribution is a sense of relatedness" as opposed to a "masculine grasp of facts." *Id.* at 197; see also Susan Ware, *Unlocking the Porter-Dewson Partnership: A Challenge for the Feminist Biographer*, in WRITING WOMEN'S LIVES, *supra* note 20, at 51, 61–63.

<sup>74</sup> 261 U.S. 525 (1923).

<sup>75</sup> See WARE, PARTNER AND I *supra* note 73, at 98–99; Letter from Felix Frankfurter to Florence Kelley, (Feb. 28, 1921) (Papers of Felix Frankfurter, Harvard Law School Archives microfilm, Reel 100) [hereinafter Frankfurter Papers] (Frankfurter describing Dewson as "imaginative," "understanding," and devoted and as displaying "real quality of intellectual initiative and independence").

<sup>76</sup> See 261 U.S. at 553.

<sup>77</sup> See HARLAN B. PHILLIPS, FELIX FRANKFURTER REMINISCES 104 (1960) (describing effects of *Adkins* on state minimum-wage laws).

by advocating local, voluntary consumer action and grew to see a need for compulsory legislation on a state and then a national scale—Kelley decided that the only feasible response to *Adkins* was a national campaign for a constitutional amendment; an amendment would ensure that future efforts to enact protective labor legislation could not be undone with a stroke of the Court's pen.<sup>78</sup> Kelley's plan met with strong opposition, however, not only from Frankfurter but also from the NCL's other close male attorney advisors, including Harvard Law School professor Roscoe Pound, progressive New York City attorney Robert Szold, and NCL President and former Secretary of War Newton Baker. Steeped in the conservative culture of the American legal profession, these lawyers saw Kelley's call for a constitutional amendment as far too radical, even for a cause as important as the protection of the nation's workers.<sup>79</sup>

When Kelley continued to insist on her campaign to change the Constitution, and even presented language for the amendment she envisioned, she pushed her male advisors beyond the limits of their legal traditions.<sup>80</sup>

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<sup>78</sup> Kelley's frustration was further fueled by the Supreme Court's decision striking down federal legislation prohibiting products made with child labor from entering interstate commerce. Kelley and other social reformers supported the idea of a constitutional amendment on child labor. Frankfurter opposed this plan as well, on the ground that solutions to such social problems belong at "the local level of government." LIVA BAKER, FELIX FRANKFURTER 114–15 (1969).

<sup>79</sup> See generally MICHAEL E. PARRISH, FELIX FRANKFURTER AND HIS TIMES: THE REFORM YEARS 128, 162 (1982) (describing Frankfurter's increasing disillusionment with national solutions to social problems in the aftermath of the First World War).

<sup>80</sup> See Sybil Lipschultz, *Social Feminism and Legal Discourse: 1908–1923*, 2 YALE J. L. & FEMINISM 131 (1989) (observing growing divergence between men's legal and women's reform cultures in 1920s). Although Lipschultz's basic point is certainly correct, I have some quibbles with her analysis. Lipschultz claims that male lawyers saw "equality and difference as binary opposites" and that they resisted the efforts of 1920s female reformers to achieve "industrial equality" for women by abandoning their earlier *Muller*-type claims about women's physical weakness and instead pointing to the differences in the social conditions faced by women. *Id.* at 160. My research suggests that the dispute between Kelley and her male legal advisors was more about tactics than about goals and that the differences between the political views of female reformers and male attorneys were more complex than Lipschultz suggests. Kelley, for example, continued to espouse *Muller*-like views about women's greater physical weakness throughout her life. See, e.g., Letter from Florence Kelley to Newton D. Baker (June 3, 1921) (Papers of National Consumers' League, Reel 11, Frame 706, Library of Congress, Washington, D.C.) (describing visit from Alice Paul and criticizing "these mad women" supporting the ERA, which would invalidate legislation requiring employers to provide women with seats in the workplace and "other special items which are more necessary for women than for men"); see also *infra* note 93 (describing Kelley's "lifelong" views about women's differences). Moreover, contrary to Lipschultz's claim that the NCL's male lawyers thought in "binary" terms about equality/inequality and sameness/difference, these men ardently opposed Alice Paul's formalist equality doctrines and agreed with Kelley's views opposing the Equal Rights Amendment. See Joan G. Zimmerman, *The Jurisprudence of Equality: The Women's Minimum Wage, the First Equal Rights Amendment, and Adkins v. Children's Hospital, 1905–1923*, 78 J. AM. HIST. 188 (1991) (describing the split during the 1920s between Kelley and the National Women's Party). Frankfurter's views about the underlying purposes of sex-specific protective labor legislation also seem much more in accord with Kelley's social vision than Lipschultz understands. See, e.g., Felix Frankfurter, *Hours of Labor and Realism in Constitutional Law*, 4 HARV. L. REV. 353, 367 (1916) (arguing

Frankfurter ceased to act as a neutral legal advisor taking direction from his client, and began instead to behave as an advocate for his own political views. Kelley expressed great "impatience with further tinkering with legislation" and invoked her father's struggle for passage of the Reconstruction Amendments and the fight for women's suffrage as models of the campaign she envisioned, but Frankfurter continued to insist that the proper strategy was to redraft the D.C. statute to address the Court's objections.<sup>81</sup> When Kelley refused to accept his advice, Frankfurter began to use his stature to fight Kelley's proposal at NCL chapter meetings. Frankfurter acknowledged to one male lawyer ally that Kelley "has given her life to causes before you and I were born which at the end of her whole life are largely dust and ashes," but nevertheless added, "[o]f course, that doesn't mean that we should allow her to run away with her own ideas and subscribe to them if we don't believe them."<sup>82</sup> Frankfurter further urged his fellow male legal consultants to "put on their fighting armor"<sup>83</sup> and boycott the conference Kelley had called to discuss what steps should be taken next.

