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# PREFACE

## LAW AND THE CREATION OF MEANING: A BRIEF REFLECTION ON THE WORK OF JANE LARSON

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I first met Jane when she was my student at the University of Minnesota and while the purpose of this gathering is not to exchange reminiscences about Jane, the person, separating her work from who she was would not be faithful to the work she produced and the impact that it had. I selected the title of this short piece with some care because while Jane was absolutely committed to the idea of law as an autonomous academic discipline, neither restrained by strict doctrinalism nor parasitic on other precincts of the academy, she also understood that legal scholarship stands at the intersection of reason and power and there is a special responsibility to be clear about how law functions as an interlocking set of coercive normative institutions. Thus her work, firmly rooted in formal legal analysis, was also of a piece with the methodologies and ambitions of both the social sciences and the humanities.

A quick look at the topics and the methodologies assayed in her work reveals her range. Prostitution and Human Rights, Rape Reform in Late Nineteenth Century America, Informality, Illegality, and Inequality, Class, Economics and Social Rights, Conflict of Laws, the Constitutionality of the Independent Counsel Statute, Using the FTC Act Precedents in State Consumer Protection Cases, The Impact of Titling on Low Income Housing in Texas and these do not exhaust the titles of her works (it leaves out many and does not include her important book).[1] Yet if you look at her work what ties it together

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1. See, e.g. Jane E. Larson, *New Home Economics*, 10 Const. Comment. 443 (1993); *Prostitution, Labor, and Human Rights*, 37 U.C. Davis L. Rev. 673 (2003-2004); *Imagine*

was in many ways her commitment to a continuation of the realist project.[2] Thus her methodological turn to both the social sciences and to the humanities. She understood that Critical Legal Studies and Feminist legal inquiry were elaborations on the idea that law is not an autonomous institution from which rules issue unsullied by the political, legal, and social culture that produced them. Neither are judges (much less Justices) resistant to the currents of the river they swim in. Nonetheless, her commitment, like the realists, was to facts. She did not believe that judicial decision-making was an exercise in unconstrained power or the mere exercise of individual preference, but she wanted to make plain what those constraints might be and how they reflected the relatively unspecified norms of the institution in question. Doctrine and legal reasoning as independent methods of analysis or sources of decision may not be dispositive, but they perform an important translating role between the situation of the conflict and the rules a judicial actor might access to resolve that conflict. Understanding the dynamics of the struggle is actually key to understanding the role that law and legal decision-making might play sorting out the not just the legitimate use of power, but the crawl spaces where the powerful might be resisted.

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*Her Satisfaction: The Transformative Task of Feminist Tort Work*, 33 Washburn L.J. 56 (1993-1994); *Introduction: Third Wave—Can Feminists Use the Law to Effect Social Change in the 1990's*, 87 Nw. U. L. Rev. 1252 (1992-1993); *A Good Story and the Real Story*, 34 J. Marshall L. Rev. 181 (2000-2001); *Class, Economics, and Social Rights*,54 Rutgers L. Rev. 831 (2001-2002); *Free Markets Deep in the Heart of Texas*, 84 Geo. L.J. 179 (1995-1996); *Sexual Injustice of the Traditional Family*, 77 Cornell L. Rev. 997 (1991-1992); *Women Understand So Little, They Call My Good Nature Deceit: A Feminist Rethinking of Seduction*, 93 Colum. L. Rev. 374 (1993); *Even a Worm Will Turn at Last: Rape Reform in Late Nineteenth-Century America*, 9 Yale J.L. & Human. 1 (1997); *A House Divided Using Dred Scott to Teach Conflict of Laws*, 27 U. Tol. L. Rev. 577 (1995-1996); *The Constitutionality of the Independent Counsel Statute*, 25 Am. Crim. L. Rev. 187 (1987-1988); *Sexual Labor and Human Rights*, 37 Colum. Hum. Rts. L. Rev. 391 (2005-2006) (with Berta E. Hernandez-Truyol); *Feminism in Relation*, 17 Wis. Women's L.J. 1 (2002) (with Catherine Albiston and Tonya Brito); *Using FTC Act Precedents In State Consumer Protection Cases*, 3 Antitrust 24 (1988-1989) (with Lawrence R. Fullerton) ; *El Titulo en la Mano: The Impact of Titling Programs on Low-Income Housing in Texas Colonias*, 36 Law & Soc. Inquiry, (2011) (with Peer M. Ward, Flavio de Souza, and Cecilia Giusti); HARD BARGAINS: THE POLITICS OF SEX (with Linda Hirshman) (1998).

