

FEMINIST LEGAL REALISM

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INTRODUCTION

This Article begins to rethink current conceptions of two of the most significant legal movements in this country¹—Legal Realism and Feminist

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¹ This work serves as the foundation for my book project in progress, MAE C. QUINN, FEMINIST LEGAL REALISM? REALISTIC WOMEN IN THE TRENCHES, ON THE BENCHES, AND BEYOND (unpublished manuscript) (on file with author) [hereinafter Quinn, FEMINIST LEGAL REALISM?]. It also expands on my initial thoughts on this subject in Mae C. Quinn, *Further (Ms.)Understanding Legal Realism: Rescuing Judge Anna Moscovitz*

Jurisprudence. The story of Legal Realism has been retold for decades. Authors have dedicated countless books,² law review articles,³ and blog posts⁴ to the subject. Legal and other scholars repeatedly have attempted to define better the movement and ascertain its adherents. Although the usual suspects—Karl Llewellyn, Roscoe Pound, and Jerome Frank—are almost always a part of the conversation, surprisingly few agree on the totality of Realism's personage or parameters. The lists of those considered realists—and there are many—are constantly expanding and contracting. The movement's teachings and implications are ever-evaluated. In all of this alleged evolution, however, one thing has remained constant: male-centered descriptions of Legal Realism have occupied the center of the discussion.

Arguing that this master narrative should not hold, this Article challenges traditional understandings of Realism. It offers a gendered account of the realist enterprise that shifts those in legal history's margins to the mainstream. Focusing on the realistic work of one such woman, Anna Moscovitz Kross—one of the country's first women law graduates, practicing lawyers, and judges—this Article examines the work of realistic women in law during and after the realist era's heyday. Looking beyond the leading lights of the Ivy League, Ivory Tower, and prestigious courts, this account is interested in the work of women like Kross who were in community trenches and involved with the trial-court benches. Such women, who remarkably have remained under history's radar, pressed to create their own

Kross, 88 TEX. L. REV. 43 (2009), available at www.texasrev.com/sites/default/files/seealso/vol88/pdf/88TexasLRevSeeAlso43.pdf [hereinafter Quinn, *Further (Ms.) Understanding*].

² See, e.g., WOUTER DE BEEN, LEGAL REALISM REGAINED (William Twining ed., 2008); CULTURAL ANALYSIS, CULTURAL STUDIES, AND THE LAW: MOVING BEYOND LEGAL REALISM (Austin Sarat & Jonathan Simon eds., 2003); BRIAN LEITER, NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY (2007) [hereinafter LEITER, NATURALIZING JURISPRUDENCE]; BRIAN Z. TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING (2010) [hereinafter TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE]; E.W. THOMAS, THE JUDICIAL PROCESS: REALISM, PRAGMATISM, PRACTICAL REASONING AND PRINCIPLES (2005).

³ See, e.g., Eric Engle, *The Fake Revolution: Understanding Legal Realism*, 47 WASHBURN L.J. 653 (2008); Michael Steven Green, *Legal Realism as Theory of Law*, 46 WM. & MARY L. REV. 1915 (2005); Lewis A. Grossman, *Langdell Upside-Down: James Coolidge Carter and the Anticlassical Jurisprudence of Anticodification*, 19 YALE J.L. & HUMAN. 149 (2007); David Marcus, *The Federal Rules of Civil Procedure and Legal Realism as a Jurisprudence of Law Reform*, 44 GA. L. REV. 433 (2010); William P. Marshall, *Judicial Accountability in a Time of Legal Realism*, 56 CASE W. RES. L. REV. 937 (2006); 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); Pierre Schlag, *Formalism and Realism in Ruins (Mapping the Logics of Collapse)*, 95 IOWA L. REV. 195 (2009); Robert Weisberg, *Did Legal Realism Engage the Real World of Criminal Law?*, 7 OHIO ST. J. CRIM. L. 293 (2009).

⁴ See, e.g., Dan Ernst, *Llewellyn Lives*, LEGAL HISTORY BLOG (Oct. 5, 2008, 12:32 PM), <http://legalhistoryblog.blogspot.com/2008/10/lllewellyn-lives.html>; William Ford, *Legal Realism, Herman Pritchett, and the Great Divide*, EMPIRICAL LEGAL STUDIES (June 22, 2006, 8:54 PM), http://www.elsblog.org/the_empirical_legal_studi/2006/06/legal_realism_p.html.

practical jurisprudence rooted in realistic projects in the first half of the twentieth century.

Like other women of her generation, Kross did not just talk about Realism; she actually *did* Realism. As outsiders and reformist lawyers, Kross and her cohorts sought to address social problems they believed contributed to the oppression, marginalization, and day-to-day inequality experienced by women, families, and communities. Authentically interdisciplinary and interactive, Kross sought practical solutions for the real issues of real people with whom she personally connected.

While her modes of operating found parallels in the work of her male realist contemporaries, they stood in stark contrast, too. Her less academically-driven activities, sustained community-based efforts, and strikingly collaborative approaches differed from the heady, removed, and largely exclusionary work of male realists at the time. Even after being appointed to the bench, Kross found ways to establish agency without entirely adopting the hierarchical and traditional norms of the institutions in which she worked. Accordingly, her realist legal work—its values, practices, and goals—can be seen as a feminist enterprise. Thus, it can serve to shed new light not only on traditional understandings of realism, but also on feminism. This new history not only offers an account of women as realists, but of realists as activists.

In this way, this Article serves as a two-way mirror—reflecting on our realist past while looking into our feminist 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, Kross and her cohorts also 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, 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, a return to on-the-ground practices and applied 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 legal realist history, as well as a new feminist jurisprudence agenda, one that may be called *Feminist Legal Realism*.⁵

⁵ To date, I have found no references to the term “Feminist Legal Realism” in legal scholarship or otherwise. “Feminist Realism” has been used, however, in the literary, artistic, and religious realms. See, e.g., MOLLY YOUNGKIN, *FEMINIST REALISM AT THE FIN DE SIÈCLE: THE INFLUENCE OF THE LATE-VICTORIAN WOMEN’S PRESS ON THE DEVELOPMENT OF THE NOVEL* (2007) (describing, in a positive light, literary representations of

This Article begins by sketching the traditional androcentric account of Realism, recounting in Part II the story of the legal realists that focuses on men within the academy and elite courts “searching” for a more practical jurisprudence during the 1930s and 1940s. It explains, however, that despite the group’s purported focus on the pragmatic, its methods were largely removed from real-world experience. And in the course of their intellectual debates, its adherents often engaged in biting critiques that prevented cohesion and forward movement. These features contributed to the program’s less-than-stellar showing, which left much of its work unfinished.

Part III of this Article describes how the traditional tale has continued with later critical legal movements—also allegedly committed to change—picking up where the known realists left off. For instance, the Law and Society movement of the 1950s and 1960s is well known as Realism’s first offspring. Critical Legal Studies, which emerged in the 1970s, is considered the progenitor of Law and Society. And Feminist Jurisprudence, it is said, was born of Critical Legal Studies in the 1980s, providing an additional layer in the standard genealogy.

While all of these movements also sought to deconstruct legal norms and engage in reformatory efforts, like the traditional realists, their members—as if part of an unbroken familial cycle—repeatedly returned to impractical practices of the realist campaign. By retreating to the Ivory Tower, removing themselves from the real world and engaging in wars of words, members of these movements largely worked to reify some of the very structures they sought to challenge. Part III posits that such replication of hegemonic norms is particularly puzzling in the case of feminists who pledged at the outset of their activities to embrace context, build community, and address lived inequality, while spending a great deal of time expressly distancing themselves from the traditional realists. Indeed, the Feminist Jurisprudence camp sought to reject connections to the realists, arguing they were not part of the same male lineage. Rather, the realist movement was seen by legal feminists as insufficiently radical in its methods and unsuccessful in bringing about real change.

In all of this protest, however, legal feminists have failed to consider the possibility of another account of the realist experience—one that acknowledges the work of radical realist women who did change systems and lives. Part IV begins to offer this alternative account, recovering the history of one forgotten woman in law—Anna Moscowitz Kross. A lawyer, judge, and public official, Kross was part of the realist enterprise working from outside of the law’s elite institutions. But like other women who were en-

women’s agency); Serena Anderlini-D’Onofrio, *Is Feminism Realism Possible? A Theory of Labial Eros and Mimesis*, 8 J. GENDER STUD. 159, 160 (1999) (proposing “a notion of mimesis based on female embodiedness and eros,” for instance, by replacing phallic mimesis with labia-centric representations); Beverly Wildung Harrison, *Feminist Realism*, 46 CHRISTIANITY & CRISIS 235 (1986) (attempting to construct a Christian feminist moral agenda with regard to the issue of abortion).

gaged in such efforts, she was left off of Realism's lists and out of legal history's canon. I argue that her work, and the work of others like her, should be seen as Feminist Legal Realism.

In Part V of this Article, I explore some of the implications of this new narrative, suggesting that feminist legal history may serve as an important site of activism not only by rewriting the past of legal movements in this country, but also by helping us to rethink the future. Feminist Legal Realism may offer today's legal feminists a new way of working for transformation, encouraging them to abandon mere debates about words on paper and unkind attacks on fellow legal feminists. Rather, by embracing Feminist Legal Realism's commitment to action and activism, contemporary legal feminists may find a new line to their lineage as well as a way forward.

II. THE STANDARD LEGAL REALIST STORY: A GENEALOGY

Legal Realism has been called one of the most significant legal movements in the United States.⁶ As a master narrative,⁷ Realism's roots run deep in the American and international legal imagination.⁸ Even for most skeptics, its lore is hard to ignore.⁹

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.¹⁰ Perhaps most frequently and fundamentally, Realism

⁶ LEITER, NATURALIZING JURISPRUDENCE, *supra* note 2, at 1; *see also* CULTURAL ANALYSIS, CULTURAL STUDIES, AND THE LAW: MOVING BEYOND LEGAL REALISM, *supra* note 2, at 6; WILLIAM W. FISHER III, MORTON J. HOROWITZ & THOMAS A. REED, AMERICAN LEGAL REALISM xiv (1993) [hereinafter FISHER ET AL., AMERICAN LEGAL REALISM].

⁷ *See* JUDITH M. BENNETT, HISTORY MATTERS: PATRIARCHY AND THE CHALLENGE OF FEMINISM 130 (2006) ("A master narrative is, in short, what everyone *must* know about a specific historical period"); *see also id.* at 53 (noting the "repetitious power of a master narrative").

⁸ William Twining, *Talk About Realism*, 60 N.Y.U. L. REV. 329, 381 (1985) ("[T]he 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 in the early 1930s, Realism was not a dominant movement, but prominent because it was extensively discussed).

⁹ Anthony D'Amato, *Legal Realism Explains Nothing*, 1 WASH. U. JURISPRUDENCE REV. 1, 9 (2009) (describing Legal Realism as a "self-fulfilling prophecy" perpetuated by legal academia); Anthony J. Sebok, *Misunderstanding Positivism*, 93 MICH. L. REV. 2054, 2072 n.80 (1995) ("The legacy of legal realism is difficult to estimate or evaluate.").

¹⁰ *See, e.g.*, FISHER ET AL., AMERICAN LEGAL REALISM, *supra* note 6; N.E.H. HULL, ROSCOE POUND & KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE (1997); LAURA KALMAN, LEGAL REALISM AT YALE, 1927-1960 (1986) [hereinafter KALMAN, LEGAL REALISM AT YALE]; LEITER, NATURALIZING JURISPRUDENCE, *supra* note 2; *see also* Twining, *supra* note 8.

has been framed as arguing against mechanical application of laws by courts, instead urging mindfulness of the law's interpretation and import in the real world.¹¹ Thus, at times both descriptive and normative in their efforts, legal realists offered a new take on judging. They also advocated broader acceptance of emerging non-formalistic legal thinking and methods.¹²

A. *A History of Elite Men Searching for a Practical Jurisprudence*

This traditional description is supported by the work of Karl Llewellyn, said by some to be the father of Legal Realism.¹³ With his 1930 essay, *A Realistic Jurisprudence—The Next Step*,¹⁴ Llewellyn instigated an intense realist conversation that spanned many years.¹⁵ In *Realistic Jurisprudence*, Llewellyn, then a Columbia law professor, used Harvard Law Dean Roscoe Pound's challenge to mechanical application of law as Realism's springboard.¹⁶ Llewellyn's work went on to acknowledge the present "complexity

¹¹ Brian Leiter, *American Legal Realism*, in THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 50, 50 (Martin P. Golding & William A. Edmundson eds., 2005) [hereinafter Leiter, *American Legal Realism*] ("[United States Realists] were reacting against the dominant 'mechanical jurisprudence' or 'formalism' of their day."); see also TAMANAH, BEYOND THE FORMALIST-REALIST DIVIDE, *supra* note 2, at 27.

¹² See William A. Edmundson, *Introduction* to THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY, *supra* note 11 (focusing on the descriptive feature of Realism and its practice-related implications); FISHER ET AL., AMERICAN LEGAL REALISM, *supra* note 6, at xi–xv (offering insights on Realism as practiced in the courts and propounded by the academy). Of course, such accounts cover much of the period when Anna Moscovitz Kross was implementing these kinds of ideas. See *infra* Part IV.

¹³ FISHER ET AL., AMERICAN LEGAL REALISM, *supra* note 6, at 49 (noting that Llewellyn was "acknowledged [as] the chief Realist").

¹⁴ Karl N. Llewellyn, *A Realistic Jurisprudence—The Next Step*, 30 COLUM. L. REV. 431 (1930) [hereinafter Llewellyn, *A Realistic Jurisprudence*].

¹⁵ See FISHER ET AL., AMERICAN LEGAL REALISM, *supra* note 6, at 49–52; KALMAN, LEGAL REALISM AT YALE, *supra* note 10, at 3 (describing the realists as engaging in debates throughout the 1920s and 1930s).