Kelley's falling out with Newton Baker was no less dramatic. Baker started his career as a lawyer and progressive mayor of Cleveland, Ohio, and later became Secretary of War under Woodrow Wilson.<sup>84</sup> In 1915, he accepted the position of President of the NCL where he was Kelley's strong supporter. Baker had used his appointment to a cabinet post during World War I to the great advantage of Kelley and the NCL,<sup>85</sup> and had shown himself willing to defend Kelley against recurring attacks by NCL members who disliked her socialist commitments.<sup>86</sup> But even Baker could

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that jurists should "cease to look upon the regulation of women in industry as exceptional, as the law's graciousness to a disabled class, and shift the emphasis from the fact that they are *women* to the fact that it is *industry* and the relation of industry to the community that is regulated").

<sup>81</sup> Letter from Florence Kelley to Felix Frankfurter (May 26, 1923) (Frankfurter Papers, Reel 100, Frame 280, *supra* note 75).

<sup>82</sup> Letter from Felix Frankfurter to Ben Cohen (June 5, 1923) (Frankfurter Papers, Reel 100, Frame 288, *supra* note 75); *see also id.*, Letter from Felix Frankfurter to Grace Abbott (June 5, 1923); Executive Committee Minutes (June 6, 1923) (Massachusetts Consumers' League Papers, Box 1, Folder 11), *supra* note 66 (notes reflecting Frankfurter's attendance at a Massachusetts Consumers' League meeting to speak against Kelley's proposal and advocate his own plan to revise the D.C. statute); *id.* (June 22, 1923) (Kelley strongly opposing Frankfurter's proposed redraft of D.C. statute).

<sup>83</sup> *Id.*

<sup>84</sup> Baker's biographer characterizes him as a "gradualist" who was left-wing on local issues and right of center on national ones. *See* C.H. CRAMER, NEWTON D. BAKER: A BIOGRAPHY 8 (1961). Somewhat ironically given his earlier involvement with the NCL, Baker by the end of his life had evolved into an "open-minded conservative" who opposed the augmentation of national authority under the New Deal. *Id.* at 8, 260-77.

<sup>85</sup> Baker, for example, agreed to require army clothing contractors to adhere to minimum-wage scales, maximum work hours restrictions and the like; established a wartime Board of Control for Labor Standards, to which he appointed Kelley; and exerted his influence to oppose efforts to override, in the name of the war effort, state statutes prohibiting night work for women. *See* CRAMER, *supra* note 86, at 191.

<sup>86</sup> *See, e.g.*, Letter from Newton D. Baker to Maud Nathan (June 30, 1919) (Papers of



not support Kelley when she argued that our "Ancient Instrument must be amended."<sup>87</sup> Baker responded that the Constitution should never be used to legislate and joined the boycott of Kelley's conference, which would decide the next steps after the *Adkins* defeat. In the end, Kelley's frustration rose to such a great level that she wrote an uncharacteristically blunt letter to Baker demanding his resignation.<sup>88</sup>

This conflict between Kelley and her male political advisors ended in a stalemate.<sup>89</sup> But the split between Kelley and her male legal advisors contributed to a decline in the NCL's momentum in the 1920s. Within the organization, the NCL's governing board became deeply divided about Kelley's efforts to enlist the NCL in an ultimately unsuccessful plan to pass a constitutional amendment to override the Supreme Court's veto of federal child labor legislation.<sup>90</sup> Outside forces further contributed to stalled social reform efforts as the women's rights movement split between social reformers such as Kelley, who accepted sex-specific approaches to protective labor legislation, and the "equal rights" feminists represented by the law-trained Alice Paul and the National Women's Party, who argued for across-the-board formal equality.<sup>91</sup> But although

National Consumers' League, Reel 8, Frame 127, Library of Congress, Washington, D.C.); letter from Maud Nathan to Newton D. Baker (June 28, 1919) (complaining about Kelley's involvement in "socialist" organization).

<sup>87</sup> Letter from Florence Kelley to Newton D. Baker (Nov. 28, 1919) (Papers of National Consumers' League, Reel 7, Frame 653, Library of Congress, Washington, D.C.). For more on Baker's view of the Constitution, see Newton D. Baker, *The Making and Keeping of the Constitution*, Address Before the College of William and Mary, in *BULLETIN*, Dec. 10, 1934, at 8, 24 (arguing that the Constitution "deals with the structure of a government and avoids mere legislative enactments" and urging students to avoid suggestions for constitutional change "pressed on you [as] suggestions of convenience and social amelioration," because, without deep understanding of constitutional principles, "your judgments will necessarily be infirm in the face of such appeals"). For insights into Baker's philosophy on a wide range of matters, see WILLIS THORNTON, *NEWTON D. BAKER AND HIS BOOKS* (1954).