2. See, Jane E. Larson, *Is It Time for a New Legal Realism?* (with Howard Erlanger, Bryant Garth, Elizabeth, Mertz, Victoria Nourse, and David Wilkins) 2005 Wisc. L. Rev. 335 (2005). The "realist project" is difficult to define in any absolute sense because of all of the competing claims to its core concepts. Moreover, there have been many vulgar characterizations of what the realists were up to and whether they were systematic theorists at all. Suffice to say for the purposes of this essay and for understanding Jane's work, the realist project was essentially a methodological program that sought to identify and describe the patterns of judicial decisions and to use insights and methods of the social sciences to accomplish that task. In addition, realists understood that courts, while couching their opinions in the language of doctrinal categories often "enforce the prevailing, uncodified norms as they would apply to the underlying factual situation." *See* BRIAN LEITER, NATURALIZING JURISPRUDENCE, 61-65 (2007). Of course, I have added here that the divide between the humanities and the social sciences is not so neat as the ordinary categories would suggest and that separation is particularly troubling in the context of law because of its position as a mediator between or justifier of coercive normative institutions.

Her renovation of legal realism moved beyond the critique of classical legal thought or classical legal liberalism, but she did not toss formalism as a method onto the trash heap. She knew that unreflective judicial law-making relied on formal arguments and doctrinal extension to a degree that the inability to master these techniques of lawyering was to stand disarmed in the face of power.[3] Without denying the ways in which moral, political, social, and economic conflict constructed law, she understood that the mythology of law was a powerful force in itself. Thus she saw the engagement with history as a critical step in providing the necessary distance between the critics of the law and the objects of legal rules. History put the operation of law in context. It also provided a comparative foundation for understanding the situation of current legal disputes. Without ever falling prey to presentism, her recourse to history was a technique for recapturing facts that would permit us to understand the nature of the legal and social problems we were confronting as well as the nature of the illusions about the law we had to both reveal and manage.

As with her most important teachers, she understood that to endeavor to reclaim the discourse of lived reality she would have to fashion legal arguments that could take that reclaimed discourse and turn it into a weapon that courts and other legal actors would have to confront and take seriously.[4] The institutions of law are just one means of social control, but the place that legal discourse occupies in our culture means that it would always be a place where the macro struggles of our time would be refracted into almost denatured categories. She knew there is no place free from the play of politics, but that law, legal reasoning, and legal argumentation were a particular kind of politics and that failing to appreciate the semi-autonomous nature of legal institutions and the formalism of legal analytic and argumentative forms would be to misunderstand law. But while she understood the instrumental qualities of law and legal analysis she also knew that law was not limited to its instrumental purposes or techniques. Law, in short, was about power, and hegemony required that raw power be converted into meaning.

The idea of hegemony as a description of how law functions to maintain specific kinds of social control without requiring the constant imposition of brute power animates much of her work. Her most trenchant critiques involved demonstrating how the mask of consent was merely the normalized relations of class, race and gender. Yet, her critique, rooted as it was in the law, never slipped into the kind of easy structural analysis that yields thin and unsatisfying conclusions. Instead, her conception of culture and its role in perpetuating and justifying social relations was sensitive and nuanced and thus produced a rich description of the impact of legal changes as well as the impact of the law before it was enlisted in the struggle to produce change. The social life of the colonias would not be dramatically changed by titling the occupants of the land

3. Frederick Schauer, *Formalism*, 97 Yale. L. J. 509 (1988). *See also* FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING (2009).

4. Gerald Torres, *Sex Lex: Creating A Discourse*, 46 Tulsa L. Rev. 101 (2012); Torres and Milun, *Translating Yonnondio by Precedent and Evidence: The Mashpee Indian Case*, 1990 Duke L. J. 625 (1990).

purchased on contract, but it would provide an additional tool to rebalance the power along the border. The formal change could provide an asset that could be enlisted in the struggle between potential landowners and the developers who would use their dreams of home ownership against the colonia residents. She could apply the analysis of de Soto and assess its impact across a variety of institutions. Would it change the way credit functioned in the Rio Grande valley? Would it change the nature of civic engagement? Her inquiries were empirical and deeply theoretical, exactly what we want legal scholarship to be.[5] Rather than take the empirical work of people like de Soto and make an ideological argument, she said, "Let's look." When I suggested that part of her project was to renovate the realist critique, her work in the colonias was a cardinal example of that project. But it was not the only one.