¹⁶ FISHER ET AL., AMERICAN LEGAL REALISM, *supra* note 6, at 49–52; HULL, *supra* note 10, at 140–46 (recounting how Pound's work served as the catalyst for Llewellyn's initial assertions about Legal Realism). Pound is also credited with conceiving sociological jurisprudence to describe a slightly earlier movement that called for pragmatism in the law. See Roscoe Pound, *Mechanical Jurisprudence*, 8 COLUM. L. REV. 605, 609 (1908); see also MICHAEL WILLRICH, CITY OF COURTS: SOCIALIZING JUSTICE IN PROGRESSIVE ERA CHICAGO 104–15 (Christopher Tomlins ed., 2003). But, as borne out by the work of feminist legal historians such as Felice Batlan and Gwen Hoerr Jordan, well before Pound women in law were engaged in community activities and lawyering strategies that quite clearly reflected sociological jurisprudence's definition and themes. See *infra* note 61 (describing the sociological jurisprudence movement as the precursor to Legal Realism which is traditionally described as a male-only story, too). 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, e.g., 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 1800s] never formalized their law reform movement by naming it or establishing a separate, specific organization.").

of law,” challenging statutes and appellate decisions as the “*center of reference* for discussion.”¹⁷ He urged a new focal point for legal discussions that would zero in on “the *area of contact* between judicial (or official) *behavior* and the *behavior* of laymen.”¹⁸ Law itself, with an emphasis on “observable behavior” in the community, needed to be seen as “all of society, and all of man in society.”¹⁹

Pound responded, simultaneously acknowledging the strength of these ideas, and suggesting their limits. Not only was the notion of law as indeterminate not original, but Pound feared the work of “younger teachers of law,” like Llewellyn, dwelled too much on the illusory features of the legal landscape.²⁰ “[S]uch critical activity, important as it is,” Pound argued, “is not the whole of jurisprudence”²¹ He doubted whether a “science of law” that both described the legal order and developed forward-thinking knowledge about it could ever be built out of nothing more than “criticism[s].”²²

Llewellyn replied with his 1931 paper, *Some Realism about Realism*,²³ chiding Pound in sharp terms, perhaps setting the stage and tone of the Legal Realism movement for years to come.²⁴ Llewellyn defended the work of “new realists” like himself.²⁵ According to Llewellyn, there were at least twenty law professors, judges, and lawyers—all men²⁶—who shared in his thinking and were engaged in similar innovative work.²⁷ As for their normative agenda, Llewellyn said 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.”²⁸ He further acknowledged that many within the group were looking

¹⁷ Llewellyn, *A Realistic Jurisprudence*, *supra* note 14, at 443–45.

¹⁸ *Id.* at 442–43.

¹⁹ *Id.* at 464, 465.

²⁰ Roscoe Pound, *The Call for a Realist Jurisprudence*, 44 HARV. L. REV. 697, 697–705 (1931).

²¹ *Id.* at 699.

²² *Id.*

²³ See Karl N. Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1236 (1931) [hereinafter Llewellyn, *Some Realism About Realism*] (discussing the “Is” and “Ought” features of the realist enterprise).

²⁴ According to Fisher, Horowitz, and Reed, this “famous exchange . . . may be the best short guide to the Realist movement, its strengths and flaws alike.” FISHER ET AL., *supra* note 6, at 49.

²⁵ See Llewellyn, *Some Realism About Realism*, *supra* note 23, at 1224, *passim*; see also LAURA KALMAN, *THE STRANGE CAREER OF LEGAL LIBERALISM* 16 (1996) [hereinafter KALMAN, *LEGAL LIBERALISM*] (“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.”).

²⁶ Llewellyn, *Some Realism About Realism*, *supra* note 23, at 1227.

²⁷ See *id.* at 1227. Somewhat ironically and presciently, in an effort to distance this modern movement from prior legal thinking, Frank described the latter as having a “childish desire to have a fixed father-controlled universe, free of chance and error.” JEROME FRANK, *LAW AND THE MODERN MIND* 37 (1930).

²⁸ See Llewellyn, *Some Realism About Realism*, *supra* note 23, at 1236; see also KALMAN, *LEGAL LIBERALISM*, *supra* note 25, at 16 (“[R]ealists debunked the rule of law

outside of the law to social science to try to give greater form and substance to this approach.²⁹

Llewellyn claimed legal realists did not have one voice or message.³⁰ Yet he and his contemporaries spilled a great deal of ink over the years attempting to arrive at some more distilled understanding of the realist enterprise, as well as to develop best approaches to Realism. Thus, 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.

For instance, while Llewellyn's writings called for greater understanding of how the law operated in the trenches of society,³¹ others wrote articles calling attention to particular areas of doctrine ripe for realist infusion.³² Some scholars urged application of specific social-scientific methods, suggesting practical approaches to the law as applied.³³ And yet others, most notably Jerome Frank, advocated changes in the law school environment and curriculum.³⁴ Meanwhile, Llewellyn was compiling and exchanging his lists

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.”).

²⁹ See Llewellyn, *Some Realism About Realism*, *supra* note 23; see also KALMAN, LEGAL LIBERALISM, *supra* note 25, at 16 (Realists believed “improved legal rules would utilize the insights of the social sciences and increase lawyers’ proficiency at predicting the course of law.”).

³⁰ See Llewellyn, *Some Realism About Realism*, *supra* note 23, at 1251.

³¹ See KARL N. LLEWELLYN, JURISPRUDENCE: REALISM IN THEORY AND PRACTICE 78 (1962) (“[O]ne concerned with law . . . must center his thought on behavior, on the interactions between the behavior of the law-officials and behavior of laymen.”); Karl N. Llewellyn, *The Normative, the Legal, and the Law-Jobs: The Problem of Juristic Method*, 49 YALE L.J. 1355, 1356–57 (1940).

³² See, e.g., Thurman Arnold, *Fair and Effective Use of Present Antitrust Procedure*, 47 YALE L.J. 1294 (1938) (renowned New Deal “trust-buster” and distinguished antitrust scholar) (looking at the economic reality behind antitrust laws); Walter Wheeler Cook, ‘*Characterization*’ in the Conflict of Laws, 51 YALE L.J. 191, 194 (1941) (pioneering choice-of-law scholar and co-father of the “local law” theory) (arguing that theoretical writers have forgotten the purposes conflict of law rules were designed to serve); Arthur L. Corbin, *Jural Relations and their Classifications*, 30 YALE L.J. 226, 226–27 (1921) (avowed non-realist and seminal contracts scholar) (stating that the law is determined by what societal agents do as much as by the rules expressing what those agents should do); Leon Green, *Causal Relation in Legal Liability—In Tort*, 36 YALE L.J. 513 (1927) (realist tort law trailblazer) (examining whether the goals of tort law are met in case law and the limitations of these goals).

³³ See HULL, SEARCHING FOR AN AMERICAN JURISPRUDENCE, *supra* note 10, at 284 (describing a rift between Llewellyn, Frank, and others, on the one hand, and Hessel Yntema, Wheeler Cook, Herman Oliphant, and Underhill Moore, on the other, around the issue of application of particular social scientific methods in legal studies); KALMAN, LEGAL REALISM AT YALE, *supra* note 10, 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); see also KALMAN, LEGAL REALISM AT YALE, *supra* note 10, 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).

³⁴ See JEROME FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 227–46 (1950). See generally Jerome Frank, *A Plea for Lawyer-Schools*, 56 YALE L.J. 1303 (1947) (arguing law schools should expose students to practicing law, not merely

of those believed to be part of the realist movement.³⁵ Thus, somewhat ironically, in supposedly pressing for realistic and pragmatic approaches to improve the delivery of justice, realist adherents became increasingly mired in academic rhetoric as the movement unfolded.

In its fervor, realist discourse reached the level of rancor. Historians N.E.H. Hull and Laura Kalman have painstakingly detailed the in-fighting that took place around the idea of Realism at the nation's most prestigious law schools.³⁶ 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.³⁷ Rivalries between the elite law schools reached a crescendo as players moved from institution to institution, based in part on support for their ideas.³⁸ In the context of all of this criticism and negativity, Realism struggled to construct a coherent, positive program.³⁹

Realists' disputes raged on for the next several years without, many would argue, making substantive inroads.⁴⁰ For instance, Llewellyn's call for

studying it in the library); Jerome Frank, *Why Not a Clinical Lawyer-School?*, 81 U. PA. L. REV. 907 (1933) (arguing law schools should teach more than rules and principles). 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 with pioneering the cause of clinical legal education. See Margaret Martin Barry, John C. Dubin & Peter A. Joy, *Clinical Legal Education for this Millennium: The Third Wave*, 7 CLINICAL L. REV. 1, 8 (2000). Frank was followed by other realists interested in changing the legal education system. See, e.g., 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); cf. ROBERT M. HUTCHINS, *SOME OBSERVATIONS ON AMERICAN EDUCATION* xii (1956) (describing "the futility of vocational training").

³⁵ See HULL, *supra* note 10, at 205 (in response to a list offered by Pound, Llewellyn and Frank worked together to create their own list with different names). By 1931, Llewellyn's list spanned nearly fifty names, up from twenty. See *id.*, app. at 343-46.

³⁶ See HULL, *supra* note 10, at 173-222; KALMAN, *LEGAL REALISM AT YALE, 1927-1960*, *supra* note 10, at 55-62.

³⁷ John Henry Schlegel, *Critical Legal Studies: An Afterword*, 36 STAN. L. REV. 673, 673 (1984) [hereinafter Schlegel, *Critical Legal Studies*] (describing the "making of handcrafted definitions of what Realism really was").

³⁸ See MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 313-14 n.85 (1992) (describing Yntema, Oliphant, and Cook's development of the Institute of Law at Johns Hopkins University, an institution devoted to the scientific study of law, which Cook viewed as more fruitful than the teaching of law); KALMAN, *LEGAL REALISM AT YALE*, *supra* note 10, at 112-13; LOOKING BACK AT LAW'S CENTURY 343 (Austin Sarat et al. eds., 2002) (describing universities battling to see who could hire more of these "mutineers").

³⁹ Realism's agenda was also impacted by events outside of the academy. First, President Franklin D. Roosevelt plucked many known realists for his New Deal administration. See KALMAN, *LEGAL LIBERALISM*, *supra* note 25, at 17. Later "Red Scare" intimidation tactics, led by J. Edgar Hoover, targeting liberal university professors also quieted many academics. HULL, *supra* note 10, at 310-20; see also Sonya G. 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. & U.L. 1, 9 n.39 (1998) (indicating that 798 undergraduate professors had been accused of Communist activities). Both Pound and Llewellyn came under investigation by the Federal Bureau of Investigation; Pound cleared the FBI's screens while Llewellyn was brought in for interviews. HULL, *supra* note 10, at 317-21.

⁴⁰ See, e.g., KALMAN, *LEGAL REALISM AT YALE*, *supra* note 10, at 230.

greater understanding of the law on the ground had gotten him interested in the Cheyenne Indian nation. He believed the Cheyenne maintained “a legal system that was less complicated and more direct than the common law system,” providing an ideal testing site for realist approaches in a quasi-laboratory situation.⁴¹ And so, he partnered with E. Adamson Hoebel, an anthropologist, to study the Cheyenne nation over a span of two years.⁴² In the end, Llewellyn offered observations about Cheyenne legal experiences in his 1941 publication, *The Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence*.⁴³ He described a community with deep “local law ways” that allowed for humane “[l]eeway” in resolution of disputes, permitting local decision-makers to “feel[] the way through to a solution.”⁴⁴

Inconsistent with realist tenets, Llewellyn performed nearly all of the project’s work at arm’s length. Despite his own suggestions to the contrary,⁴⁵ he visited the reservation only one time during a ten-day field study.⁴⁶ Ultimately, Llewellyn drew his conclusions primarily from his colleague’s field notes.⁴⁷ And given the text’s esoteric tone and lack of applicability to the law as lived in the rest of the country, at least one scholar saw the long awaited text as a great disappointment.⁴⁸ 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 in the text’s title, but on using them for his ends. Indeed, during this same period he spent more time on a decidedly different and more mainstream project—drafting of the Uniform Commercial Code.⁴⁹ Llewellyn’s Cheyenne project, therefore, serves as an

⁴¹ HULL, *supra* note 10, at 286.

⁴² 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) (describing how Hoebel performed most of the fieldwork “on the ground” work, while Llewellyn provided much of the method and theory for the project).

⁴³ KARL N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* (1941) [hereinafter *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE*].

⁴⁴ See *id.* at 317, 334, 337–38.

⁴⁵ *Id.* at viii (claiming 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.”).

⁴⁶ HULL, *supra* note 10, at 313; Conley and O’Barr, *supra* note 42, at 186. He made this visit with his former research assistant and then wife, Emma Corstvet, whom he referred to as an unrecognized “Co-author” in the book’s dedication notes. *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE*, *supra* note 43, at v (thanking Corstvet in the book’s dedication notes for her sociological insights while in the field).

⁴⁷ HULL, *supra* note 10, at 290 (explaining that Llewellyn had Hoebel inquire about such topics as “aggression and fraud, disputed right, disputed fact . . . and law crafts and law craftsmen”).

⁴⁸ KALMAN, *LEGAL REALISM AT YALE*, *supra* note 10, at 18 (noting that when Llewellyn’s *Cheyenne Way: Conflict and Case Law in Primitive Jurisprudence* was finally published, Jerome Frank “announced that Llewellyn would have better spent his time studying the law-ways of Tammany Hall braves than the Cheyenne Indians”).