<sup>88</sup> Kelley began:

A long time ago, at your request, I promised to tell you frankly if it should appear that the League needed a change in its top officer. The catastrophe of the adverse decision of the Supreme Court in the minimum wage case caused confusion in our ranks[,] which called for close intimate participation of the officers of the Councils of the League. This you could not give . . .

Letter from Florence Kelley to Newton D. Baker (Aug. 29, 1923) (Papers of Newton Baker, NCL File [1922-28] Library of Congress, Washington, D.C.).

<sup>89</sup> Kelley was too skilled a politician to allow her anger at Frankfurter and Baker to stand in the way of her relationship with these key figures for long. She soon persuaded Baker to continue his involvement with the NCL as an honorary president and continued to call on Frankfurter for legal advice, most importantly, on the Equal Rights Amendment drafted by Alice Paul, which Kelley and others in her reform circle ardently opposed because of the threat it posed to many state laws that granted protective labor standards to women only. See *supra* note 80.

<sup>90</sup> See GOLDMARK, *supra* note 1, at 117-19.

<sup>91</sup> See generally NANCY F. COTT, *THE GROUNDING OF MODERN FEMINISM* 120-29 (1987) (discussing the split between National Women's Party, represented by Paul, and women's

Kelley could not know this at the time of her death in 1932, a new generation of NCL graduates, including Dewson, Grace Abbott, and Francis Perkins, would transmit the NCL's gendered vision of social policy into the New Deal, thus continuing the influence of an American female political culture into another generation.<sup>92</sup>

### III. THE MYSTERY AT THE HEART OF KELLEY'S STORY

The first volume of Sklar's biography does not foreshadow the consequences that followed from the division between male public lawyering roles and female behind-the-scenes legal worker roles, as just described; it will be interesting to see what Sklar makes of these matters in the next volume of her biography. But even in her first volume under review here, Sklar leaves the reader puzzled by a mystery she never explicitly addresses: Why did Kelley choose not to assert her status as a lawyer in defining her public persona? This question stands as a central narrative knot—an unresolved tension at the heart of the plot that compels our interest in Kelley's life.

There appears, as far as I have been able to glean, no direct evidence that provides a conclusive answer to the question of why Kelley did not publicly claim the identity of lawyer (though we can hope that Sklar will uncover such evidence in the next volume of her biography). Kelley's autobiographical writings provide few clues: Kelley discusses her early interest and studies in the law and her motivations for eventually obtaining her bar license, but not why she did not carry through on her initial intent to practice law. And although Kelley's general views about women's proper place in the home led her to appear "old-fashioned" even to her near-contemporary admirers,<sup>93</sup> Kelley did strongly support women's legal training and admission to all privileges of the legal pro-

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social reform groups such as the NCL, represented by Kelley); Zimmerman, *supra* note 80 (same). Paul was herself trained as a lawyer at American University's Washington College of Law. See Mary L. Clark, *The Founding of Washington College of Law: The First Law School Established by Women for Women*, 47 AM. U.L. REV. 613, 665 (1998). A potentially fascinating project might explore how Paul's and Kelley's respective self-identities in the legal realm contributed to their political differences.

<sup>92</sup> See Wendy Sarvasy, *Beyond the Difference versus Equality Policy Debate: Postsuffrage Feminism, Citizenship, and the Quest for a Feminist Welfare State*, 17 SIGNS 329 (1992).

<sup>93</sup> As Kelley's friend and colleague Josephine Goldmark explained:

[Kelley's] deep-rooted feminism, her passionate championship of the rights of women, her denunciation of wrongs still suffered by them were never in conflict with her fundamental belief in the claims of the family. She was, in the intensity of that belief, what might today be called old-fashioned.

GOLDMARK, *supra* note 1, at 18.

fession.<sup>94</sup> Like many people oriented towards action rather than self-examination, Kelley appears simply not to have reflected on the contradictions of her own life situation.

One of Sklar's many talents as an historian is her care in reasoning from historical sources, and the lack of conclusive evidence about Kelley's motives perhaps accounts for Sklar's failure to address why Kelley chose not to embrace the role of lawyer. It is not difficult to surmise, however, what factors motivated Kelley's decisions, based on what we know about the social and historical context in which she was operating. Kelley's decision to emphasize her "feminine" moral voice—her claim to possess special knowledge derived from women's domestic experiences, untainted by the amoral, masculine world of business and law—was perfectly rational given the options available to her. The number of women lawyers in Kelley's age cohort was small, and although the number was increasing, many of the women who had received law degrees by the close of the nineteenth century had tried but failed at law practice.<sup>95</sup> Those who did practice law typically did so in the offices of their husbands or fathers.<sup>96</sup> Thus, a claim by Kelley to have the qualifications to exercise authority in the masculine legal culture of her day would have subjected her to constant struggles against skepticism and discrimination.

