

Feminist Legal Realism?

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Abstract
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I. Introduction

The Legal Realist movement has generated remarkable renewed interest in recent years. Countless books,¹ law review articles,² and blog posts³ have been dedicated to the subject. Legal and other scholars repeatedly have returned to the well to attempt to better define Legal Realism and ascertain its adherents. Although certain usual suspects like Roscoe Pound, Karl Llewellyn and Jerome Frank are almost always a part of the conversation, surprisingly few agree on the totality of Realism's personage and parameters. The lists of those considered Realists -- and there are many -- are constantly expanding and contracting. Its teachings and implications are ever-evaluated. In all of this alleged evolution, however, one thing has remained constant -- male-centered conceptions of Realism have occupied the center of the debate.

¹ See, e.g., BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* (Princeton U. Press 2010); WOUTER DE BEEN, *LEGAL REALISM REVISITED* (Stanford University Press 2008); BRIAN LEITER, *NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY 1* (Oxford Press 2007); MOSES J. ARONSON, *ROSCOE POUND AND THE RESURGENCE OF JURISTIC IDEALISM* (Kessinger 2007); E.W. THOMAS, *THE JUDICIAL PROCESS: REALISM, PRAGMATISM, PRACTICAL REASONING AND PRINCIPLES* (Cambridge University Press 2005); MICHAEL MARTIN, *LEGAL REALISM: AMERICAN AND SCANDINAVIAN* (P. Lang 1997); N.E.H. HULL, *ROSCOE POUND & KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE* (University of Chicago Press 1997); BRIAN Z. TAMANAHA, *REALISTIC SOCIO-LEGAL THEORY* (Oxford University Press 1997); JOHN HENRY SCHLEGEL, *AMERICAN LEGAL REALISM AND EMPIRICAL SOCIAL SCIENCE* (University of North Carolina Press 1995); see also CULTURAL ANALYSIS, *CULTURAL STUDIES, AND THE LAW: MOVING BEYOND LEGAL REALISM* (Duke U. Press 2003, Austin Sarat and Jonathan Simon, eds.).

² See, e.g., David Marcus, *The Federal Rules of Civil Procedure and Legal Realism as a Jurisprudence of Law Reform*, 44 Ga. L. Rev. 433, 437 (2010); Robert Weisberg, *Did Legal Realism Engage the Real World of Criminal Law?*, 7 OHIO ST. J. CRIM. L. 293 (2009); Pierre Schlag, *Formalism and Realism in Ruins: (Mapping the Logics of Collapse)*, 95 Iowa L. Rev. 195 (2009); Eric Engle, *The Fake Revolution: Understanding Legal Realism*, 47 WASHBURN L.J. 653 (2008); Lewis A. Grossman, *Langdell UpsideDown: James Coolidge Carter and the Anticlassical Jurisprudence of Anti-Codification*, 19 Yale J. of L. and the Humanities 149 (2007); William P. Marshall, *Judicial Accountability in a Time of Legal Realism*, 56 CASE W. RES. L. REV. 937 (2006); Michael Steven Green, *Legal Realism as Theory of Law*, 46 WM. & MARY L. REV. 1915 (2005); William E. Nelson, *Brown v. Board of Education and the Jurisprudence of Legal Realism*, 48 ST. LOUIS U. L.J. 795 (2004); Ben Glassman, *Representing Law, Representing Truth: Legal Realism and Issues in the Ethics of Representation*, 44 HOW. L.J. 1 (2000); see also Victoria Nourse & Gregory Shaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?*, 95 CORNELL L. REV. 61 (2009).

³ See, e.g., Stone on John R. Commons & Legal Realism, found at: <http://legalhistoryblog.blogspot.com/search?q=legal+realism> (last visited July 23, 2010); Leiter Reports: A Philosophy Blog, found at: <http://leiterreports.typepad.com/blog/2010/07/legal-formalism-and-legal-realism-what-is-the-issue.html> (last visited July 23, 2010); Legal Realism, Herman Pritchett, and the Great Divide, found at: http://www.elsblog.org/the_empirical_legal_studi/2006/06/legal_realism_p.html (last visited July 23, 2010); Llewellyn Lives, found at: <http://legalhistoryblog.blogspot.com/2008/10/llewellyn-lives.html> (last visited July 23, 2010); Pound at Large and at Bay, found at: <http://legalhistoryblog.blogspot.com/2008/09/pound-at-large-and-at-bay.html> (last visited July 23, 2010); Legal Realism in International Arbitration, found at: <http://kluwerarbitrationblog.com/blog/2009/02/20/legal-realism-in-international-arbitration/comment-page-1/> (last visited July 23, 2010).

Arguing this center should not hold, this article begins to challenge traditional understandings of Realism with a gendered account of the Realist enterprise.⁴ It attempts to shift those in legal history's margins to the mainstream by examining the work of realistic women in law during the Realist era's heyday and beyond. To do so, it encourages looking beyond the leading lights of the Ivy League, Ivory Tower, and prestigious courts.

Unlike prior dominant Realist narratives, this alternative account is interested in the work of women in the legal trenches and on trial benches pressing to create their own practical jurisprudence rooted in realistic projects during the first half of the last century. Focusing on the realistic work of Judge Anna Moscowitz Kross, it starts to tell the story of law women of her generation who were not just talking Realism, but actually "doing" Realism. It suggests they were not anomalies. Many women were engaged in realistic social and court reform efforts throughout this time, significant in their aspirations and impact, but largely below history's radar.

With Kross as a centerpiece, this article begins to unearth contributions of realistic women in law – starting down the path to revise Realism's written history and potentially renew its pragmatic promises. Kross and her cohorts primarily sought to address social problems they believed contributed to oppression, marginalization, and day-to-day inequality experienced by individuals, families and communities. This article examines those concerns and explores the motivations of their active engagement with the law as lived.

Further, this article focuses on the methods of the realistic women like Kross and others of her generation. In some ways their modes of operating found parallels in the work of their male Realist contemporaries. But their less academically-driven activities, sustained community-based efforts, and strikingly communal approaches stand in stark contrast to the heady, removed, and largely exclusionary work of male Realists at the time. The small handful realistic women who made their way to the legal academy by the end of this era also provide a somewhat different vision of the standard, masculine Realist account.

Less interested in list-making and dominance of ideas, these women, like Kross, generally did not shy away from seeing real-life social problems up close and in a multi-dimensional light. Authentically interdisciplinary and collaborative, they sought practical solutions for the real issues and real people with whom they personally connected. In this way, their work during this time may be seen as more feminist in its values, practices, and goals.

Beyond merely providing an account of forgotten women from the past, this article offers some thoughts about current feminist legal activities, as well as hopes for

⁴ This article serves as the foundation for my book project in progress, *FEMINIST LEGAL REALISM? REALISTIC WOMEN IN THE TRENCHES, ON THE BENCHES, AND BEYOND*. It also expands on my initial thoughts on this subject in *Further (Ms.)Understanding Legal Realism: Rescuing Judge Anna Moscowitz Kross*, 88 *Tex. L. Rev.* See Also 43 (2009).

the future. It suggests that those who are currently grappling with the realities of feminism and the law – particularly within the academy -- may draw some lessons from the life and experiences of Kross and her contemporaries.

Like feminists today, in the shadows of constructed categories and lists, they too sought to establish their own agency and identities while challenging lived injustice. And although no path is ever perfect, their generally more rooted, communal, and practical approaches to feminist concerns -- through activism and not just academics, proximity over polemics, doing beyond talking -- may provide a potent shot in the arm for those feeling the frustration of feminism's limited impact on the law and its institutions as lived.

In the end, on-the ground practices and methods that largely focus on pragmatic improvement, inclusion, and humane connection, rather than supremacy of ideas, Ivory Tower acceptance, and ego-driven accolades, may help revive feminist projects that have become increasingly individualistic, inaccessible and nihilistic. As such this work suggests a new ongoing Legal Realist agenda, one that may be called *Feminist Legal Realism*.⁵

This article begins by sketching the traditional androcentric account of Realism....

⁵ To date, I have found no references to the term "Feminist Legal Realism" in legal scholarship or other related writings that I have reviewed on this subject. Notably, however, the term "feminist realism" has been used in the literary, artistic, and religious realms. See, e.g. MOLLY YOUNGKIN, *FEMINIST REALISM AT FIN DE SIECLE* (2007) (describing the influence of a late Victorian women's periodicals and presses on the development of the novel as a literary genre); Serena Anderlini-D'Onofrio, *Is Feminism Realism Possible? A Theory of Labial Eros and Mimesis*, 8 *J. of Gender Studies* 159 (1999)(proposing "a notion of mimesis based on female embodiedness and eros," for instance by replacing Aristotle's phallic mimesis with labia-centric representations); Beverly Harrison, *Feminist Realism*, 46 *Christianity and Crisis* 233 (1986)(attempting to construct a Christian feminist moral agenda with regard to the issue of abortion).

II. The Traditional Realist Story: Men In Search of a Practical Jurisprudence

Legal Realism has been called one of the most significant legal movements in the United States.⁶ Given the movement's breadth and impact on legal institutions, if not the lore of its expanse and effect, as a reality it is hard to ignore.⁷ And if scholarly attention is any measure of a movement's import, page for page Realism likely tips the scales.⁸

To date Legal Realist accounts have focused on the life and work of high-profile and high-ranking men in the legal academy and courts who attempted to make better sense of law in the United States during the first half of the last century.⁹ Perhaps most frequently Realism has been framed as a jurisprudence that argued against natural meaning and mechanical application of law by courts, instead urging mindfulness about the law as interpreted and felt in the real world.¹⁰ Thus at times both descriptive and

⁶ BRIAN LEITER, *NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY* at 1 (Oxford Press 2007); *see also* WILLIAM W. FISHER, III, MORTON J. HOROWITZ & THOMAS A. REED, *AMERICAN LEGAL REALISM* xiv (Oxford Press 1993) ("in several respects Legal Realism was an extraordinarily influential movement in American Legal History"); *CULTURAL ANALYSIS, CULTURAL STUDIES, AND THE LAW: MOVING BEYOND LEGAL REALISM* at 6 (Duke U. Press, 2003 (Austin Sarat and Jonathan Simon, eds.)) ("With the ascendancy of legal realism during the last two-thirds of the twentieth century, both law and social science found themselves engaged in the practical arts of governing to an extent barely imagined in the preceding century.").

⁷ Twining, *Talk About Realism, supra n. ___* at 381 ("the Realist Movement is of enormous historical significance and interest, in the United States and beyond, in terms of both particular achievements and a general but extremely elusive kind of 'influence.'"); *see also* Rodger D. Citron, *The Nuremberg Trials and American Jurisprudence: The Decline of Legal Realism, The Revival of Natural Law, and the Development of Legal Process Theory*, 2006 MICH. ST. L. REV. 385, 386 (2006) (stating that critics characterized the Legal Realist movement as fruitless, and that even in the early 1930s, Realism was not a dominant movement, but was prominent in that it was extensively discussed); Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054, 2072 (1995) ("The legacy of legal realism is difficult to estimate or evaluate."); Steven M. Quevedo, *Formalist and Instrumentalist Legal Reasoning and Legal Theory*, 73 CAL. L. REV. 119, 120 (1985) ("For all of its prominence, the formalism/instrumentalism distinction has proven elusive in recent jurisprudence. . . . [and] has failed to bear intellectual fruit when put to work by legal historians. . .").

⁸ A Westlaw search in the journals and law reviews database ("JLR") using the term "legal realism" produces 6,230 documents.

⁹ *See, e.g.*, BRIAN LEITER, *NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY* (Oxford University Press: 2007); N.E.H. HULL, *ROSCOE POUND & KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE* (University of Chicago Press: 1997); WILLIAM W. FISHER, III, MORTON J. HOROWITZ & THOMAS A. REED, *AMERICAN LEGAL REALISM* (Oxford Press 1993); LAURA KALMAN, *LEGAL REALISM AT YALE, 1927-1960* (University of North Carolina Press: 1986); *see also* William Twining, *Talk About Realism*, 60 N.Y.U. L. Rev. 329 (1985).

¹⁰ Brian Leiter, *American Legal Realism in THE BLACKWELL GUIDE TO PHILOSOPHY OF LAW AND LEGAL THEORY* at ___ (United States realists "were reacting against the dominant 'mechanical jurisprudence' or 'formalism' of their day"); *see also* TAMANAHA, *supra n. ___* at ___.

normative in their efforts,¹¹ by the standard account Legal Realists offered a new take on judging as well as advocated broader acceptance of emerging non-formalistic judicial methods.

This traditional characterization is supported by the work of Karl Llewellyn, thought by some to be the father of Legal Realism.¹² With his 1930 essay, *A Realistic Jurisprudence – The Next Step*,¹³ Llewellyn, a then Columbia Law professor, kicked off an intense Realist conversation that spanned at least two decades. In *Realistic Jurisprudence* Llewellyn used Harvard Dean Roscoe Pound’s work as a springboard to help carve out emerging thinking about the law.¹⁴ This approach acknowledged the “complexity of law,” based in part on the limits of words in statutes and rules as the “center of reference for discussion of law.”¹⁵ Thus is urged a new “focal point” for the study of law which would zero in on “the area of contact between judicial (or official) behavior and the behavior of laymen.”¹⁶ Then law itself, with an emphasis on “observable behavior” in the community, would be reconstructed in the lawyers mind – it would need to be seen as “all of society, and all of man in society.”¹⁷

Pound responded, both acknowledging some of the strengths of this thinking but warning about the limits of Llewellyn’s claims. For instance, he suggested that the claim of law as indeterminate, as offered by the “younger teachers in law” like Llewellyn, was not all that new. Nevertheless, their work dwelled too much on the illusory features of the legal landscape.¹⁸ “[S]uch critical activity, important as it is,” Pound argued, “is not

¹¹ See Leiter, *American Legal Realism*, *supra n.* ____ at ____ (focusing on the descriptive feature of Realism and its practice-related implications); FISHER, ET AL., *AMERICAN LEGAL REALISM*, *supra n.* ____ at xi-xv (offering insights on Realism as practiced in the courts and propounded by the academy);

¹² FISHER, ET AL., *AMERICAN LEGAL REALISM*, *supra n.* ____ at 49 (Llewellyn was “acknowledged the chief Realist”).

¹³ 30 Col. L. Rev. 431 (1930).

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¹⁸ Pound is credited for conceiving of the term “sociological jurisprudence,” to describe a slightly earlier movement that also called for pragmatism in the law. See Roscoe Pound, *Mechanical Jurisprudence*, 8 Colum. L. Rev. 605, 669 (1908); see also MICHAEL WILLRICH, *CITY OF COURTS* (____). But as borne out by the work of feminist legal historians like Felice Batlan and Gwen Hoerr Jordan, and described *infra n.* ____, before Pound coined this phrase to describe the thinking and work of men in the courts and academy, women in law were engaged in community activities and lawyering strategies that quite clearly satisfied sociological jurisprudence’s definition and themes. Apparently these women did not stake out their territory as a movement or school of thought – or perhaps their names simply did not gain the traction and play of parallel androcentric legal movements. See Gwen Hoerr Jordan, *Agents of (Incremental) Change: From Myra Bradwell to Hillary Clinton*, 9 Nev. L. J. 580, 600 (2009) (“[Women] law activists [of the late 1800’s] never formalized their law reform movement by naming it or establishing

the whole of jurisprudence.” Thus he doubted whether a “science of law” that both “described the legal order” and developed forward-thinking knowledge about law could ever be built out of nothing more than “criticisms.”¹⁹

Llewellyn replied with his 1931 paper, *Some Realism about Realism*,²⁰ chiding Pound in sharp terms, perhaps setting the stage and tone for years to come.²¹ Speaking in the royal “we,” Llewellyn reinforced the idea that such a group “new realists” did, in fact, exist. Llewellyn agreed that members of this novel band shared some basic concerns, including understanding that both law and society were in a constant state of flux, that healthy skepticism about the workings and motivations of courts was essential to fully understanding their operations, and that any meaningful study of law needed to include careful examination of the “effects . . . on the laymen of the community.”²² But its adherents, at least twenty law professors, judges and lawyers – all men -- were actively participating in an important “movement in thought and work about the law” rooted in “innovation.”²³

As for its normative agenda, Llewellyn explained that Realist reformers called for implementation of legal rules in a way that acknowledged their impact on the ground, as well as a conception of law “as a means to a social end and not as an end in itself.”²⁴ He further acknowledged that many within the group were looking outside of the law to

a separate, specific organization.”). Pound, historians and others have largely overlooked the work of these women. But practical, innovative, and social justice-minded legal activities by women outside of the academy and elite courts continued and evolved over time, well into Realism’s heyday. As will be further described, Anna Moscowitz Kross, was among the women “doing” such “realistic” work. See *infra*, Section III.