⁴⁹ See HULL, *supra* note 10, at 295–300. Llewellyn and Corstvet divorced five years after their work together on *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMI-*

example of the ways in which Realism was seen as a failed movement,⁵⁰ or at least left certain business unfinished.⁵¹

Despite its unfulfilled promises, in the years since Realism's apex, academics have continued to robustly debate its meaning, as well as which names belong on its registry. For instance, in their important anthology *American Legal Realism*, Harvard Law professors William Fisher and Martin Horowitz, along with attorney Thomas 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—controversial."⁵²

For Fisher, Horowitz, and Reed, 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."⁵³ Accordingly, they claim to have been somewhat expansive in their designations.⁵⁴ Yet, their proposed list of realists 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 that in part challenges clear delineation of insiders and outsiders in the realist group. In his new work, Brian Tamanaha suggests that overgeneralizations have resulted in a false divide between those considered realists and formal-

TIVE JURISPRUDENCE. See David Ray Papke, *How the Cheyenne Indians Wrote Article 2 of the Uniform Commercial Code*, 47 BUFF. L. REV. 1457, 1470 (1997). Llewellyn then married another former student, Soia Mentschikoff, who helped him draft the UCC. *Id.* Mentschikoff went on to become a Chicago Law professor, and later Dean of the University of Miami School of Law. Robert Whitman, *Soia Mentschikoff and Karl Llewellyn: Moving Together to the University of Chicago Law School*, 24 CONN. L. REV. 1119, 1119, 1124 n.18 (1992). As I plan to further explore in my text in progress, FEMINIST LEGAL REALISM?, *supra* note 1, both Corstvet and Mentschikoff might also be seen as part of Feminist Legal Realism's legacy.

⁵⁰ 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"); Steven M. Quevedo, *Formalist and Instrumentalist Legal Reasoning and Legal Theory*, 73 CALIF. L. REV. 119, 120 (1985) ("[F]or 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 . . ."); see also Ann Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1400 (1986).

⁵¹ KALMAN, LEGAL REALISM AT YALE, *supra* note 10, at 230 ("Intellectually, realism had not proved significant; pedagogically, it had not fulfilled its promise."); Twining, *supra* note 8, at 382–84 (suggesting that features of the realist endeavor are not yet complete). Indeed, just as the Supreme Court was entering into one of its most "activist" eras under the leadership of Chief Justice Earl Warren, arguably reaching beyond the literal letter of the law in an effort to improve real world circumstances for citizens, realist activities as traditionally understood began to wind down. KALMAN, LEGAL REALISM AT YALE, *supra* note 10, at 201–28.

⁵² FISHER ET AL., *supra* note 6, at xiii.

⁵³ *Id.* at xiii–xiv.

⁵⁴ KALMAN, LEGAL LIBERALISM, *supra* note 25, at 13 (describing the work of Fisher, Horowitz, and Reed as a "big-tent conception" of Legal Realism).

ists.⁵⁵ Thus, he urges exploration of the common ground shared by decades of judges and others who have thought about judging.⁵⁶ Tamanaha offers a list of “realist” themes as possibly unifying legal thinkers and actors over time, even beyond the era described as the traditional legal realist age.⁵⁷ Here again, however, Tamanaha’s rethinking fails to mention the work of women in law—including Anna Moscowitz Kross—as possibly contributing to these or related goals, historically or contemporarily.⁵⁸

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.⁵⁹ It could easily seem, then, as well-known historian of jurisprudence William Twining claimed, that “[o]ne of the few generalizations that can be confidently made about the realists is that they were American, white, and male.”⁶⁰ Indeed, to date, no comprehensive account of American Realism has meaningfully acknowledged women as contributing to such an agenda during the project’s apex or beyond.⁶¹

⁵⁵ TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE, *supra* note 2, at 85–90.

⁵⁶ *See id.* at 186. *But see* Brian Leiter, *Legal Formalism and Legal Realism: What is the Issue?*, 16 LEGAL THEORY 111 (2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1646110 (critiquing Tamanaha’s critique).

⁵⁷ TAMANAHA, BEYOND THE FORMALIST-REALIST DIVIDE, *supra* note 2, at 187–96.

⁵⁸ *Id.*; *see also* Brian Tamanaha, *A Vision of Social-Legal Change: Rescuing Ehrlich from ‘Living Law’*, 36 LAW & SOC. INQUIRY 297, 297 (2011) (“[r]escuing” another forgotten male realist through biography); *cf.* Quinn, *Further (Ms.) Understanding Legal Realism*, *supra* note 1, at 44 (pointing out the lack of women in Tamanaha’s reformulation of the history of Realism).

⁵⁹ *See* HULL, *supra* note 10; KALMAN, LEGAL REALISM AT YALE, *supra* note 10. 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. KALMAN, LEGAL LIBERALISM, *supra* note 25, at 250 n.2. Again there is no suggestion that the expanded conception might include women in law. *See id.*

⁶⁰ Twining, *supra* note 8, at 333. It is worth noting that Twining continues, in a tone of jest, “and even then one hears the voice of Soia Mentschikoff growling, ‘What about me?’” *Id.* Twining also goes on to suggest that “[m]ost historians would probably agree that it is sensible to treat figures like . . . Mentschikoff [among others] . . . as successors or followers who belong to a different generation” than traditional realists. *Id.* at 341–42.

⁶¹ As noted earlier, Felice Batlan has traced the careers of women who were contributors to the sociological jurisprudence effort, an antecedent to the Legal Realism movement. *See generally* Felice Batlan, *Notes from the Margins: Florence Kelley and the Making of Sociological Jurisprudence*, in 2 TRANSFORMATIONS IN AMERICAN LEGAL HISTORY: LAW, IDEOLOGY, AND METHODS ESSAYS IN HONOR OF MORTON J. HOROWITZ (Daniel W. Hamilton & Alfred L. Brophy eds., 2010) (recounting the reform efforts of Florence Kelley in New York City during the beginning of the twentieth century); 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 (2006) (arguing that women settlement workers played groundbreaking legal roles at the turn of the twentieth century). Additionally, Gwen Hoerr Jordan has recently argued that Myra Bradwell’s work during the late 1800s also may be seen as the precursor to sociological jurisprudence. *See* Jordan, *Agents of (Incremental) Change*, *supra* note 16, at 604–12; Gwen Hoerr Jordan, “Horror of a Woman”: Myra Bradwell, the 14th Amendment, and the Gendered Origins of Sociological Jurisprudence, 42 AKRON L. REV. 1201, 1218–29 (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

Yet, somewhat ironically, it is from the continuation of this masculine narrative that today's feminist legal scholars largely take their cue; their work is seen as a direct descendant of the traditional antiformalist 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, begat Critical Legal Studies as a school of thought. And it is out of the rib of Critical Legal Studies that modern Feminist Jurisprudence is said to be 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. This is so despite early protests by feminists who sought to reject offered comparisons to the realists. Even contemporary legal feminists fail to consider the possibility of a female-gendered realist narrative, with all of the opportunities that may be provided by such an alternative genealogy.

B. *The Unfolding of the Traditional Male-Centered Tale*

1. *Law and Society Movement*

As the standard story goes, where the men of Realism left off, their Law and Society brethren picked up.⁶² As noted by one adherent, “[l]aw and society research in the 1960s extended this [realist] critique, pushing a progressive agenda that sought to use law instrumentally to achieve distribu-

Thomas, and others, my co-authors of a related project: FEMINIST LEGAL HISTORY: ESSAYS ON WOMEN AND LAW (Tracy A. Thomas and Tracey Jean Boisseau eds., 2011). Future projects will need to explore connections between this earlier group of women and feminist legal realists. See also *infra* Part V.

⁶² By providing the following synopses of the Law and Society, Critical Legal Studies, and Feminist Jurisprudence movements, in some ways I engage in the same position-based, reductionist accounting I seek to challenge. But what I offer is a take on the traditional telling. As the basic themes of this project suggest, I am fully cognizant that 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 out the supposed implicit judgments and constructed subjectivities of others. See Martha Minow, *Feminist Reason: Getting It and Losing It*, 38 J. LEGAL EDUC. 47, 52 (1988) [hereinafter Minow, *Feminist Reason*] (“Feminists are no more free than others from the stereotypes in cultural thought.”); David M. Trubek, *Back to the Future: The Short, Happy Life of the Law and Society Movement*, 18 FLA. ST. U. L. REV. 11, 24 (1990) [hereinafter Trubek, *Back to the Future*] (“[T]here 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.”).

Thus, I further concede that what follows is an overly simplistic 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 among these approaches that have 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 progress in the movement.

tional justice.”⁶³ Socio-legal scholars, many with connections to the University of Wisconsin, built on the skeptical tradition of the realists.⁶⁴ They called for further deconstruction of claims made within the field of law and sought to use their evaluations as a “means [to achieve] a more just society.”⁶⁵

Much of the critical scholarly work that emerged during this period sought to provide a window into problematic locations in law where, in the real world, formal rules fell short of achieving their purported aims.⁶⁶ In this way, Law and Society work was similar to that of realists who feared there were interstices between “paper rules” and the “realities of implementative practice.”⁶⁷ Also consistent with the realist legacy, most on-the-ground insights and research came from social scientists and not traditional law professors.⁶⁸ For instance, more than criminal law scholars, criminologists were well known for studies that demonstrated the shortcomings of criminal law and procedure to achieve substantive justice.⁶⁹ And emerging law school clinics, mostly run by non-tenure-track law faculty, were trying to fill

⁶³ 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* 114 (Austin Sarat & Jonathan Simon eds., 2003).

⁶⁴ See Trubek, *Back to the Future*, *supra* note 62, at 11 (describing courses offered by four faculty members at the University of Wisconsin Law School that focused on law and society).

⁶⁵ Berman, *supra* note 63, at 106–07.

⁶⁶ Joel Handler et al., *A Roundtable on New Legal Realism, Microanalysis of Institutions, and the New Governance: Exploring Convergences and Differences*, 2005 *WIS. 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.”).

⁶⁷ See G. Edward White, *From Realism to Critical Legal Studies: A Truncated Intellectual History*, 40 *SW. L.J.* 819, 831 (1986). Because of this similarity between Law and Society and realist work, socio-legal projects undertaken during the second half of the twentieth century are frequently referred to as “gap studies.” See, e.g., Mark Kessler, *Review: Lawyers and Social Change in the Postmodern World*, 29 *LAW & SOC’Y REV.* 769, 771 (1995); see also Thomas D. Russell, *The Shape of the Michigan River as Viewed from the Land of Sweatt v. Painter and Hopwood*, 25 *LAW & SOC. INQUIRY* 507, 511 (2000) (“[I]f 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.”).

⁶⁸ KALMAN, *LEGAL LIBERALISM*, *supra* note 25, at 17 (“[T]hrough the realists made ‘law and social science’ their mantra, they never got very far in their attempts to integrate the two.”). See also Trubek, *Back to the Future*, *supra* note 62, at 20.

⁶⁹ See, e.g., JEROME H. SKOLNICK, *JUSTICE WITHOUT TRIAL: LAW ENFORCEMENT IN DEMOCRATIC SOCIETY* (Christine Cardone ed., 3d ed. 1994) (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 & Society Review*, holds a Ph.D. but not a J.D.; Orleans is a Sociologist); see also ABRAHAM S. BLUMBERG, *CRIMINAL JUSTICE* (1967); Abraham S. Blumberg, *The Practice of Law as Confidence Game: Organizational Cooptation of a Profession*, 1 *LAW & SOC’Y REV.* 15, 38–39 (1966).

some of these gaps through court-based challenges.⁷⁰ 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 “white coated” elites of the legal academy.⁷¹

Law and Society 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.⁷² Even so, more skeptical scholars associated with the movement wondered whether the law as written and interpreted in United States courts would ever have the capacity to achieve change.⁷³

Many Law and Society adherents grew disillusioned.⁷⁴ Thus, not unlike the legal realist account, differences impeded the forward movement of the larger project. Perhaps in part due to the changing demographics of law

⁷⁰ Such instances are described in Juliet M. Brodie’s *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.

See also J.P. Ogilvy, *Clinical Legal Education: An Annotated Bibliography—Part Three: Synopses of Articles, Essays, Books, and Book Chapters*, 11 *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.”).

⁷¹ Trubek, *Back to the Future*, *supra* note 62, at 7–8. Trubek continued:

The law and development movement was conceived in the 1950s and 1960s 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 somewhere in the world, the jurists of the Imperial Age of American Law were ready to fix it.

Id. at 20–21; cf. Carrie Menkel-Meadow, *Taking Law and ____ Really Seriously: Before, During and after the Law*, 60 *VAND. L. REV.* 555, 569 (2007) [hereinafter Menkel-Meadow, *Taking Law and ____ Really Seriously*] (“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.”).

⁷² Kessler, *supra* note 67, at 771 (“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.”).

⁷³ See, e.g., Trubek, *Back to the Future*, *supra* note 62, at 42 (“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.”); cf. Louise G. Trubek, *Lawyering for Poor People: Revisionist Scholarship and Practice*, 48 *U. MIAMI L. REV.* 983, 984 (1994) [hereinafter Trubek, *Lawyering for Poor People*].

⁷⁴ Mauricio García-Villegas, *Symbolic Power without Symbolic Violence*, 55 *FLA. L. REV.* 157, 158 (2003) (In the late 1980s, a number of “prominent members of L[aw] & S[ociety] 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.”).

school faculties, which now included greater numbers of women of all races and men of color, a new group emerged from Law and Society's foundation.⁷⁵ Seeing itself as more critical, the newly declared camp called itself the Conference on Critical Legal Studies ("CLS").⁷⁶

2. *Critical Legal Studies*

The first Critical Legal Studies conference took place in 1977.⁷⁷ Many adherents involved became interested in moving beyond gap studies to applying postmodern and poststructural deconstructive approaches⁷⁸ of Foucault, Derrida, and others to the law and legal institutions.⁷⁹ 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 the replication of hegemonic norms.⁸⁰ There is a striking 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.⁸¹

⁷⁵ See KALMAN, LEGAL LIBERALISM, *supra* note 25, at 94–95 (recounting how an influx of women and minority law faculty during the late 1970s and early 1980s worked to challenge the positions held by many white male elites in the legal academy and assumptions of that in-group).

⁷⁶ See *id.* at 94 ("The arrival of law and economics and critical legal studies shattered the liberal consensus.").

⁷⁷ Pierre Schlag, *Critical Legal Studies*, in THE OXFORD INTERNATIONAL ENCYCLOPEDIA OF LEGAL HISTORY 295, 295 (Stanley N. Katz ed., 2009) (describing the event as an "invitational conference"); see also Menkel-Meadow, *Taking Law and _____ Really Seriously*, *supra* note 71, at 572 n.69 and accompanying text (describing author's attendance at this conference, held at the University of Wisconsin).

⁷⁸ See KALMAN, LEGAL LIBERALISM, *supra* note 25, at 82–93; *id.* at 308 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).