On the other side of the balance, Kelley had little to gain from insisting on recognition as a lawyer because she had much richer sources of personal capital on which to draw. Her personal capital came from two main sources, as we have seen. First, Kelley enjoyed the advantages of class privilege, having been raised in a socially prominent family and claiming as her father a nationally powerful politician. Kelley profited from all of the skills acquired from such an upbringing, as well as its advantages in

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<sup>94</sup> Indeed, Kelley attributed the Supreme Court's decision in *Adkins* to the lack of women's representation in law, writing:

In my own profession, the exclusion of women from the best equipped law schools with greatest prestige is most injurious for it delays the needed membership in the courts of women with every requisite qualification. The Supreme Court of the United States has taught us, in recent years that, until this change is made, the most defenseless of our people, women and children who must earn their living in industry, need not hope for social justice.

AUTOBIOGRAPHICAL NOTES, *supra* note 19, at 57.

<sup>95</sup> See generally DRACHMAN, *supra* note 15, at 2, 173; KAREN BERGER MORELLO, *THE INVISIBLE BAR* (1986); Virginia G. Drachman, *The New Woman Lawyer and the Challenge of Sexual Equality in Early Twentieth-Century America*, 28 IND. L. REV. 227, 229-35 (1995). Still other women ran into the roadblocks of discriminatory law school and/or bar admissions policies and never even obtained their bar licenses. See D. Kelly Weisberg, *Barred from the Bar: Women and Legal Education in the United States 1870-1890*, 28 J. LEGAL EDUC. 485 (1977).

<sup>96</sup> See, e.g., JANE M. FRIEDMAN, *AMERICA'S FIRST WOMAN LAWYER: THE BIOGRAPHY OF MYRA BRADWELL* (1993); Virginia G. Drachman, "My 'Partner' in Law and Life": *Marriage in the Lives of Women Lawyers in Late 19th- and Early 20th-Century America*, 14 LAW & SOC. INQUIRY 221, 230, 235-42 (1989).

providing an extensive network of personal, family, and class connections to circles of power and influence.

Second, Kelley drew personal and political capital from her ties (which overlapped with class) within the women's social reform movement. As we have seen, Kelley's claim to special moral expertise as a reform movement leader was directly tied to a separate spheres ideology that attributed special moral insights to those with a "feminine" experience. For Kelley to have asserted credentials in the masculine world of law may thus have contradicted, rather than enhanced, Kelley's authority.<sup>97</sup>

But as Sklar's biography and what we know of Kelley's later life make clear, Kelley's public persona was greatly at odds with her actual conduct. While Kelley was willing to forego the status of "lawyer," she did not want to secede from actual involvement in shaping the legal strategy of the Illinois Factory Inspector's Office or the NCL. Kelley's instincts appear to have correctly told her that retaining control over legal strategy was crucial to her ability to lead these organizations, and she thus exercised her legal expertise behind the scenes while cultivating men to serve as the legal figureheads.

The existence of such contradictions—between fact and image, public identity and private conduct, work performed and accomplishments claimed—emerge as powerful evidence of the operation of gender in the construction of lawyering roles in Kelley's historical context. These contradictions and incoherences also, I suggest, following Judith Butler's conception,<sup>98</sup> created opportunities for agency. Kelley navigated within the structures of gender, race, and class to achieve political and personal power. I am, in short, convinced by Sklar's claims that gender in some ways enhanced, even while it in other ways constrained, Kelley's political agency.

Today, of course, women's opportunities in law have greatly increased. The role of lawyer is no longer gendered in the same sense as it was during Kelley's time; women can now comfortably claim the title of lawyer and large numbers enter the profession. Much evidence, however, still points to continuing gender differentiation in lawyering roles once past the threshold. Women lawyers, for example, can still be observed in a great many institutions engaging in role-differentiated behavior vis-a-vis their male counterparts, much as Kelley and her female colleagues did—as, for example, in being relegated to behind-the-scenes, supporting roles to senior male figureheads who then claim the public credit and pres-

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<sup>97</sup> See DRACHMAN, *supra* note 15, at 9-36 (discussing attempts to reconcile separate spheres ideology with women's entrance into the legal profession); *id.* at 65-77 (describing women lawyers' experience of "double consciousness" in attempting to integrate gender and professional identities); see also Babcock, *supra* note 15, at 1696 (noting that, unlike in medicine, "there was no way to sugarcoat law practice by connecting it to the ideal world of purity and tender feeling that nineteenth-century women supposedly inhabited").

<sup>98</sup> See BUTLER, *supra* note 43.

tige.<sup>99</sup> Similarly, statistics show that, with rare exceptions, women lawyers continue to confront a "glass ceiling" that shuts them out from the uppermost strata of the profession.<sup>100</sup> The legal roles men such as Brandeis and Frankfurter assumed in their day—as super-elite public figures with enormous social capital and reputation—are still largely reserved for men.<sup>101</sup> It thus cannot be denied that gender continues to have a significant effect in shaping individuals' life trajectories in the legal profession, even in the absence of the obvious structural barriers presented by exclusionary policies.<sup>102</sup> It bears asking, then, whether aspects of Sklar's methodology might help us understand the complicated ways in which gender operates, both as an historical force and continuing into the present, in the construction of lawyering roles.

