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## PORTIA'S DEAL

KAREN M. TANI\*

### INTRODUCTION

The years of the New Deal were heady times for lawyers in the federal government. According to participant-observers, young “legal eagles” swooped down on Washington, D.C., from elite law schools, often at the beckoning of Harvard law professor Felix Frankfurter. There, they drafted groundbreaking statutes and codes, executed ambitious regulatory programs, and defended historic reform legislation against a hostile Supreme Court. “[G]overnment gave a young lawyer responsibility that was tenfold above what he would receive outside,” recalled one such lawyer. Many lawyers recalled an *esprit de corps*. It followed from long hours spent tackling the same problems, but also from attending the same parties, rooming in the same houses, and recognizing themselves as a “counter-elite” to the bar’s more corporate-oriented leadership. After the years of excitement ended, the eagles soared onward, to seats on the Supreme Court, partnerships in law firms, and professorships in elite law schools.<sup>1</sup>

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1. For first-hand accounts, see THOMAS I. EMERSON, *YOUNG LAWYER FOR THE NEW DEAL: AN INSIDER’S MEMOIR OF THE ROOSEVELT YEARS* (1991); THOMAS H. ELIOT, *RECOLLECTIONS OF THE NEW DEAL: WHEN THE PEOPLE MATTERED* (John K. Galbraith ed., 1992); DONALD RICHBERG, *MY HERO: THE INDISCREET MEMOIRS OF AN EVENTFUL BUT UNHEROIC LIFE* (1954); *THE MAKING OF THE NEW DEAL: THE INSIDERS SPEAK* (Katie Loucheim ed., 1983); ALGER HISS, *RECOLLECTIONS OF A LIFE* (1988); WILLIAM O. DOUGLAS, *GO EAST, YOUNG MAN: THE EARLY YEARS—THE AUTOBIOGRAPHY OF WILLIAM O. DOUGLAS* (1974). For important secondary accounts, see JEROLD S. AUERBACH, *UNEQUAL JUSTICE: LAWYERS AND SOCIAL CHANGE IN MODERN AMERICA* (1976); DONALD A. RITCHIE, *JAMES M. LANDIS: DEAN OF THE REGULATORS* (1980); PETER H. IRONS, *THE NEW DEAL LAWYERS* (1982); WILLIAM LASSER, *BENJAMIN V. COHEN: ARCHITECT OF THE NEW DEAL* (2002); DAVID MCKEAN, *PEDDLING INFLUENCE: THOMAS “TOMMY THE CORK” CORCORAN AND THE BIRTH OF MODERN LOBBYING* (2005); MICHAEL E. PARRISH, *CITIZEN RAUH: AN AMERICAN LIBERAL’S LIFE IN LAW AND POLITICS* (2010). On Frankfurter’s role in placing young lawyers in government positions, see G. Edward White, *Felix Frankfurter, the Old Boy Network, and the New Deal: The Placement of Elite Lawyers in Public Service in the 1930s*, 39 *ARK. L. REV.* 631 (1986); *THE MAKING OF THE NEW DEAL*, *supra*. “Legal eagles” is from ELIOT, *RECOLLECTIONS OF THE NEW DEAL*, *supra*, at 29; the “tenfold” quote is from EMERSON, *YOUNG LAWYER FOR THE NEW DEAL*,

This account, while true to the experiences of notable participants, does not cover the spectrum of New Deal lawyering. Many “older, more anonymous government lawyers” populated New Deal agencies; they approached their jobs<sup>2</sup> not as a calling or crusade but “as ordinary legal work, albeit work with high stakes.”<sup>3</sup> Further, a small but significant number of New Deal lawyers were women. Barbara Nachtrieb Armstrong, the first woman law professor in the United States, was one of the key designers of the Social Security Act.<sup>4</sup> Lucy Somerville Howorth served on the Board of Appeals of the Veterans Administration and later became the first woman to head an Executive Commission.<sup>5</sup> Bessie Margolin, who began her career with the Tennessee Valley Authority, became an important defender of the Fair Labor Standards Act, winning twenty-five of the twenty-seven cases she argued before the U.S. Supreme Court.<sup>6</sup> These women lawyers and others like them possessed a set of experiences, perspectives, and skills that differed from that of their male peers. Some stayed long after the “legal eagles” departed.

We know little about these women, because we have not asked. When influential “legal eagles” sat down to record oral histories and pen memoirs, they rarely mentioned their women colleagues (or lack thereof). A charitable interpretation is that these men understood their personal stories as part of a larger history of government, law, and politics in an era of great social and economic change; unless a woman was a major player in an important legal reform or court battle—and few women were—there was no reason to mention her.

*supra*, at 20; “Counter-elite” is from Michael E. Parrish, *The Great Depression, the New Deal, and the American Legal Order*, 59 WASH. L. REV. 723, 746 (1983–1984).

2. On the breadth and significance of the work that lawyers performed for agencies in this era, see Raymond P. Baldwin and Livingston Hall, *Using Government Lawyers to Animate Bureaucracy*, 63 YALE L.J. 197 (1953); EMERSON, *supra* note 1; IRONS, *supra* note 1.

3. Michele Landis Dauber, *New Deal Lawyers*, in ENCYCLOPEDIA OF THE SUPREME COURT OF THE UNITED STATES 399, 401 (David S. Tanenhaus, ed., 2008); see also ESTHER LUCILE BROWN, *LAWYERS, LAW SCHOOLS AND THE PUBLIC SERVICE* 59 (1948) (drawing distinctions, in a study of federal government lawyers in the 1940s, between “political appointees,” “‘top-flight’ career men,” permanent “career personnel,” and temporary workers).

4. See generally Herma Hill Kay, *The Future of Women Law Professors*, 77 IOWA L. REV. 5 (1991); Roger J. Traynor, *Barbara Nachtrieb Armstrong—In Memoriam*, 65 CAL. L. REV. 920 (1977). On Armstrong’s influence on the Social Security Act, see Alice Kessler-Harris, *In the Nation’s Image: The Gendered Limits of Social Citizenship in the Depression Era*, 86 J. AM. HIST. 1251, 1260–1263 (1999).

5. See generally DOROTHY S. SHAWHAN & MARTHA H. SWAIN, *LUCY SOMERVILLE HOWORTH: NEW DEAL LAWYER, POLITICIAN, AND FEMINIST FROM THE SOUTH* (2006).

6. FEMINISTS WHO CHANGED AMERICA, 1963–1975 298 (Barbara J. Love ed., 2006).

Today, many historians of the New Deal consider gender a useful category of analysis and women crucial actors, and yet work on women lawyers remains thin, for several reasons. Scholarship on New Deal lawyers tends to focus on Supreme Court litigation, an arena in which women lawyers played only a modest role. (Although women lawyers made great inroads into the federal government in 1930s, legal positions requiring court appearances remained the most difficult to secure.) More recent scholarship on New Deal administrative law is better positioned to recognize women lawyers,<sup>7</sup> but has yet to explore an agency that was open to hiring them. As for scholars of women and the legal profession, they have produced broad surveys and rich monographs.<sup>8</sup> However, much of the best work clusters around the pioneer women who entered practice in the late nineteenth century, rather than subsequent generations, and around notable individuals rather than groups or cohorts of lower-profile women attorneys.<sup>9</sup>

By highlighting three lesser-known attorneys, all women and former employees of the Social Security Board, this essay argues for a gender-conscious social history of New Deal lawyering and compiles an under-explored set of research questions. Sue Shelton White, an outspoken feminist, came to the New Deal after a long career as a court reporter, political organizer, and senate staffer. Records of her time in government suggest the difference that gender, and specifically gendered opportunity structures, made to the work of a New Deal lawyer. Marie Remington Wing, a prominent politician and attorney in her native Cleveland, joined the New Deal as the lead attorney in a regional office. Her biography encourages scholars to remember that just as the

7. See, e.g., Daniel R. Ernst, *Lawyers, Bureaucratic Autonomy, and Securities Regulation During the New Deal* (Georgetown Law Faculty Working Paper, Paper No. 115, 2009), available at [http://scholarship.law.georgetown.edu/fwps\\_papers/115](http://scholarship.law.georgetown.edu/fwps_papers/115); Jessica Wang, *Imagining the Administrative State: Legal Pragmatism, Securities Regulation, and New Deal Liberalism*, 17 J. POL. HIST. 257 (2005).