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²⁰ See Karl N. Llewellyn, *Some Realism About Realism – Responding to Dean Pound*, 44 Harv. L. Rev. 1222, ____ (discussing the “is” and “ought” features of the Realist enterprise); .

²¹ According to Fisher, et al., this “famous exchange” “may be the best short guide to the Realist movement, its strengths and flaws alike.” FISHER, ET. AL., *supra* n. ____ at 49.

²² See Llewellyn, *Some Realism About Realism supra* n. ____ at ____; see also LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 16 (Yale U. Press 1996)(“By the realists’ accounts, the doctrinal scholarship of traditionalists erred in treating law as a system of neutral rules that judges mechanically applied to reach the one legally ‘correct’ decision.”).

²³ See Llewellyn, *Some Realism About Realism supra* n. ____ at ____ . Somewhat ironically and presciently, in an effort to distance this modern movement from prior legal thinking, Frank described the latter as “childish desire to have a fixed father-controlled universe, free of chance and error.” FISHER, ET. AL., *supra* n. ____ at 50 (citing JEROME FRANK, *LAW AND THE MODERN MIND* (1930)); see also *infra* ____.

²⁴ See Llewellyn, *Some Realism About Realism supra* n. ____ at ____; see also KALMAN, *LEGAL LIBERALISM supra* n. ____ at 16 (“realists debunked the rule of law as part of an effort to improve it. In undermining the predictive force of age-old legal rules, for example, realists often spoke of laying the groundwork for new ones.”).

social science methods to try to give greater form and substance to this approach.²⁵

Despite his apparent role as spokesperson for the movement, Llewellyn claimed the group did not have one voice or message.²⁶ What is more, he and his contemporaries spilled a great deal of ink attempting to arrive at some more distilled understanding of Realism, as well as develop best approaches to the project. Vigorous sometimes vitriolic Realist exchanges took place across the pages of the nation's elite law school journals over the next two decades, taking the conversation in a variety of sometimes competing critical directions.²⁷

For instance, while Llewellyn called for greater understanding of how the law operated in the work-a-day trenches of society,²⁸ others wrote articles urging attention to particular areas of doctrine ripe for Realist infusion.²⁹ Some scholars urged application of specific social scientific methods, suggesting practical approaches to the law as applied.³⁰ And yet others, most notably Jerome Frank, advocated changes in the law school

²⁵ See Llewellyn, *Some Realism About Realism supra n. ___* at ___; see also KALMAN, LEGAL LIBERALISM *supra n. ___* at 16 (in their eyes the realists' "improved legal rules would utilize the insights of the social sciences and increase lawyers' proficiency at predicting the course of law"); J.H. Schlegel, *American Legal Realism and Empirical Social Science: From the Yale Experience*, 28 Buffalo L. Rev. 459 (1979).

²⁶ See Llewellyn, *Some Realism About Realism supra n. ___* at ___;

²⁷ See, e.g., Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 Harv. L. Rev. 697 (1931); Karl N. Llewellyn, *Some Realism About Realism – Responding to Dean Pound*, 44 Harv. L. Rev. 1222 (1931); JEROME FRANK, LAW AND THE MODERN MIND (1930).

²⁸ Karl N. Llewellyn, *Jurisprudence: Realism in Theory and Practice* (University of Chicago Press 1962); *The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method*, 49 YALE L. J. 1355 (1940).

²⁹ See HULL, SEARCHING FOR AN AMERICAN JURISPRUDENCE, *supra n.* at 284; see also, e.g., Walter Wheeler Cook (pioneering choice of law scholar and co-father of the "local law" theory), "Characterization" in *the Conflict of Laws*, 51 YALE L. J. 191 (1941); Thurman W. Arnold (renowned New Deal "trust-buster" and distinguished antitrust scholar), *Fair and Effective Use of Present Antitrust Procedure*, 47 YALE L. J. 1294 (1938); Charles Edward Clark (Yale Law School Realist Dean and noted civil procedure scholar) *The Summary Judgment*, 38 YALE L. J. 423 (1929); Robert Maynard Hutchins (distinguished evidence scholar and legal education figure), *Some Observations on the Law of Evidence – State of Mind to Prove an Act*, 38 YALE L. J. 283 (1929); Leon A. Green (Realist tort law trailblazer) *Causal Relation in Legal Liability – In Tort*, 36 YALE L.J. 513 (1927); Arthur L. Corbin (self-avowed non-Realist and seminal contracts scholar), *Rights and Duties*, 33 YALE L. J. 501 (1924).

³⁰ See KALMAN, LEGAL REALISM AT YALE, *supra n. ___* at 17-19 (describing Underhill Moore's commitment to behavioral psychology and Llewellyn's additional insights that sociology, economics, history and other social sciences might be useful to a law reform program); HULL, SEARCHING FOR AN AMERICAN JURISPRUDENCE, *supra n.* at 284 (describing a rift between Llewellyn, Frank and others, on the one hand, and Wheeler Cook, Herman Oliphant, and Underhill Moore, on the other, around the issue of application of particular social scientific methods in legal studies). See also KALMAN, LEGAL REALISM AT YALE, *supra n. ___* at 18 (describing Frank as one of several who did not believe anthropology as a social science was relevant or helpful to the Realist agenda).

environment and curriculum.³¹ All the while, Llewellyn and others were actually compiling competing lists of those who they believed were part of the Realist project.³² Thus, somewhat ironically, in pressing for realistic and pragmatic approaches to improve the delivery justice, Realist adherents became ever-more mired in academic rhetoric and lost in the life of the mind as the movement unfolded.

What is more, in its fervor, Realist discourse seemed to reach the level of rancor.³³ Historians N.E.H. Hull and Laura Kalman have painstakingly detailed the infighting that took place around the idea of Realism at the nation's most prestigious law schools.³⁴ Not only did many resist Realism's taking hold within the legal academy, but its followers and promoters battled for supremacy in defining its contours.³⁵ Rivalries between the elite schools reached a crescendo as players moved from institution to

³¹ See Jerome Frank, *A Plea for Lawyer Schools*, 56 Yale L. J. 1301 (1947); Jerome Frank, *Why Not a Clinical-Lawyer School?* 81 Pa. L. Rev. 907 (1933). Frank, a lecturer at Yale who went on to serve in the New Deal Administration and as a judge on the Second Circuit Court of Appeals, is often credited for pioneering the cause of clinical legal education. See Margaret Martin Barry, John C. Dubin, Peter Joy, *Clinical Legal Education for this Millenium: The Third Wave*, 7 Clinical L. Rev. 1 (2000).

As for other Realists interested in changing the legal education system, see ROBERT MAYNARD HUTCHINS, *SOME OBSERVATIONS ON AMERICAN EDUCATION* (University Press of Cambridge 1956); Herman E. Oliphant, *A Return to Stare Decisis*, 14 A.B.A.J. 71, 74 (1928) (describing the "orgy of overgeneralization" at American law schools) (cited in Joel R. Cornwell, *Languages of a Divided Kingdom: Logic and Literacy in the Writing Curriculum*, 34 J. MARSHALL L. REV. 49 (2000)); see also Karl N. Llewellyn, *On What is Wrong with So-Called Legal Education*, 35 COLUM. L. REV. 663 1 (1935).

³² See HULL, *SEARCHING FOR AN AMERICAN JURISPRUDENCE*, *supra n.* at 205 (in response to a list offered by Pound, Llewellyn and Frank worked together to create another list with different names included). By 1931, Llewellyn's list spanned nearly 50 names, up from 20. See *id.* at appendix.

³³ To be sure, Realists did not corner the market on biting commentary in legal scholarship. But, as will be discussed *infra*, given the movement's alleged goals it seemed particularly inappropriate, if not unhelpful. What is more, their innovations in legal thinking seemed to go hand-in-hand with innovations in acidity.

³⁴ HULL, *SEARCHING FOR AN AMERICAN JURISPRUDENCE*, *supra n.* ____; KALMAN, *LEGAL REALISM AT YALE, 1927-1960*, *supra n.* ____.

³⁵ John Henry Schlegel noted:

As the story is usually told, one day Roscoe Pound decided that he had to speak out about some disquieting tendencies in the scholarship and thought of "some of our younger teachers of law," which provoked Llewellyn to reply denying Pound's charges. While the event was more complicated than that, the aftermath of the event is clear. A new cottage industry was born: the making of handcrafted definitions of what Realism really was. Were one to carefully review the product of this industry, one would be struck with a deep sense of wonder about what was at stake in the underlying dispute. What turf-intellectual, political, moral, or even personal (in terms of control of an intellectual movement)-was implicated by the answer given to the question "What was Realism?" so that anyone would fight about it?

John Henry Schlegel, *Critical Legal Studies: An Afterword*, ____ Stanford Law Review 673 (1984).

institution, based in part on support for their ideas.³⁶ In all of this critique and negativity, Realism struggled to construct a coherent, positive program.

Realists' disputes raged on for the next several years without, many would argue, making substantive inroads on the ground.³⁷ Beyond failing to gain meaningful traction given its internal tensions, Realism's agenda was also impacted by events outside of the academy. First, Franklin D. Roosevelt plucked many known Realists for his New Deal Administration.³⁸ With this development it could be said that the brotherhood was finally able to take its ideas out of the Ivory Tower and into the "real" world.³⁹ But the level at which they performed their work within the federal government's bureaucracy largely prohibited the kind of rigorous, on-the-ground fact checking called for by the school. Rather, in these roles Realists engaged in removed, top-down "good government" social engineering.⁴⁰ In addition, their work was being done through federal administrative agencies and not local trial courts and institutions, which had for so long been the focus of Realist concerns.⁴¹

The later domestic "Red Scare" intimidation tactics led by J. Edgar Hoover, targeting liberal university professors, also quieted many academics.⁴² Both Pound and

³⁶ See generally KALMAN, *LEGAL REALISM AT YALE*, *supra n. ___*; see also MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 313-14 (Oxford University Press 1992) (describing the founding by Yntema, Oliphant, and Walter Wheeler Cook, of the Institute of Law at Johns Hopkins University, an institution devoted to the scientific study of law, which they viewed as more fruitful than the teaching of law.); AUSTIN SARAT, BRYANT GARTH, ROBERT A. KAGAN (EDS.), *LOOKING BACK AT LAW'S CENTURY* 343 (Cornell University Press 2002) (describing Columbia University President Nicholas Murray Butler's rejection of Realist education reform ideals as the "non-professional study of law," leading William O. Douglas, along with Yntema, Oliphant, and Moore to "[e]ave] Columbia in a huff." Furthermore, Johns Hopkins University and Yale University "did battle" to hire the greatest number of Columbia "mutineers.").

³⁷ See KALMAN, *LEGAL REALISM AT YALE, 1927-1960*, *supra n. ___*.

³⁸ See KALMAN, *LEGAL LIBERALISM*, *supra n. ___* at 17 (explaining that academic elites within the Realist movement were brought "to Washington D.C. to join regulatory commissions " and ultimately "staffed the New Deal agencies that promoted reform and recovery" during the Roosevelt administration).

³⁹ See Carrie Menkel-Meadow, *Taking Law and ___ Really Seriously: Before, During and "After" the Law*, 60 *Vand. L. Rev.* 555, 564 (2007) (describing many New Deal lawyers as "moving into government from academe and, in some cases, moving back into the academy").

⁴⁰ See KALMAN, *LEGAL LIBERALISM*, *supra n. ___* at 17-19.

⁴¹ See David M. Trubek, *Back to the Future: The Short, Happy Life of the Law and Society Movement*, 18 *Fla. State U. L. Rev.* 1, 21 (1990)(describing the post-war era as an "Imperialist Age," where many legal elites "felt that they knew or could easily learn how society should be organized"; "[i]f something was wrong somewhere in the world, the jurists of the Imperial Age of American law were ready to fix it" by devising "unproblematic systems of social governance and transformation").

⁴² KALMAN, *LEGAL REALISM AT YALE*, *supra n. ___* at 194; HULL, *SEARCHING FOR AN AMERICAN JURISPRUDENCE*, *supra n. ___* at 307-320; see also generally Sonya Smith, *Cohen v. San Bernadino Valley College, The Scope of Academic Freedom Within the Context of Sexual Harassment Claims and In-Class Speech*, 25 *J. C. & Ed. L.* 1, 9 (1998)(describing the McCarthy-era tactics employed to chill academic

Llewellyn came under investigation by the Federal Bureau of Investigation; Pound cleared its screens while Llewellyn was brought in for interviews.⁴³ Apparently Realism's supposed radical constructs came too close to Communism in the minds of Hooverites. Thus, traditional Realist law school conversations had considerably cooled by the 1950's.⁴⁴

This turn of events presented a strange paradox. Just as the Supreme Court was entering into one of its most "activist" eras under the leadership of Earl Warren, arguably reaching beyond the literal letter of the law in an effort to improve real world circumstances for citizens, Realist activities as they are traditionally understood began to wind down. And despite thousands of pages dedicated to the endeavor, by 1960 many of the known Realists' stated goals were abandoned, or at least remained substantially unfulfilled.⁴⁵

For instance, Llewellyn's call for greater understanding of the law on the ground had gotten him interested in the Cheyenne Indian nation during the 1930's. He believed the Cheyennes maintained "a legal system that was less complicated and more direct than common law systems," providing an ideal testing ground for Realist approaches in a "quasi-laboratory situation."⁴⁶ However, a busy academic who juggled many thought experiments, Llewellyn worked through a junior anthropologist collaborator, E. Adamson Hoebel, to study the Cheyenne nation.

Hoebel, an expert on the Cheyennes, did most of the project's on-the-ground investigation work over the course of many years.⁴⁷ Despite strong suggestions to the

speech and citing to a study indicating that 798 university professors had been accused of Communist activities).

⁴³ KALMAN, LEGAL REALISM AT YALE, *supra n.* ___ at 194; *see also* HULL, SEARCHING FOR AN AMERICAN JURISPRUDENCE, *supra n.* ___ at 307-320; *see also* Peter Dinunzio, Elinor Kim, Robert Whitman, *Karl N. Llewellyn, How Icelandic Saga Literature Influenced the Scholarship and Life of an American Realist*, 39 CONN. L. REV. 1923, 1963 n. 268 (2007) (noting that Llewellyn's colleagues at the University of Chicago cooperated with the FBI in subjecting Llewellyn and his wife, Soia, and his former wives to repeated security clearance checks.)

⁴⁴ KALMAN, LEGAL REALISM AT YALE, *supra n.* ___ at 188. According to Kalman Realism was "defused" at Yale by the middle of the last century.