Her commitment to changing the discourse of gender inequality was not limited to the historical work she did, although it was in the service of that project. Instead it was rooted in the idea that you had to take the lived experience of women as the starting point for re-crafting how issues of gender are understood. This is evident in the briefs she helped write as well as in the historical work she did. Her essay on the tort of seduction[6] illustrates this in an exemplary fashion. She had to understand and explicate not only the specific tort, but the doctrinal structure of tort remedies and it was in the careful dissection of the doctrine and with it a careful examination of the social meaning of the claimed harm that the assault on the dominant discourse of gender relations was most acute.[7] That essay was a model of scholarly care and carefully grounded social critique. When the idea of creating a new legal discourse of gender is understood as such it is work like this essay that will be the wellspring of that development as much as any deeply abstract philosophical inquiry, as important as such inquiries might be.

Her work on prostitution is bracing because it calls to account in a lucid and cool way those who would try and redefine labor, consent, and freedom. She does this using the tools of law, history, and social theory. She points out the under-theorized accounts of labor that are elided in the consideration and criticism when the specific labor is sexual labor. By demonstrating that the liberal account of slavery and gender essentially prevents the full appreciation of the social relations of labor she is not just updating Marxism, she is saying that the insight that Marx applied to labor is distorted when pushed through a liberal legal sieve. This telling does not turn away from the realities of sexual labor, but asks hard questions about the nature of "free labor" and the conditions under which it is regulated. She exposes the contradictions in the very nature of the regulations themselves by demonstrating that they cannot usefully comprehend the labor conditions that exist in the world and that their approach to prostitution is merely the most pronounced example.

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5. Hernando de Soto, *The Mysteries of Capital* (2000).

6. Jane E. Larson, *Women Understand So Little, They Call My Good Nature Deceit: A Feminist Rethinking of Seduction*, 93 Colum. L. Rev. 374 (1993).

7. This was in many ways exactly like the realist situational critique of tort doctrine.

Yet, as I reflect on her work I am reminded of her courage. I hope you will indulge this little aside. The best work is always the result of hard work and a powerful intellect, but one aspect of both of those attributes is often overlooked, and it is the thing that makes all the difference: courage. Of course, intellectual courage is a prerequisite to honest inquiry, but with Jane, her courage was evident not just in her work, but in her actions. When the Minneapolis anti-pornography ordinance proposed by Professor Catharine MacKinnon was taking shape, the opposition to the effort was not restricted to reasoned disagreement. Beyond the attempts to lampoon the ordinance by casting it as censorship rather than as a remedial measure to compensate those who had been harmed by pornography, there were real physical threats to supporters of the ordinance. Jane was one of those people whose reasoned opposition to pornography carried with it real physical jeopardy. Her steadfast work not only revealed the strength of her intellectual commitment, but her refusal to be intimidated. While I have no evidence of the hardships she faced in the colonias of south Texas, I am sure that those grandees who could see their power being challenged were not well pleased either. Her activism was rooted in a detailed understanding of the law and the social conditions under which it was operating. As the civil rights and feminist struggles have demonstrated, the redemptive or liberatory potential in making the law do what it says is often overlooked, but it takes a critical analyst to unlock that potential. This is intellectual work with a bite and was an expression of her intellectual honesty that she did not shrink from any pressure her analysis produced.

I could review all of her work and it would reveal the same virtues I have outlined here. This is not to say that her work was not worthy of critique itself, but importantly, it was generative. The mark of any important work is often not so much in the work itself, but in the other work it generates. It may be critical work or it may be work extending the lines of inquiry, but that it produces a scholarly reaction (and a conversion of the scholarly inquiries into action) is the true mark of any work's staying power. Her analysis of the legal and social dynamics in the colonias was especially important as gauged by this metric. It generated additional legal and cross-disciplinary work.

It is often said that one of the benefits of good scholarship is that it informs teaching by making insights deeper. More than that, however, in the case of Jane's work, it created a capacity to imagine herself into the lives of others. That empathic capacity combined with her deep knowledge of her subjects made her an exemplary teacher as was evidenced by the regard with which her students' held her. Teaching cannot be separated from the task of scholarship, especially if the scholar is open to the questions of her students. This openness is evidence of a mind that, while searching and methodologically disciplined, is not disposed to treat the untutored inquiry as beside the point. Instead, the capacity to communicate to an audience that is not composed just of peers in a way that respects both the subject and the inquisitor is also the mark of a mature and self-confident scholar.

I said that I did not choose the title to this brief essay lightly and that is true. I believe that the law is as much a part of the humanities as it is part of the social sciences. It is parasitic on neither yet it occupies a kind of middle

ground. Because of the various ways it both expresses and mediates social and state power, it is a central institution in creating the consciousness of our social position. That consciousness is where meaning lies and scholars who scour the edges of it expose the mask of consent that justifies public and private power. Jane held those justifications up and thrust them into the light where we could all see them.