8. Foundational works include CYNTHIA FUCHS EPSTEIN, *WOMEN IN LAW* (1981) (and subsequent editions); KAREN BERGER MORELLO, *THE INVISIBLE BAR: THE WOMAN LAWYER IN AMERICA 1638 TO THE PRESENT* (1986); REBECCA MAE SALOKAR & MARY L. VOLCANSEK, *WOMEN IN LAW: A BIBLIOGRAPHICAL SOURCEBOOK* (1996); VIRGINIA G. DRACHMAN, *SISTERS IN LAW: WOMEN LAWYERS IN MODERN AMERICAN HISTORY* (1998). For a more thorough bibliography, see Paul M. George & Susan McGlamery, *Women and Legal Scholarship: A Bibliography*, 77 IOWA L. REV. 87 (1991).

9. See, e.g., VIRGINIA G. DRACHMAN, *WOMEN LAWYERS AND THE ORIGINS OF PROFESSIONAL IDENTITY IN AMERICA: THE LETTERS OF THE EQUITY CLUB, 1887 TO 1890* (1993); JANE M. FRIEDMAN, *AMERICA'S FIRST WOMAN LAWYER: THE BIOGRAPHY OF MYRA BRADWELL* (1993); *REBELS IN LAW: VOICES IN HISTORY OF BLACK WOMEN LAWYERS* (J. Clay Smith, Jr. ed., 1998); Kenneth W. Mack, *A Social History of Everyday Practice: Sadie T.M. Alexander and the Incorporation of Black Women into the American Legal Profession, 1925-1960*, 87 CORNELL L. REV. 1405 (2002); MARY JANE MOSSMAN, *THE FIRST WOMEN LAWYERS: A COMPARATIVE STUDY OF GENDER, LAW AND THE LEGAL PROFESSIONS* (Oxford Hart Publ'g 2006); BARBARA BABCOCK, *WOMAN LAWYER: THE TRIALS OF CLARA FOLTZ* (Stanford Univ. Press 2011).

New Deal was national in scale, so too was its legal work. Regional outposts of the New Deal provided some women lawyers with a taste of the power that the men in Washington enjoyed. Bernice Lotwin Bernstein was in age, brains, and social networks the equivalent of one of Felix Frankfurter's "Happy Hotdogs." She joined the New Deal in 1933 and stayed for forty-five years, narrowly surviving a Cold War loyalty-security investigation. Her life offers a case study in the appeal, and the dangers, that government work held for women lawyers.

### I. WOMEN LAWYERS IN THE NEW DEAL

As of May 15, 1939, there were an estimated 5,368 lawyers working in legal positions for the federal government.<sup>10</sup> Published memoirs suggest that very few of these lawyers were women. Reconstructing his New Deal years, Labor Department lawyer Thomas Eliot recalled a city filled with women in "secretarial, research, or minor administrative posts," but "hardly any female lawyers on the scene."<sup>11</sup> The actual number, while difficult to pinpoint, was considerably higher. A 1932 survey published in the *Women Lawyers' Journal* counted 192 women lawyers in federal government positions; their duties varied, but about two-thirds performed legal work.<sup>12</sup> These figures increased over time. Anecdotal evidence,<sup>13</sup> as well as the records of the U.S. Civil Service Commission<sup>14</sup> and the Women's Bar Association of the District of Co-

10. BROWN, *supra* note 3, at 28–29. By early 1943, this number had gone up to about 8,500 (owing to the new wartime agencies). *Id.*

11. ELIOT, *supra* note 1, at 29.

12. Mary Connor Myers, *Women Lawyers in Federal Positions*, 19 WOMEN LAW. J. 28 (Winter 1931) [hereinafter *Women Lawyers I*]; Mary Connor Myers, *Women Lawyers in Federal Positions*, 19 WOMEN LAW. J. 19 (Spring 1932) [hereinafter *Women Lawyers II*].

13. All three women profiled in this article attained their positions after 1932. See Virginia Lee Warren, *Woman Attorney Prefers Government Service to Private Practice and Tells Why*, WASH. POST, Mar. 21, 1934, at 13, available at [www.washingtonpost.com](http://www.washingtonpost.com) (describing how some women lawyers in government "worked their way up" to legal posts from clerical and secretarial positions).

14. During the New Deal, some legal positions were political and others were covered by civil service rules. The U.S. Civil Service recorded how many women lawyers qualified for non-political attorney positions each year. The reports show small gains in the 1932–34 period: 7 women passed attorney entrance exams in 1932 (compared to 600 men); 1 in 1933 (compared to 18 men); and none in 1934 (compared to 14 men). In 1935, however, 212 women sat for attorney exams and 176 women passed (compared to 4916 of 6395 men). From 1936 to 1939, the numbers returned to previous levels: 1 in 1936 (compared to 38 men); none in 1937 or 1938 (compared to 16 men in each year); and 2 in 1939 (compared to 302 men). U.S. CIV. SERVICE COMMISSION ANN. REP. 49 (1932), at 73; U.S. CIV. SERVICE COMMISSION ANN. REP. 51 (1933), at 36; U.S. CIV. SERVICE COMMISSION ANN. REP. 51 (1934), at 42; U.S. CIV. SERVICE COMMISSION ANN. REP. 52 (1935), at 38; U.S. CIV. SERVICE COMMISSION ANN. REP. 53 (1936), at 36; U.S. CIV. SERVICE COMMISSION ANN. REP. 54 (1937), at 37; U.S. CIV. SERVICE COMMISSION ANN. REP. 55 (1938), at 70; U.S. CIV. SERVICE COMMISSION ANN. REP. 56 (1939), at 89. Without knowing how many women lawyers occupied political posi-

lumbia,<sup>15</sup> suggests that by 1939 several hundred women worked as lawyers for the federal government.

Government positions had their disadvantages. Although the hiring process was more transparent and accessible than in the private sector, gender-based discrimination was common. Two years into Franklin Roosevelt's first term as President, U.S. Attorney for the District of Columbia Leslie Garnett had no qualms about declaring his office "no place for [women lawyers]." Women made fine "wives, sweethearts and secretaries," he explained, but they were incapable of the "cold dispassion" necessary for prosecutorial work.<sup>16</sup> Garnett's prejudices were widely shared. The Department of Justice's Antitrust Division, headed by leading liberal Thurman Arnold, "made no secret of the fact that it would not hire women," recalled Judge Cecilia Goetz, a 1940 graduate of New York University School of Law.<sup>17</sup> At the Securities and Exchange Commission, women were likewise "unwelcome."<sup>18</sup> Agencies and departments that invited more than a few women into the fold, such as the Review Division of the National Labor Relations Board (NLRB),<sup>19</sup> soon had reason to regret their progressivism. Critics of the NLRB invoked the image of the young, attractive woman lawyer in their effort to portray the agency as soft-headed, overly idealistic, and dangerously impressionable (i.e., open to communist influences).<sup>20</sup>

Once hired, women also faced discrimination in pay, promotion, and retention. Women lawyers in the federal government commonly received lower salaries than men with similar or lesser qualifications and were often passed over for promotions.<sup>21</sup> One Department of Jus-

tions, or how many women lawyers left government each year, these records are of limited use. At the very least, however, they suggest that the number of women lawyers was in the hundreds during the second stage of the New Deal.