⁴⁵ KALMAN, LEGAL REALISM AT YALE, *supra n.* ___ at 230 ("Intellectually, realism had not proved significant; pedagogically, it had not fulfilled its promise.").

⁴⁶ HULL, SEARCHING FOR AN AMERICAN JURISPRUDENCE, *supra n.* ___ at 287-295, 313.

⁴⁷ *See* John M. Conley, William M. O'Barr, *A Classic in Spite of Itself: The Cheyenne Way and the Case Method in Legal Anthropology*, 29 LAW & SOC. INQUIRY 179, 186-87 (2004) (Hoebel, the strong field worker, did nearly all of the "on the ground" work, while Llewellyn provided much of the method, goals, theory, and research for the project. Hoebel also reserved the most important interviewees for joint questioning between him and Llewellyn.).

contrary in his own writing,⁴⁸ Llewellyn himself only visited the reservation one time for a 10-day field study.⁴⁹ From afar he urged Hoebel to obtain unofficial “stories about people who are not leading figures”⁵⁰ -- all the while suggesting specific topics to which his reservation subjects’ attention should be directed.⁵¹

In the end Llewellyn offered some interesting observations about Cheyenne legal experiences in his 1941 publication, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE*. He described a community with deep “local law ways” that allowed for humane “leeway” in resolution of disputes and permitted decision-makers to feel their way to fair outcomes.⁵² But contrary to Realist tenets, nearly all of the project’s work was done at arm’s length, Llewellyn’s conclusions drawn through his colleague’s field notes. Given its lack of applicability to the law as lived in the rest of the country, the long awaited text was not uniformly embraced as contributing to mainstream Realist concerns.⁵³ What is more, it was clear that much of Llewellyn’s attention during this time was not on the well-being of the Cheyenne people, “primitives” as he called them, but spent on the decidedly different project – drafting of the Uniform Commercial Code.⁵⁴

⁴⁸ KARL N. LLEWELLYN AND E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* viii (1941)(“these chapters are the result of field investigation among the Northern Cheyennes on the Tongue River Reservation at Lame Deer, Montana. In the summer of 1935, both authors shared in the field work, and in 1936, Hoebel returned to an additional summer’s work for completion of the materials;” the book is “the result of the joint efforts of the authors one of whom is a specialist in law, the other in anthropology. Both are students of human behavior: proponents of realistic sociology”).

⁴⁹ HULL, *SEARCHING FOR AN AMERICAN JURISPRUDENCE*, *supra n.* ___ at 287-295, 313; *see also* Conley and O’Barr, *supra n.* ___ at 186-87. He made this visit with his former research assistant and then wife, Emma Corstevet, who he referred to as an unrecognized “Co-author” in the book’s dedication notes. *See also* *THE CHEYENNE WAY*, *supra n.* ___ at x (thanking Corstevet for her sociological insights while in the field).

⁵⁰ HULL, *SEARCHING FOR AN AMERICAN JURISPRUDENCE*, *supra n.* ___ at 289-90.

⁵¹ HULL, *SEARCHING FOR AN AMERICAN JURISPRUDENCE*, *supra n.* ___ at 290 (recounting that Llewellyn had Hoebel inquire about such topics as “aggression and fraud,” “disputed right,” “disputed fact,” and “law craft and law craftsmen.”).

⁵² HULL, *SEARCHING FOR AN AMERICAN JURISPRUDENCE*, *supra n.* ___ at 295.

⁵³ KALMAN, *LEGAL REALISM AT YALE*, *supra n.* ___ at 18 (when Llewellyn’s *CHEYENNE WAY* was finally published, Jerome Frank “announced that Llewellyn would have better spent his time studying the law-ways of Tammany Hall braves than Cheyenne Indians”).

⁵⁴ *See* David Ray Papke, *How the Cheyenne Indians Wrote Article 2 of the Uniform Commercial Code*, 47 *BUFF. L. REV.* 1457, 1461-1462 (1997); *see also* HULL, *SEARCHING FOR AN AMERICAN JURISPRUDENCE*, *supra n.* ___ at 295-300. As further recounted *infra*, and in my manuscript-in-progress on *FEMINIST LEGAL REALISM*, Llewellyn and Corstevet divorced not long after their work together on *THE CHEYENNE WAY*. HULL, *SEARCHING FOR AN AMERICAN JURISPRUDENCE*, *supra n.* ___ at 300. Llewellyn then married another former student, Soia Metchnikoff, who served as his UCC collaborator, a Chicago Law professor, and later Dean of University of Miami School of Law. *Id.* *See also infra notes* ___ and accompanying text.

Similarly, while the legal academy had been impacted by the ideas of its Realist-leaning faculty, Frank's desired fundamental reframing of legal education did not take place.⁵⁵ . . . MORE . . . Some claim the movement actually failed.⁵⁶ Most agree that it left certain business unfinished.⁵⁷

Despite its unfulfilled promises, in the years since Realism's apex, academics have continued to debate its meaning, as well as which names should be included on its registry. For instance, in their important anthology *AMERICAN LEGAL REALISM*, Harvard Law professors Fisher and Horowitz, along with attorney Reed claim that "the task of deciding precisely which authors and works should be accorded the label Realist is not...simple" as "the scope of the Realist movement has been – and undoubtedly will continue to be -- controverted."⁵⁸

For Fisher, Horowitz and Reed, however, the "heart of the movement was an effort to define and discredit classical legal theory and practice -- and to offer in their place a more philosophically and politically enlightened jurisprudence. All of the lawyers, judges, and legal scholars who contributed to that project should, in our view, be considered Realists."⁵⁹ Accordingly they claim to have been somewhat over-inclusive in their designations.⁶⁰ Yet their list of Realist thinkers, authors and practitioners fails to include a single woman lawyer, judge or scholar who was engaged in the Realist enterprise.

Recently a more nuanced strand of this narrative has emerged which in part challenges clear delineation of insiders and outsiders in the Realist group. In his new work Brian Tamanaha suggests that over generalizations have resulted in a false divide between those considered Realists and non-Realists (formalists), urging exploration of the common ground shared by decades of judges and others who have thought about

⁵⁵ KALMAN, *LEGAL REALISM AT YALE*, *supra n.* ___ at 145-87 (describing post-war Realism, including Frank's course on the trial courts and fact-finding and call for the creation of "lawyer-schools"); Menkel-Meadow, *Taking Law and ___ Really Seriously*, *supra n.* ___ at 567 ("Legal Realism's major contribution to legal education was its critique of formalism and of easy classification of law as rules. It actually did little to change the structure or performance of legal education.").

⁵⁶ David Marcus, *The Federal Rules of Civil Procedure and Legal Realism as a Jurisprudence of Law Reform*, 44 Ga. L. Rev. 433, 437 (2010) (recounting the "familiar story about the failure of Legal Realism"); *see also* Scales, *infra n.* ___ and accompanying text.

⁵⁷ Twining, *Talk About Realism*, *supra n.* ___ at 382-84 (suggesting that features of the Realist endeavor are not yet complete).

⁵⁸ FISHER, ET AL., *AMERICAN LEGAL REALISM*, *supra n.* ___ at xiii.

⁵⁹ FISHER, ET AL., *AMERICAN LEGAL REALISM*, *supra n.* ___ at xiii-xiv.

⁶⁰ LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* (Yale U. Press 1996)(describing the work of Fisher, Horowitz, and Reed as a "big-tent" conception" of Legal Realism).

judging.⁶¹ Tamanaha offers a list of “Realist” themes as possibly unifying certain legal thinkers and actors over time, even beyond the era most often described as the traditional Legal Realist age. These include viewing law as a means to serve social ends; pursuing social-scientific approaches to law; seeking to educate young lawyers to improve legal practice and judging; and advancing a progressive political agenda in/through law reform.⁶² Here again, however, Tamanaha’s rethinking also fails to mention the work of women in law as possibly contributing to these or related goals, historically or contemporarily.⁶³

Such oversight is not unusual. Even Kalman and Hull, women who have made important contributions to the Realist narrative, offer an essentially all-male account in their important books on the subject.⁶⁴ And well-known historian of jurisprudence, William Twining, has gone so far as to claim that “[o]ne of the few generalizations that can be confidently made about the Realists is that they were American, white, and male.”⁶⁵ Thus, to date, no comprehensive account of American Realism has meaningfully acknowledged women as contributing to such an agenda during the project’s peak or thereafter.⁶⁶

⁶¹ BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* (Princeton U. Press 2010).

⁶² TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE*, *supra n. ___*; see also Brian Z. Tamanaha, *Understanding Legal Realism*, 87 *Tex. L. Rev.* 731 (2009).

⁶³ See Mae C. Quinn, *Further (Ms.) Understanding Legal Realism: Rescuing Judge Anna Moscovitz Kross*, 88 *Tex. L. Rev.* See Also 43 (2009).

⁶⁴ HULL, *SEARCHING FOR AN AMERICAN JURISPRUDENCE*, *supra n. ___*; KALMAN, *LEGAL REALISM AT YALE*, *supra n. ___*. In her later work, *THE STRANGE CAREER OF LEGAL LIBERALISM*, Kalman’s analysis of the “big-tent” theory for Realism espoused by Horowitz and company suggests that Walton Hamilton, Thomas Powell, and Felix Frankfurter would make the expanded cut. Again there is no suggestion that the expanded conception might include women in law.

⁶⁵ Twining, *Talk about Realism*, *supra n. ___* at 343 (it is worth noting that Twining continues, in a tone of jest, “and even then one hears the voice of Soia Metschikoff growling ‘What about me?’”). Twining also goes on to suggest “[m]ost historians would probably agree that it is sensible to treat [Metschnikoff, among others] as successors or followers who belong to a different generation” than traditional Realists. *Id.* at 341-42. Metschikoff is discussed in more detail *infra* Part IV. All of this despite Twining’s rather broad-stroke assessment that in United States scholarship “[o]ne can identify at least five different perspectives on Realism that deserve comment: 1. A distinctive theory of or about law; 2. A theory of adjudication; 3. A negative or nihilistic critique of formalism; 4. A constructive search for alternatives to Langdellism; and 5. Various political or ideological interpretations.” *Id.*

⁶⁶ As noted earlier, Felice Batlan has traced the careers and contributions of women involved in the sociological jurisprudence. See Felice Batlan, *Law and the Fabric of the Everyday: The Settlement Houses, Sociological Jurisprudence, and the Gendering of Urban Legal Culture*, 15 *S. Cal. Interdisc. L.J.* 235 (2005-06); Felice Batlan, *Notes from the Margins: Florence Kelly and the Making of Sociological Jurisprudence*, in *TRANSFORMATION OF AMERICAN LEGAL HISTORY* (forthcoming). And Gwen Hoerr Jordan has recently argued that Myra Bradwell’s work during the late 1800’s also may be seen as the precursor to sociological jurisprudence. See Gwen Hoerr Jordan, *Agents of (Incremental) Change: From Myra Bradwell to Hillary Clinton*, 9 *Nev. L.J.* 580 (2009); Gwen Hoerr Jordan, “Horror of a Woman”: Myra Bradwell, the 14th Amendment, and the Gendered Origins of Sociological Jurisprudence, 42 *Akron L. Rev.*

Yet, it is from the continuation of this masculine narrative that today's feminist legal scholars largely take their cues; their work seen as a direct descendant of the traditional anti-formalist tale. As described in the next section, the dominant account of Legal Realism reportedly served as a starting point for the Law and Society movement. The Law and Society movement, it is said, then begat Critical Legal Studies as a school of thought. And it is out of the rib of Critical Legal Studies, that modern Feminist Jurisprudence was born. Thus many feminist legal scholars have, at least implicitly, accepted the traditional framing of the running Realist narrative, its cyclical nature, and their part in it. In doing so they fail to consider the possibility of a gendered Realist genesis and genealogy, as well as the opportunities that may be provided by such an alternative account.

III. Continuation of the Traditional Realist Tale (or Repeating His Story)

A. *Law and Society Movement*

As the standard story goes, where the men of Realism left off, their Law and Society brethren picked up.⁶⁷ As noted by Paul Schiff Berman, “[l]aw and society research in the 1960’s extended [the Realist] critique, pushing a progressive agenda that sought to use law instrumentally to achieve distributional justice.”⁶⁸ Socio-legal scholars, many with connections to the University of Wisconsin, built on the skeptical tradition of the Realists.⁶⁹ They called for further deconstruction of claims made within the field of

1201 (2009). Thus, this article and book in progress can be seen as part of the gendered legal history being (re)covered and (re)presented by Batlan, Jordan, Tracy Thomas and others, my co-authors of a related project: FEMINIST LEGAL HISTORY: WOMEN AND THE LAW IN U.S. HISTORY (Tracy Thomas and Tracy _____, eds., forthcoming N.Y.U. Press 2011).

⁶⁷ By providing the following synopses of the Law and Society, Critical Legal Studies, and Feminist Jurisprudence movements, in some ways I am engaging in the same kind of position-based, reductionist accounting that I critique. However, what I offer here is a take on the traditional telling, hopefully self-consciously (if not painfully) aware that I am providing my own understanding of the dominant narratives as a foil to my offered alternative revisioning. As the basic theme of this project suggests, historic moments and movements can be understood in a multiplicity of ways, and no storyteller is ever free from her own bias or embeddedness in a constructed reality – even when pointing up the supposed implicit judgments and constructed subjectivities of others. See David M. Trubek, *Back to the Future*, *supra n.* _____ at 24 (“there have always been many different currents of thought about law, society and social science in the movement” and those involved “came from very different starting points and have very different goals for the enterprise.”); Martha Minow, *Feminist Reason: Getting it and Losing It*, 38 J. Legal Educ. 47, _____ (1988) (“feminists are no more free than others from the stereotypes in cultural thought”); see also Judith Butler, *Giving an Account of Oneself* (Fordham U. Press 2005).

⁶⁸ Paul Schiff Berman, *Telling a Less Suspicious Story: Notes Toward a Nonskeptical Approach to Legal/Cultural Analysis*, in CULTURAL ANALYSIS, CULTURAL STUDIES, AND THE LAW: MOVING BEYOND LEGAL REALISM at 114 (Duke U. Press, 2003; Austin Sarat and Jonathan Simon, eds.).

⁶⁹ See David M. Trubek, *Back to the Future*, 18 Fla. St. L. Rev. 11 (1990) (describing courses offered by four faculty members at the University of Wisconsin Law School that focused on law and society).

law and sought to use their evaluations as a “means [to achieve] a more just society.”⁷⁰ During this same time, with Earl Warren still leading the Supreme Court, the so-called due process revolution took hold, with lawyers pressing the courts for greater individual rights and liberties.⁷¹

Much of the critical scholarly work that emerged during this period sought to provide a window into problem locations in law where, in the real world, formal rules fell short of achieving their purported aims.⁷² In this way, the Law and Society work was similar to that of Realists who feared there were interstices between “paper rules’ and the realities of implementative practice.”⁷³ Because of this, socio-legal projects undertaken during the second half of the 20th Century are frequently referred to as “gap studies.”⁷⁴

⁷⁰ *Id.* at 106-107.

⁷¹ See *A Roundtable on the New Legal Realism, Microanalysis of Institutions, and the New Governance: Exploring Convergences and Differences*, 2005 Wisc. L. Rev. 479, 498 (2005) (“Legal Realism, and its Law and Society successors in America, were focused until recently on two clusters of organizational forms and practices--the command-and-control bureaucracy associated with the New Deal (and the “social” regulation of the 1970s), and the rights-recognizing judiciary associated with the Warren Court.”).