#### IV. SOME THOUGHTS ON A RESEARCH AGENDA

Sklar's work illuminates a number of possibilities for a renewed research agenda exploring the operation of gender in the legal profession. This Part considers these issues and suggests some ways in which Sklar's project may offer corrective insights in the debate among feminist legal scholars about gender and lawyering roles.

##### A. *Why Study Gender in the Construction of Lawyering Roles?*

The most important overall lesson of Sklar's detailed inquiry into Florence Kelley's life is that a focus on gender in understanding the con-

<sup>99</sup> See, e.g., Patricia M. Wald, *Glass Ceilings and Open Doors: A Reaction*, 65 FORDHAM L. REV. 603, 605 (1996) (discussing tendency for women lawyers to be assigned undervalued "minding and grinding" roles).

<sup>100</sup> Studies of this striking phenomenon hint at a host of causal factors, including, according to one leading study: a lack of "mentoring" of women attorneys by more senior figures; policies about part-time, flex-time and other work expectations that disadvantage women who are playing traditionally gendered caretaking roles outside the workplace; mixed messages about what "personal styles" are considered acceptable for women attorneys; and women's ambivalence and role confusion. See Committee on Women in the Profession, *Report: Glass Ceilings and Open Doors*, 64 FORDHAM L. REV. 291 (1995).

<sup>101</sup> See *id.* at 310, 358. Indeed, legal academia has proved to be one of the most resistant bastions of gender stratification. See AMERICAN BAR ASSOCIATION COMMISSION ON WOMEN IN THE PROFESSION, *ELUSIVE EQUALITY: THE EXPERIENCES OF WOMEN IN LEGAL EDUCATION* 23 (1996) (finding women hold only 16% of tenured faculty positions and only 8% of deanships); Carl Tobias, *Engendering Law Faculties*, 44 U. MIAMI L. REV. 1143 (1990). Other statistics attesting to the continuing gender stratification of the legal profession abound. See, e.g., Carrie Menkel-Meadow, *Feminization of the Legal Profession: The Comparative Sociology of Women Lawyers*, in *LAWYERS IN SOCIETY* 221 (R. Abel & P. Lewis eds., 1995) (transnational study).

<sup>102</sup> For a path-breaking analysis of the factors that give rise to such differentiated opportunities in the professions, see JOAN C. WILLIAMS, *UNBENDING GENDER: WHY WORK AND FAMILY CONFLICT AND WHAT TO DO ABOUT IT* (forthcoming 1999).

struction of professional roles is a worthwhile—even crucial—project. Sklar carefully documents how deeply the constraints and possibilities offered by gender affected Kelley's approach to being a lawyer and social reformer. Sklar's work thus belies the claims of critics within the legal academy who denounce as counterproductive a focus on gender differences in understanding lawyers' roles.

Moreover, as we have seen, Sklar's work brings into focus the specific links by which one historically and socially situated women's culture was transmitted, transformed, and employed to achieve important legal and public policy objectives during the first part of this century. Sklar's research illustrates the complicated means by which ideas about role performance—how to be a good lawyer, or a good social reformer, or a good anything—are passed down from generation to generation. Just as Kelley's vision both resembled and differed from her great-aunt's and her father's, any new generation, agent, or personality both inherits and transforms what it has learned and observed. Gender is one such powerful social lesson, learned, thankfully, in partial and contradictory ways that create space for resistance and transformation. Although we understand very little about the processes by which this kind of intergenerational transfer and transformation of role-bound behavior takes place,<sup>103</sup> the powerful influence of history and social context cannot be questioned, as Sklar's work tellingly illustrates. Sklar's work thus suggests that additional careful inquiry could similarly reveal the tenacious ways in which gender-linked ideas about professional roles have been transmitted to and informed the lives of successive generations of lawyers.

### *B. Some Correctives Suggested by Sklar's Inquiry*

#### 1. The "Different Voice" Theorists

The most controversial claims about how gender operates in the construction of lawyering norms are those based on the premise that women assert or should assert a different type of moral "voice" as lawyers.<sup>104</sup>

As already noted in Part I, support for this premise is generally drawn from Carol Gilligan's book *In A Different Voice*, pointing out the consequences of researchers' exclusion of women and girls from empirical studies of human development of moral reasoning.<sup>105</sup> Read carefully, Gil-

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<sup>103</sup> One interesting postmodernist-feminist perspective on the need for more work on these questions can be found in SEYLA BENHABIB, *SITUATING THE SELF* 217-18 (1992).

<sup>104</sup> See, e.g., Menkel-Meadow, *Portia I* and *Portia II*, *supra* note 4.

<sup>105</sup> See GILLIGAN, *supra* note 5. Significantly, both here and even more so in her later work, Gilligan is careful to emphasize that her findings are *not* that girls and boys reason differently. Rather, Gilligan finds that both males and females express "justice" and "care"

ligan's work makes relatively modest claims. But some in the legal academy have extrapolated from Gilligan's work more ambitiously than her actual data warrant, giving rise to a counter-reaction that has thrown the whole project of inquiring into the gendered dimensions of lawyering into disrepute.