15. In 1940, "practically all" of the 300-some members of the Women's Bar Association of the District of Columbia worked in government agencies. *Uncle Sam's Women Lawyers*, N.Y. TIMES, Jan. 21, 1940. Two years earlier, the figure was 69 out of 215 members. Louise Foster and Florence Curoe, *Women Lawyers in U.S. Work Are Discussed at Bar Dinner*, WASH. POST, Mar. 4, 1938, at 19, available at [www.washingtonpost.com](http://www.washingtonpost.com).

16. *Women Won't Work for Him If District Attorney Knows It*, WASH. POST, Mar. 24, 1934.

17. Quoted in CYNTHIA FUCHS EPSTEIN, *WOMEN IN LAW* 84 (Univ. of Ill. Press 2d ed. 1993).

18. *Id.*

19. Of the 105 attorneys in the NLRB's Review Division, 11 percent were women. LANDON R. STORRS, *CIVILIZING CAPITALISM: THE NATIONAL CONSUMERS' LEAGUE, WOMEN'S ACTIVISM, AND LABOR STANDARDS IN THE NEW DEAL ERA* 217 (Univ. of N.C. Press 2000). In the agency as a whole, women lawyers constituted about 9 percent of the total (23 of 258). *Uncle Sam's Women Lawyers*, *supra* note 15.

20. STORRS, *supra* note 19, at 218-19; JAMES A. GROSS, *THE MAKING OF THE NATIONAL LABOR RELATIONS BOARD: A STUDY IN ECONOMICS, POLITICS, AND THE LAW* 182-83 (SUNY Press 1974).

21. *Women Lawyers I*, *supra* note 12; *Women Lawyers II*, *supra* note 12; cf. Clara Greacen, *Experiences in Government Service*, 20 WOMEN LAW. J. 11, 12 (1932-1933).

tice lawyer, for example, reported that after she married, she received a demotion and \$1,000 less in pay than a man doing the same work.<sup>22</sup> In the event that both a husband and wife were employed by the federal government and cutbacks became necessary, Section 213 of the 1932 Economy Act mandated the dismissal of one member of the marital unit.<sup>23</sup> Of the 1,603 persons dismissed under this provision in the first few years, three-fourths were women.<sup>24</sup> What became of them is unclear, but as pioneering federal appeals judge Florence Allen observed in 1944, when thousands of soldiers began re-entering the civilian workforce, the transition from the public sector to the private was not kind to women lawyers. Only those with an established roster of clients—a hard thing for even men to cultivate while in government—would survive.<sup>25</sup>

Still, federal government work offered women lawyers better opportunities than they found elsewhere. From inside agencies, they drafted laws, policed private industry, negotiated settlements, and created policy.<sup>26</sup> Mima Riddiford Politt, for example, a single mother who cobbled together a legal education at four different law schools and tried eight times to pass the District of Columbia bar, was eventually tasked, as a lawyer for the Interior Department, with helping draft Felix Cohen's famous treatise on Indian Law<sup>27</sup> and representing Japanese Americans interned during World War Two.<sup>28</sup> These vital but less visible administrative positions also sheltered women from some of the everyday dilemmas that plagued them in comparably important posts in the private sector, such as whether or not to behave feminine-

22. *Women Lawyers II*, *supra* note 12, at 29.

23. Bessie I. Koehl, *Present Day Attacks on the Employment of Married Women*, 21 *WOMEN LAW. J.* 36, 36 (1934-1935). For a full history of this provision and its later repeal, see John Thomas McGuire, "The Most Unjust Piece of Legislation": Section 213 of the Economy Act of 1932 and Feminism During the New Deal, 20 *J. POL. HIST.* 516 (2008).

24. McGuire, *supra* note 23 at 527.

25. Florence E. Allen, *Women in Law*, 17 *J. EDUC. SOC.* 498, 500 (1944).

26. Prominent New Deal lawyer Jerome Frank observed in 1945 that "effective women lawyers" had found their "largest opportunities . . . in the Federal government." Jerome N. Frank, *Women Lawyers*, 31 *WOMEN LAW. J.* 4, 5 (1945). Labor Department solicitor Bessie Margolin agreed, although she adopted a less sanguine tone: "Government attracts the competent women because they have no alternative." Briton Hadden and Henry Robinson Luce, *Lawyers: Perils of Portia*, *TIME*, Mar. 6, 1964, at 47.

27. FELIX S. COHEN, *HANDBOOK OF FEDERAL INDIAN LAW* (1941).

28. Oral history interview with Daniel H. Pollitt (Nov. 27, 1990) (Interview L-0064-1, in the Southern Oral History Program Collection), available at [http://docsouth.unc.edu/sohp/L-0064-1/excerpts/excerpt\\_8950.html](http://docsouth.unc.edu/sohp/L-0064-1/excerpts/excerpt_8950.html). Of course, not all the work was so glamorous. Pollitt also devoted many hours to reviewing low-level tort claims against the government, her son recalled, such as complaints of squirrel bites at the White House and canoes overturning at Monmouth Cave. *Id.*

ly in the courtroom (either way, they were publicly criticized).<sup>29</sup> Advising the federal government, like representing poor clients or writing briefs in the back office of a small law firm, was a “gap within the bar’s discriminatory structure.”<sup>30</sup>

Of the New Deal agencies, the Social Security Board was more hospitable to women than most.<sup>31</sup> The programs it administered (old-age insurance, unemployment insurance, public assistance, maternal and child health) fell under the rubric of “social reform,” and were therefore considered to be women’s business. Further, the clients of the new agency—the elderly, the disabled, poor women and children—were among the beneficiaries of established “maternalist” projects (mothers’ pensions, poor law reforms, wage and hour restrictions, etc.). Just as social workers, who were predominantly female, were considered perfectly suited to this work, women lawyers were “peculiarly adapted” to represent “the downtrodden and the maladjusted.”<sup>32</sup> The following sections spotlight three of the Board’s women lawyers and suggest their relevance for current scholarly conversations.

## II. SUE SHELTON WHITE

Sue Shelton White (1887–1943) was a “woman of the New South.” Born to a genteel, respectable Tennessee family (her father’s bloodlines tied her to Thomas Jefferson and John Marshall), she was acutely aware of the roles that her society prescribed for women of her race and class. At the same time, her own household was relatively egalitar-

29. Hadden and Luce, *supra* note 26, at 48.

30. Mack, *supra* note 9, at 1473; Hadden and Luce, *supra* note 26.

31. SSB General Counsel Tom Eliot recalled that of the ninety lawyers he hired for the Social Security Board in 1936, only three were women. ELIOT, *supra* note 1, at 29. (He likely had in mind Sue Shelton White, Bernice Lotwin Bernstein, and Rosalie M. Moynahan). These numbers, while small, are significant when paired with the lack of evidence of SSB hostility toward women lawyers (other agencies and departments rejected them outright), as well as the data from the following years, in which at least three additional women (Lilian Poses, Marie Wing, and Gladys Harrison) joined the SSB legal staff in high-visibility positions. Other agencies noteworthy for their hospitality to women include the Labor Department, see *supra* note 19, and the Treasury Department, see Oscar S. Cox to George D. Riley (Nov. 24, 1939) Oscar S. Cox Papers, Box 50 (on file with the Franklin D. Roosevelt Presidential Library and Museum, Hyde Park, N.Y.) (noting that as of Oct. 31, 1939, there were 440 lawyers on the staff of the Treasury’s legal division, twenty-one of which were women).