⁷² *A Roundtable on New Legal Realism, Microanalysis of Institutions, and the New Governance: Exploring Convergences and Differences*, 2005 Wisc. L. Rev. 479, 498 (2005) (“Perhaps the central preoccupation of this scholarship has been the relation between formal law and the informal social circumstances that mediate its practical effects.”).

⁷³ See Mark Kessler, *Review Essay: Lawyers and Social Change in the Postmodern World*, 29 *Law & Soc’y Rev.* 769, 771 (1995)(“The major research questions posed and methodology employed in much law and society research emerge from legal realism. The dominant paradigm involves scientific, empirical research investigating a central preoccupation of the realists: whether the “law in the books” corresponds to the “law in action” Much of this work has a reformist purpose, using the research findings to suggest ways to close identified gaps.”); see also G. Edward White, *From Realism to Critical legal Studies: A Truncated Intellectual History*, 40 *Sw. L.J.* 819, 831 (1986).

⁷⁴ See David M. Trubek, *Back to the Future: The Short, Happy Life of the Law and Society Movement*, 18 *Fla. State U. L. Rev.* 9 (Law and Society supporters were largely “[l]egalists” who “saw law as a tool to be used by liberal reformers: when liberal analysis revealed a gap between reality and legalist ideals, they believed there existed a legal way to close the gap.”).

Professor Thomas Russell, in writing about the less than light subject of students of color being excluded from law schools, provides a light yet useful discussion of “gap studies”:

“Gap studies, an important even though not currently fashionable form of sociolegal scholarship, examine whether a particular rule or law in practice has brought about the results theoretically anticipated or formally expressed. For instance, if legislators passed a law guaranteeing a chicken in every pot, a gap study would check pots looking for chickens; the term gap stems from the frequency with which researchers have found pots outnumbering chickens.”

Thomas D. Russell, *The Shape of the Michigan River as Viewed from the Land of Sweatt v. Painter and Hopwood*, 25 *Law and Social Inquiry* 507, 511 (2000).

Interestingly, perhaps also consistent with the Realist legacy,⁷⁵ most of the on-the-ground insights and research came from social scientists and not lawyers. For instance, criminologists were well known for studies which demonstrated the shortcomings of criminal law and procedure to achieve substantive justice.⁷⁶ Also outside of traditional legal academic circles, emerging law school clinics were trying to fill some of these gaps through court-based challenges.⁷⁷ Yet the Law and Society movement, in part with the formation of the Law and Society Association in 1965, was very much seen as shaped and influenced by legal elites inside of the legal academy.⁷⁸

⁷⁵ KALMAN, LEGAL LIBERALISM *supra n. ___* at 17 (“though the realists made ‘law and social science’ their mantra, they never got very far in their attempts to integrate the two”). See David M. Trubek, *Back to the Future*, *supra n. ___* at 19 (Focus on social science in the Realist movement “does not mean, however, that the Realists ever did much social science or that their commitment to social science was deep and abiding”; they “were more interested in *using* social science than in redefining law as an object social scientists could *study*). Llewellyn’s Cheyenne Indian studies may serve as the prototypical example of this gap between rhetoric and reality in traditional Realist lawyers’ “on the ground” social science work.

⁷⁶ See, e.g., JEROME H. SKOLNICK, JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY (Wiley 1966) (renowned sociologist, New York University Law professor, and law and society scholar); Richard D. Schwartz & Sonya Orleans, *On Legal Sanctions*, 34 U. CHI. L. REV. 274 (1967) (Schwartz, a law professor at Syracuse University and founding editor of the Law and Society Review, holds a Ph.D. but not a J.D.). See also ABRAHAM S. BLUMBERG, CRIMINAL JUSTICE (Quadrangle 1967); see also Abraham S. Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession*, 1 Law & Soc’y Rev. 15 (1967). Blumberg’s criticisms of law enforcement and the Federal Bureau of Investigation also opened him up to scrutiny by J. Edward Hoover. Wolfgang Saxon, *A. S. Blumberg, 75, Professor Concerned With Equal Justice*, N.Y. Times, Nov. 19, 1996, found at <http://www.nytimes.com/1996/11/19/us/a-s-blumberg-75-professor-concerned-with-equal-justice.html>.

⁷⁷ See Juliet M. Brodie, *Little Cases on the Middle Ground: Teaching Social Justice Lawyering in Neighborhood-Based Community Lawyering Clinics*, 15 CLINICAL L. REV. 333, 335 (2009) (“In the 1960s, responding to students’ demands for ‘social relevance,’ the notion of the social justice mission of clinical education ‘blossomed’ but was joined by a more explicit pedagogical mission and the goal of teaching students not only lawyering skills, but also lawyering ‘values’ and the need for engagement with pro bono and other access to justice endeavors”); J. P. Ogilvy and Karen Czapanskiy, *Clinical Legal Education: An Annotated Bibliography - Part Three: Synopses of Articles, Essays, Books, and Book Chapters*, 12 CLINICAL L. REV. 101, 225 (2005) (“The societal concern with poverty in the 1960’s coincided with the drive to provide law students with practical experience. ‘Service model’ clinics were based on the need for legal help for the poor.”). See also David M. Trubek, *Back to the Future: The Short, Happy Life of the Law and Society Movement*, 18 Fla. State U. L. Rev. 1, 8-9 (“In the early years, law and society knowledge fostered reform efforts including the civil rights movement, the War on Poverty, and the rights expansion of the Warren Court.”).

⁷⁸ Trubek, *Back to the Future*, *supra n. ___* at 7-8; see also Rumu Sarkar, *Are International Institutions Doing Their Job?*, 90 AM. SOC’Y INT’L L. PROC. 223, 232 (1996) (“The law and development movement was conceived in the womb of the activist law and society movement of the 1950s and 1960s at a time when many in the legal elite believed the law could and should be actively used to shape society [and] lawyers thought they could devise relatively unproblematic systems of social governance and transformation. . . . If something was wrong anywhere in the world, the jurists of the Imperial Age of American Law were ready to fix it.”). Cf. Menkel Meadow, *Taking Law and ___ Really Seriously*, *supra n. ___* at 569 (The Law and Society Association was formed as an intentionally multidisciplinary group of lawyers, sociologists, anthropologists, historians, psychologists, political scientists, and economists who sought to study law and legal institutions empirically and in context.”)

Despite the publication of many studies identifying problems, next steps and implementation of solutions were seldom pursued by those in the legal academy.⁷⁹ Rather scholars took on the feel of “white-coated experts” who were distanced and disengaged from their subjects.⁸⁰ What is more, many Law and Society researchers were funded by federal government grants, causing some to question the efficacy of the work and its commitment to challenging the status quo.⁸¹

This work also appeared to be based on the assumption that there was, in fact, some preferred set of rules and laws “out there” to be ascertained and put in place.⁸² But more skeptical scholars associated with the movement began to wonder whether the law as written and interpreted by United States courts would ever have the capacity to achieve fundamental change.⁸³

⁷⁹ Trubek, *Back to the Future*, *supra n. ____* at 40.

⁸⁰ Trubek, *Back to the Future*, *supra n. ____* at 40.

⁸¹ FA – quote from Trubek at L&S Conference?; Mark Kessler, *Lawyers and Social Change in the Postmodern World*, 29 LAW & SOC'Y REV. 769, 770 (1995) (“During the past decade or so, traditional law and society scholarship has been criticized as intellectually sluggish, lacking a critical, political edge, and too closely tied to the interests of policymaking elites”).

⁸² Kessler, *supra n. ____* at 770 (“Thus, although these [gap] studies portray law as ineffective in shaping behavior, they also reflect an abiding faith that law, if designed properly, may contribute significantly to struggles for social justice.”)

⁸³ As explained by Louis Trubek, identified on the Wisconsin Law webpage as an advocate, activist, and clinical law professor:

The critical analysis of law that developed in the 1970s and 1980s had challenged liberal thinking about the law's instrumental value in producing social change. The Law and Society movement's integration of law and social science had uncovered the gaps between legal doctrine and the workings of the law in action, and had exposed the limits of the law's effectiveness in changing human behavior.

Louise G. Trubek, *Lawyering for Poor People: Revisionist Scholarship and Practice*, 48 U. Miami L. Rev. 983, 984 (1994). Louise Trubek's husband, David M. Trubek, a fully tenured law professor at the University of Wisconsin Law School who holds a named chair, provides further insights on the movement and its “gap studies.” See David M. Trubek, *Back to the Future*, 18 Fla. St. L. Rev. 1, 42 (1990) (“As the result of over two decades of gap studies, impact studies, and implementation research, we have come to doubt the independent power of law to reshape social arrangements.”).

About the work being done by and in the courts during the 1960's Civil Rights era, Professor Powe explains:

. . . history reveals that judicial decisions, by themselves, produced virtually no change. Only when supplemented by executive and legislative action did judicial action lead to real social change . . . Violence and electoral politics, rather than judicial activism, moved the executive and legislative branches to action.

L.A. Powe, Jr., *Review Essay: The Supreme Court, Social Change, and Legal Scholarship*, 44 Stanford L. Rev. 1615, 1622 (1992).

Many Law and Society adherents grew disillusioned.⁸⁴ Thus, not unlike the story of the traditional Legal Realist account, differences impeded the forward movement of the larger project. Perhaps in part due to the changing demographics of law school faculties which now included greater numbers of women and professors of color, a new group emerged from Law and Society's foundations.⁸⁵ Seeing itself as more critical, the newly declared camp called itself the Conference on Critical Legal Studies ("CLS").⁸⁶

B. *Critical Legal Studies*

The first Critical Legal Studies conference took place in 1977.⁸⁷ Many involved were interested in moving beyond gap-studies-type work to applying post-modern and post-structural deconstructive approaches⁸⁸ of Foucault,⁸⁹ Derrida,⁹⁰ and others to the law

⁸⁴ Mauricio García-Villegas, *Symbolic Power without Symbolic Violence*, 55 Florida L. Rev. 157 (2003) ("At the end of the 1980s some prominent members of [Law and Society] began to reconceptualize its movement. The aim was to achieve greater critical commitment in opposition to the predominant position, which, according to critics, was politically and epistemologically perverted through the prevalence of an institutional viewpoint and a public policy bias."). See also Mark Kessler, *Lawyers and Social Change in the Postmodern World*, 29 Law and Society Review 769, 770 (1995) ("During the past decade or so, traditional law and society scholarship has been criticized as intellectually sluggish, lacking a critical, political edge, and too closely tied to the interests of policymaking elites.").

⁸⁵ See LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 94-95 (Yale Press 1996) (recounting how an influx of women and minority law faculty during the late 1970's and early 1980's worked to challenge the positions held by many white male elites in the legal academy and assumptions of that in-group); see also Herma Hill Kay, *The Future of Women Law Professors*, 77 Iowa L. Rev. 5, 12 (1991) (noting that "[t]he decade of the 1970's marked the beginning of a dramatic increase in the number of women law professors"); Herma Hill Kay, *UC's Women Law Faculty*, 36 U.C. Davis L. Rev. 331, 381 (2003) (offering insights into the experiences of women of color who joined University of California law faculties between 1980 and 2000).

⁸⁶ See LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 94 (Yale Press 1996) ("The arrival of law and economics and critical legal studies shattered the liberal consensus.").

⁸⁷ Pierre Schlag, *Critical Legal Studies*, in *The Oxford Encyclopedia of Legal History* 295 (Stanley N. Katz, ed. 2009) (describing the event as an "invitational conference"); see also Menkel Meadow, *Taking Law and ____ Really Seriously*, *supra n. ____* at 572 n. 69, and accompanying text (Menkel-Meadow describes her attendance at this conference, held at the University of Wisconsin).

⁸⁸ Menkel Meadow, *Taking Law and ____ Really Seriously*, *supra n. ____* at 572; KALMAN, *LEGAL LIBERALISM*, *supra n. ____* at 82-93; see also *id.* at n. 58 and accompanying text (offering that post-structuralist ideas may have been brought to the fore by younger law faculty who had encountered such thinking in their undergraduate educations).

⁸⁹ FA -Foucaultian synopsis *cf.* KALMAN, *LEGAL LIBERALISM*, *supra n. ____* at 97 and accompanying notes (noting that while a quasi Foucault-cult emerged in the United States, the French philosopher was shunned in his own country's university system).

⁹⁰ M.J. Clark provides the following overview of Derrida's work for a legal audience:

"For Derrida, concepts are things, as tactile in their effect as earth and water, as restrictive as chains, and yet as invisible as ether. His project makes the invisible

and legal institutions.⁹¹ Some also employed Marxist thinking in their critiques, arguing that law and legal institutions merely worked to reinforce oppressive class structures and maintain stratified inequality through its replication of hegemonic norms.⁹² Thus the likeness between CLS, Law and Society, and traditional Legal Realist thinkers in their shared desire to debunk myths about written law, its deployment, and legal institutions is striking.⁹³

As the next generation, however, CLS scholars were not particularly interested in offering snapshots of problem locations where law as applied to facts fell short.⁹⁴ Rather,

structures of thought, inquiry, and self-identity visible, showing us how what we often hold to be a condition of freedom in fact turns out to be a yoke of enslavement.

This insight is at the foundation of postmodern philosophy, a critical strategy (not a system or method) aimed at unsettling all modes of transcendental, fixed, or essentialist thought. It attacks the hegemonic foundationalism that lies at the base of Western thought. This strategy, also called deconstruction, is thus a kind of philosophical, critical and social practice aimed at rethinking the world.”

M.J. Clark, *Deconstruction, Feminism, and Law: Cornell and MacKinnon on Female Subjectivity and Resistance*, 12 Duke J. Gender L. & Pol’y 107 (2005).

⁹¹ This is, obviously, a simplistic synopsis and overview of deconstructionist philosophies that emerged and were carried forward by feminist legal theorists. But part of the critique offered in this project relates to the insistence by modern feminist scholars and others on finely parsing nuanced non-substantive differences between these approaches that has resulted in a maddening level of complexity, a small group of insiders who can share in jargon-laden conversations, and an apparent lack of affirmative, forward movement. *See infra n. ___* and accompanying text.

⁹² Douglas Litowitz, *Gramsci, Hegemony, and the Law*, __ Brigham Young L. Rev. __ (2000)(describing the work of Italian Marxist Antonio Gramsci and its influence on American critical legal studies); *see also* Menkel Meadow, *Taking Law and ___ Really Seriously*, *supra n. ___* at 572; Louise G. Trubek, *Lawyering for Poor People*, *supra n. ___* at 984 (“The Critical Legal Studies movement had indicated how the law, as a reflection of the most socially powerful voices, can subordinate or legitimate the subordination of marginalized persons.”)

⁹³ Paul Schiff Berman, *Telling a Less Suspicious Story: Notes toward a Nonskeptical Approach to Legal/Cultural Analysis*, in CULTURAL ANALYSIS, CULTURAL STUDIES, AND THE LAW: MOVING BEYOND LEGAL REALISM at 115 (Duke U. Press, 2003; Austin Sarat and Jonathan Simon, eds.)(“The legal realist critique and sociolegal gap studies can be viewed as equivalent to the modernist version of the hermeneutics of suspicion described by [Paul] Ricoeur”); John Henry Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 Stanford L. Rev. 391 (“[J]ust like Realism, CLS has as one of its central goals the dejustification of legal rules. Indeed, the movement uses essentially the same techniques; claims of incoherence or inappropriateness abound, as do examples of demythologizing (i.e., debunking or trashing) judicial decisionmaking (and everything else), and direct denials of the correctness of policy.”); *see also* KALMAN, LEGAL LIBERALISM, *supra n. ___* at 82-83 (describing how some CLS scholars quite self-consciously asserted the new movement’s descendancy from Legal Realism to claim a “pedigree”).