⁷⁹ See Kessler, *supra* note 67, at 769, 772 (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."); see also M.J. Clark, *Deconstruction, Feminism, and Law: Cornell and MacKinnon on Female Subjectivity and Resistance*, 12 DUKE J. GENDER L. & POL'Y 107, 108 (2005) ("For Derrida, concepts are *things*, as tactile in their effect as earth and water, as restrictive as chains, and yet as invisible as ether.").

⁸⁰ Douglas Litowitz, *Gramsci, Hegemony, and the Law*, 2000 BYU L. REV. 515, 515 (2000); Menkel-Meadow, *Taking Law and _____ Really Seriously*, *supra* note 71, at 572; see also Trubek, *Lawyering for Poor People*, *supra* note 73, at 984–85 ("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.").

⁸¹ Berman, *supra* note 63, at 115; John Henry Schlegel, *Notes Toward an Intimate, Opinionated, and Affectionate History of the Conference on Critical Legal Studies*, 36 STAN. L. REV. 391, 397 (1984) [hereinafter Schlegel, *Notes Toward an Intimate History*]; see also KALMAN, LEGAL LIBERALISM, *supra* note 25, at 82–83 (describing how some CLS scholars asserted the new movement's descendancy from Legal Realism to claim a "pedigree").

As the next generation, however, CLS scholars were not particularly interested in offering snapshots of problematic locations where law as applied to facts fell short.⁸² Rather, they questioned these very signifiers.⁸³ Through fine-grained analyses, many of these scholars attempted to dismantle separate notions of law versus society, or individual as opposed to community.⁸⁴ Their work was thus seen as a radical and deeply critical departure from mainstream legal academic thinking.

Nevertheless, this conversation, too, became dominated by a handful of academic insiders.⁸⁵ As with Realism, a select set of voices—again primarily those of white men comfortably ensconced in the legal academy—drove CLS discourse across the pages of America’s law journals, attempting to direct the dialogue on their terms.⁸⁶ This relatively closed discussion, fully accessible to a limited few, seemed ever more removed from real world and community-based experiences. CLS has been criticized, therefore, for becoming a set of depressing, deconstructive debates with little or no positive takeaway.⁸⁷

⁸² John Henry Schlegel, *CLS Wasn’t Killed by a Question*, 58 ALA. L. REV. 967, 975 (2007) [hereinafter Schlegel, *CLS Wasn’t Killed by a Question*] (“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.”).

⁸³ See KALMAN, LEGAL LIBERALISM, *supra* note 25, at 84; Robert W. Gordon, *Critical Legal Histories*, 36 STAN. L. REV. 57, 57 (1984) (giving “a brief account of the impulses that have prompted the Critical scholars to their chosen ways of writing history”).

⁸⁴ Kessler, *supra* note 67, at 772 (“From an ideological perspective, there is no useful distinction between law *and* society.”); KALMAN, LEGAL LIBERALISM, *supra* note 25, at 86 (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 the individual and the community”).

⁸⁵ See Schlegel, *CLS Wasn’t Killed by a Question*, *supra* note 82, at 968 n.7 (“There was a terrible problem with elitism among us . . . as well as of a fear that outsiders might undermine our project.”); cf. Schlegel, *Notes Toward an Intimate History*, *supra* note 81, at 402 (“[I]n an organization that claims to be as deeply antihierarchical as this one does, behavioral manifestations of traditional notions such as . . . ‘getting ahead is teaching at a better law school,’ are deeply troubling.”).

⁸⁶ Reading these writings, one is struck by the club-like feel 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., Schlegel, *CLS Wasn’t Killed by a Question*, *supra* note 82 (referring throughout his piece and with great informality to his CLS cohorts, including “Fred,” “Bob,” “Duncan,” and “Laura”).

⁸⁷ 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* note 25, at 121–25; see also Berman, *Telling a Less Suspicious Story*, *supra* note 63, at 127 (describing CLS as so “paranoid” in its style that it “may, over time, have a potentially corrosive effect on society”); Gordon, *supra* note 83, at 116 (stating that CLS scholars “have for the most part not succeeded in communicating their ideas clearly enough to attract much relevant criticism from outside opponents”); Kessler, *supra* note 67, at 770 (“Newer postmodern approaches are criticized as lacking any utility for, or even disabling, transformative politics.”).

At least one follower 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.⁸⁸ But with the usual suspects taking up most of the space, many adherents were implicitly and explicitly pushed into its corners. The dominant group marginalized some of the very same voices credited with helping start the movement—including those of women.⁸⁹

C. *Women and Feminist Jurisprudence: The Turn Away From
(and Toward) Legal Realism*

With this, many CLS women simply moved out.⁹⁰ In the 1980s, they began holding their own meetings at which critical feminist scholarship and practice were openly and extensively discussed.⁹¹ Starting out under the banner of “Fem-Crits,” the work of this group soon came to be known for Feminist Jurisprudence or “Feminist Legal Theory.”⁹² With its birth from CLS, this movement was and is seen by many as a further unfolding of the standard story about Legal Realism—yet another generation with bloodlines running to the male-only traditional account.⁹³

⁸⁸ Schlegel, *Critical Legal Studies*, *supra* note 37, at 673; *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.”).

⁸⁹ Carrie Menkel-Meadow has described how men at the CLS conferences “ghettoized” its women members by relegating them to separate sessions. Carrie Menkel-Meadow, *Feminist Legal Theory, Critical Legal Studies, and Legal Education or “The Fem-Crits Go to Law School”*, 38 J. LEGAL EDUC. 61, 63 (1988) [hereinafter Menkel-Meadow, *The Fem-Crits Go to Law School*].

⁹⁰ Similarly, faculty of color—women and men—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 detailed account of the emergence of the Critical Race Theory movement through this same history 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.L. & PUB. POL’Y 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.”). For a discussion of how some women of color were, and may continue to feel, torn between and erased by the feminist jurisprudence and critical race theory camps, *see* Kimberlé Crenshaw, *Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics*, 1989 U. CHI. LEGAL F. 139, 152 (1989).

⁹¹ *See* D. KELLY WEISBERG, *FEMINIST LEGAL THEORY: FOUNDATIONS* xvii–xviii (1993) (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).

⁹² Deborah L. Rhode, *Feminist Critical Theory*, 42 STAN. L. REV. 617, 621–22 (1990). *See generally* Menkel-Meadow, *The Fem-Crits Go to Law School*, *supra* note 89.

⁹³ *See* Menkel-Meadow, *Taking Law and _____ Really Seriously*, *supra* note 71, 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 & 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

Like traditional realists, many of these critical lawyers and scholars sought to reach outside of customary legal doctrine to bring other disciplines to bear on their understanding of the law in action.⁹⁴ But the legal scholars and practitioners who moved in this direction—primarily women—did so with a view toward challenging male-centered assumptions and tools of the legal academy and legal institutions.⁹⁵ In particular, they became more concerned with context, community, and action—much like Anna Moscovitz Kross.⁹⁶

Psychologist Carol Gilligan's research featured prominently, serving as a basis for feminist legal scholars to challenge the naturalized masculine objective in the law and call for greater consideration of context, care, and communion in legal discourse and decision-making.⁹⁷ Similarly, 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 "resist the privileging of one woman's perspective over another," or to allow the focus on individual theories concerning varied lived experiences to divide the group.⁹⁸ These feminist legal methods were seen as "radically nonassimilationist," suggesting women in law should be "resistant to [seeing] mere inclusion in dominant social institutions" as a mode of societal transformation.⁹⁹ Thus, it appeared the group was not only trying to practice what it preached, but lay groundwork at the

"Fem-Crits" and Legal Realism); see also Gary Minda, *The Jurisprudential Movements of the 1980s*, 50 OHIO ST. L.J. 599, 622 (1989).

⁹⁴ See, e.g., Kathleen A. McDonald, *Battered Wives, Religion, & Law: An Interdisciplinary Approach*, 2 YALE J.L. & FEMINISM 251 (1990) (religion); Martha Minow, *The Supreme Court, 1986 Term—Forward: Justice Engendered*, 101 HARV. L. REV. 10, 46 (1987) (philosophy); see also Martha Albertson Fineman, *Gender and Law: Feminist Legal Theory's Role in New Legal Realism*, 2005 WIS. L. REV. 405, 405 (2005) ("[F]eminism is at its core an interdisciplinary endeavor; feminist scholars are well accustomed to integrating work from multiple disciplines.").

⁹⁵ See Minow, *Feminist Reason*, *supra* note 62, at 47 ("Feminists have shown how . . . assertions of neutrality hide from view the use of a male norm for measuring claims of discrimination."); Trubek, *Lawyering for Poor People*, *supra* note 73, at 985 ("Feminist scholars had suggested that the law excludes the concerns of women through its incorporation of male perspectives and devaluation of personal experience.").

⁹⁶ See *infra* Part III.

⁹⁷ See, e.g., Patricia A. Cain, *Feminism and the Limits of Equality*, 24 GA. L. REV. 803, 835–36 (1990); Robin West, *Jurisprudence and Gender*, 55 U. CHI. L. REV. 1, 14–15 (1988) [hereinafter West, *Jurisprudence*]; see also Richard A. Posner, *Conservative Feminism*, 1989 U. CHI. LEGAL F. 191, 211–12 (1989) (noting and questioning Gilligan's insights). There were other approaches to feminist legal theory even at this early juncture. The work of Catharine MacKinnon, seen as a dominance theorist or radical feminist, offered related but alternative takes on patriarchy and the law. See CATHARINE A. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* (1987) [hereinafter MACKINNON, *FEMINISM UNMODIFIED*].

⁹⁸ Cain, *Feminism and Limits*, *supra* note 97, at 846; see also Bender, *A Lawyer's Primer*, *supra* note 97, at 3.

⁹⁹ Martha Albertson Fineman, *Introduction to AT THE BOUNDARIES OF LAW: FEMINISM AND LEGAL THEORY*, xiv Martha Albertson Fineman & Nancy Sweet Thomadsen eds., (1991) [hereinafter Fineman, *Introduction*].

outset to stave off the reification of elite structures, power grabs, and divides that damaged earlier critical legal movements.¹⁰⁰

The ultimate goal was to substantively address women's lived inequality, as well as to perpetuate fairness and non-subordination in the world more generally.¹⁰¹ 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 deconstruction for deconstruction's sake.¹⁰² Although seen as largely postmodern, early feminist legal thinkers were deeply concerned with pragmatism, life outside of the Ivory Tower, and action.

Significantly, even those engaged in "theoretical" work sought to look beyond binaries and bridge the supposed divide between practice and thought, ideas and activism.¹⁰³ For instance, Martha Fineman called upon her colleagues to reject the allure of "grand theorizing" so common in the academic world, and 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."¹⁰⁴ Robin West advocated the value of making visible the real life stories of women, to "dislodge legal theorists' confidence that they speak for [women]."¹⁰⁵ These activities were not intended to be limited to classroom discussions and professional conferences. Leslie Bender, Mari Matsuda, and many others urged taking Legal Feminism's work beyond the academy's doors to "design transformative social, political, and legal systems" that "emphasize feminist values and concerns" and see humans as interdependent.¹⁰⁶

Grounded insights of legal practitioners and clinicians were central to the movement's work in the early days. Ann Scales practiced law while

¹⁰⁰ Cf. Scales, *supra* note 50, at 1401 n.144 (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).

¹⁰¹ West, *Jurisprudence*, *supra* note 97, at 72 ("A perfect legal system will protect against harms sustained by all forms of life . . ."); Minow, *Feminist Reason*, *supra* note 62, at 47 ("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.").

¹⁰² See, e.g., WEISBERG, *supra* note 91, at 405 ("CLS seeks to deconstruct the law, whereas feminist legal theory seeks to empower women through law"); Fineman, *Introduction*, *supra* note 99, at xi ("[T]he 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.").

¹⁰³ Cf. WEISBERG, *supra* note 91, at 408 (noting that "[f]eminist writing has been criticized for deemphasizing theory").

¹⁰⁴ Fineman, *Introduction*, *supra* note 99, at xii.

¹⁰⁵ West, *Jurisprudence*, *supra* note 97, at 65.

¹⁰⁶ Bender, *supra* note 97, at 11; see also Mari J. Matsuda, *Liberal Jurisprudence and Abstracted Visions of Human Nature: A Feminist Critique of Rawls' Theory of Justice*, 16 N.M. L. REV. 613, 622 (1986) (discussing value of the collective efforts of feminists); Cain, *Feminism and Limits*, *supra* note 97, at 806 (highlighting the need for a "woman-centered perspective" as an important goal of feminist legal theory).

teaching, including serving as lead counsel for New Mexico NARAL in a case where it successfully sued for Medicaid funding of abortions.¹⁰⁷ A strong early voice in Feminist Jurisprudence, she urged her sisters in the movement to resist abstraction and value “honesty and pragmatism”¹⁰⁸ as “[f]airness must have reference to real human predicaments.”¹⁰⁹ Similarly, Lucie White engaged students through feminist lawyering work. Focusing primarily on the needs of poor women of color, White’s thinking and writing was deeply informed by the personal interactions she had with women struggling in impoverished communities.¹¹⁰

These sentiments assisted feminist legal theory in being seen both as critical and constructive.¹¹¹ Legal Feminism was also hopeful. Energy pulsing through these early writings helped carry a message of optimism, suggesting that transformation and social change were possible through collective action and new feminist approaches. Although none posited any easy answers, the implicit message in this early scholarship was that by chipping away together over time, reformation of existing power dynamics and structures of exclusion would be inevitable.

It was this optimism, in part, that led some feminists to recoil when their work was characterized as a continuation of Legal Realism. For instance, Ann Scales expressed gratitude to the realists for beginning a conversation that challenged law as a “scientific enterprise, devoid of moral or political content.”¹¹² However, she dismissed the male-dominated movement as being insufficiently radical in its thinking and inadequately revolutionary in its efforts.¹¹³ More than this, Scales claimed Legal Realism failed to deliver change as promised, instead leading followers down a dead-end path.¹¹⁴ Patricia Cain noted that she resented comparisons between the traditional men of Realism and feminist legal scholars, as they implied that feminists lacked originality and failed to create something new.¹¹⁵

¹⁰⁷ See UNIVERSITY OF DENVER, STURM COLLEGE OF LAW FACULTY DIRECTORY: ANN C. SCALES, <http://law.du.edu/index.php/profile/ann-scales> (last visited Nov. 13, 2011).