32. H. T. Thurschwell, Letter to the editor, N.Y. TIMES, Sept. 3, 1934. Women, too, voiced this opinion. See, e.g., *Bench and Bar Bright Career for Women Now*, WASH. POST, Nov. 14, 1933, at 10 (quoting woman attorney Edith Atkinson as describing women as “naturally altruistic” and “naturally inclined to give more consideration to small details of the welfare of the child”). On women lawyers’ greater access to opportunities involving the poor, especially poor women and children, see Felice Batlan, *The Birth of Legal Aid: Gender Ideologies, Women, and the Bar in New York City, 1863–1910*, 28 L. & HIST. REV. 931 (2010).



ian, and all around her old traditions and hierarchies were buckling.<sup>33</sup> As young adults, White and like-minded female peers used their resources and privileges to advocate for progressive reforms and to claim a wider sphere of influence than their predecessors had enjoyed.<sup>34</sup>

Among these women, White was a radical: she viewed marriage as “too much of a compromise.”<sup>35</sup> She criticized racial discrimination in both its brutal and more genteel forms.<sup>36</sup> In a place where many women thought it imprudent to press for the vote, White was a leader in the suffrage movement, one unashamed to use direct, rather than discrete, lobbying tactics.<sup>37</sup> In 1919, she impressed some of her peers (and mortified others) by joining picket lines in front of the White House and burning then-President Woodrow Wilson in effigy. For this she spent five days in jail, but also solidified her reputation as one of the most important suffrage leaders of the day.<sup>38</sup> Along with fellow members of the National Women’s Party (NWP), she later co-authored the Equal Rights Amendment and campaigned tirelessly for its ratification by the states.<sup>39</sup>

Unlike many members of her social set, White worked for wages. By the time she was fourteen, both her parents had died, leaving White and her siblings few assets. White took up stenography and spent her twenties working as a court reporter in Jackson, Tennessee.<sup>40</sup> She considered pursuing law school during this time, but her lawyer friends discouraged her,<sup>41</sup> and her involvement with the suffrage movement kept her occupied. She waited to study law until 1920, after the conclu-

33. Betty Sparks Huehls, *Sue Shelton White: Lady Warrior* 5–25 (Dec. 2002) (unpublished Ph.D. dissertation, University of Memphis) (on file with McWhorter Library, Univ. of Memphis).

34. MARJORIE SPRUILL WHEELER, *NEW WOMEN OF THE NEW SOUTH: THE LEADERS OF THE WOMAN SUFFRAGE MOVEMENT IN THE SOUTHERN STATES* 50–51 (1993); *see also* GLENDA ELIZABETH GILMORE, *GENDER AND JIM CROW: WOMEN AND THE POLITICS OF WHITE SUPREMACY IN NORTH CAROLINA, 1896–1920* (1996).

35. WHEELER, *supra* note 34, at 87.

36. *Id.* at 105–06.

37. *Id.* at 77.

38. Florence Armstrong, “Personal recollections of Sue Shelton White (1887–1943) by some of her friends and associates,” 1959, *Sue Shelton White Papers*, Schlesinger Library, Radcliffe Institute for Advanced Study, Cambridge, Mass.; Betty Sparks Huehls & Beverly Greene Bond, *Sue Shelton White (1887–1943): Lady Warrior, in TENNESSEE WOMEN: THEIR LIVES AND TIMES* 140 (Sarah Wilkerson Freeman & Beverly Greene Bond, eds., vol. 1, 2009); KATHERINE H. ADAMS & MICHAEL L. KEENE, *AFTER THE VOTE WAS WON: THE LATER ACHIEVEMENTS OF FIFTEEN SUFFRAGISTS* 146 (2010).

39. ADAMS & KEENE, *supra* note 38, at 149; WHEELER, *supra* note 34, at 195. On the National Women’s Party, *see* Nancy F. Cott, *Feminist Politics in the 1920s: The National Woman’s Party* 71 ]. *AM. HIST.* 43 (1984).

40. Huehls, *supra* note 33, at 24–27.

41. *Id.* at 28.

sion of the ratification campaign. By then, she was living in Washington, D.C. (she had relocated at the request of NWP founder Alice Paul) and working as a clerk to Senator Kenneth McKellar (D., Tennessee).<sup>42</sup> She enrolled in night classes at Washington College of Law<sup>43</sup> and received her degree in 1923.<sup>44</sup>

Sue White believed that the capable, intelligent woman ought to “be admitted to her destiny, wherever it may lead her”—even, she once told the *Washington Daily News*, to the highest office in the land.<sup>45</sup> She also understood, however, that she was in the minority, and that her path to “destiny” would likely be obstructed.<sup>46</sup> After graduation, while her male counterparts enjoyed the mentorship and sponsorship of older members of the bar,<sup>47</sup> White continued to work for Senator McKellar.<sup>48</sup> Only when their relationship became irreparably strained,<sup>49</sup> in 1926, did she attempt to make her way as a practicing lawyer. By moving back to her hometown and partnering with a male lawyer, she earned enough to survive, but she did not consider her practice a success.<sup>50</sup>

It was White’s organizational work for the Democratic Party that eventually launched her legal career.<sup>51</sup> Party leaders, such as the influential Molly Dewson, quickly realized that White had a powerful presence in the South, especially among women. In 1930, at the urging of Dewson and her network,<sup>52</sup> the Party elevated White to Executive Sec-

42. *Id.* at 28–29.

43. On the relationship between part-time schools and the rising numbers of women lawyers in the 1920s, see Ronald Chester, *Women Lawyers in the Urban Bar: An Oral History*, 18 *NEW ENG. L. REV.* 521, 524 (1982–1983). Chester also discusses Washington College of Law and its women-friendly policies. *Id.* at 528–530.

44. Huehls, *supra* note 33, at 201–04.

45. Ronald Chester, *A Survey of WCL Women Graduates: 1920’s Through the 1940’s*, 32 *AM. U. L. REV.* 627, 629–30 (1982–1983) (quoting *Should a Woman be President of the U.S.?* *WASH. DAILY NEWS*, Nov. 14, 1931).

46. The *Washington Daily News* ran White’s editorial alongside one by psychiatrist Nolan Lewis, who opined that a woman presidential candidate would not have the confidence of the people, owing to women’s tendency toward “contradictory emotional behavior . . . in times of stress.” According to Lewis, 19 of 20 men and 18 of 20 women “consider[ed] the question as premature, as absurd, or as a joke.” *Id.*

47. White observed this phenomenon during her court reporter days. *WHEELER, supra* note 34, at 85.

48. Huehls, *supra* note 33, at 208–09.

49. Political disagreement may have helped produce the strain, *WHEELER, supra* note 34, at 196. However, it resulted primarily from Senator McKellar’s decision to promote White to senatorial secretary, only to quickly replace her with his brother. Huehls, *supra* note 33, at 209.

50. Huehls, *supra* note 33, at 222–25.

51. *Id.* at 241–49.

52. On Molly Dewson, Eleanor Roosevelt, Frances Perkins, and other members of this woman’s network, see Susan Ware, *Women and the New Deal*, in *FIFTY YEARS LATER: THE NEW DEAL*

retary of the Women's Division. She did not disappoint; women turned out strongly for Franklin Roosevelt in the 1932 presidential election, earning White a top slot on the post-election patronage list ("Class A—Imperative Recognition").<sup>53</sup>

White got neither the political position (Executive Director of the Women's Division)<sup>54</sup> nor the legal position (General Counsel of the Tennessee Valley Authority)<sup>55</sup> that she most wanted, despite Dewson's repeated personal appeals to the President,<sup>56</sup> but she eventually landed a coveted position in the National Recovery Administration (NRA). In early 1934, she became the executive assistant to the head of the NRA's Consumer Advisory Board.<sup>57</sup> After the Supreme Court invalidated the National Industrial Recovery Act in May of 1935,<sup>58</sup> the women's network mobilized again, securing White a transfer to the Office of the General Counsel of the newly formed Social Security Board.<sup>59</sup>

As one of the first employees that the Board hired, White performed important legal work. The Social Security Program was a "broad scale" effort that included not only old-age insurance (today's "Social Security"), but also unemployment insurance, child and maternal health grants, and categorical public assistance.<sup>60</sup> These programs were politically and administratively complex, and in the early years, generated novel legal questions nearly every day.<sup>61</sup> By answering those questions, White helped "lay the foundations" of the entire enterprise. Like many New Deal lawyers, White also did more than simply analyze legal questions. "Everyone on the professional staffs of the Social Security Board knew Sue White, consulted her, and valued her

EVALUATED 115–22 (Harvard Sitkoff, ed., 5th ed. 1985); SUSAN WARE, PARTNER AND I: MOLLY DEWSON, FEMINISM, AND NEW DEAL POLITICS (1989); JOAN HOFF-WILSON & MARJORIE LIGHTMAN, EDs., WITHOUT PRECEDENT: THE LIFE AND CAREER OF ELEANOR ROOSEVELT 52–55 (1984). For an especially nuanced view of this network and the cleavages within it, see Robyn Muncy, *Women, Gender, and Politics in the New Deal Government: Josephine Roche and the Federal Security Agency*, 21 J. WOMEN'S HIST. 60 (2009).