⁹⁴ John Henry Schlegel, *CLS Wasn’t Killed by a Question*, 58 Alabama L. Rev. 967, 975 (2007)(“In our case, what we in CLS were not were scholars participating in the Law and Society movement whose work at that time was defined by the endless repetition of research designed to show the gap between law on the books and the law in action.”).

they questioned these very signifiers.⁹⁵ Through fine-grained analyses many of these scholars⁹⁶ attempted to dismantle the separate notions of law versus society, subject and object, individual as opposed to community.⁹⁷ Their work was thus seen as radical and deeply critical departure from mainstream legal academic thinking.

Nevertheless, it was not long before this conversation, too, was dominated by a handful of legal elites.⁹⁸ As with Realism, a select set of voices – again primarily those of men comfortably ensconced in the academy -- drove CLS discourse across the pages of America’s law journals, attempting to direct the dialogue on their terms.⁹⁹ This relatively closed discussion, fully accessible to a limited few, seemed ever more removed from real world experience and devolved into the deeply abstract.¹⁰⁰ It has been

⁹⁵ “Writers in the dominant tradition make an important, though usually silent, move even before they start saying anything substantive about law-in-history: They divide the world into two spheres, one social and one legal. “Society” is the primary realm of social experience. It is “real life” “Law” or “the legal system,” on the other hand, is a distinctly secondary body of phenomena. It is a specialized realm of state and professional activity that is called into being by the primary social world in order to serve that world’s needs.” Robert W. Gordon, *Critical Legal Histories*, 36 *Stan. L. Rev.* 57 (1984); see also KALMAN, LEGAL LIBERALISM, supra n. __ at 84; John Henry Schlegel, *CLS Wasn’t Killed by a Question*, 58 *Alabama L. Rev.* 967, 975 (2007).

⁹⁶ KALMAN, LEGAL LIBERALISM, supra n. __ at n. 58 and accompanying text (raising questions about whether first wave CLS scholars actually employed these ideas or they were co-opted by these older scholars from new recruits).

⁹⁷ Mark Kessler, *Lawyers and Social Change in the Postmodern World*, 29 *Law and Society Review* 769, 770 (1995)(“Influenced by theorists of ideology and practice, such as Gramsci and Bourdieu, and postmodern writers, like Foucault and Derrida, this work examines law as a discourse that shapes consciousness by creating the categories through which the social world is made meaningful. From an ideological perspective, there is no useful distinction between law *and* society.”); KALMAN, LEGAL LIBERALISM, supra n. __ at 86-87 (declaring that Critical Legal Theorists rejected the rights-focused regime that emerged during the Warren Court years as “prevent[ing] transformative social change by perpetuating the dichotomy between individual and the community”).

⁹⁸ John Henry Schlegel, *CLS Wasn’t Killed by a Question*, 58 *Alabama L. Rev.* 967 (2007)(Schlegel confesses on behalf of CLS scholars, “[t]here was a terrible problem with elitism among us and related problems of a certain social insularity, as well as of a fear that outsiders might undermine our project.”); Paul Schiff Berman, supra n. __ at 113-116; see also Schlegel, *Notes Towards an Intimate History of CCLS*, supra n. __ at (“Yet, in an organization that claims to be as deeply antihierarchical as this one does, behavioral manifestations of traditional notions such as ‘wisdom proceeds up river on the Charles and then out to the countryside,’ or ‘getting ahead is teaching at a better law school,’ are deeply troubling.”)

⁹⁹ Reading these writings, one is struck by the clubiness of it all – a closed conversation among insiders referring to each other on a first name basis, mirroring the Realist communications that filled legal journals several decades before. See, e.g., John Henry Schlegel, *CLS Wasn’t Killed by a Question*, 58 *Alabama L. Rev.* 967 (2007)(Throughout his piece Schlegel refers with great informality to his CLS cohorts, including “Fred, ‘Bob,” “Duncan,” and “Laura.”).

¹⁰⁰ Robert Gordon, *Critical Legal Histories*, 36 *Stanford L. Rev.* 57 (1984)(“although many of them try hard to write free of jargon for wide audiences, [CLS scholars] have for the most part not succeeded in communicating their ideas clearly enough to attract much relevant criticism from outside opponents.”); see also KALMAN, LEGAL LIBERALISM, supra n. __ at 125 (recounting a dialogue between Duncan Kennedy

criticized for becoming a set of depressing, deconstructive debates with little or no positive end game.¹⁰¹

At least one adherent admitted that like the Realists, some CLS scholars created their own cottage industry (and careers) around simply defining the movement and attempting to “win” the debate over what “it” was.¹⁰² But with the usual suspects taking up most of the space in the cottage, many of its adherents were implicitly and explicitly pushed out. The dominant group marginalized some of the very same voices credited with helping start the movement – including those of women.¹⁰³

C. *Feminist Jurisprudence*

CLS women, therefore, moved to their own movement.¹⁰⁴ In the 1980’s they began holding their own meetings at which critical feminist scholarship and practice was openly and extensively discussed.¹⁰⁵ Starting out under the banner of “Fem-Crits,” the

and another CLS adherent that was criticized for its intimacy and oddness, citing to ____); Cite to “acid head” claim.

¹⁰¹ Duke Law School Dean Paul Carrington, one of many who called CLS a “nihilistic” movement, helped lead the parade with a harshly worded speech that was published in the Washington Post KALMAN, LEGAL LIBERALISM, supra n. ____ at 121-25; see also Paul Schiff Berman, *Telling a Less Suspicious Story: Notes toward a Nonskeptical Approach to Legal/Cultural Analysis*, in CULTURAL ANALYSIS, supra n. ____ at 127 (describing some CLS scholars as employing a “hermeneutics of suspicion” that is so “paranoid” in its style that it “may, over time, have a potentially corrosive effect on society.”); Mark Kessler, *Lawyers and Social Change in the Postmodern World*, 29 Law and Society Review 769, 770 (1995) (“Newer postmodern approaches are criticized as lacking any utility for, or even disabling, transformative politics”).

¹⁰² See John Henry Schlegel, *Critical Legal Studies: An Afterword*, ____ Stanford Law Review 673 (1984); see also James Boyle, *Introduction: A Symposium of Critical Legal Studies*, 34 Am. U. L. Rev. 929, 929 (1985) (“Recently there has been a great deal of loose talk and brouhaha about critical legal studies. Several symposia have been devoted to the distinctly unplayful task of defining this mysterious animal.”).

¹⁰³ Carrie Menkel-Meadow has described how men at the CLS conferences “ghettoized” its women members by relegating them to separate sessions. See FEMINIST LEGAL THEORY FOUNDATIONS, supra n. ____ at xvii-xviii; see also Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or, “The Fem Crits Go to Law School,”* 38 J. Legal Ed. 61 (1988).

¹⁰⁴ Similarly, faculty of color reacted to the exclusionary practices of CLS scholars. Critical Race Theory is also said to have emerged largely as a result of this rift. For a superb and account relating to the emergence of the Critical Race Theory movement and the related call for Critical Race Realism as a new school of thought, see Gregory Scott Parks, *Toward Critical Race Realism*, 17 Cornell J. of L. and Public Policy 683, 704 (2008) (“Just as Realism was the precursor to the Law and Society movement, itself a precursor to Critical Legal Studies, Critical Legal Studies was a precursor to Critical Race Theory.”).

As will be discussed further, *infra*, Parks argues....

¹⁰⁵ See FEMINIST LEGAL THEORY: FOUNDATIONS at xvii-xviii (Temple U. Press 1993)(D. Kelly Weisberg, ed.)(providing accounts of the birth of feminist legal theory that largely track the traditional narrative – suggesting it is a reaction to a largely male past rather than a return to, or acknowledgment of, earlier feminist realist practices).

work of this group of scholars and activists soon came to be known feminist jurisprudence or feminist legal theory.¹⁰⁶ With its birth from CLS, this movement was and is seen by many as the further unfolding of the standard story about Legal Realism - yet another generation with bloodlines running to the male-only traditional account.¹⁰⁷

Like traditional Realists, many of these critical lawyers and scholars sought to reach outside of customary legal doctrine and boundaries to bring other disciplines to bear on their understanding of the law in action.¹⁰⁸ But the legal scholars and practitioners who moved in this direction – primarily women – did so with a view towards challenging male-centered assumptions and tools of the legal academy and legal institutions.¹⁰⁹ The research work of psychologist Carol Gilligan featured prominently during this time, serving as a basis for feminist legal scholars to challenge the masculine objective and natural in the law and call for greater consideration of context, care, and communion in legal discourse and decision-making.¹¹⁰

¹⁰⁶ Deborah Rhode, *Feminist Critical Theory*, 42 Stan. L. Rev. 617 (1990); Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or, "The Fem Critics Go to Law School,"* 38 J. Legal Ed. 61 (1988); Robin West, *Deconstructing CLS-Fem Split*, 2 Wis. Women's L. J. 85 (1986); see KALMAN, LEGAL LIBERALISM at 179.

¹⁰⁷ Carrie Menkel-Meadow, *Taking Law and ___ Really Seriously*, supra n. ___ at 576 ("Feminism and Critical Race Theory continued in theory what Critical Legal Studies had begun—the critique of law as "neutral" or "objective.""); Ronald Chester and Scott E. Alumbaugh, *Functionalizing First-Year Legal Education: Toward a New Pedagogical Jurisprudence*, 25 U.C. Davis L. Rev. 21, 44-45 (1991)(noting connections between the "Fem-Crits" and Legal Realism); David E. Van Zandt, *Book Review, The Only American Jurisprudence, reviewing AMERICAN JURISPRUDENCE, 1870-1970: A HISTORY, BY JAMES E. HERGET*, 28 Hous. L. Rev. 965 (1990) ("More recent approaches such as feminist legal studies and law and literature also reflect the reorientation accomplished by Pound and the realists."); Gary Minda, *The Jurisprudential Movements of the 1980's*, 50 Ohio St. L.J. 599 (1989)(narrating the family history of realism through generations of movements, including CLS and feminist legal thought and action); see also Richard A. Posner, *Conservative Feminism*, 1989 U. Chi. Legal F. 191, ___ (suggesting there is no distinctively "feminine" way of thinking about the law, but instead a way of thinking shared by some men and women that is consistent with the thinking of traditional Realists).

¹⁰⁸ See, e.g., Kathleen A. McDonald, *Battered Wives, Religion, and Law: An Interdisciplinary Approach*, 2 Yale J.L. & Feminism 251, 275 (1990)(religion); Martha Minow, *Justice Engendered*, 101 Harv. L. Rev. 10, ___ (1987)(philosophy); Ann Scales, *Emergence of Feminist Jurisprudence: An Essay*, 95 Yale L. J. 1373 (1986)(psychology); see also Martha Albertson Fineman, *Role Gender and Law: Feminist Legal Theory's Role in the New Legal Realism*, 2005 Wisc. L. Rev.405, (2005)("feminism is at its core an interdisciplinary endeavor; feminist scholars are well accustomed to integrating work from multiple disciplines"). [note: next sentence quote and use later in piece]

¹⁰⁹ See Martha Minow, *Feminist Reason: Getting It and Losing It*, 38 J. Legal Educ. 47 (1988) ("Feminists have shown how . . . assertions of neutrality hide from view the use of a male norm for measuring claims of discrimination."); see also Louise G. Trubek, *Lawyering for Poor People: Revisionist Scholarship and Practice*, 48 U. Miami L. Rev. 983, 984 (1994) ("Feminist scholars had suggested that the law excludes the concerns of women through its incorporation of male perspectives and devaluation of personal experience.")

¹¹⁰ See Patricia A. Cain, *Feminism and the Limits of Equality*, 24 Ga. L. Rev. 803 (1990); Leslie Bender, *A Lawyer's Primer on Feminist Tort and Theory*, 38 J. Legal Educ. 3, ___ (1988); Robin West, *Jurisprudence and Gender*, 55 U. Chi. L. Rev. 1 (1988); Ann Scales, *The Emergence of Feminist*

This way of thinking was not only relevant to legal analysis and challenges to oppression, but early feminist legal scholars called for care and community-based approaches even within the movement. Emblematic of this non-hierarchical ethos, Patricia Cain called on women in law to embrace their “separateness and connectedness with others,” being careful not to “privilege one perspective over another,” or allow focus on individual theories over varied lived experiences to divide the group.¹¹¹ In a related move, Martha Fineman described feminist methods as “radically nonassimilationist,” suggesting women in law should be “resistant to [seeing] mere inclusion in dominant social institutions” as a mode of societal transformation. Thus, it appeared the group was not only trying to practice what it preached, but lay the groundwork at the outset to stave off the reification of elite structures, power grabs, and divides that damaged earlier critical legal movements.¹¹²

The ultimate goal was to substantively address women’s lived inequality, as well as perpetuate fairness and non-subordination in the world more generally.¹¹³ In this way early feminist jurisprudence sought to breathe new life into the circular debates that plagued CLS, stressing the importance of a positive program with particularized values rather than engaging in deconstruction for deconstruction’s sake.¹¹⁴ Although seen as

Jurisprudence: An Essay, 95 Yale L. J. 1373 (1986); see also Richard A. Posner, *Conservative Feminism*, 1989 U. Chi. Legal F. 191, ___ (noting and questioning Gilligan’s insights).

To be sure, there were other approaches to feminist legal theory even at this early juncture. The work of Catherine MacKinnon, seen as a dominance theorist or radical feminist, offered related but alternative takes on patriarchy and the law. See, e.g., CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (HARVARD U. PRESS 1987). But even MacKinnon’s writing suggested different approaches to legal thought and action than dominant discourses within the academy. Her work, too, is more grounded and concrete than the practices of the CLS camp that came before. See, e.g., *id.* at 198-205 (discussing anti-pornography legislation drafted by MacKinnon and Andrea Dworkin).

¹¹¹ Patricia A. Cain, *Feminism and the Limits of Equality*, 24 Ga. L. Rev. 803, ___ (1990).

¹¹² Cf. Ann Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 Yale L. J. 1373, ___ (1986)(acknowledging some elitism within the women’s legal movement, but noting it was not due to the “theoretical failure” of the “revolutionary consciousness” coming from a “revolutionary elite” versus the masses since most of its members -- women -- were the interested masses).

¹¹³ Robin West, *Jurisprudence and Gender*, 55 U. Chi. L. Rev. 1 (1988)(“A perfect legal system will protect against harms sustained by all forms of life.”); Martha Minow, *Feminist Reason: Getting It and Losing It*, 38 J. Legal Educ. 47 (1988)(“Adopting . . . feminist critiques can deepen the meaning of equality under law. I advocate developing similar feminist critiques in contexts beyond gender, such as religion, ethnicity, race, handicap, sexual preference, socioeconomic class, and age”).

¹¹⁴ See, e.g., *See FEMINIST LEGAL THEORY: FOUNDATIONS* at 405 (Temple U. Press 1993)(“CLS seeks to deconstruct the law, whereas feminist legal theory seeks to empower women through law.”); Martha Albertson Fineman, *Introduction in AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY* at xi (Routledge 1991, Martha Albertson Fineman and Nancy Sweet Thomadsen, eds.)(“the real distinction between feminist approaches to theory (legal and otherwise) and the more traditional varieties of legal theory is a belief in the desirability of the concrete”). The movement received support from some unlikely candidates, including outsiders who identified early feminist legal work as more practical, productive, and forward-looking than CLS projects. For instance, CLS critic Owen Fiss remarked:

largely post-modern in their thinking, and many early feminist legal thinkers were connected in some way to the legal academy, they were also deeply concerned with pragmatism, life outside of the Ivory Tower, and action.