¹⁰⁸ Scales, *supra* note 50, at 1386.

¹⁰⁹ *Id.* at 1380.

¹¹⁰ Cf. Lucie E. White, *No Exit: Rethinking “Welfare Dependency” from a Different Ground*, 81 GEO. L.J. 1961, 1970–71 (1993); see generally Lucie E. White, *Subordination, Rhetorical Survival Skills, and Sunday Shoes: Notes on the Hearing of Mrs. G.*, 38 BUFF. L. REV. 1 (1990) (analyzing Mrs. G.’s case).

¹¹¹ See KALMAN, LEGAL LIBERALISM, *supra* note 25, at 179 (“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.”); Chester & Alumbaugh, *supra* note 93, at 44–45 (“Groups such as the ‘Fem-Crits’ and their sympathizers exhibit more of the pragmatism of the Realists.”).

¹¹² Scales, *supra* note 50, at 1400.

¹¹³ See *id.*

¹¹⁴ See *id.*

¹¹⁵ Patricia A. Cain, *Feminist Legal Scholarship*, 77 IOWA L. REV. 19, 32 (1991); cf. Schlegel, *Notes Toward an Intimate History*, *supra* note 81, at 391 (“[T]he notion of history implies a past that is to be recreated, and this organization effectively has no past . . .”).

But these responses suggest that feminist scholars were overlooking another powerful avenue for activism: feminist legal history. Focused on the traditional male-centered tale, they overlooked the possibility of a new narrative about the legal realists—a narrative that would include overlooked voices, experiences, and desires of past women in law, in addition to focusing on the law in action. By accepting the standard story about Legal Realism, feminists implicitly bought into an androcentric account of that movement and its lineage, with its focus on thinking over doing.¹¹⁶ Indeed, despite these early protests, the naturalizing of this history and traditional version of events has resulted in feminist legal scholars impliedly becoming the intellectual daughters of the CLS movement, granddaughters of the Law and Society movement, and great-grandchildren of the realists we know.¹¹⁷

Worse, however, seeming to replicate the practices of the realists, many contemporary legal feminists have turned increasingly towards academic debates focusing on supremacy of ideas. Like earlier generations in the standard story, it appears contemporary feminist legal projects in this country have largely become battles over words, thoughts, and theories rather than active struggles to improve lived experiences. Sadly, the Feminist Jurisprudence movement may be falling prey to seeming inevitability and adopting the same destructive patterns that impaired successes of earlier critical generations.¹¹⁸ Somewhat paradoxically, they may be abdicating claims of radicalism and creativity in the process, ensuring their own movement fails to deliver change.¹¹⁹

For example, despite early assertions that feminist legal work was primarily concerned with concrete and experience-based issues, it veered in the direction of the “malestream” theorizing it purported to reject.¹²⁰ As the movement unfolded throughout the 1990s and into the new millennium, feminist legal conversations grew increasingly abstract and removed from

¹¹⁶ Cf. Martha Minow, *Feminist Reason*, *supra* note 62, at 52 (“[W]e 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.”).

¹¹⁷ 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, *LIVING WITH HISTORY/MAKING SOCIAL CHANGE* 165 (2009).

¹¹⁸ *Id.* (arguing that the impression women were not a part of key historical moments may impact the ability of contemporary women to “think creatively and strive for originality”).

¹¹⁹ See NICOLA LACEY, *UNSPEAKABLE SUBJECTS: FEMINIST ESSAYS IN LEGAL AND SOCIAL THEORY* 169–70 (1998) (warning that feminists’ failure to more directly engage traditional jurisprudence out of fear of buying into the orthodoxy may be shortsighted, resulting in overgeneralizations and lost opportunities).

¹²⁰ Cf. Liz Stanley & Sue Wise, *But the Empress Has No Clothes! Some Awkward Questions About the ‘Missing Revolution’ in Feminist Theory*, 1 *FEM. THEORY* 261, 263 (2000).

the lives of individual women and other marginalized persons.¹²¹ Having arrived, many legal feminists appeared to climb ever-higher into the Ivory Tower to engage in heady conversations largely inaccessible to the vast majority of persons supposedly embraced by the feminist agenda.¹²² Even when fully understood, the weight of these discourses has provided little forward movement. And feminist legal work, frequently drawing from the dense work of Judith Butler, has become decidedly less encouraging.¹²³ Newer legal feminists have also turned ever away from the reality of lived experiences.

An example of such a conversation took place at a 2003 symposium hosted by the Columbia Journal of Gender and Law. A group of feminist scholars, when asked to respond to the question: “Why a Feminist Law Journal,” decided to use the 1994 Texas Supreme Court Case *Twyman v. Twyman*,¹²⁴ a case “involving divorce, sadomasochistic sex, and a claim of emotional distress, as a focal point to explore how feminism deals with gender, sexuality, and power, and whether it does so sufficiently.”¹²⁵ Many of the participants, including Janet Halley and Brenda Cossman, offered some form of their own “re-readings of the *Twyman* facts,” which involved William and Sheila Twyman, their divorce, and related legal proceedings for tort damages.¹²⁶ Such re-readings were intended, in part, as a way to “take a break” from old-school legal feminism’s confining constructs, which too often depict women in a singular, vulnerable light.¹²⁷

As a result, Sheila Twyman’s own factual allegations, including claims of coercive sado-masochist sex by her husband—who knew “she had been

¹²¹ See Brenda Cossman, Dan Danielsen, Janet Halley & Tracy Higgins, *Gender, Sexuality, and Power: Is Feminist Theory Enough?*, 12 COLUM. J. GENDER & L. 601, 610 (2003) (noting that “[o]ne of the most crucial moments in the genealogy of United States feminism was the roughly simultaneous publication in 1990 of Judith Butler’s *Gender Trouble* and Eve Kosofsky Sedgwick’s *Epistemology of the Closet*”).

¹²² See LACEY, *supra* note 119, at 176–78 (describing undue abstraction as one negative consequence stemming from grand theorizing); Rosalind Dixon, *Feminist Disagreement (Comparatively) Recast*, 31 HARV. J.L. & GENDER 277, 297–98 (2008) (“Newer feminisms have also placed a much greater emphasis than older feminists on the role of complex ideologies in producing gender injustice . . . [and use] a style that is much less familiar, direct, or accessible to legal scholars.”); cf. Naveen Thayyil, *Feminist Jurisprudence and Navel Gazings: Some Reflections*, 14 UCL JURISPRUDENCE REV. 308, 324 (2008), available at <http://arno.uvt.nl/show.cgi?fid=81269> (“Feminist jurisprudence at present, it would appear, needs larger audiences and more participants, more listeners and more sections to discuss, to debate, and to disagree.”).

¹²³ Dixon, *supra* note 122, at 300, 302 (“Newer feminist theories are . . . consistently more skeptical of the capacity of law to act as a vehicle for achieving feminist change.” Postmodern feminists, for example, believe “feminist resistance should focus on processes of literary and analytic deconstruction, rather than the kind of political mobilization aimed at achieving legal change.”).

¹²⁴ 855 S.W.2d 619 (Tex. 1993).

¹²⁵ Cossman et al., *supra* note 121, at 601.

¹²⁶ *Id.* at 611, 626.

¹²⁷ *Id.* at 633; see also JANET HALLEY, SPLIT DECISIONS: HOW AND WHY TO TAKE A BREAK FROM FEMINISM 348–63 (2006) (offering an expanded view of the author’s thoughts on such an enterprise, including an extended re-reading of the *Twyman* case).

raped at knifepoint before their marriage”¹²⁸—were purposely rewritten so the authors could bring to bear Foucault, Nietzsche, and “queer theory postmodern feminism informed by the work of Judith Butler”¹²⁹ on the Twyman story.¹³⁰ Under one constructed reading based on Foucault Volume One, Sheila is the “anti-sex fidelity-enforcing wife from hell, who won’t have mild S/M sex with her husband, won’t let him sleep around to let him get it, *and* won’t divorce in peace.”¹³¹

No doubt overly simplistic, binary characterizations of women as victims and men as abusers are out of step with many modern understandings of human relationships.¹³² And a critique of the Texas Supreme Court’s decision, as well as its development of a limited doctrinal vantage point, would serve as appropriate feminist legal fodder.¹³³ Even taking issue as a lawyer with Sheila Twyman’s account or the validity of her legal claim seems appropriate. But expressly disregarding “what actually or probably happened between William and Sheila Twyman” for purposes of dramatically retelling their story in “four very divergent” ways to showcase theory’s possibilities seems to lack a productive goal, as well as a sense of respect.¹³⁴ “Taking a break” from feminism should not involve disregard for the experiences and expressed pain of others. Yet, by the article’s end, it seems plaintiff Twyman served as a puppet dressed in different deconstructive costumes. In an ulti-

¹²⁸ *Twyman*, 855 S.W.2d at 620 n.1.

¹²⁹ Cossman et al., *supra* note 121, at 621.

¹³⁰ *See id.* at 614–17, 621–23.

¹³¹ *Id.* at 616. As a further example, the authors offered another take on the real story: that the parties’ divorce action and struggles over William Twyman’s infidelity, which had been pending for several years, “was for both of them a paroxysm of intimacy, a sustained crescendo of erotic interrelatedness, which, if it should ever end, would leave both of them aimless and lonely to the last degree.” *Id.* One is left to wonder if anyone ever called Sheila Twyman to ask how she felt about such characterizations of her life.

¹³² *See infra* note 282 and accompanying text.

¹³³ *See generally* Mae C. Quinn, Note, *The Garden Path of Boyles v. Kerr and Twyman v. Twyman: An Outrageous Response to Victims of Sexual Misconduct*, 4 TEX. J. WOMEN & L. 247 (1995) (examining *Twyman*’s implications and the viability of intentional infliction of emotional distress claims in cases involving alleged sexual misconduct or abuse). Indeed, over fifteen years ago, when the *Twyman* case was first decided, I wrote a student note examining its implications and the viability of intentional infliction of emotional distress claims in cases involving alleged sexual misconduct or abuse. *See id.* (arguing that plaintiffs in sexual misconduct cases will seldom be successful under the tort of intentional infliction of emotional distress). Interestingly, nearly ten years after my note was published, Brenda Cossman offered her first “rereading” of the facts of the case to include a more sex-positive interpretive possibility. In doing so, she suggested that my Note, described as the only comment on the case written at the time, merely “proceed[ed] on the assumption that [the sexual activity in *Twyman*] constitutes an emotional harm.” Brenda Cossman, *Sexuality, Queer Theory, and “Feminism After”*: *Reading and Rereading the Sexual Subject*, 49 MCGILL L.J. 847, 860–61 n.53 (2004). While admittedly my student note was underdeveloped in a number of respects, and my thinking has changed since my law school days, I did not assert that sadomasochist sexual activity is *per se* harmful and unlawful. This was, and is, not my position at all. Rather, my point was that juries, as a cross-section of the community, may be best-suited for determining certain features of tort-based claims—not judges.

¹³⁴ Cossman et al., *supra* note 121, at 611.

mate rejection of the realist agenda, Sheila Twyman's life story, and that of William Twyman, became fiction.

Although this example, with its unabashed rejection of lived reality, is extreme, over the last decade legal feminists around the world have voiced concerns about similar developments. For instance, Joanne Conaghan, a British feminist legal scholar, has expressed regret that many postmodern colleagues, in attempting "to avoid the 'trap' of essentialism . . . simply . . . steer clear of approaches which rely on or invoke some notion of women's experience."¹³⁵ This, she laments, has "the unfortunate effect of directing feminist efforts away from concrete, empirically-based legal research with a socio-economic or distributive focus towards more abstract theoretical encounters with gendered cultural and legal representations."¹³⁶ Similar concerns have been expressed in this country.¹³⁷

Somewhat ironically, however, some of the most vocal critics of contemporary feminism's abstractions have engaged in a fair amount of theorizing on their own.¹³⁸ In addition, many have adopted the same sharp sound of their American realist forefathers.

For instance, Katherine Sheehan rebuffed Robin West for her lack of care and hostility against postmodernism when she stated, among other things, that "for feminist reformers concerned with doing something with law to end patriarchy, as a tool of analysis deconstruction has all the usefulness of an unhinged steering wheel in avoiding a collision with a wall."¹³⁹ Sheehan then belittled West's analysis, declaring: "West is wrong about deconstruction, but she is wrong in an interesting way, and it is interesting

¹³⁵ Joanne Conaghan, *Reassessing the Feminist Theoretical Project in Law*, 27 J.L. & Soc'y 351, 369 (2000).

¹³⁶ *Id.* at 370.

¹³⁷ One of the most notable examples was Martha Nussbaum's New Republic essay decrying the influence of Judith Butler's work. See Martha Nussbaum, *The Professor of Parody: The Hip Defeatism of Judith Butler*, THE NEW REPUBLIC, Feb. 22, 1999, available at <http://www.akad.se/Nussbaum.pdf>.

¹³⁸ See, e.g., MACKINNON, FEMINISM UNMODIFIED, *supra* note 97; but see *id.* at 198–205 (discussing collaboration in the context of anti-pornography legislation drafted by MacKinnon and Andrea Dworkin). Such irony is not our prize alone. In a recent exchange between Australian feminist legal scholar Ngaire Naffine and Britain's Anne Bottomley, both expressed concerns about theory overtaking more grounded work; each one, however, accused the other of engaging in undue abstraction. See Ngaire Naffine, *In Praise of Legal Feminism*, 22 LEGAL STUD. 71, 71 (2004) (reflecting on the achievements and ongoing challenges of feminism within the academy); Anne Bottomley, *Shock to Thought: An Encounter (of a third kind) with Legal Feminism*, 12 FEM. L. STUD. 29, 42–44 (2004) (accusing Naffine of joining an "orthodoxy" in feminist legal scholarship that panders to the legal academy, while deconstructing Naffine's text through reference to French philosopher Alain Badiou); see also Ngaire Naffine, *Shocking Thoughts: A Reply to Anne Bottomley*, 12 FEM. L. STUD. 175, 177 (2004) (responding to Bottomley, by pointing out the hypocrisy of her critique since her writing is "designed for a very select and knowing audience").