53. Huehls, *supra* note 33, at 318.

54. *Id.* at 318–19. Although White held this position on an interim basis from 1932 to 1933, President Roosevelt decided that he wanted Dewson to fill the post.

55. The position went to Frankfurter protégé James Lawrence ("Larry") Fly.

56. Huehls, *supra* note 33, at 322–25.

57. *Id.* at 326.

58. *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935).

59. DOROTHY S. SHAWHAN & MARTHA H. SWAIN, *LUCY SOMERVILLE HOWORTH: NEW DEAL LAWYER, POLITICIAN, AND FEMINIST FROM THE SOUTH* 88 (2006).

60. Jack B. Tate, contribution to "Personal recollections of Sue Shelton White," *supra* note 38.

61. See generally Karen M. Tani, *Securing a Right to Welfare: Public Assistance Administration and the Rule of Law, 1935–1964* (2011) (unpublished Ph.D. dissertation, Univ. of Pa.) (on file with the Van Pelt Library, Univ. of Pa.).

advice," recalled White's office-mate. "She was equally the confidante of the young New Deal lawyers fresh from law school and veterans of the Democratic political campaigns."<sup>62</sup> Echoed White's former boss, Jack Tate, "[s]he was at home with the most idealistic social worker fresh from college and with the most cynical politician."<sup>63</sup> For all of these reasons, White rose quickly, working her way to Chief of the General Counsel's Division of Business Law and Chief of the Regional Staff.<sup>64</sup> Only cancer stopped her rapid ascent. White died in 1943, at the age of fifty-five.

Historians of women and gender have by now thoroughly mined Sue Shelton White's biography,<sup>65</sup> but legal scholars have yet to recognize her importance. If nothing else, she helps scholars begin to investigate the difference that gender made to the work of government lawyers. There were clear educational differences between White and her male counterparts: unlike the nation's elite law schools, Washington College of Law welcomed students who worked (it offered only evening classes during White's time) and relied primarily on a textbook and lecture system, rather than the Harvard case method.<sup>66</sup> These were but a subset, however, of larger differences in life experience and career trajectory. White earned her legal position not by scoring top marks, as many male New Deal lawyers did, but by inspiring others to join her causes and devoting years of her life to unglamorous work. In other words, her main assets were personality, passion, and time in the trenches. The result was a New Deal lawyer who cultivated the affections of a wide swath of co-workers and who chose her battles carefully. (Some of her male counterparts, by contrast, had difficulty understanding the perspectives of non-lawyers and drew criticism for their unbending legalistic stances.)<sup>67</sup> White remained "explosive," friends recalled, but because she "express[ed] her objections very eloquently" and attempted to overcome petty resentments, her "loud blasts"—such as over the rule preventing a married woman from using

62. Rosalie Moynahan, "Personal recollections of Sue Shelton White," *supra* note 38.

63. Tate, "Personal recollections of Sue Shelton White," *supra* note 38.

64. Armstrong, "Personal recollections of Sue Shelton White," *supra* note 38.

65. WHEELER, *supra* note 34; WARE, *supra* note 52; Anne Firor Scott, *After Suffrage: Southern Women in the Twenties*, 30 J. S. HIST. 298 (1964); THESE MODERN WOMEN: AUTOBIOGRAPHICAL ESSAYS FROM THE TWENTIES (Elaine Showalter, ed., 1989).

66. Chester, *supra* note 45, at 632.

67. Tani, *supra* note 61, at 45–46, 115–47.

her own name on the government payroll after her marriage—received attention.<sup>68</sup>

Friends also recalled White's affinity for the "underdog,"<sup>69</sup> which likely related to her own sense of disadvantage. This affinity manifested itself in White's legal work. For example, when asked to analyze whether the Social Security Act allowed states to discriminate against Native Americans—a question that plagued the agency for decades<sup>70</sup>—White's initial reaction was that failure to include them would be a clear violation of the Fourteenth Amendment. Since 1924, Native Americans had been formally recognized as U.S. citizens, she explained; the fact that "the paternalism of the white man's government results in their receiving aids of various kinds" did not mean that a state could lawfully exclude them from its social welfare programs.<sup>71</sup> Upon further reflection, White added nuance to her position (e.g., she recognized that the Board might be criticized for "assuming judicial functions" were it to invoke the Fourteenth Amendment), but she expressed no sympathy for the would-be excluders.<sup>72</sup> Factors other than gender may, of course, provide even greater insight into White's thinking, but at the very least this evidence suggests the value of further research.<sup>73</sup>

### III. MARIE REMINGTON WING

Like Sue White, Marie Remington Wing (1885–1982) came from a respectable, educated, and relatively progressive family. In Cleveland, Ohio, where her father was a federal judge, she attended the prestigious Miss Mittleberger School for Girls. She proceeded directly to Bryn Mawr College, interrupting her studies only once, when her mother insisted that she stay home to make her social "debut." Also like White,

68. Armstrong, "Personal recollections of Sue Shelton White," *supra* note 38.

69. *Id.*

70. Tani, *supra* note 61, at 199–217.

71. Sue S. White to Thomas H. Eliot, "Indians," Feb. 5, 1936, General Records of the Department of Health, Education, and Welfare, Office of the General Counsel, Correspondence on Public Assistance Programs and the Social Security Act, 1935–1961, Box 10.

72. Sue S. White to Thomas H. Eliot, "Indians—Additional Memorandum," Feb. 10, 1936, General Records of the Department of Health, Education, and Welfare, Office of the General Counsel, Correspondence on Public Assistance Programs and the Social Security Act, 1935–1961, Box 10.

73. Cf. Linda Gordon, *Social Insurance and Public Assistance: The Influence of Gender in Welfare Thought in the United States, 1890–1935*, 97 AM. HIST. REV. 19 (1992) (illustrating the difference that gender-based analysis makes to scholarly understandings of New Deal social welfare policy).

hard times (in Wing's case, her father's "financial reverses") caused Wing to set aside her educational ambitions and seek paid employment. In 1907, she secured a receptionist job at the local Young Women's Christian Association (YWCA) and quickly climbed the ranks to "Industrial Secretary" (a position dedicated to guiding factory girls towards religion, education, and wholesome recreation). Eleven years later, after a brief stint in New York City, Wing was General Secretary of the Cleveland Metropolitan YWCA and a leading advocate for women's suffrage and social welfare legislation. Wing remained with the YWCA until 1922, when she applied to and was accepted at Cleveland Law School.<sup>74</sup>

Law, at that moment, was a natural choice for Wing. From her advocacy work, she had come to appreciate the promise and complexity of legal reform.<sup>75</sup> She also had every reason to expect a warm welcome at Cleveland Law School, which her father helped found in 1897. Wing's legal education was far from secure, however. Her father had by then passed away, and she remained unmarried.<sup>76</sup> Lacking the luxury of a male breadwinner's salary, Wing attended night classes and during the day worked for the Consumers' League. The job often took her to Columbus, where she lobbied the state legislature for wage and hour reforms, compulsory education, and old-age assistance.<sup>77</sup>

The biggest demand on Wing's time, however, was local electoral politics. As General Secretary of the YWCA, she had joined the campaign for a new city charter and proportional representation in city government. In 1922, after that effort succeeded, friends encouraged her to run as an independent for one of the new seats on the City Council. In the post-Nineteenth Amendment world, they urged, women

74. Marie Remington Wing, "One Woman's Memories of Cleveland and Mentor, 1890-1979," Marie Remington Wing papers, Container 1, F 2; Marie Wing, interview by Clinton Warne and Dorothy M. Austin, April 18, 1980, Consumers League of Ohio Oral History Interviews, Western Reserve Historical Society Library, Cleveland, Ohio. On the Miss Mittleberger School, see Sharon Morrison Pinzone, *The Sociocultural Context of Cleveland's Miss Mittleberger School For Girls, 1875-1908* (May 2009) (unpublished Ph.D. dissertation, Cleveland St. Univ.) (on file with OhioLINK).