For instance, even those engaged in “theoretical” work sought to look beyond binaries and bridge the supposed divide between practice and thought, ideas and activism.¹¹⁵ For instance, Martha Fineman called upon her colleagues to reject the allure of “grand theories” so common place in the academic world to engage in “middle range” work that self-consciously “mediates between the material circumstances of women’s lives and the grand realizations that law is gendered.”¹¹⁶ Robin West advocated the value of making visible the presently invisible real life stories of women and other outsiders, to “dislodge legal theorists’ confidence that they speak for [them].”¹¹⁷

Similarly, Leslie Bender, Mari Matsuda, and others urged the use of consciousness raising as a tool.¹¹⁸ Such affirmative practices were seen as essential to “frame-bursting” to “break through our legal system’s myths.”¹¹⁹ “[A]lways speak[ing] in the voice . . . of a lack of power over others” without “subordinat[ing], demean[ing],

“Although critical legal studies and feminism appear to overlap in that both endorse a program of demystification, feminism differs from critical legal studies in two important respects. First, there is an affirmative point to the exercise: The end of critique is not critique, as it is with the most virulent forms of critical legal studies, but rather the achievement of a true and substantive equality for women. This egalitarian commitment not only supplies a motive for the deconstructive exercise, but also places a limit upon it Second, feminism’s concern with inequality is not confined to the law, but instead embraces all social institutions, including some of the most familiar, such as the family, the market, and various intimate practices and public industries (prostitution and pornography) that treat women as sex objects. Feminism strikes out at subordination in all its forms.

Owen Fiss, *The Law Regained*, 74 Cornell L.Rev. 245, 251-252 (1989); see also Ronald Chester and Scott E. Alumbaugh, *Functionalizing First-Year Legal Education: Toward a New Pedagogical Jurisprudence*, 25 U.C. Davis L. Rev. 21, 44-45 (1991)(“Groups such as the “Fem-Crits” and their sympathizers exhibit more of the pragmatism of the Realists”).

¹¹⁵ Cf. FEMINIST LEGAL THEORY: FOUNDATIONS at 408 (Temple U. Press 1993)(noting that “[f]eminist writing has been criticized for deemphasizing theory”).

¹¹⁶ Martha Albertson Fineman, *Introduction in AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY* (Routledge 1991, Martha Albertson Fineman and Nancy Sweet Thomadsen, eds.)(“the real distinction between feminist approaches to theory (legal and otherwise) and the more traditional varieties of legal theory is a belief in the desirability of the concrete”).

¹¹⁷ Robin West, *Jurisprudence and Gender*, 55 U. Chi. L. Rev. 1 (1988).

¹¹⁸ Leslie Bender, *Lawyer’s Primer on Feminist Theory*, 38 J. Legal Educ. 3 (1988); Mari J. Matsuda, *Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls’ Theory of Justice*, 16 N. Mex. L. Rev. 613 (1986); see also Patricia A. Cain, *Feminism and the Limits of Equality*, 24 Ga. L. Rev. 803, ___ (1990).

¹¹⁹ Leslie Bender, *Lawyer’s Primer on Feminist Theory*, 38 J. Legal Educ. 3 (1988).

silenc[ing], or abus[ing]" would help women to establish power within themselves.¹²⁰ These activities were not supposed to be limited to classroom discussions and professional conferences, but taken beyond the academy's doors to help "design transformative social, political, and legal systems that emphasize feminist values and concerns" that see humans as interdependent.¹²¹

The grounded insights of practitioners and clinicians were also central to the movement's work in the early days. Indeed, divides between these designations may not have been as rigid as they are today. Elizabeth Schneider, an important voice for feminist jurisprudence, began her teaching as an adjunct professor while still practicing law and then moved to clinical work before accepting a traditional classroom teaching position. She brought to the academy her important experiences as an attorney working with battered women and helped expand self-defense standards to account for their experiences. She argued that "[r]ecognizing the links between individual change and social change means understanding the importance of political *activity*, not just theory."¹²²

Ann Scales has also practiced law throughout her legal teaching career, including by serving as lead counsel for New Mexico NARAL in a case where it successfully sued for Medicaid funding for abortions. A significant early voice in feminist jurisprudence, she urged her sisters in the movement to "resist [] abstraction" and value "honesty and pragmatism" as "[f]airness must have reference to real human predicaments."¹²³

Carrie Menkel-Meadow/Lucie White/Louise Trubek....

These sentiments assisted feminist legal theory in being seen as not just critical but constructive.¹²⁴ It was also hopeful. Energy pulsing through these early writings helped carry a message of optimism, suggesting that transformation and social change was potentially possible through collective action and new feminist legal approaches. Although no one posited any easy answers, the implicit message in this early scholarship was that by chipping away together, reformation over time of existing power dynamics and structures of exclusion was inevitable.

It was this optimism, in part, that led some feminists to recoil at suggestions during the 1980's and 1990's that feminist jurisprudence merely reflected a continuation

¹²⁰ *Id.* at n.19.

¹²¹ Leslie Bender, *Lawyer's Primer on Feminist Theory*, 38 J. Legal Educ. 3 (1988).

¹²² Elizabeth M. Schneider, *The Dialectics of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. Rev. 589 (1986).

¹²³ Ann C. Scales, *Emergence of Feminist Jurisprudence*, 95 Yale L. J. 1373 ____ (1986).

¹²⁴ "Together, the legal scholarship of feminists and critical race theorists was eclipsing that of their progenitor, critical legal studies, in part because they seemed more constructive." KALMAN, *LEGAL LIBERALISM*, *supra* n. ____ at 179.

of Legal Realism. Scales, for instance, expressed gratitude to the Realists for beginning a conversation that challenged law as a “scientific enterprise, devoid of moral or political content.”¹²⁵ But she dismissed the male-dominated movement as being insufficiently radical in its thinking and revolutionary in its efforts.¹²⁶ More than this, it failed to deliver change as promised, instead leading followers down a path that was ultimately abandoned.¹²⁷ Others, like Patricia Cain, resented comparisons that were made between traditional male Realism and the work of feminist legal scholars as they implied that feminists lacked originality and failed to create something new.¹²⁸

But these responses suggest that feminist scholars did not consider the possibility of another narrative about the Legal Realist movement, one that would actually reflect the voices, experiences, and insights of women. Indeed, by accepting the standard story offered about Legal Realism, feminists in law implicitly accepted the traditional, androcentric narrative of that movement and its lineage.¹²⁹ And despite these early protests, the naturalizing of this version of events has resulted in feminist legal scholars impliedly settling into their roles as the intellectual daughters of the CLS movement, granddaughters of the Law and Society movement, and great-grandchildren of the Realists we know.¹³⁰

Uncritical embrace of the traditional telling of Legal Realism also limits our frame of reference. Like earlier generations in the standard story, it appears many feminist legal projects in this country have become battles over words, thoughts, and ideas rather than active struggles to improved lived experiences – a familiar mode of operating within critical legal movements. What may be worse, a fair number of women in law appear to now embrace the same self-serving, inhumane, and anti-feminist values and goals reflected in some of the work of their legal forefathers and known Realist relations. By failing to affirmatively rethink its lineage, the feminist jurisprudence movement may be falling into the same destructive patterns that impaired the successes

¹²⁵ Ann C. Scales, *Emergence of Feminist Jurisprudence*, 95 Yale L. J. 1373 ____ (1986).

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ Pat Cain, *Feminist Legal Scholarship*, 77 Iowa L. Rev. 19 (1991).

¹²⁹ Martha Minow, *Feminist Reason: Getting it and Losing It*, 38 J. Legal Educ. 47, ____ (1988)(“we share the version of reality that has for the most part prevailed in the entire culture. Not only does this instill conceptions of difference and stereotypic thinking, it also gives us internal scripts about how to argue, and indeed, how to know.”)

¹³⁰ Feminist historian and activist Gerder Lerner has warned about a related problem. By accepting traditional, male-centric histories some women tend to embrace their place as victims and internalize “the myth of their inferiority [and] their passivity.” Gerda Lerner, *Holistic History: Challenges and Possibilities*, in *LIVING WITH HISTORY/MAKING SOCIAL CHANGE* at165 (U. N.C. Press, 2009).

of earlier critical generations. And, somewhat ironically, they may be abdicating earlier claims of creativity in the process....¹³¹

-For all of its initial optimism and positive energy, feminist jurisprudence's nihilist turn.¹³²

-Turned to grand theorizing and away from the real

-Another war over dominance of ideas

-Loss of fundamental values; treat each other poorly

-Breaking the cycle before it breaks us?

¹³¹ *Id.* at 165 (blindly assuming women were not a part of key historical moments may impact the ability of contemporary women to “think creatively and strive for originality.”).

¹³² FA -- Berman 117 ?

IV. Writing the Forgotten Past Chapters: Anna Moscowitz Kross and Feminist Legal Realism (or Recovering Her Story)

Rather than blindly continuing down this narrative path, this project suggests that we pause to reconsider our story and the lineage of feminists in law. Contrary to the claims of those telling (and accepting) the traditional male-only tale about Legal Realism, women in law, generally excluded from the Ivy League and Ivory Tower, were working on the ground during the last half of the last century in trial courts and impacted communities in realistic ways. Often looking beyond the formal legal mechanisms and rules, their realistic approaches to law involved actively "doing" and "creating" Realism and not just talking about or searching for an American Jurisprudence. Their work involved cites of Legal Realism outside of appellate judging and decision-making. They realized that written legal decisions and laws as written only represented one slice of the law, one that was divorced from legal ripples as lived....MORE.

Although there are parallels between the work of the women during this time and that of the male Realists, there appear to be some differences too. In particular, as will be further explored below, their work suggested particular values, goals and methods. These similarities and difference have led me to see their work as a form of Feminist Legal Realism. One woman engaged in this enterprise was Anna Moscowitz Kross.¹³³

A. *Roots of Reform: In the Trenches*

Anna Moscowitz was born in 1892 in Nishwez, Russia. When she was just a toddler, Moscowitz and her family, with little more than the clothes they were wearing, sailed to the United States to try to escape oppressive conditions in Russia. Settling in the Lower East Side of Manhattan, the Moscowitz's shared a small tenement apartment in a busy building filled with other immigrants and poor families.¹³⁴

To attempt to support the family, Moscowitz's father found factory work in the garment industry. But day to day existence for the Moscowitz's was a challenge; the family constantly felt the sharp sting and exclusionary power of poverty. As an example, Moscowitz later recounted for the press one particularly painful and sad irony of her circumstances: that she was unable to attend her elementary school graduation because her father, who made clothes for others, could not afford to buy her the proper outfit to wear to the ceremony and received her diploma.¹³⁵

¹³³ The reader will note I begin by referring to her as Moscowitz and then switch to Kross out of respect for her choice in taking her husband's name. See Mae C. Quinn, *Revisiting Anna Moscowitz Kross's Critique of New York City's Women's Court: The Continued Problem of Solving the 'Problem' of Prostitution with Specialized Criminal Courts*, 33 Fordham Urb. L. J. 665, ___ (2006) .

¹³⁴ See *id.* at 669 (notes 10-11 and accompanying text describing Kross's childhood experience).

¹³⁵ See Mae C. Quinn, *Revisiting Anna Moscowitz Kross's Critique of New York City's Women's Court: The Continued Problem of Solving the 'Problem' of Prostitution with Specialized Criminal Courts*, 33 Fordham Urb. L. J. 665, 669 (2006) (notes 10-11 and accompanying text describing Kross's childhood experience).

Moscowitz joined the factory workforce while only a child to help contribute to household finances. Thus at age eleven she became a garment worker, too. While it is clear that this experience was a prominent feature in her life, shaping her thinking throughout adulthood, she did not let the factory walls limit her possibilities. Resourceful, she carried the skills she learned as a nimble pieceworker into the larger world, putting them to practical use in other ways. Responding to needs and opportunities as they presented themselves, she further supplemented the family's earnings through additional odd jobs, including stringing beads and tutoring other new immigrants.¹³⁶

Education was always an important feature of Moscovitz's life. Realizing her academic skills and talents, she made sure to put her schooling to good service - not only focusing on her own advancement but the betterment of those around her. Education was not something to be used to distance and exclude, but to bridge and facilitate. Moscovitz's generosity and patience as a teacher took her outside of her tenement building and into the larger New York City immigrant community. Ultimately she taught at the University Settlement and Education Alliance programs in lower Manhattan.¹³⁷ She largely worked with Russian Jews who sought to escape the revolution and harsh conditions in their home land, just as her family had.¹³⁸

But many of her students endured mistreatment and discrimination here in the states, too. Moscovitz understood this experience. For instance, in her youth she had been fired from a job because she could not work on the Jewish Sabbath. And while holding a Succoth ceremony in their home, Moscovitz's family was accosted by someone throwing a bottle through their window. These experiences with poverty, subjugation and anti-semitism helped lead Moscovitz to seek out a life in law.¹³⁹

While studying to be a teacher, a friend invited Moscovitz to a New York City courthouse to watch the proceedings. She was taken by the experience, apparently believing that representing clients and accessing legal processes might be the key to addressing injustice. She ultimately received a scholarship to attend New York University Law School in 1908, but continued to teach immigrants in the evening - always keeping one foot in the real world and connected to lived experiences beyond book-based law.¹⁴⁰

¹³⁶ See Quinn, *Kross's Critique of Women's Court supra n. ___* at 669 notes 10-13 and accompanying text.

¹³⁷ *Id.*

¹³⁸ FA - University Settlement and Education Alliance as serving Russian and Eastern European jews...

¹³⁹ See Quinn, *Kross's Critique of Women's Court supra n. ___* at 669 notes 10-13 and accompanying text.

¹⁴⁰ See Quinn, *Kross's Critique of Women's Court supra n. ___* at 669 notes 10-13 and accompanying text.

One of only a few women students at New York University Law School, Moscovitz formed a student Suffrage Association chapter, successfully involving law school classmate Fiorello LaGuardia in its work. Beyond this, a self-identified “feminist,” Moscovitz brought women law students and community members together around the issue of prostitution and the treatment of women accused of such crimes.¹⁴¹ During this time various social and religious groups had been engaged in a powerful moral reform agenda to stamp out the “social evil” of prostitution, in part through increased undercover investigations and prosecutions. More moderate groups called for compassionate treatment for women sex workers who were seen as fallen women in need of assistance and support. Ultimately, in an effort to respond to both calls, a specialized Women’s Court within New York City’s Magistrates Court system was created to handle such matters differently than other criminal cases. Over time, however, the Women’s Court came under investigation for a variety of corrupt practices including bail fixing by bondsmen.¹⁴²

Although not yet able to provide direct representation to clients, Moscovitz helped lead investigation efforts in the Women’s Court. She attempted, among other things, to stop its voyeuristic features that placed accused prostitutes on display for the community as a form of entertainment in evening sessions. Through the Prison Committee of the Church of the Ascension she also organized groups to provide social and other services to discharged women prisoners as a form of early re-entry work. Thus while still a law student she implemented innovative, interdisciplinary approaches to impacting legal institutions and developed holistic approaches to the delivery of legal assistance beyond the strict attorney-client relationship.¹⁴³

After she graduated in 1910 and passed the bar, Moscovitz was finally in a position to provide traditional representation within the Women’s Court. Here, too, she played a role in institutional reform outside of standard lawsuit-based mechanisms along with her women peers in the profession. Moscovitz, one of the 76 members of the newly formed New York Women Lawyers’ Association, helped press for the provision of representation for accused prostitutes in that city.¹⁴⁴ Such women, if indigent and unable to afford private counsel, would not have otherwise have been provided with free representation. But Moscovitz and the Association, through their perseverance and active problem-solving skills, convinced judges and court administrators to appoint

¹⁴¹ Howard Whitman, *Annie, The Poor Man’s Judge*, *Collier’s*, March 1, 1947 at 46.