Menkel-Meadow's work, which draws heavily from Gilligan, has similarly become a lightning rod for criticism from those who oppose "different voice" perspectives.<sup>106</sup> But just as in the case of Gilligan, a careful reading of Menkel-Meadow's claims shows them to be far more tentative than they are sometimes portrayed. Menkel-Meadow can be read as offering a series of hypotheses, research questions, or brainstorming exercises for further empirical inquiry into the ways in which gender may assert itself in the legal profession.<sup>107</sup> It may be true that the entry of large numbers of women into the legal profession will (through some complicated causal chain of events and influences, not explained) lead to less greed, more altruism, the development of less adversarial lawyering styles, less hierarchical management, more attention to quality of life issues, and so on.<sup>108</sup> To note such possibilities is not to argue that they are necessary truths. Instead, these ideas require empirical verification. Some such hypotheses may present workable research projects; some must at this point remain speculative given the limits on the present state of our knowledge and ability to acquire it. Sklar's work suggests that we can neither reject the significance nor assume the accuracy of our speculations about the possible links between gender and lawyering performances until we understand much more about the complex processes through which role socialization takes place.

Put otherwise, broad claims that there are gender "differences" in lawyering performances or "voices" can be seen as provocative, exploratory probes opening new areas for inquiry. What must follow is a closer, more detailed investigation that will test, refine, discard, and/or validate parts

modes of reasoning, but that more girls (about half of them) exhibit a "predominance" towards a care orientation. Gilligan's point is that researchers who limited their studies of moral development to boys tended to overlook this important aspect of both female and male moral development. See, e.g., *MAPPING THE MORAL DOMAIN* xix, 8, 82, 112 (Carol Gilligan et al. eds., 1988). In her later work, Gilligan is somewhat more careful to acknowledge class and cultural biases. See, e.g., *id.* at xix (limiting findings to "educationally advantaged North Americans"); *id.* at 159-73 (finding, not surprisingly, that disadvantaged urban youth display a greater focus on a "justice" orientation, with all study subjects able to describe deeply unfair situations they had experienced).

<sup>106</sup> See, e.g., Cahn, *supra* note 10.

<sup>107</sup> See, e.g., Menkel-Meadow, *Theories of Gender*, *supra* note 4, at 296-97 ("feminist theory has moved too fast for the research necessary to test some of its claims . . . We still need the thick descriptions of gender-structured reality . . . We still require explicit testable hypotheses about gender differences to determine their validity"); Menkel-Meadow, *Portia I*, *supra* note 4, at 50 ("It is my hope that this preliminary review will spark more thorough and comprehensive research").

<sup>108</sup> See, e.g., Menkel-Meadow, *Portia II*, *supra* note 4, at 86-89, 108-114 (suggesting these possibilities as result of influx of women into legal profession).

(probably, even certainly, not all) of the claims that have been made about how gender is linked to lawyering roles. Sklar's book offers an excellent example of how such an inquiry might be conducted.

Sklar's work further demonstrates how a change of focus in studying gender can result in a very different picture than that suggested by a preliminary, wide-angle scan. Some of the conclusions that emerge from Sklar's exhaustive inquiry are just as one might have anticipated, but other aspects of Sklar's findings are at odds with what preliminary speculations might predict. For example, one might assume *a priori* that a separate spheres ideology, focused on women's special insights derived from their domestic experiences, would have led women's reform groups to concentrate on small-scale, local volunteerism, as indeed the NCL did during its first years of existence. But as we have seen, the NCL's strategy, with Florence Kelley as its driving force, evolved over time to envision sweeping social policy reform on a national scale, to the point of calling for fundamental constitutional reforms. This vision was on such a grand scale that even the generation of progressive male lawyers affiliated with the NCL, suffering from the myopia of legal traditionalism, could not stretch their imaginations sufficiently to embrace it. In the 1930s, as already noted, this "feminine" vision of a national welfare state would achieve partial fruition in the national social policies of the New Deal.<sup>109</sup>

This example demonstrates the fallacy of positing that a moral orientation attributed to a particular gender will necessarily translate into a particular substantive outcome. The intermediary links are too many, the processes by which ideas are transmitted and transformed too complex, to assume any particular result from traits attributed to a particular gender in a given historical period or social context.

## 2. Critics of the "Different Voices" Approach

As just noted, Sklar's work highlights the problems inherent in attributing particular outcomes to the actions of a particular gender, even in a context in which a strong ideology based on perceived gender differences clearly is in play. Equally important, however, Sklar's work points out the reductionist tendencies inherent in strong versions of opposing claims that focusing on women's "different voices" (whether culturally or biologically explained) necessarily results in the attribution of inferior stereotypes to women.

First, it simply defies plausibility to deny that women lawyers engage in multifaceted forms of self-presentation, both verbal and nonverbal, that differ from those of male lawyers. Gender is a pervasive social fact enforced at many levels, from "macro" structures to the "micro" details

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<sup>109</sup> See *supra* note 17 (citing examples of literature exploring this history).



of everyday self-presentation, in which one unavoidably performs gender regardless of whether one chooses to use traditional symbols of gender or to reject them (thus making another powerful and immediately obvious statement).<sup>110</sup> The question thus is not whether gender operates in the performance of lawyering roles but, instead, what the inevitable manifestations of a gendered identity—made consciously and unconsciously in infinite ways over the course of one's lifetime—mean; what they signal, in connection with claims to authority within the realm of law.