75. See *'Lady Bountifuls' Draw Fire of Feminist Leader*, WASH. POST, Jun. 28, 1935, at 16 (reporting that after the suffrage fight and some battles over social legislation, Wing came to believe that a legal education would be helpful); cf. ADAMS & KEENE, *supra* note 38, at 149 (observing that a number of suffragists applied to law school after the campaign ended, in order "to extend [their] ability to help others secure their civil rights").

76. The closest thing Wing had to a husband was her longtime companion, Dorothy Smith. Western Reserve Historical Society, Finding Aid to the Marie Remington Wing Papers, Western Reserve Historical Society Library, Cleveland, Ohio. Sue White followed a similar path. See Huehls, *supra* note 33, at 347-64 (on White's "long-term friendship" with Florence Armstrong).

77. On the politics and policies of the National Consumers' League, see STORRS, *supra* note 19.

ought to hold public office. To Wing's surprise, she beat a powerful Republican opponent in 1923 and won reelection in 1925. She lost in 1927 (a result, she alleged, of vote tampering),<sup>78</sup> but in the meantime, she had graduated from law school, passed the bar, and "hung out [her] shingle." At the age of forty-one, she had amassed many friends and acquaintances, and never lacked for clients.<sup>79</sup>

Marie Wing became a New Deal lawyer by accident: she sought out a position in the Roosevelt administration, but in fact aimed higher than the legal staff. In 1936, when Social Security Board member John Gilbert Winant came through town to inquire about someone to head a regional outpost of his agency, Wing's name came up. She was a much better choice, friends of the Administration urged Winant, than the man he had in mind. Thereafter, Wing lobbied hard for the job, making personal appeals to female power brokers Molly Dewson and Frances Perkins, traveling to Washington to state her case to the Social Security Board, and encouraging supporters to write on her behalf.<sup>80</sup> She did not get the position, but the Board was sufficiently impressed to offer her the job of Regional Attorney—general counsel, in effect, for the brand new regional office.<sup>81</sup>

As Regional Attorney, Wing helped the states in her region (Ohio, Kentucky, Michigan) understand the various titles of the Social Security Act and create plans that qualified for federal aid. This was no small task: some programs outlined in the federal Act seemed to replicate existing state-level programs (e.g., aid to dependent children resem-

78. She would later be grateful for having lost the '27 election: soon after, the Council became the center of a corruption scandal; one of Wing's former colleagues was killed, reportedly for knowing too much. Wing, "One Woman's Memories of Cleveland and Mentor, 1890-1979," *supra* note 74; Wing interview, *supra* note 74.

79. Wing, "One Woman's Memories of Cleveland and Mentor, 1890-1979," *supra* note 74; Wing interview, *supra* note 74. Cleveland was by then accustomed, if not entirely friendly, to women lawyers. Genevieve Rose Cline, the first woman to serve on the U.S. Customs Court, began her career in Cleveland in 1921. Florence Allen, the first woman to be elected to a state supreme court and the first woman to serve on a federal appeals court, began her career there in 1914. MORELLO, *supra* note 8, at 231-35.

80. Marie Wing to Mary Dewson, Apr. 24, 1936, Marie Remington Wing papers, Container 4, F 56; Marie Wing to Mary Dewson, May 7, 1936, Marie Remington Wing papers, Container 4, F 56; Marie Wing to Frances Perkins, May 7, 1936, Marie Remington Wing papers, Container 4, F 56; Marie Wing to John G. Winant, May 8, 1936, Marie Remington Wing papers, Container 4, F 56. For letters from Wing to her supporters, and from her supporters to Winant, see Marie Remington Wing papers, Container 4, F 56.

81. Marie Wing to Thomas H. Eliot, May 20, 1936, Marie Remington Wing papers, Container 4, F 56. White's biography includes a similar episode: after working for the SSB's Office of the General Counsel for several years, she applied for the position of Regional Director. The Civil Service Commission rejected her application, ostensibly because she lacked the right kind of experience and the requisite number of years in government service. Huehls, *supra* note 33, at 343-44.

bled state-run mothers' pensions), but in fact demanded the creation of new bureaucracies and the implementation of new, unfamiliar rules. This caused confusion and sometimes hostility.<sup>82</sup> Other programs, such as unemployment compensation, had no precedent in the region, which meant that Wing spent many hours with legislators and lobbyists trying to design an acceptable plan.<sup>83</sup>

Political landmines abounded. In Wing's home state of Ohio, Governor Davey treated the new social welfare programs as a source of plum patronage opportunities and resisted federal guidance. He provoked one of the first compliance hearings in the Board's history when he used old-age assistance records to solicit votes for the 1938 gubernatorial election.<sup>84</sup> Part of Wing's job was to monitor this behavior and advise the central office in Washington about how to pressure state and local officials into compliance. In this, she was fearless. Jack Tate, the highest-ranking attorney in the Social Security Board for much of Wing's tenure, recalled her as a "hell-raiser": she "wanted to try new things in a new way" and was unafraid to "turn the world upside down."<sup>85</sup> Wing stayed in her post for nearly seventeen years, resigning only when a consolidation of the regional offices shifted her position to Chicago.<sup>86</sup>

Wing's path to government work was similar to White's: she became a New Deal lawyer by virtue of her skill, ambition, and social and political networks. What is special about her biography and what merits further exploration is her experience working for the federal government out in a "region." What did it mean to represent the New Deal in locales far removed from Washington, D.C.? Regional attorneys may not have had to confront hostile Supreme Court justices, but they faced an equally difficult task: translating a complex federal law into something intelligible, and sellable, to people who had no part in its drafting and who had strong attachments to alternative legal orders. Simultaneously, they were the eyes and ears of the central agency. Without them, the General Counsel in Washington had no sense of the life of the

82. BLANCHE D. COLL, *SAFETY NET: WELFARE AND SOCIAL SECURITY, 1929-1979* (1995); see generally Tani, *supra* note 61, at 47-62.

83. Wing interview, *supra* note 74; see also Marie Wing's monthly reports to the General Counsel and the Regional Director, Marie Remington Wing papers, Container 4, F 56.

84. See CHARLES MCKINLEY & ROBERT W. FRASE, *LAUNCHING SOCIAL SECURITY: A CAPTURE-AND-RECORD ACCOUNT 1935-1937, 169-74* (1970); COLL, *supra* note 82, at 75-76.

85. *The Reminiscences of Jack B. Tate* (July 6, 1965), at 115-16 (on file with the Oral History Collection of Columbia University, New York, N.Y.).

86. Wing interview, *supra* note 74.



law. In short, this was vital work. The implication is that regional offices may have been sites where women lawyers exercised a form of “ironic power” (i.e., power derived from occupying a less prestigious and desirable position).<sup>87</sup> We need to excavate more information about women like Wing, who situated themselves in the critical junctures between the national and the local.