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¹⁴³ See Quinn, *Kross’s Critique of Women’s Court supra n. ___* at 66-678 notes 12-59 and accompanying text.

¹⁴⁴ This group was originally named the Women Lawyers’ Club and changed its name to the Women Lawyers’ Association once it became more national in scope. See Jean H. Norris, *The Woman Lawyers’ Association*, 4 *Women Lawyers’ Journal* 28, 28 (1915) (noting that the Women Lawyers’ Association began as the Women Lawyers’ Club in 1899, with only 18 members); see also VIRGINIA G. DRACHMAN, *SISTERS IN LAW: WOMEN LAWYERS IN MODERN AMERICAN HISTORY* 235 (1998).

volunteer women lawyers for many of the women defendants.¹⁴⁵ Moscowitz was part of a group of at least six women lawyers who formed an informal legal association to handle such matters.¹⁴⁶

Interestingly, such efforts and generosity worked not only to protect the rights of the women defendants but provided an opportunity for women attorneys. Otherwise denied the ability to work as lawyers,¹⁴⁷ they were able to gain practice experience and develop professional identities.¹⁴⁸ Moscowitz wrote about this phenomenon of interconnectedness in the Association's newsletter, the Women Lawyers' Journal, which served as perhaps the main news outlet for women lawyers across the country.¹⁴⁹ Apparently shut out of the nation's elite law reviews, women used the journal's quarterly issues to engage in discourse about issues impacting women lawyers.¹⁵⁰ Moscowitz's

¹⁴⁵ See Bertha Rembaugh, *Problems of the New York Night Court for Women*, 2 Women Lawyers' Journal 45 (1912) ("During this month (April) we have had a good many conferences with the different magistrates and officials connected with the Court, urging them in especial to assign us to first offender cases where there was no other attorney.").

¹⁴⁶ See Marion Weston Cottle, *Women in the Legal Profession*, 4 Women Lawyers' Journal 60 (1915) ("Six lawyers – all members of the Women Lawyers' Association – recently volunteered to act as counsel for women prisoners in the New York Women's Night Court. The names of the women are Mrs. Jean H. Norris, Miss Bertha Rembaugh, Mrs. Mary M. Lilly, Miss Anna Moscowitz, Miss Amy Wren, and Miss Sarah Stevenson, who are numbered among the women leaders of the New York bar.").

¹⁴⁷ For instance, in a 1923 New York Times article, Anna recounted that law firms refused to hire her when she graduated from law school because she was a woman. See *70,000 Work People Clients for Woman*, N.Y. Times, Jul. 22, 1923 at X7. In addition to her Women's Court volunteer work, she apparently also volunteered in the office of a male attorney friend to gain experience handling labor union cases. *Id.*

¹⁴⁸ See Mary Jane Mossman, *Gender and Professionalism in the Law: The Challenge of (Women's) Biography*, 29 Windsor Y.B. Access Just. 19 (2009) (describing, in the context of early Indian woman lawyer Cornelia Sorabji, how such biographies can "reveal some of the complexities of ideas about gender and legal professionalism" and paradoxes, where gender may have provided both obstacles and opportunities).

¹⁴⁹ The Women Lawyers' Journal was a quarterly newsletter published by the New York Women Lawyer's Club beginning in 1910 or 1911. VIRGINIA G. DRACHMAN, *SISTERS IN LAW: WOMEN LAWYERS IN MODERN AMERICAN HISTORY* 235 (1998) (recounting that the Journal served as a platform for women lawyers helped the New York Association build its membership nationally from 76 in 1911, its first year of publication, to 130 in 1914); see also Jean H. Norris, *The Woman Lawyers' Association*, 4 Women Lawyers' Journal 28, 28 (1915) (claiming publication began in 1910). Perhaps not surprisingly the introductory notes of the Journal, seeking further subscriptions from women lawyers across the country suggested a similar symbiotic interconnectedness – "We extend a cordial invitation to all women to join our Club and help our Journal. You need us and we need you." See generally 1 Women Lawyers' Journal 17 (1911).

¹⁵⁰ For example, in one early issue the Journal provided brief news pieces covering events across the country including the admission of the first woman, Irene G. Brown, to the Texas bar, and France's appointment of women magistrates to its children's court. It also contained longer feature articles, including one on the history of the Women's Law Class of New York University, the Juvenile Court movement in Connecticut, and anti-trust law developments. See generally 1 Women Lawyers' Journal 20 (1911).

writing joined the articles of other women lawyers who were part of the Association and supported each other in their various projects – even when at times they might disagree about methods.¹⁵¹ The Journal’s editors characterized the publication as “the link that binds us together.”¹⁵²

Seeking to recruit more lawyers to practice in the Women’s Court criminal setting, Moscowitz described such work as a pragmatic solution to addressing unmet legal needs while gaining experience and exposure.¹⁵³ More than this, using language that could have easily informed the vocabulary of later male Realists, Moscowitz extolled the virtues of women lawyers seeing the impact of the law in the trenches while using legal processes to achieve substantive social ends beyond case resolution:

From the standpoint of social service it is the woman lawyer’s duty to enter wholeheartedly into the criminal branch of the law. . . . Is there any place where woman can be of greater service to her fellow man? Is there a better school of experience wherein she can come closer to the actual facts of life? Very few women have more than glimpsed behind the hideous portals of the criminal court. The fear of contamination and a desire to avoid coming face to face with certain phases of life seem to have a strong hold upon even the woman in the legal profession. . . . [But t]he time has come when it should be considered a privilege to have the opportunity of coming in close touch with our more unfortunate fellow beings The opportunity of coming before the public, winning professional recognition and – above all – performing social service, should inspire women to enter the practice of criminal law.¹⁵⁴

Thus, in an apparent attempt to head off future claims of superiority by those women in the profession who might turn away from “real life” interactions with accused criminals, she turned traditional hierarchical assumptions on their heads. It was a duty, as well as an honor, for legal professionals to engage with those with legal and social needs.

Moscowitz, like many of the City’s vice crusaders, did hope to reduce prostitution in New York City as a result of her work. But through direct representation she came to

¹⁵¹ See, e.g., Kross did not agree with Bertha Rembaugh’s views on prostitution. But the Journal still shared an announcement of a book Rembaugh wrote on the subject. See generally *Club News*, 1 *Women Lawyers’ Journal* 20 (1911).

¹⁵² See *To Members*, 4 *Women Lawyers’ Journal* 40 (1915).

¹⁵³ Anna Moscowitz, *The Opportunity of the Women Lawyer in the Criminal Court*, 4 *Women Lawyers’ Journal* 86 (1914). In fact one of Anna’s colleagues in this endeavor, Jean H. Norris, who went on to be named the first women judge in New York’s Magistrates Court system. Quinn, *Kross’s Critique of Women’s Court supra n. ____* at 681. Anna M. Kross was the second women named to the position. See *infra n. ____*.

¹⁵⁴ Anna Moscowitz, *The Opportunity of the Women Lawyer in the Criminal Court*, 4 *Women Lawyers’ Journal* 86 (1914).

have a deeper appreciation of the complicated issue than those driven solely by religious or moral compunction -- or who never actually spent time talking to an accused sex worker. On the one hand she was concerned about the spread of venereal disease throughout the City. She was also concerned, however, about the health and rights of her individual clients. Her experience also suggested that most prostitutes were drawn to the work as a result of difficult life circumstances, not necessarily free choice or desire. Some were also very young or presented as mentally challenged. Thus she came to view the activity as more of a social problem or failing of society than something that should be met with imprisonment.¹⁵⁵

Working closely with sex workers she also came to see them as unique individuals with complex life stories which the legal system, with its “cold” application of statutes and “twisting of a section of the code,” did not fully consider.¹⁵⁶ And law’s punitive processes were not sufficiently informed by emerging social scientific methods to offer meaningful alternatives to incarceration.¹⁵⁷ In addition, the law as written and applied often resulted in unintended consequences. Many of her clients were actually victims of the law, falsely accused and wrongly swept up in overzealous vice raids in poor communities.¹⁵⁸ The rules of evidence, as applied, resulted in innocent women being discredited and lying police officers being believed.¹⁵⁹

These on-the-ground insights informed her thinking beyond the individual cases in front of her, inspiring her to undertake more significant systemic reform efforts while just in her mid-twenties.¹⁶⁰ Thus while she continued to represent accused prostitutes in the Court, she began publically advocating reform of the institutions overly legalistic and punitive processes. Moscovitz took up the cause in a 1915 Women’s Law Journal article sharing insights about what she learned as a Women’s Court lawyer and, now,

¹⁵⁵ Anna sometimes vacillated between expressing moral concerns of her own and stating that others objected to prostitution on such grounds. *Compare* _____ and Report on Prostitution. Her repeated use of conclusory terms like “social evil” and “social problems,” also make it hard to glean her specific thoughts in all circumstances. But it is clear she gave a great deal of thought to the thorny issue of sex work and that her position on criminal prosecutions intensified over time based on her experiences, leading her to call for abolition of the Women’s Court. *See infra* ____.

¹⁵⁶ Anna Moscovitz, *The Night Court for Women in New York City*, 5 Women Lawyers’ Journal 9, 9 (1915).

¹⁵⁷ Anna Moscovitz, *The Night Court for Women in New York City*, 5 Women Lawyers’ Journal 9, 9 (1915).

¹⁵⁸ Quinn, *Kross's Critique of Women's Court supra n. ____* at 680-81.

¹⁵⁹ *Id.*

¹⁶⁰ Jean H. Norris, *The Women Lawyers’ Association*, 4 Women Lawyers’ Journal 28, 28 (1915)(Anna Moscovitz was named as one of only a few women in New York city who “made a success at their chosen profession” of law.)’

Chairperson of the Legal Committee of the Forum of the Church of the Ascension.¹⁶¹ Again using language remarkably similar to that used years later within Legal Realist circles, Kross complained about the formalistic nature of the Women's Court:

...in the [Women's] Night Court . . . [e]ach case must be brought under some statute called by some legal name, and fall within some section of the law, aided by legal interpretation. The accusation, the accused, the evidence, as well as the plea, are confined within legal provision, and all parade in legal attire. This is the result of the institution itself. It is purely and simply a court of justice, governed by legal phraseology, technicality and restrictions.¹⁶²

Beyond the mechanistic processes, Moscowitz complained that the very personnel running the Court failed to account for the realities that unfolded before them:

The magistrate upon the bench, no matter what his feelings may be or how kindly disposed he may feel toward an offender, is under the law, only the modern incarnation of the Simon of Pharisee, the Legalist of Old. Every officer in the court gradually but surely absorbs this spirit. Even the woman probation officer takes on magisterial function and is but another of the empty forms which brings not hope, but punishment and despair to the offender.¹⁶³

Accordingly, Moscowitz called for a less formal and more social-scientific approach to dealing with prostitution. Although she did not spell out exactly what her proposed model would look like, she explained in broad strokes that any legal intervention should serve as a means to the social end of assisting those drawn to the sex trade:

Here is the crux of the evil of the [Women's] Night Court. The strictly legal procedure is more or less antagonistic to and in conflict with the healthy treatment of the social evil. The government of any community in proceeding successfully against the social evil must have the sanction of the law as a matter of course, but the treatment should be based on a knowledge of human nature and human suffering, severe if necessary, but always sympathetic. . . . Here is a wide field of labor waiting for

¹⁶¹ Anna Moscowitz, *The Night Court for Women in New York City*, 5 *Women Lawyers' Journal* 9, 9 (1915).

¹⁶² Anna Moscowitz, *The Night Court for Women in New York City*, 5 *Women Lawyers' Journal* 9, 9 (1915).

¹⁶³ Anna Moscowitz, *The Night Court for Women in New York City*, 5 *Women Lawyers' Journal* 9, 9 (1915).

sympathetic hearts and ready hands to bring about a more scientific system in the treatment of the downcast and fallen. . . .¹⁶⁴

Over the next few years, Moscowitz continued her public campaign to change applied law and legal institutions around prostitution – building alliances both with fellow legal professionals and those not only outside her discipline but religion.¹⁶⁵ Indeed in her role as Chairperson of the Legal Committee of the Church of the Ascension, Moscowitz wrote to Mayor John Purroy Mitchel in 1917 to complain about harsh vice police practices and the Court’s failure to treat accused sex workers humanely. In that letter she urged closure of the Women’s Court and the creation of a Welfare Commission “with full powers to act” and provide a “scientific solution” to problems of, and created by, sex workers.¹⁶⁶

These reform efforts resulted in some changes. Although the Mayor did not completely dismantle the criminal court model for prostitution cases, he did abolish the Night Court. Moving all matters to daytime sessions he addressed the complaints of Moscowitz and her peers about accused women serving as a form of entertainment for evening theater goers.¹⁶⁷ In addition, in 1919 he appointed the first woman to the Magistrates Court bench, Jean H. Norris – one of the lawyers who had been working with Moscowitz to provide representation to accused prostitutes and her former New York University Law School classmate.¹⁶⁸ He hoped Norris would help to “feminize” or

¹⁶⁴ Anna Moscowitz, *The Night Court for Women in New York City*, 5 *Women Lawyers’ Journal* 9, 9 (1915).

¹⁶⁵ Quinn, *Kross's Critique of Women's Court supra n. ____ at 680-81*.

¹⁶⁶ Quinn, *Kross's Critique of Women's Court supra n. ____ at 680-81*; see also Anna Moscowitz Kross, Report on Prostitution and the Women’s Court (Part I – History of the Women’s Court) at 9-10 (1935). This famous report is further described *infra n. ____*.

¹⁶⁷ A sign was also posted in the courtroom warning that “[n]o idlers or sightseers are permitted to attend.” GEORGE E. WORTHINGTON & RUTH TOPPING, *SPECIALIZED COURTS DEALING WITH SEX DELINQUENCY* 294 (1969); see also Quinn, *Kross's Critique of Women's Court supra n. ____ at 681-82*.

¹⁶⁸ *Mrs. Jean H. Norris Appointed to Bench: First Woman Magistrate to be Named in This State Nominated by Mayor*, N.Y. TIMES, Oct. 28, 1919, at 4; see also Quinn, *Kross's Critique of Women's Court supra n. ____ at 681-82*.

In the year before, 1918, Anna had been appointed as the first woman to serve as an attorney for New York City’s Office of Corporation Counsel. See *Kross's Critique of Women's Court supra n. ____ at ____*; see also New York City Law Department, Office of Corporation Counsel website, <http://www.nyc.gov/html/law/html/diversity/diversity.shtml>. In that paid position, which she held until 1923, she continued to focus her attention on women’s issues and law as it unfolded on the ground. Part of her work as an attorney representing New York City involved an “intensive study of the problems and the shortcomings of both the Family and the Domestic Violence Courts.” Kross Biography, _____ at 5. Although this document is talked about in a typed-written 5-paged biography among Anna Kross’s papers, see Kross Biography, _____ at 5, I have not been able to find a copy of the study. Indeed her time at Corporation Counsel is not particularly well documented. See August 2009 NYC Law Department newsletter *Hearsay* (found at: www.correctionhistory.org/html/chronic/amk/1AnnaKross.doc) (noting that the Law Department’s annual report for 1918 failed to even mention Anna Kross joining the office as its

humanize the court's features.¹⁶⁹ These modifications, while they did not satisfy all of Moscowitz's requests, reflected the later Realist insight that law and its improvement did not necessarily implicate the written statutes, but was a function of the "the area of contact between judicial (and official) behavior and the behavior and impact on laymen."¹⁷⁰ Here the impact related to laywomen.