¹³⁹ Katherine C. Sheehan, *Caring for Deconstruction*, 12 YALE J.L. & FEMINISM 85, 85 (2000) (responding to ROBIN WEST, *CARING FOR JUSTICE* (1997)). Sheehan begins her article noting that West's statement reflected an "uncharacteristic lack of grace." *Id.*

that she goes so far out of her way to be wrong about deconstruction.”¹⁴⁰ Similarly, Catharine MacKinnon shared her own critical views about postmodern feminist legal work, declaring that by “pretending to be profound while being merely obscure (many are fooled), slathering subjects with words, its self proclaimed practitioners fairly often don’t say much of anything.”¹⁴¹

Just as was seen in earlier male-dominated critical legal efforts, a great deal of feminist legal work has involved unkind wars of words.¹⁴² Many adherents appear to be competing to have their academic ideas win out over others—without sufficient concern for their peers or improving material circumstances in the world. Rather than continuing these debasing debates about words as they appear on paper, which seem to have us stuck in the present, perhaps we should revisit our past to see if there is a way forward.

II. THE FORGOTTEN CHAPTERS AND EMERGING COUNTER-ACCOUNT: ANNA MOSCOWITZ KROSS AND FEMINIST LEGAL REALISM

Given the current climate in feminist legal communities—as well as the renewed interest in the American legal realist narrative—this is a particularly good moment to pause to reconsider the genealogy of Legal Feminism as it relates to Legal Realism.¹⁴³ Contrary to the claims of those who have been telling (and accepting) the traditional male-only tale about Legal Realism, many women in law were, in fact, engaged in their own realist projects during the first half of the last century. However, their work involved sites of Legal Realism outside of appellate judging and decision-making, or legislative rules. On the ground in impacted communities and trial courts, these women engaged in legal work in various realistic ways. Often looking beyond formal legal mechanisms and rules, their pragmatic approaches to law involved actively “doing” and “creating” Realism, and not just talking about or “searching” for an American jurisprudence.¹⁴⁴

Similar to male realists of the day, these women were concerned with how people in individual communities, including themselves, were impacted

¹⁴⁰ *Id.* Sheehan sarcastically adds that Martha Nussbaum’s apparently flawed analysis of Judith Butler’s work displayed a lack of care atypical of someone of her academic standing and title. *See id.* at 87 n.14 (“Surely Nussbaum would not have become Ernst Freund Professor of Law & Ethics at The University of Chicago if this effort were typical of her scholarship.”).

¹⁴¹ Catharine MacKinnon, *Points Against Postmodernism*, 75 CHI.-KENT L. REV. 687, 693 (2000).

¹⁴² *Cf.* Mary Anne Case, *Journals as a Feminist Playground*, 12 COLUM. J. GENDER & L. 644, 647 (2003) (claiming feminist scholars need not “incorporate strategies in . . . hurtfulness” as part of their projects, but would be wise “to learn not to be hurt as easily, not to be as fearful of hurting others”); JUDITH A. BAER, *OUR LIVES BEFORE THE LAW: CONSTRUCTING A FEMINIST JURISPRUDENCE* ix (1999) (“I believe that the worst mistake feminists have made is to be too nice.”).

¹⁴³ *See supra* Part I; *infra* Part II.

¹⁴⁴ *See generally* HULL, *supra* note 10 (searching for an American jurisprudence).

by official decisions and institutions. Despite their exclusion from elite legal venues, they came together to productively engage in social reform work in innovative ways—to uplift themselves and others oppressed by marginalization. Like the traditional well-known realists, they were interested in interdisciplinarity. But frequently looking to non-legal and social-scientific modes of operating to advance their causes, these women operationalized such cross-cutting efforts.

Although there are parallels between the work of the women during this time and that of the male realists, there were also significant differences. In particular, as will be further explored, much of their work reflected different values, goals and methods. These differences were not necessarily gendered—that is to say, “female”—ways of operating. Nor is it clear these practices were employed by women alone. But they do align with much of what was identified at the outset of the Feminist Jurisprudence movement, focusing on empowering marginalized persons, including women, through law. And, unlike the known male realists, these women were focused on delivering pragmatic responses. Thus, these similarities and differences serve to recast Legal Realism’s past and may help to rethink Legal Feminism’s future.

One woman engaged in this more feminist realist enterprise was Anna Moscowitz Kross.¹⁴⁵ An early woman graduate of New York University Law School, among the first women to actively practice law in the United States, and one of the country’s first women appointed to the bench, Kross was a trailblazer in establishing a place for women in the field of law. More than this, however, she sought to impact institutions, represent clients, and engage in judicial decision-making in ways that were seen as far from commonplace. Kross’s engagement with the law—a relationship that spanned from the 1910s to the 1960s—was very much in line with realist aims, including using law as a means for social ends. However, her feminist approaches to such work suggests a somewhat different take on the realist enterprise, one that I call Feminist Legal Realism.

A. *Roots of Reform—In the Trenches*

Anna Kross was born in 1892 in Nishwez, Russia, and her family came to the United States to escape oppressive conditions when she was an infant.¹⁴⁶ Settling in the Lower East Side of Manhattan, they shared a small tenement apartment in a busy building filled with other poor immigrants.¹⁴⁷

¹⁴⁵ For the sake of clarity I refer throughout the text to “Kross” by her married name.

¹⁴⁶ 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 nn.10–11 (2006) [hereinafter Quinn, *Revisiting Kross’s Critique*].

¹⁴⁷ *Id.*

Kross's father worked in a garment factory.¹⁴⁸ But day-to-day existence was a challenge; the family constantly felt the sting and exclusionary power of poverty.¹⁴⁹ Kross 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 to receive her diploma.¹⁵⁰

While only a child, Kross also joined the workforce as a garment worker.¹⁵¹ It is clear that though this experience was a prominent feature in her life, shaping her thinking throughout adulthood, she did not let the factory walls limit her possibilities. Kross carried the skills she learned as a nimble pieceworker into the larger world, putting them to practical use in other ways.¹⁵² Responding to needs and opportunities as they arose, she supplemented the family's earnings through odd jobs, including stringing beads and tutoring other new immigrants.¹⁵³

Education was always an important feature of Kross'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 also on the betterment of those around her. Education was not something to be used to distance and exclude, but to bridge and facilitate. Kross'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,¹⁵⁴ where she worked with Russian Jews who sought to escape the revolution and harsh conditions in their homeland, just as her family had.¹⁵⁵

Many of her students endured continued mistreatment, harsh conditions, and discrimination in America.¹⁵⁶ Kross understood this false promise.

¹⁴⁸ *Id.*

¹⁴⁹ *See id.*

¹⁵⁰ *See id.*

¹⁵¹ *Id.*

¹⁵² *Cf.* Lucie White, *Paradox, Piece-Work and Patience*, 43 HASTINGS L.J. 853 (1992) (explaining how daily routines can affect lawyers' perspective of the world).

¹⁵³ *See* Quinn, *Revisiting Kross's Critique*, *supra* note 146, at 669 n.11.

¹⁵⁴ *Id.*; *see also* MINA CARSON, *SETTLEMENT FOLK: SOCIAL THOUGHT AND THE AMERICAN SETTLEMENT MOVEMENT, 1885–1930*, ix (1990) (recounting the history of Settlement work in this country, including its emphasis on testing ideas through experience over “hollow” thought experiments).

¹⁵⁵ *See* CARSON, *supra* note 154, at 152 (explaining that after 1900, New York City's University Settlement became a center of assistance for “exiles and pogrom victims” from Russia); RUTH HUTCHINSON CROCKER, *SOCIAL WORK AND SOCIAL ORDER: THE SETTLEMENT MOVEMENT IN TWO INDUSTRIAL CITIES, 1889–1930*, at 2 (1992) (noting that most Settlement workers—unlike Kross—left lives of privilege to live among the poor and help them).

¹⁵⁶ *See* HOWARD MARKEL, *QUARANTINE! EAST EUROPEAN JEWISH IMMIGRANTS AND THE NEW YORK CITY EPIDEMICS OF 1892*, at 32–37 (1997) (describing the difficult living conditions of many poor Russian immigrants on Manhattan's Lower East Side, including overcrowding in tenement buildings and boarding houses); *see also* NANCY FONER, *FROM ELLIS ISLAND TO JFK: NEW YORK'S TWO GREAT WAVES OF IMMIGRATION 190–96* (2000)

For instance, in her youth, she had been fired from a job because she could not work on the Jewish Sabbath.¹⁵⁷ And while holding a Sukkot ceremony in their home, Kross's family was accosted by someone throwing a bottle through their window.¹⁵⁸ These early experiences with poverty, subjugation, and antisemitism led Kross to seek out a life in law.¹⁵⁹ She received a scholarship to attend New York University Law School in 1908.¹⁶⁰ However, she continued to teach immigrants in the evening—always keeping one foot in the real world and staying connected to lived experiences beyond book-based learning.¹⁶¹

One of only a few women students at New York University Law School, Kross formed a student Suffrage Association chapter, successfully involving law school classmate Fiorello LaGuardia.¹⁶² Kross also brought women law students and community members together around the issue of prostitution and the treatment of women accused of such crimes. During this time, various social and religious groups were engaged in a powerful moral reform agenda to stamp out the “social evil” of prostitution, in part through increased undercover stings and prosecutions.¹⁶³ More moderate groups called for compassionate treatment for women sex workers who were seen as fallen women in need of assistance and support.¹⁶⁴ 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 separately from other criminal cases.¹⁶⁵

Not yet able to provide direct representation to clients, Kross helped lead citizen investigations of the Women's Court, which attempted, among other things, to stop its voyeuristic practices that placed accused prostitutes on display for the community as a form of entertainment in evening sessions.¹⁶⁶ Through the Prison Committee of the Church of the Ascension, an Episcopal organization, she also organized groups to provide social and other services to discharged women prisoners as an early form of re-entry work.¹⁶⁷ Thus, while still a law student, Kross implemented innovative, in-

(describing educational challenges faced by Russian Jewish immigrants in the early 1900s).

¹⁵⁷ Quinn, *Revisiting Kross's Critique*, *supra* note 146, at 669 n.11.

¹⁵⁸ *Id.*

¹⁵⁹ *See id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.* at 669 n.12.

¹⁶² *Id.* at 670.

¹⁶³ *Id.* at 671–76.

¹⁶⁴ *See id.*

¹⁶⁵ *See id.*

¹⁶⁶ *See id.* at 676–78.

¹⁶⁷ Thus began a long working relationship between Kross and well-known, influential, and sometimes controversial Reverend Percy Stickney Grant of the Episcopal Church of the Ascension. For more on the Church of the Ascension, see *Parish History, THE CHURCH OF THE ASCENSION IN THE CITY OF NEW YORK*, <http://www.ascensionnyc.org/history> (last visited Dec. 17, 2011). Grant, known as a socialist, brought together religious, legal and other reformers to address class-based and other injustices. *See gen-*

terdisciplinary approaches to impact legal institutions and develop holistic models for the delivery of legal assistance beyond more binary conceptions of the attorney-client relationship.

After she graduated in 1910 and passed the bar, Kross was finally in a position to provide traditional representation within the Women's Court.¹⁶⁸ Here, too, she played a role in institutional reform outside of standard lawsuit-based mechanisms—along with her female peers in the profession. Kross, one of the seventy-six members of the newly formed New York Women Lawyers' Association ("Association"), helped press for provision of counsel for accused prostitutes.¹⁶⁹ Such women, if indigent and unable to afford private attorneys, would not have otherwise obtained free representation. But Kross and the Association, through their perseverance and active problem-solving skills, convinced judges and court administrators to appoint volunteer women lawyers for many of the defendants.¹⁷⁰ Kross was part of a group of at least six women lawyers who formed an informal legal association to handle such matters.¹⁷¹

Interestingly, such efforts and generosity worked not only to protect the rights of women defendants, but also to provide an opportunity for women attorneys. Otherwise denied the ability to work,¹⁷² they were able to gain practice experience and develop professional identities.¹⁷³ Kross wrote about

erally PERCY STICKNEY GRANT, *HOW TO PUT THE PEOPLE BEHIND THE LAW* (1912) (seeking to empower community members and have lawyers and lay people work together for social change).

¹⁶⁸ Quinn, *Revisiting Kross's Critique*, *supra* note 146, at 678.

¹⁶⁹ *Id.* 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 LAW. J.* 28, 28 (1915) (noting that the Women Lawyers' Association began as the Women Lawyers' Club in 1899, with only eighteen members); see also VIRGINIA G. DRACHMAN, *SISTERS IN LAW: WOMEN LAWYERS IN MODERN AMERICAN HISTORY* 235 (1998). Today it is known as the National Association of Women Lawyers.

¹⁷⁰ See Bertha Rembaugh, *Problems of the New York Night Court for Women*, 2 *WOMEN LAW. J.* 45, 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.").

¹⁷¹ See Marion Weston Cottle, *Women in the Legal Profession*, 4 *WOMEN LAW. J.* 60, 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 Stephenson, who are numbered among the women leaders of the New York bar.").

¹⁷² For instance, in a 1923 *New York Times* article, Kross 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*, July 22, 1923, at X7. In addition to her Women's Court volunteer work, she also volunteered in the office of an attorney friend—a man—to gain experience handling labor union cases. *Id.*

¹⁷³ See Mossman, *supra* note 172, at 19 (noting, in the context of the biography of early Indian woman lawyer Cornelia Sorabji, "while ideas about gender and the culture of legal professionalism could present formidable barriers to aspiring women lawyers, these ideas sometimes intersected in paradoxical ways to offer new opportunities for women to become legal professionals.").