Second, Sklar makes a convincing argument, in both the Kelley biography and some of her prior work,<sup>111</sup> that gender stereotypes do not necessarily marginalize or empower members of either sex. Instead, gender stereotypes provide a context that often burdens women with a set of disadvantages, but sometimes presents special avenues of opportunity for resistance or transformation. In contrasting the options available to Kelley with those available to her male friend and political cohort Henry Demarst Lloyd, for example, Sklar shows the ways in which important possibilities (even in "male" terms) are sometimes available to women but not to men by virtue of gender arrangements.

To make this point is not to deny that women suffer great disadvantage on the axis of gender. As we have seen, Kelley's strategy of acceding to conventional expectations of role differentiation between male "lawyers" and female "nonlawyers" significantly hurt her ability to lead the NCL when her views differed from those of the male lawyers to whom she ceded public authority over legal matters.

Similarly, one might argue that if Kelley had had access to the male world of privilege—if she had been able to pursue her desire for law training unimpeded, for example, as her brother did—she could have accomplished far more than she did given the more limited opportunities available to her. But the fact remains that it is Kelley, not her brother, whom we today remember as one of the most important social reformers of her era. This point remains telling even if we adopt Brandeis or Frankfurter as the correct standard for comparison: Kelley could not have been who she was if she had access to the masculine political and legal power possessed by Brandeis and Frankfurter. Kelley's historical importance derives from her success in building a political base among women reformers through which to advance visionary ideas that defied the framework espoused by a tradition-bound, male political and legal world. The very fact of Kelley's exclusion from that world provided her with the ideological and motivational bases underlying her life project.

Put otherwise, Kelley both gained and lost by relying on claims to a special "feminine" voice; the complexity of this situation defies a neat

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<sup>110</sup> See ERVING GOFFMAN, *GENDER ADVERTISEMENTS* (1979) (analyzing gender coding in myriad aspects of dress, body movement, and other aspects of self-presentation).

<sup>111</sup> See Sklar, *supra* note 16.

tally on a profit/loss ledger. Sklar's treatment of these complex problems concerning Kelley's agency demonstrates how facts may prove more complex and ambiguous than a univalent theory of male privilege can acknowledge. Moreover, the example of Kelley's agency based in claims to a special "feminine" moral authority contradicts arguments that "different voice" claims are always and necessarily counterproductive.

This last point, of course, skirts a giant epistemological debate about whether the experience of membership in oppressed groups creates unique forms of knowledge.<sup>112</sup> I do not intend to take on this debate within the confines of this Review Essay; my intent here is to make a more modest point, using Kelley as an example of how perceptions of and claims to common experience can motivate agency and change in enormously productive ways. We thus should not dismiss all such rhetorical strategies out of hand as some feminists in the legal academy have tended to do on the subject of gender in the legal profession.

In sum, Kelley's example shows us that understanding the ways gender operates in particular contexts may call for a more complex analysis than a univalent theory of male domination permits. To argue that the existence of male domination (a social fact that appears present in all known societies in one way or another<sup>113</sup>) means that gender always and completely disadvantages women is to essentialize male privilege in much the same way that adherents of "different voices" claims have been accused of essentializing historically and socially contingent expressions of femininity. To echo a favorite point of Foucauldians, power is never so absolute as to leave no room for challenge, maneuvering, or transformation. These areas of contestation present the most interesting material for studying how gender and other ideologies operate in the construction of our social world. To be open to such complex understandings may require more tentativeness, more open-mindedness, and more tolerance for ambiguity on all sides in the debate about how gender operates in the construction of lawyers' personas.

All of this is not to say that critics of the use of moral difference theory in the study of the legal profession have not added some important correctives in this debate. First, of course, as already noted, these critics are entirely correct in objecting to tendencies to resort to broad-brush, essentialist claims about the nature of gender differences.<sup>114</sup> Similarly, crit-

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<sup>112</sup> Compare, e.g., Mari J. Matsuda, *Pragmatism Modified and the False Consciousness Problem*, 63 S. CAL. L. REV. 1763 (1990), with Scott Brewer, *Pragmatism, Oppression, and the Flight to Substance*, *supra* at 1753 (debating claims that oppressed groups have special knowledge); see also Randall L. Kennedy, *Racial Critiques of Legal Academia*, 102 HARV. L. REV. 1745 (1989) (disputing arguments that scholars of color may possess distinct and uniquely valuable perspectives on race issues).

<sup>113</sup> See SHERRY B. ORTNER, *MAKING GENDER: THE POLITICS AND EROTICS OF CULTURE* 177 (1996).

<sup>114</sup> The classic treatment of this issue is Angela Harris, *Race and Essentialism in Feminist Theory*, 42 STAN. L. REV. 581 (1990).

ics of the "differences" view are on point, I believe, in cautioning against making too much of the results of Gilligan-style social psychology to draw conclusions about how men and women differ.<sup>115</sup> As Sklar's work so beautifully portrays, and as many commentators have pointed out, gender differences vary widely with social context, historical period, personality, and a host of other factors, and our research methodologies must be able to take all of these influences into account.