#### IV. BERNICE LOTWIN BERNSTEIN

From White’s and Wing’s biographies, one might conclude that women lawyers, in contrast to their male counterparts,<sup>88</sup> still needed a certain pedigree to access federal government jobs—not only education, but an upper-class, Protestant, old-stock family. One might also conclude that outspoken feminism, or at least participation in the battle for women’s suffrage, was a prerequisite. The biography of Bernice Bernstein (1908–1996), born Bernice Nisha Lotwin, suggests otherwise. Bernstein was the daughter of Russian-Jewish immigrants. She and her six siblings grew up in a small dairy farming community in Northwestern Wisconsin, where her father traded farming merchandise for a living. Her ticket out was neither family connections nor political influence, but a superior record in the village’s public school, which in turn gave her access to the University of Wisconsin and the state capitol.<sup>89</sup>

Bernstein’s path toward the New Deal began during her junior year of college, when she met progressive-minded faculty and graduate students in the school of economics. Edwin Witte, Arthur Altmeyer, Elizabeth Brandeis, and others were concerned about the social and economic insecurity that the Depression exposed. In “the old La Follette-John R. Commons tradition,” they worked closely with state legislators, and later the Roosevelt Administration, to design solutions. Bernstein chose to enter the University of Wisconsin Law School rather

87. See Mack, *supra* note 9, at 1473 (coining the phrase “ironic power”); see also Felice Batlan, *Engendering Legal History*, 30 L. & Soc. INQ. 823, 847 (2005) (“[The concept of] [i]ronic power conveys many of the ambiguities and contestations that so much of the literature on gender and legal history highlights.”).

88. See Parrish, *supra* note 1, at 747 (“[T]he New Deal lawyers . . . were usually outsiders. They did not quite fit the traditional mold of the legal establishment, because of their ideas, their social background, or their ethnocultural heritage.”).

89. Affidavit of Respondent as to Her Life, In the Matter of: Bernice Lotwin Bernstein In Security Proceedings, December 1954, Papers of Bernard Bernstein, Folder 7, Box 2 [hereinafter Bernstein affidavit].

than pursue an academic career, but she maintained a strong academic interest in social insurance.<sup>90</sup>

Bernstein, unlike White and Wing, closely resembled the prototypical New Deal lawyer when she graduated from law school: she served as note editor for the Wisconsin Law Review, was elected to the Order of the Coif, and graduated at the top of her class (with the best record, rumor had it, of any student in the school's history). Men with similar records were hand-picked for federal government positions, sold to their supervisors as the best and the brightest. After a year working for the Wisconsin Department of Agriculture, Bernstein was chosen, too. Under Donald Richberg, General Counsel of the National Recovery Administration, Bernstein analyzed industry-specific codes of fair practices (she played a particularly important role in drafting the lumber code) and later tackled problems with administration and compliance. She subsequently requested that the Labor Department "loan" her to the newly formed Social Security Board, where she drafted a model state unemployment insurance bill, helped states set up their programs, and eventually settled in for the long term. In her off time, she even relaxed like the prototypical New Deal lawyers, attending parties at the house on Q Street (where a number of the men boarded), and Sunday teas at Justice Brandeis's home.<sup>91</sup>

It was common for New Deal lawyers to move from agency to agency;<sup>92</sup> it was also common for them to leave for lucrative or influential non-government positions.<sup>93</sup> Bernstein, unlike the men of her caliber, did not leave her government position. Certainly, she found her work fulfilling, but she also knew that her options were limited. Years after her law school graduation, she still remembered a mentor warning her that "private practice was 'too tough' for a girl like [her]."<sup>94</sup> With the exception of brief absences, corresponding to the births of her children, Bernstein worked continuously for the federal government, moving from the Social Security Board, to the War Manpower Commission, to the Labor Department. Even after her family relocated to New York, Bernstein found work with the federal government. Jack Tate, a longtime colleague and by then the General Counsel of the Federal Se-

90. *Id.*

91. *Id.*; see also The Reminiscences of Bernice Lotwin Bernstein (Mar. 3, 1965, Apr. 2, 1965, Apr. 6, 1965) (on file with the Oral History Collection of Columbia University, New York, N.Y.).

92. See generally the materials cited *supra* note 1.

93. See generally the materials cited *supra* note 1.

94. Bernstein affidavit, *supra* note 89.

curity Agency,<sup>95</sup> wooed her back with the position of Regional Attorney. She held that post until 1966, when the agency elevated her to Regional Director. (In the meantime, her agency changed names, becoming the Department of Health, Education and Welfare (HEW).) After eleven years, spanning the welfare rights movement and New York City's fiscal crisis, Bernstein was finally ready to retire, but she served a capstone year as special assistant to HEW Secretary Joseph A. Califano, Jr.<sup>96</sup>

Bernstein's biography suggests that women lawyers, whether because of intra-governmental networks or private sector discrimination, may have been more likely than their male peers to stay in government once employed there. This choice had consequences, as a final episode in Bernstein's biography illustrates. On April 27, 1953, President Truman issued Executive Order No. 10450, which broadened the coverage of the 1950 statute that was the cornerstone of the federal loyalty-security program. Under the terms of the Order, the heads of *all* federal government departments and agencies became responsible for "insur[ing] that the employment and retention" of each of their civilian employees was "clearly consistent with the interests of the national security"; persons who failed to meet that standard could be summarily suspended or dismissed.<sup>97</sup> Agencies implemented the order by designating particular positions as "sensitive," and then conducting "full field investigations" of the holders. Learning that her position had been so classified, Bernstein contacted Frederick Schmidt, her agency's Director of Security (and a former supervisor in the FBI's Criminal Division), to inform him about two pieces of information: her prior membership in the National Lawyers Guild and her brief acquaintance with a handful of "'rotten' characters" in the Treasury Department, where her husband Bernard had worked as assistant general counsel. Bernstein urged Schmidt to review all the information in her government file and to secure from her and her husband any other information that he desired, but to postpone conducting a full field investigation. She considered her reputation "above reproach and outstanding," but she would rather resign, she said, than subject her three

95. In 1939, under an executive reorganization plan, the Social Security Board became part of the Federal Security Agency, an umbrella-type agency that housed both New Deal and war-related programs.

96. Bernstein affidavit, *supra* note 89; Wolfgang Saxon, *Bernice Bernstein, 87, U.S. Chief of New York Health Programs*, N.Y. TIMES, Mar. 2, 1996.

97. Security requirements for Government employment, 18 Fed. Reg. 2489 (Apr. 27, 1953) (to be codified at 3 C.F.R., 1949-1953).

school-age children to the “discussion” that an investigation would inevitably produce in her suburban Long Island community. Schmidt invited Bernstein to submit a written statement, which she promptly did. Without her knowledge, he also initiated a thorough investigation.<sup>98</sup>

On October 6, 1954, Bernstein received a letter from the Under Secretary of the Department of Health, Education, and Welfare informing her that “removal from employment may be necessary.” In the 1940s, the investigation found, she and her husband “established and continued a sympathetic association” with Harry Dexter White, William Henry Taylor, Nathan Gregory Silvermaster, “and others who have been reported as members of the Communist Party and involved in a Soviet espionage conspiracy.”<sup>99</sup> Accordingly, the Director of Security suspended Bernstein’s employment. Bernstein had thirty days to refute the charges.<sup>100</sup>

The transcript of Bernstein’s January 12, 1955, hearing before the HEW Security Hearing Board suggests how dangerous life had become for government employees. The proceeding centered on the extent of Bernstein’s interactions with the alleged Communists in the Treasury Department, but ranged widely across her personal and professional life. Security Director Schmidt interrogated her about a particular book in her private library and the “accumulation” of funds in her family’s bank account since the mid-1940s.<sup>101</sup> To attempt to demonstrate Bernstein’s loyalty, her lawyer<sup>102</sup> asked her such questions as how she felt about the Russian invasion of Finland (“shocked”); how she perceived communism when she was in college and law school (“a freak ideology”); whether she was “a believer in our free enterprise system” (“I am”); what her taste was in music (“basically classical”); and whether her children attended “a progressive school” (“No. It is quite

98. Bernice Lotwin Bernstein to Parke M. Banta, August 23, 1954, Papers of Bernard Bernstein, Box 7, Folder 2; Bernice Lotwin Bernstein to Frederick Schmidt, May 17, 1954, Papers of Bernard Bernstein, Box 6.