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.¹⁷⁴ Kross's writing joined the articles of other Association lawyers who supported each other in their various projects—even when at times they might disagree about methods.¹⁷⁵ The *Journal's* editors characterized the publication as “the link that binds us together.”¹⁷⁶

Using the *Journal* to recruit more women lawyers to practice in the criminal setting, Kross described such work as a pragmatic solution to addressing unmet legal needs while gaining experience and exposure.¹⁷⁷ More than this, invoking language that could have easily informed the vocabulary of later male realists, Kross extolled the virtues of women working 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

¹⁷⁴ The *Women Lawyers' Journal* was a quarterly newsletter published by the New York Women Lawyer's Club beginning in 1910. See DRACHMAN, *supra* note 169, at 235 (1998) (recounting that the *Journal* served as a platform for women lawyers and helped the New York Association build its membership nationally from twenty in 1911, its first year of publication, to 130 in 1914). 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 1 *WOMEN LAW. J.* 17, 17 (1911).

¹⁷⁵ For instance, Kross did not agree with all of Probation Officer Maude Miner's views on prostitution. See Anna Moscovitz Kross, Report on Prostitution and the Women's Court (Part I – History of the Women's Court) 3–5 (1935) (draft report from the American Jewish Archives; copy on file with author) (noting Kross's disagreement with Miner about the establishment of the Women's Court); see also Katherine B. Davis, *Colony Plan Opposed*, N.Y. *EVENING POST*, Dec. 11, 1916 (describing Miner's early advocacy work to create the Women's Court); Quinn, *Revisiting Kross's Critique*, *supra* note 146, at 674 n.35. But both Kross and Miner's work was covered by the *Journal*. See *Women in Public Life*, 3 *WOMEN LAW. J.* 31, 31 (1914).

¹⁷⁶ *To Members*, 4 *WOMEN LAW. J.* 40, 40 (1915).

¹⁷⁷ Anna Moscovitz, *The Opportunity of the Women Lawyer in the Criminal Court*, 4 *WOMEN LAW. J.* 86, 86 (1914) [hereinafter Moscovitz, *Opportunity*]. In fact one of Kross's colleagues in this endeavor, Jean H. Norris, went on to be named the first women judge in New York's Magistrates Court system. See Quinn, *Revisiting Kross's Critique*, *supra* note 146, at 681. Anna M. Kross was the second woman named to the position. See *infra* Part III.B.

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.¹⁷⁸

Thus, in an apparent attempt to head off future claims of superiority by women in the profession who might turn away from “real life” interactions with accused criminals, she strategically turned traditional hierarchical assumptions on their heads. It was a duty, as well as an honor, for legal professionals to engage those with legal and social needs. Moreover, this personalized interaction served as a new mark of success in the profession.¹⁷⁹

Kross, like many of the City’s vice crusaders, hoped to reduce prostitution in New York City. But through direct representation, she came to have a deeper appreciation for this complicated issue than those driven by religious or moral compunction. Kross came to view prostitutes not as criminals, but individuals whom society largely failed, and whose work, in turn, could negatively impact society—making them a “social problem.”¹⁸⁰ And while in some ways she shared the paternalistic instincts of other vice crusaders, she was more interested in helping empower women so that they could take control of their own lives.

Working closely with sex workers, she also came to see them as unique individuals with complex life stories that the legal system, with its “cold” application of statutes, did not fully consider.¹⁸¹ Law’s punitive processes were not sufficiently informed by emerging social-scientific methods to offer meaningful alternatives to incarceration.¹⁸² In addition, the law as written and applied often resulted in unintended consequences. Many of Kross’s clients were actually victims of the law, quickly accused and wrongly swept

¹⁷⁸ Moscovitz, *Opportunity*, *supra* note 177, at 86.

¹⁷⁹ Similar sentiments were expressed by Clara Foltz, an earlier woman criminal defense lawyer engaged in similar work on the west coast. See BARBARA BABCOCK, *WOMAN LAWYER: THE TRIALS OF CLARA FOLTZ* 288–319 (2011) (chapter crediting Foltz with developing the role of the public defender in this country).

¹⁸⁰ See Quinn, *Revisiting Kross’s Critique*, *supra* note 146, at 670 n.118. Anna Moscovitz sometimes vacillated between expressing her own moral concerns about prostitution and suggesting that others held such views. Her repeated use of conclusory, popular terms of the day like “social evil” suggests that she was more judgmental of prostitutes than she acknowledged. From her writings and work, 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* Part III.B. In addition, such statements may have reflected practical and strategic advocacy moves. See Michele Alexandre, *The New Faces of Feminism*, in *TRANSCENDING THE BOUNDARIES OF LAW: GENERATIONS OF FEMINISM AND LEGAL THEORY* 97, 100, 104 (Martha Albertson Fineman ed., 2011) (describing in part the sometimes “shrewd strategic calculation” of “feminism-in-action” who work outside of the academy).

¹⁸¹ See Anna Moscovitz, *The Night Court for Women in New York City*, 5 *WOMEN LAW. J.* 9, 9 (1915) [hereinafter Moscovitz, *The Night Court for Women*].

¹⁸² See *id.*

up in overzealous vice raids in poor communities.¹⁸³ The rules of evidence, as applied, resulted in innocent women being discredited and lying police officers believed.¹⁸⁴

These conclusions, grounded in lived reality, informed Kross's thinking beyond individual cases and inspired her to undertake more significant systemic reform efforts. While she continued to represent accused prostitutes in the Court, she began publicly advocating modification of the institution's overly legalistic and punitive processes. Kross 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, Chairperson of the Legal Committee of the Forum of the Church of the Ascension.¹⁸⁵ 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*:

[I]n 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.¹⁸⁶

Beyond the mechanistic processes, Kross complained that the 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.¹⁸⁷

Accordingly, Kross called for a less formal and more social-scientific approach to dealing with accused prostitutes. 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

¹⁸³ Quinn, *Revisiting Kross's Critique*, *supra* note 146, at 680–81.

¹⁸⁴ *See id.*

¹⁸⁵ Moscovitz, *The Night Court for Women*, *supra* note 181, at 9.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.* Here, Kross may have been referring to Maude Miner. *See supra* note 175.

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 sympathetic hearts and ready hands to help bring about a more scientific system in the treatment of the downcast and fallen¹⁸⁸

Over the next few years, Kross pressed her public campaign to change applied law and legal institutions around prostitution—continuing to build alliances not only with those inside and outside of the legal profession, but inside and outside of her faith.¹⁸⁹ Further embracing her role as Chairperson of the Legal Committee of the Church of the Ascension, Kross wrote to Mayor John Purroy Mitchell in 1917 to complain about harsh vice police practices and the Court’s failure to treat accused sex workers humanely.¹⁹⁰ Although the Mayor did not completely dismantle the criminal court model for prostitution cases, he did abolish the Women’s Court evening sessions. Moving all matters to daytime sessions, he addressed the complaints of Kross and her peers about accused women serving as a form of entertainment for evening theater-goers.¹⁹¹

In addition, in 1919, the Mayor appointed the first woman to the Magistrates Court bench, Jean H. Norris—one of the lawyers who had been working with Kross to provide representation to accused prostitutes and her former New York University classmate.¹⁹² He hoped Norris would help to “feminize” or humanize the court’s features.¹⁹³ These modifications, while they did not satisfy all of Kross’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 (or

¹⁸⁸ *Id.*

¹⁸⁹ Quinn, *Revisiting Kross’s Critique*, *supra* note 146, at 679–81.

¹⁹⁰ *Id.* at 681; *see also* ANNA M. KROSS, REPORT ON “PROSTITUTION AND THE WOMEN’S COURT” 10 (early draft) [hereinafter KROSS REPORT] (on file with author). Unfortunately, I have been unable to locate the final version of this famous report, which was covered by the press at the time of its release. *See Mrs. Kross Favors Social War on Vice*, N.Y. TIMES, March 9, 1935 (“The official report on a complete survey of the methods used in [the Women’s Court] was sent to the Mayor early this week, after several months investigation at the suggestion of the City Chief Magistrate.”). Only draft versions of the report have been located, and they are on file at the American Jewish Archives of Hebrew Union College, Cincinnati, Ohio.

¹⁹¹ *See* Quinn, *Revisiting Kross’s Critique*, *supra* note 146, at 681. 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 293–94 (1925).

¹⁹² *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.

¹⁹³ *See* Quinn, *Revisiting Kross’s Critique*, *supra* note 146, at 681–82 n.86 (reflecting an understanding that women’s experiences at that point might bring to bear different thinking than that of men on the bench).

official) *behavior* and the *behavior* and impact on laymen.”¹⁹⁴ Here, the impact related to laywomen.

B. Progressive Progression—On to the Trial Court Benches

Problems continued in the Women’s Court, however, including a corruption scandal that resulted in Judge Norris being removed from office in 1931.¹⁹⁵ Kross replaced Norris in 1934.¹⁹⁶ On the bench only a week, Kross spoke at a lunch for the New York City Federation of Women’s Clubs. There she declared that as a judge 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.’”¹⁹⁷

At the invitation of her former law school classmate, Fiorello LaGuardia, who took office as New York City’s next mayor the same day Kross took the bench, Kross officially proposed an alternative model. Kross’s plan—outlined in a lengthy 1935 report, which 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.¹⁹⁸ Kross characterized the existing Women’s Court as being built upon a “naive faith in the omnipotence of the laws.”¹⁹⁹ Expanding on her earlier ideas, Kross urged a new hybrid medical-social system of case resolution for prostitution matters outside of the formal court structure.²⁰⁰

She envisioned a 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 with 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.²⁰¹ Thus, deeply inter-

¹⁹⁴ Llewellyn, *A Realistic Jurisprudence*, *supra* note 14, at 442–43.

¹⁹⁵ See Quinn, *Revisiting Kross’s Critique*, *supra* note 146, at 683–85; see also JOHN M. MURTAUGH & SARA HARRIS, *CAST THE FIRST STONE* 232 (1957) (describing an “extortion ring that operated among innocent women as well as professional prostitutes” in the Women’s Court).

¹⁹⁶ See Quinn, *Revisiting Kross’s Critique*, *supra* note 146, at 685. Mayor O’Brien appointed Kross as one of his last official acts, the night before LaGuardia took office. *Id.*

¹⁹⁷ *Mrs. Kross Scores Vice Case Methods*, N.Y. TIMES, Jan. 14, 1934, at 24; see also Quinn, *Revisiting Anna Moscovitz Kross’s Critique*, *supra* note 146, at 685.

¹⁹⁸ See KROSS REPORT, *supra* note 190.

¹⁹⁹ *Id.* at 12; see also Quinn, *Revisiting Kross’s Critique*, *supra* note 146, at 686–87.

²⁰⁰ KROSS REPORT, *supra* note 190, at 3–4; see also Quinn, *Revisiting Kross’s Critique*, *supra* note 146, at 687–88.

²⁰¹ KROSS REPORT, *supra* note 190, 3–4.

disciplinary in its approaches and rooted in emerging social science methods, Kross's proposal was a localized example of the kinds of administrative models about which realists in the academy were writing and theorizing.²⁰²

Although the plan found support within the women's bar and the medical community,²⁰³ Mayor LaGuardia rejected it.²⁰⁴ Kross publically criticized him for this, using her unique real-world vantage point and personal narratives 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.²⁰⁵

She further described the plight of the women brought before her, trapped in the City's web of corruption.²⁰⁶ She recounted that after a recent house raid, five prostitutes were arrested—four of whom had counsel; the fifth did not because she “presumably had fallen behind in her weekly payments” to her pimp or the police.²⁰⁷ She also shared insights on how the system's punitive and legal focus failed to break the cycle of repeated arrests and actually kept sex workers linked to the trade. Invoking the experience of another young woman recently brought before the bench, Kross chided:

[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

²⁰² 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, 71 (2005) (describing Arnold's realist insights and desire to develop “functional, flexible relationships between courts and agencies” to help bring about practical solutions to problems presented by the depression era's economic landscape).

²⁰³ See, e.g., Harry J. Benjamin, *Prostitution: In Some of its Medico-Psychological Aspects and an Attempt at its Practical Solution*, MED. REV. REVIEWS 3, 21 (1935) (lauding Kross's recommendations).

²⁰⁴ Anna M. Kross & Harold M. Grossman, *Magistrates Courts of the City of New York: Suggested Improvements*, 7 BROOK. L. REV. 411, 443–49 (1938) [hereinafter Kross & Grossman, *Suggested Improvements*]. LaGuardia's rejection of the plan may have also reflected 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 national 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 L. & HIST. REV. 331, 335 (2009).

²⁰⁵ Kross's statement was 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 her proposals, 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.

MAGISTRATE KROSS, STATEMENT GIVEN OUT AT THE WOMEN'S COURT, 3–4 (1936).

²⁰⁶ See *id.*

²⁰⁷ *Id.*

where we must do it: We must help to rehabilitate to readjust the woman who has become a prostitute.²⁰⁸

Kross's statements did not convince LaGuardia to adopt her plan, and their relationship became strained following these interactions.²⁰⁹ But this did not deter her from using her judicial position to re-imagine the legal system's treatment of sex workers, particularly younger prostitutes. Thus, like other women reformers of her time who learned to be "both politically visionary and practical,"²¹⁰ Kross turned her attention to the administrative workings of the court.²¹¹ There she found spaces between the cracks of law to develop a new approach to try to empower the young women who came before her.²¹² In this way, Kross was again "doing" the work of Realism, rather than merely talking about it, operationalizing her theories on law, society, and crime.

C. *The Wayward Minors' Court and Social Services Bureau*

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 some ways mirrored her proposal to LaGuardia.²¹³ With the help of social worker Dorris Clarke, she established a specialized court docket called the Wayward Minors' Court for Girls.²¹⁴ It focused on young women between the ages of sixteen and twenty-one charged with prostitution and other acts of sexual

²⁰⁸ *Id.*

²⁰⁹ See Quinn, *Revisiting Kross's Critique*, *supra* note 146, at 690 (describing Kross's frustration with LaGuardia's failure to adopt her plan); see also CHARLES GARRETT, *THE LA GUARDIA YEARS, MACHINE AND REFORM POLITICS IN NEW YORK CITY* 16 (1961) (describing tensions between Kross and LaGuardia); *Gambler Decision Upheld by Court*, N.Y. TIMES, Sept. 4, 1943, at 15 (discussing LaGuardia's criticism of Kross after she dismissed charges against an alleged gambler).