### 3. An Additional Corrective

Finally, Sklar's work suggests a lesson often forgotten by participants in the debate about how to understand the operation of gender in the construction of lawyering norms. That lesson is that the gender ideology individuals claim to espouse, based on certain social expectations or ideals, may not correlate in any reliable way with how they actually behave. Actual conduct may—indeed, probably will—deviate significantly from such ideal representations. This possibility is one that Gilligan, for example, seems to greatly under-appreciate in her work: the self-reports of the girls in the studies on which many of the conclusions in *In A Different Voice* are based may state that they approach moral problems in a certain manner, but those claims do not resolve the question of how they actually perform.

A similar idea is captured by the image of Shakespeare's Portia, who so captivated early theorists who applied Gilligan's moral theory to the lawyering realm. As a number of critics have pointed out, the Portia who makes the eloquent mercy speech in *The Merchant of Venice* when disguised as a man is also the character most insistent on pushing the letter of the law to its limits against Shylock.<sup>116</sup> Portia makes a fine speech about mercy, but when it comes down to brass tacks in representing her "client," she is every bit as—indeed, more—willing to exploit legal technicalities and reject compromise solutions than any of her male compatriots.<sup>117</sup>

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<sup>115</sup> An excellent critical discussion of Gilligan's work from a variety of interdisciplinary perspectives, raising issues concerning Gilligan's lack of historical perspective and failure to appreciate cultural variability, can be found in Linda K. Kerber et al., *On In a Different Voice: An Interdisciplinary Forum*, 11 *SIGNS* 304 (1986).

<sup>116</sup> See, e.g., Jane Maslow Cohen, *Feminism and Adaptive Heroism: The Paradigm of Portia as a Means of Introduction*, 25 *TULSA L.J.* 657, 725-34 (1990) (urging feminists to cease viewing Portia as embodiment of "mercy" figure); Alice N. Benston, *Portia, the Law, and the Tripartite Structure of The Merchant of Venice*, in *THE MERCHANT OF VENICE: CRITICAL ESSAYS* 163, 172-80 (Thomas Wheeler ed., 1991) (arguing that Portia personifies "law," not mercy). But cf. Menkel-Meadow, *Portia II*, *supra* note 4, at 97-106 (acknowledging complexity of Portia's role but continuing to argue for use of Portia as symbol supporting feminine "ethic of care" in lawyering); RICHARD A. POSNER, *LAW AND LITERATURE: A MISUNDERSTOOD RELATION* 108-9 & n.54 (1988) (accepting equation of Portia with "feminine" equity dimensions of law).

<sup>117</sup> Carl G. Jung's theory of personality is interesting in this regard. Jung posits that all

This, then, is another lesson to be drawn from a close, empirical study of gender in the construction of lawyering norms: the attribution of certain modes of acceptable behavior to men and to women in connection with gender ideologies may have scant correlation with actual behavior. Even when such social constraints make it hard for persons of a particular gender to act in particular ways, gender ideology may not reliably correlate with gender-differentiated goals. Women may be restricted in taking overt actions in accordance with certain goals, but may find other ways of trying to achieve these ends (as Kelley did in keeping her hand in the legal work of the NCL behind the scenes, while granting male figureheads public authority in this realm). Here again, the concept of women's agency is an important one to bring to bear on the analysis. Women must operate within a socially constructed world of external (and internalized) constraints, but the existence of such constraints has a complex and variable relationship to observed outcomes, especially in contested situations.<sup>118</sup> Just as Kelley was in private every bit the lawyer she did not claim to be in public, it may be that further study of how gender operates in the social construction of lawyering roles will yield discoveries far more complex, contradictory, and unpredictable than we now can anticipate.

## CONCLUSION

This Review Essay has called on feminist scholars within the legal academy to leave behind strong positions that either insist on theorizing generally about the relationship between gender and lawyering roles or dismiss such inquiries out of hand. In place of these approaches, I have argued for an historical and context-sensitive exploration that would import new insights by feminist scholars working within the disciplines of history, anthropology, and other interpretative social sciences. Scholars such as Kathryn Kish Sklar have shown how a fine-grained empirical approach to the study of gender, open to complexity, contradiction, and surprise, can yield enormous insights in advancing our understanding of how gender operates in the construction of social institutions, including lawyering roles.

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human personalities contain both masculine and feminine aspects (the "animus" and "anima," respectively), but that the side of this duality opposite to one's manifest gender is largely repressed into the unconsciousness, where it can emerge in shadowy but powerful ways, as when men dream of mysterious women (their anima) or seemingly "feminine" women commit acts of great violence. See C.G. JUNG, ASPECTS OF THE FEMININE (R.F.C. Hull trans., 1982); C.G. JUNG, ASPECTS OF THE MASCULINE (R.F.C. Hull trans., 1989); see also ANTHONY STORR, C.G. JUNG 23-72 (1973) (discussing Jung's theory of animus and anima); GARETH S. HILL, MASCULINE AND FEMININE: THE NATURAL FLOW OF OPPOSITES IN THE PSYCHE (1992) (same).

<sup>118</sup> See, e.g., ORTNER, *supra* note 113, at 181, 194-212 (studying ways in which disruptions caused by arrival of outsider trekkers in the Himalayas created conditions that allowed Sherpa women certain opportunities to advance their status).