99. On the exposure of the “Silvermaster Ring” (via informant Elizabeth Bentley) and the group’s broader significance for American anti-communism, see JOHN EARL HAYNES & HARVEY KLEHR, *EARLY COLD WAR SPIES: THE ESPIONAGE TRIALS THAT SHAPED AMERICAN POLITICS* (2006).

100. Nelson A. Rockefeller to Bernice L. Bernstein, October 6, 1954, Papers of Bernard Bernstein, Box 7, Folder 2.

101. In the Matter of: Bernice Lotwin Bernstein, Transcript of Proceedings, Department of Health, Education, and Welfare, Security Hearing Board, Washington, D.C., Jan. 13, 1955 [hereinafter hearing transcript].

102. Joseph Fanelli was another New Deal lawyer. He served as special assistant to the U.S. Attorney General and was reportedly one of Felix Frankfurter’s favorites. *THE MAKING OF THE NEW DEAL*, *supra* note 1, at 103.

conservative.”).<sup>103</sup> Loyalty, these questions imply, could be proven only through demonstrated adherence to upper-middle class norms, cultural conservatism, and a muscular, capitalist-oriented variety of political liberalism. All non-conforming facts had to be explained. For example, in examining Bernstein about her 1936 work on social insurance, Bernstein’s counsel observed that the topic was then “of particular interest to the left-wingers and pinkos and communists,” and yet Bernstein took a “strictly technical and scholarly” approach.<sup>104</sup>

Through aggressive lawyering and the support of the many friends and colleagues who swore to her good character, Bernstein survived the loyalty-security review. But it nearly derailed her career and took a severe personal and financial toll. As Bernstein confided in a friend, the process was “exhausting and soul-searching”; nothing “in [her] whole life ha[d] hit [her] as hard.”<sup>105</sup> This episode and others like it are important data points in our analysis of the opportunities that government offered, and continues to offer, less privileged members of the bar.<sup>106</sup> They remind us to investigate not just the rewards but also the risks that attend government work. Ideological purges may be a thing of the past, but changes in the political winds and fluctuations in the support for public jobs are not. Such instabilities are particularly problematic for lawyers who will be disadvantaged when they search for work outside government.

### CONCLUSION: IMPORTANCE AND UNIMPORTANCE

When Marie Remington Wing sat down, at the age of ninety-three, to write her life story, she began with a scene from *Alice in Wonderland*. It is Alice’s trial, and the King of Hearts is attempting to explain to the jury which facts are “important” and which are “unimportant.” He

103. Hearing transcript, *supra* note 101.

104. *Id.*

105. Bernice Bernstein to “Reg,” Jan. 17, 1955, Papers of Bernard Bernstein, Box 7. For more on the personal impact of loyalty-security investigations, see DAVID CAUTE, *THE GREAT FEAR: THE ANTI-COMMUNIST PURGE UNDER TRUMAN AND EISENHOWER* (1978); ELLEN SCHRECKER, *MANY ARE THE CRIMES: MCCARTHYISM IN AMERICA* (1998); DAVID K. JOHNSON, *THE LAVENDER SCARE: THE COLD WAR PERSECUTION OF GAYS AND LESBIANS IN THE FEDERAL GOVERNMENT* (2004); Andrea Friedman, *The Strange Career of Annie Lee Moss: Rethinking Race, Gender, and McCarthyism*, 94 J. AM. HIST. 44 (2007). In terms of financial expense, Bernstein’s lawyer devoted 162 hours to the case, at a cost of \$4,234. Bernstein and her husband surely dedicated those hours and more. Joseph H. Fanelli to Bernard Bernstein, Jan. 17, 1955, Papers of Bernard Bernstein, Box 7.

106. For more recent data on women lawyer’s occupational segregation, and their continued disproportionate representation in public sector jobs, see DEBORAH L. RHODE, *THE UNFINISHED AGENDA: WOMEN AND THE LEGAL PROFESSION* 25 (2001).

quickly loses track of the meaning of the terms. “[I]mportant—unimportant—unimportant—important,” he mumbles to himself, much to the confusion of Alice and the jury. Wing found herself in similar straits: she had much to say, but felt that she lacked the perspective needed to assess its significance.<sup>107</sup> This is the task of historical scholarship, and humanistic scholarship more generally: to continually assess and re-assess significance; to take existing categories and orderings and reconstruct them, so that raw data, new and old, becomes meaningful to today’s consumers.<sup>108</sup> It is especially the task of historians of women, since their data is so often cast into the “unimportant” bin.

This essay is an attempt to re-assess the legal careers of three “unimportant-important” women, and a plea for others to continue this work. According to conventional narratives, these women are not significant. They did not stand up before the Supreme Court and defend New Deal legislation. They did not become legislators, judges, or famous academics. Yet, their stories have much to offer us. White, the fiery suffragist who died too young, encourages us to consider the difference that gender made to the high-stakes interpretive and administrative work of New Deal lawyers. White’s biological sex did not dictate the style or quality of her lawyering, but there are hints that her path to the New Deal—a path that had everything to do with gender—affected the way that she interacted with colleagues and analyzed legal questions. Wing, the “hell-raiser” from Cleveland, inspires us to think more deeply about power and place. Regional outposts of the federal government were not as desirable to young, male graduates of Harvard Law School, and yet, as Wing discovered, they were the sites of political influence and vital legal work. Bernstein is perhaps the most intriguing case study, since in pedigree and placement she was the female equivalent of one of Felix Frankfurter’s “Happy Hotdogs.” Unlike most of her male counterparts, who used the New Deal as a launching pad for celebrated careers in academia, private practice, and politics, Bernstein remained an administrative lawyer for decades. We need more information about the costs and benefits of this career trajectory, both for the individual and for society.

Together, the lives of all three women provoke one final question. In the area of social welfare and elsewhere, much law-making happens

107. Wing, “One Woman’s Memories of Cleveland and Mentor, 1890–1979,” *supra* note 74 (quoting LEWIS CARROLL, *ALICE’S ADVENTURES IN WONDERLAND* 148–149 (Collins Design 2010)).

108. See BERNHARD FABIAN, *THE FUTURE OF HUMANISTIC SCHOLARSHIP* 18–21 (1990).

neither at the top, with Congress and the appellate courts, nor at the bottom, with the people. It happens somewhere in between, with ground-level decision-makers and mid-level bureaucrats.<sup>109</sup> Who occupied that level of decision-making in 1935? Who occupies it now? Much of the content of today's law is their doing.

109. Felicia Kornbluh & Karen Tani, *Siting the Legal History of Poverty: Below, Above, and Amidst*, in THE BLACKWELL COMPANION TO AMERICAN LEGAL HISTORY (Al Brophy and Sally Hadden, eds., forthcoming 2012); see also DANIEL P. CARPENTER, THE FORGING OF BUREAUCRATIC AUTONOMY: REPUTATIONS, NETWORKS, AND POLICY INNOVATION IN EXECUTIVE AGENCIES, 1862-1928, 19-21 (2001) (describing the importance of "mezzo-level" bureaucrats in executive agencies in the late nineteenth and early twentieth century); MARGOT CANADAY, THE STRAIGHT STATE: SEXUALITY AND CITIZENSHIP IN TWENTIETH-CENTURY AMERICA (2009) (observing the importance of federal bureaucrats in constructing an official response to homosexuality and in constructing the concept of homosexuality itself); LUCY SALYER, LAWS HARSH AS TIGERS: CHINESE IMMIGRANTS AND THE SHAPING OF MODERN IMMIGRATION LAW (1995) (describing the role of low-level immigration inspectors in shaping immigration law and policy).