B. Progression of a Movement: On Trial Court Benches

Problems continued in the Women's Court, however, including growing widespread corruption that resulted in Judge Norris being removed from office in 1931.¹⁷¹ Anna Moscowitz Kross, who had continued to call for reform, was ultimately appointed to the bench in 1934.¹⁷² After only a week in the Court, Kross publically reaffirmed her position that prostitution should be handled more informally outside of the criminal court system. At a lunch for the New York City Federation of Women's Clubs, she rather boldly declared she "was more than ever convinced that the only hope of getting at the roots of the problem of prostitution was to take it out of the courts, out of the category of crime, and 'devise some system of handling it socially.'"¹⁷³

At the invitation of her former law school classmate, Fiorello LaGuardia, who took office as New York City's mayor the same day Kross took the bench, she officially proposed an alternative model. Kross's plan – outlined in a lengthy report that received a great deal of press coverage – called for abolition of the entire Women's Court model and the creation of an alternative system to address prostitution as a public health and social services issue. In her 1935 report Kross characterized the existing Women's Court as being built upon a "naive faith in the omnipotence of the law."¹⁷⁴ Expanding on her

first woman lawyer). Kross also married Dr. Isidor Kross in 1917, adding his name to her own. See Quinn, *Kross's Critique of Women's Court*, *supra* n. ____ at 682.

¹⁶⁹ See Quinn, *Kross's Critique of Women's Court*, *supra* n. ____ at 681-82.

¹⁷⁰ Karl Llewellyn, *Some Realism About Realism...*

¹⁷¹ See JOHN M. MURTAGH & SARA HARRIS, *CAST THE FIRST STONE* 232 (1957) ("In Women's Court, where prostitutes were tried, lawyers, bondsmen, plain-clothes policemen, court personnel, and an assistant district attorney were organized into an extortion ring that operated among innocent women as well as professional prostitutes."); see also *Kross's Critique of Women's Court supra* n. ____ at 683-85.

¹⁷² See *Kross's Critique of Women's Court supra* n. ____ . Kross had been passed over for the position originally by then Mayor Jimmy Walker. However, Walker's replacement Mayor O'Brien, appointed Kross as one of his last official acts in office. This was on the eve of LaGuardia taking over as Mayor, which may have set the stage for later tensions between Kross and LaGuardia. *Id.*

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earlier ideas, Kross urged a new hybrid “medical-social” system of case resolution for prostitution matters outside of the formal court structure.¹⁷⁵

She envisioned a new interdisciplinary tribunal consisting of a medical doctor, psychiatrist, and lawyer who would assist accused prostitutes to receive medical, social, counseling and other services. It would operate like an administrative board, as in the workers’ compensation system, and encourage voluntary compliance rather than rely on punitive measures like jail sentences to address sex work. Beyond dealing those engaged in the sex trade, the tribunal system would assist with public education and make treatment available for anyone who might have contracted venereal disease.¹⁷⁶ Thus, deeply interdisciplinary in its approaches and rooted in social science methods, Kross’s proposal was a localized example of the kinds of administrative models being written about by Realists in the academy, some of whom became Roosevelt’s recruits in the federal New Deal Administration.¹⁷⁷

Although the plan found support not only within the women’s bar but the medical community,¹⁷⁸ Mayor LaGuardia failed to action on Kross’s proposal.¹⁷⁹ For this, Kross publically criticized him for his apathy, using her unique real-world vantage point within the court and community to support her critique. In a statement distributed at the Women’s Court on June 6, 1936, which she read from the bench, Kross accused LaGuardia of wasting funds on costly and ineffective vice investigations rather than setting up her proposed tribunal.¹⁸⁰ For instance, she described the plight of the women

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¹⁷⁷ See, e.g., Mark Fenster, *The Birth of a Logical System: Thurman Arnold and the Making of Modern Administrative Law*, 84 Or. L. Rev. 69 (2005)(describing Arnold’s Realist insights and desire to develop “flexible, functional relationships” between courts and agencies to help bring about practical solutions to problems presented by the depression era’s economic landscape).

¹⁷⁸ See Harry J. Benjamin, *Prostitution: In Some of Its Medico-Psychological Aspects and an Attempt at its Practical Solution*, MED. REV. REVS., Sept. 1935, at 21 (on file with author) (lauding Kross’s recommendations).

¹⁷⁹ LaGuardia’s rejection of the plan may have also reflect the rift that then existed in the New York state Democratic party around the development of an administrative state like the one emerging on the nation level. See Daniel R. Ernst, *The Politics of Administrative Law: New York’s Anti-Bureaucracy Clause and the O’Brien-Wagner Campaign of 1938*, 27 Law & History Rev. 331 (2009).

¹⁸⁰ Kross’s statement was also motivated by the conclusion of a long-term sting resulting in the arrest of gangster Charles “Lucky” Luciano. Taking LaGuardia to task for spending money on such activities rather than failing to set up her proposed prostitution tribunal, she stated:

Over a year ago I submitted to the Mayor, at his request, a plan for a new procedure for handling the question of prostitution in New York City The Mayor appointed a committee to consider this plan and other plans which were suggested. It has submitted no report, approved or disapproved no plan. We have merely drifted along into a new vice-investigation.

brought before her who were trapped in the City's web of corruption, recounting that after a recent house raid five prostitutes were arrested—four had counsel; the fifth did not because she “presumably had fallen behind in her weekly payments” to her pimp or police.¹⁸¹ She also shared her insights on how the system's punitive and legal focus failed to break the cycle of sex work and repeated arrests. Describing another young woman recent brought the bench, Kross recounted:

[she] had just completed two years in prison for prostitution and had been rearrested three weeks after her release, for soliciting on the streets. ‘What would you have done,’ she asked me, ‘if you were just out of jail, broke, and no place to go to?’ If we are going to do something about prostitution in New York City, here is where we must do it: We must help to rehabilitate to readjust the woman who has become a prostitute.

Kross's statements did not convince LaGuardia to adopt her plan, and their relationship became strained following these interactions.¹⁸² But this did not deter Kross from using her position on the bench to re-imagine the legal system's treatment of sex workers, particularly for younger prostitutes. She soon turned her attention to the administrative workings of the court, finding spaces between the cracks of law as written to develop an approach within the existing system to try to assist and empower the women who came before her.¹⁸³ In this way, Kross was again “doing” the work of Realism, rather than merely talking about it.

Obtaining funds from the federal Works Progress Administration in 1936 (“WPA”) and approval from the Magistrates Court Chief Judge, Kross undertook an “experiment” within the Women's Court that in many ways mirrored her proposal to LaGuardia.¹⁸⁴ Without dismantling the court she established a specialized court docket within the institution called the Wayward Minors' Court for Girls.¹⁸⁵ It focused on young women between the ages of sixteen and twenty-one charged with prostitution crimes and

Statement by Magistrate Kross Given Out at the Women's Court 4 (June 6, 1936) (on file with author).

¹⁸¹ *Id.*

¹⁸² *Id.*; see also Kross's *Critique of Women's Court supra n. ____* at 689.

¹⁸³ See generally Mae C. Quinn, *The Modern Problem-Solving Court Movement: Domination of Discourse and the Untold Stories of Criminal Justice Reform*, 31 Wash. U. J of L. and Policy ____ (2010)(offering one of the first historic accounts of the establishment of Kross's Wayward Minors' Court).

¹⁸⁴ See ANNA M. KROSS, PROCEDURES FOR DEALING WITH WAYWARD MINORS IN NEW YORK CITY, U.S. WORKS PROGRESS ADMIN. (1936); see also Anna M. Kross & Harold M. Grossman, *Magistrates' Courts of the City of New York: Suggested Improvements*, 7 BROOK. L. REV. 411, 439–41 (1938) (recounting that the Chief Judge signed an Order on March 2, 1936, authorizing creation of the Wayward Minors' Court).

¹⁸⁵ DORRIS CLARKE, THE WAYWARD MINORS' COURT: AN EVALUATIVE REVIEW OF PROCEDURES AND PURPOSES, 1936–1941, at 6 (1941); see also Quinn, *Untold Stories supra n. ____* at ____ .

acts of sexual “misconduct.”¹⁸⁶ Seen as adults in the eyes of the law,¹⁸⁷ their cases ordinarily would have been handled like those of other adult defendants.¹⁸⁸ However, with the name of the new specialized venue Kross informally reframed them as youths in need of assistance. She thus hoped to divert them from the criminal justice system and instead assist them with counseling and other “social scientific” interventions, as she would have in her informal tribunal.¹⁸⁹

She found other ways of being creative with the law – as broadly defined by Llewellyn -- to try to achieve her social justice ends. For instance, she began hearing the cases of young prostitutes in a different location from the regular adult defendants to try to keep them from their corrupting influences.¹⁹⁰ In addition, she employed less “legalistic” court administration processes to create diversionary practices short of trial on the merits.¹⁹¹ In these ways, the Wayward Minors’ Court attempted to “minimize the strictly legalistic character of the court” and use “individualized and socialized techniques and procedures” to help and uplift the young women despite their arrests.¹⁹²

During initial presentments in the adult Women’s Court, the magistrate screened cases for probable cause and sufficient proof for formal complaint.¹⁹³ When there was not

¹⁸⁶ KROSS, DEALING WITH WAYWARD MINORS, *supra n.* ____ at ____; *see also* BERNARD C. FISHER, JUSTICE FOR YOUTH: THE COURTS FOR WAYWARD YOUTH IN NEW YORK CITY 21 (1955) (the court was “concerned chiefly with the sexually promiscuous girl, the runaway, the undisciplined, defiant youngster, the neglected girl.”). The young women were generally charged under New York’s Wayward Minors’ Act, which had been passed in the 1920s to address “morally depraved” behavior of youths, primarily young women. Wayward Minors’ Act, Title VII-A, Code of Criminal Procedure, Section 913-a. Convicted under the Act, the accused could be placed on probation or “committed to any religious, charitable or other reformatory institution authorized by law to receive commitments” for a period not to exceed three years. Section 913-c. *See also* Quinn, *Untold Stories supra n.* ____ at ____ .

¹⁸⁷ WALTER GELLHORN, CHILDREN AND FAMILIES IN THE COURTS OF NEW YORK CITY 149 (1954) (noting that in New York “a ‘child’ ceases being a child upon his sixteenth birthday”; ALFRED J. KAHN, A COURT FOR CHILDREN: A STUDY OF THE NEW YORK CITY CHILDREN’S COURT 30–35 (1953); *see also* Quinn, *Untold Stories supra n.* ____ at ____ .

¹⁸⁸ *See* Quinn, *Untold Stories supra n.* ____ at ____ .

¹⁸⁹ Kross & Grossman, *Suggested Improvements, supra* note 185, at 430, 437 (“the Wayward Minors’ part . . . seek[s] a scientific differentiation of treatment for the persons who appear therein, on a sound crime prevention theory”); *see also* CLARKE, *supra* note ____, at 6–7.

¹⁹⁰ Kross & Grossman, *Magistrates’ Courts, supra* note ____, at 173–74; CLARKE, *supra* note ____, at 6; *see also* Quinn, *Untold Stories supra n.* ____ at ____ .

¹⁹¹ Kross & Grossman, *Suggested Improvements, supra* note ____, at 440–41; *see also* Quinn, *Untold Stories supra n.* ____ at ____ .

¹⁹² KROSS, *supra* note ____, at 16; CLARKE, *supra* note ____, at 17; *id.* at 10 (“From its inception, this court has aimed to ADJUST rather than to adjudicate; and commitment is resorted to only after all other expedients have been tried.”); *see also* Quinn, *Untold Stories supra n.* ____ at ____ .

¹⁹³ CLARKE, *supra* note ____, at 12–13; *see also* Quinn, *Untold Stories supra n.* ____ at ____ .

enough evidence to support the charges, the matter was dismissed.¹⁹⁴ However, in Kross's new Wayward Minors' Part the initial appearance was largely used to gather background information on the accused, determine her social and other needs, and encourage her to accept informal treatment and intervention if deemed appropriate.¹⁹⁵ During these proceedings, Kross tried to convince many of the women that it was in their interest to accept the assistance of the court with a view towards avoiding formal conviction.¹⁹⁶ In doing so, defendants frequently "consented" to placement outside of their homes for purposes of further physical and mental examination.¹⁹⁷ The idea was to take cases off the formal adjudication and trial track, and reroute them towards therapeutic interventions based upon the individual needs and problems of the accused.¹⁹⁸

Upon learning that the Probation Department was ill-equipped to take on increased intake and informal outreach, and social work responsibilities as she wished¹⁹⁹ – and indeed was legally precluded from doing so -- Kross again looked between the letters of the law.²⁰⁰ She created a team of lay counselors – called the Magistrates' Court Social Services Bureau -- to help her with the court's new functions.²⁰¹ These volunteers, mostly women, became an integral part of Kross's experiment....

-Home Term Court

-Home Term Advisory Council

¹⁹⁴ KROSS, *supra* note ____, at 5–6; *see also* Quinn, *Untold Stories supra n.* ____ at ____.

¹⁹⁵ KROSS, *supra* note ____, at 5–6; *see also* Quinn, *Untold Stories supra n.* ____ at ____.

¹⁹⁶ CLARKE, *supra* note ____, at 14–15; *see also* Quinn, *Untold Stories supra n.* ____ at ____.

¹⁹⁷ KROSS, *supra* note ____, at 5–6. The women were placed at residential facilities like the Florence Crittenton League or the House of Good Shepherd. Quinn, *Untold Stories supra n.* ____ at ____.

¹⁹⁸ KROSS, *supra* note ____, at 6

¹⁹⁹ KROSS, *supra* note ____, at 5–6, 10 (intake staff completed an extensive background screens for defendants relating to their educational, religious, and mental health status, living conditions, and medical history).

200. *See generally* Mae C. Quinn, *Feminizing Courts: Lay Volunteers and the Integration of Social Work in Progressive Reform*, in *FEMINIST LEGAL HISTORY* (Tracy Thomas & Tracy ____ eds)(forthcoming 2011, N.Y.U. Press).

201. For more on the various features and work of this group, *see id.*

C. Scholarship and the Academy: Beginning of Beyond

-Writings outside of academic circles

-Education beyond the law school setting

-Brooklyn Law Review articles

IV. Implications of the New Narrative: “Doing” Feminist Legal Realism in the Future

....As women’s historian Joan W. Scott, has noted “purely documenting in order to claim a home is not the work of feminism.” Rather, “its work is to destabilize – even the present – to make the unthinkable thought.”

Like historian and international human rights advocate Charlotte Bunch - who also views women's legal history as an integral part of activist activity -- more than just telling the stories-- To build on the work of women’s historian & human rights activist Charlotte Bunch it merges past & present, theory & practice by: (1) describing and telling stories of the past; (2) analyzing why things might have happened the way they did (3) offering a vision of what should exist & (4) strategizing about how to achieve that vision.

Scott again offers some helpful advice for those of us who want to engage in feminist historical work – “Feminist history is so exciting precisely because of its radical refusal to settle down, to call even a comfortable lodging a home.”...

Tentative Book Outline

- I. Introduction
- II. The Traditional Realist Story: Men In Search of an American Jurisprudence
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 - A. Reform Roots: In the Trenches
 1. Anna Moscovitz Kross
 2. Dorris Clarke
 3. Barbara Nachtrieb Armstrong
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 5. Women Lawyers Journal Accounts
 - B. Progression of a Movement: On the Benches
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 - C. Into the Academy and Elsewhere: Beginning of the Beyond
 1. Anna Moscovitz Kross
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 4. Emma Corstvet
 5. Soia Mentchnikoff
- V. Implications of the New Narrative: A Less Skeptical, More Practical, and Potentially Radical Feminist Future?

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