²¹⁰ Elisabeth Israels Perry, *Critical Journey: From Belle Moskowitz to Women's History*, in *THE CHALLENGE OF FEMINIST BIOGRAPHY* 79, 90 (Sarah Alpern et al. eds., 1992) (referring to Belle Moskowitz and the woman's movement in general). Other women during this time who sought to engage in legal reform understood Kross's mode of operating. *Id.*

²¹¹ See *id.*

²¹² See generally Mae C. Quinn, *The Modern Problem-Solving Court Movement: Domination of Discourse and Untold Stories of Criminal Justice Reform*, 31 WASH. U. J.L. & POL'Y 57, 70 (2009) [hereinafter Quinn, *Untold Stories*] (offering one of the first historic accounts of Kross's establishment of the Wayward Minors' Court).

²¹³ See ANNA M. KROSS, *NEW YORK (CITY) MAGISTRATES COURTS PROCEDURES FOR DEALING WITH WAYWARD MINORS* (1936) [hereinafter KROSS, *WAYWARD MINORS*]; Kross & Grossman, *supra* note 204, at 439–41 (recounting that the Chief Judge signed an Order on March 2, 1936, authorizing creation of the Wayward Minors' Court).

²¹⁴ See Quinn, *Untold Stories*, *supra* note 212, at 74 n.82; see also DORRIS CLARKE, *THE WAYWARD MINORS' COURT: 1936–1941: AN EVALUATIVE REVIEW OF PROCEDURES AND RESULTS* 6 (1941) (describing the Wayward Minors' Court).

“misconduct.”²¹⁵ Seen as adults in the eyes of the law,²¹⁶ these cases involving young women who ordinarily would have been handled like those of other adult defendants.²¹⁷ 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 assist them with counseling and social scientific interventions.²¹⁸

She found other ways of being creative with the law, too, defining it broadly like Llewellyn. 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.²¹⁹ In addition, she employed less formal court administration processes to create diversionary practices short of trial on the merits.²²⁰ 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”²²¹ to help young women despite their arrests.²²²

During initial presentments in the adult Women’s Court, the magistrates screened cases for probable cause and sufficient proof.²²³ When there was not enough evidence, the matters were immediately dismissed.²²⁴ However, in Kross’s new Wayward Minors’ Part, the initial appearance was largely used to gather background information on the accused and her needs, and offer informal treatment and intervention if deemed appropriate.²²⁵ Kross convinced many of these young women it was in their interest to accept the assistance of the court to avoid formal prosecution and begin making life changes.²²⁶ In doing so, defendants frequently “consented” to placement outside of their homes for purposes of further social, physical, and mental

²¹⁵ KROSS, WAYWARD MINORS, *supra* note 213, at 1; BERNARD C. FISHER, JUSTICE FOR YOUTH: THE COURTS FOR WAYWARD YOUTH IN NEW YORK CITY 21 (1955) [hereinafter FISHER, JUSTICE FOR YOUTH] (stating that the court was “concerned chiefly with the sexually promiscuous girl, the runaway, the undisciplined, defiant youngster, the neglected girl”); *see also* Wayward Minors’ Act, N.Y. CRIM. PROC. LAW Title VII-A § 913-a (repealed) (*available at* NYU Law Library).

²¹⁶ 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).

²¹⁷ *See* Quinn, *Untold Stories*, *supra* note 212, at 80.

²¹⁸ KROSS & GROSSMAN, *Suggested Improvements*, *supra* note 204, at 437; *id.* at 430 (“[T]he Wayward Minors’ part . . . seek[s] a scientific differentiation of treatment for the persons who appear therein, on a sound crime prevention theory.”).

²¹⁹ *Id.* at 173–74; CLARKE, *supra* note 214, at 6; *see also* Quinn, *Untold Stories*, *supra* note 212, at 6.

²²⁰ KROSS & GROSSMAN, *Suggested Improvements*, *supra* note 204, at 440–41.

²²¹ CLARKE, *supra* note 214, at 17.

²²² *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.”).

²²³ *Id.* at 12–13.

²²⁴ KROSS, WAYWARD MINORS, *supra* note 213, at 5–6.

²²⁵ *See id.*

²²⁶ *See* CLARKE, *supra* note 214, at 14–15.

examination.²²⁷ Kross wanted to take cases off the formal adjudication and trial track, and reroute them towards therapeutic interventions based on the unique needs and problems of each accused.²²⁸

Learning that the Probation Department was unable to take on additional intake and social work responsibilities to facilitate this new model,²²⁹ Kross again looked beyond the letter of the law.²³⁰ She created a team of lay investigators and counselors—called the Magistrates Court Social Services Bureau—to help with the court’s new functions.²³¹ These volunteers were called upon to gather mitigating, psycho-social, and other background information about the accused.²³² Kross then used this information to develop individualized treatment plans that remained in place during further adjournments for purposes of informal supervision.²³³ With the approval of their Probation Officer, defendants who successfully fulfilled their plans of service were rewarded with a case dismissal.²³⁴ Those defendants who did not were brought to trial, adjudicated, and formally sentenced.²³⁵ Other women criminal justice reformers, such as Massachusetts’s Framingham Prison Superintendent Miriam Van Waters, similarly deployed women volunteers in their innovative efforts during this period.²³⁶

Kross brought together a wide range of individuals and interests to address what she saw as a pressing social need. She tapped officials from non-profit organizations, wealthy benefactors, public school teachers, and clergy

²²⁷ KROSS, WAYWARD MINORS, *supra* note 213, at 14–18 (discussing “implied consent” obtained by “moral suasion”). The women were placed at residential facilities like the Florence Crittenton League or the House of Good Shepherd. Quinn, *Untold Stories*, *supra* note 212, at 73.

²²⁸ See KROSS, WAYWARD MINORS, *supra* note 213, at 6.

²²⁹ See *id.* at 5–6, 10 (noting that intake staff completed extensive background screens for defendants relating to their education, religion, living conditions, and medical and mental health history); see also Mae C. Quinn, “Feminizing” Courts: Lay Volunteers and the Integration of Social Work in Progressive Reform, in FEMINIST LEGAL HISTORY: ESSAYS ON WOMEN AND LAW, *supra* note 61, at 208 [hereinafter Quinn, *Feminizing Courts*] (describing that, because of a lack of resources, court probation staff could not supervise most defendants).

²³⁰ See generally Quinn, *Feminizing Courts*, *supra* note 229, at 206 (recounting Kross’s efforts to engage in judicial innovation through extra-legal experimentation).

²³¹ For more on the various features and work of this group, see *id.* at 207–14.

²³² KROSS, WAYWARD MINORS, *supra* note 213, at 9–13. Kross explained that previously “special emphasis was laid on the immediate charges” and “[l]ittle effort was made to unearth facts which might indicate the seeming delinquency was motivated by unfortunate or undesirable factors extraneous to the immediate complaint.” *Id.* at 14.

²³³ *Id.*; see also CLARKE, *supra* note 214, at 13 (noting that this investigation between arraignment and first appearance was “a radical departure from the ordinary adult court routine” and that questions were raised “as to its legality”).

²³⁴ KROSS, WAYWARD MINORS, *supra* note 213, at 17. In 1940, 330 defendants passed through the Wayward Minors’ Court. CLARKE, *supra* note 214, at 51.

²³⁵ KROSS, WAYWARD MINORS, *supra* note 213, at 18–19.

²³⁶ See, e.g., ESTELLE B. FREEDMAN, MATERNAL JUSTICE: MIRIAM VAN WATERS AND THE FEMALE REFORM TRADITION 188 (1996) (“The institution she created at Framingham served as a magnet for local women’s volunteerism, supplementing national efforts to relieve social problems.”).

to give time and support to the Social Services Bureau.²³⁷ In the end, one such religious official—Reverend Robert W. Searle, the General Secretary of the Greater New York Federation of Churches—became President of the Bureau’s Board, serving in that role for many years and facilitating Kross’s interdisciplinary work on behalf of young women.²³⁸ During this still very segregated era, Kross seemed somewhat concerned with diversity and respecting community, cultural, and racial differences. For, when her court experiment for young sex workers was expanded to Harlem, she hired three African American volunteer social workers to work with women defendants there.²³⁹ Press accounts also mentioned that her Wayward Minors’ court volunteers came “from all religious and racial groups . . . thus instrumental in providing opportunities for social and vocational adjustment.”²⁴⁰

D. *The Home Term Court and Home Advisory Council*

Over the years, Kross maintained her on-the-ground reform focus, expanded her experimentation, and turned her attention from one historic women’s issue, prostitution, to another: domestic violence.²⁴¹ In 1946, she established the Home Term Court—another specialized docket within the Magistrates’ system—targeting non-felony domestic violence matters.²⁴² In this new court, Kross sought to use social-scientific interventions to ascertain the reasons for family conflict and head off future problems.²⁴³

The Magistrates Court Chief Judge at the time, Edgar Bromberger, was highly supportive of Kross’s judicial experimentation.²⁴⁴ In describing Home Term to the press, Bromberger used realist terminology, touting its rejection of “legal ‘formalism,’” which did nothing more than aggravate family conflicts.²⁴⁵ Echoing Kross’s words from years before about reform of prostitution prosecutions, he asserted:

It has long been apparent to the magistrates . . . that a mere narrow, legal adjudication of the immediate marital episode causing an arrest or the issuance of a summons in the Magistrates Courts actually settles nothing of the fundamental family difficulty. On the contrary, a hearing or trial in open court, with the couple testi-

²³⁷ Quinn, *Feminizing Courts*, *supra* note 229, at 210.

²³⁸ *Id.*; see also Robert Searle, *Religious Leader: Head of Home Advisory and Service Council Dies*, N.Y. TIMES, June 18, 1967, at 76.

²³⁹ Quinn, *Feminizing Courts*, *supra* note 229, at 210–11.

²⁴⁰ *Welfare Bureau Will Meet at Tea*, N.Y. TIMES, Dec. 13, 1936, at D6.

²⁴¹ See generally Mae C. Quinn, *Anna Moscowitz Kross and The Home Term Part: A Second Look at the Nation’s First Criminal Domestic Violence Court*, 41 AKRON L. REV. 733 (2009) [hereinafter Quinn, *Home Term*] (explaining how Kross treated domestic violence prosecutions in a novel way and distinct from other criminal matters).

²⁴² *Id.* at 742; *New Courts to Sit in Home Disputes*, N.Y. TIMES, Mar. 18, 1946, at 23.

²⁴³ See *New Marital Court Has Home Setting*, N.Y. TIMES, Apr. 30, 1946, at 23.

²⁴⁴ See *id.*

²⁴⁵ *New Courts to Sit in Home Disputes*, *supra* note 242, at 23.

fyng against each other—many times in the presence of neighbors—actually provides additional hazard to future family tranquility and adds a further disturbing factor to the already muddled family condition.²⁴⁶

This thinking was informed by what Kross saw unfolding before her each day on the bench. Despite repeated prosecutions and sentences, the same domestic violence defendants seemed to return.²⁴⁷ Such recidivism led her to believe there was often “more than met the eye and mind in the constant repetition of tales of drunkenness, mistreatment and violence” that made their way to the Magistrates Court.²⁴⁸

As World War II came to an end, the number of domestic violence cases in New York City escalated to more than 10,000 a year.²⁴⁹ Hearing the stories of families in her court, Kross concluded that many soldiers returning home, some co-habiting with their spouses for the first time, were cracking under the strain of economic hardship, housing problems, or other war-time difficulties.²⁵⁰ Kross thus modified both the processes and physical features of the Magistrates Court in part to attempt to address these problems and model peaceful home life.

For instance, proceedings were not conducted in a formal courtroom setting, but instead within a complex of rooms arranged to look like an apartment maintained by a family of modest income.²⁵¹ The space consisted of a living room, dining room, kitchen and children’s nursery, all decorated with donations from local businesses and benevolent organizations where staff modeled certain practices within the home.²⁵² Kross was especially proud of the “cheery” red love seat in the court’s reception area where she often sat with couples and talked with them in an effort to help them work through disagreements.²⁵³

Once a complaint reached Home Term, the parties were summoned to court and the case was assigned to intake staff. The staff questioned the couple to learn as much as possible about the allegation and background circumstances.²⁵⁴ As in the Wayward Minors’ Court, Kross generally encouraged the parties to adjourn the case for purposes of an informal period

²⁴⁶ *Id.*

²⁴⁷ See Willella DeCampi & Mary Okon, *Home Term Court Makes a Home*, SUNDAY DAILY NEWS, July 9, 1950, at 5.

²⁴⁸ *Id.*

²⁴⁹ *New Courts to Sit in Home Disputes*, *supra* note 242, at 23.

²⁵⁰ See Anna M. Kross, *A Love Seat in Court 2* (Mar. 1, 1950) (unpublished manuscript) (on file with author) [hereinafter, Kross, *A Love Seat*].

²⁵¹ DeCampi & Okon, *supra* note 247, at 4–5.

²⁵² *Id.*

²⁵³ Kross, *A Love Seat*, *supra* note 250, at 2. She explained the couch “is symbolic of our great aim. Two people must sit close together on it. This is exactly what we are trying to do—to bring together those broken apart.” *Id.*

²⁵⁴ Quinn, *Home Term*, *supra* note 241, at 747–48.

of supervision and services before formal resolution of the charges.²⁵⁵ Successful adjustment resulted in case closure without formal adjudication; failure to complete informal case work requirements led to the possibility of incarceration.²⁵⁶ Commentators described this process as a “marked departure from legal formalism” that offered “a flexible, informal, and socialized procedure with emphasis on the family’s general welfare rather than rigid interpretation of the law.”²⁵⁷ And here again, such informality often involved a lack of formal legal representation for the accused batterer, causing at least one set of commentators to suggest Kross’s Home Term established a “new conception of the lawyer’s function.”²⁵⁸

Like many realists within the academy, throughout the 1940s Kross continued to call for greater social-scientific methods in the application of legal rules and assessment of legal processes. However, she also practiced what she preached. She dedicated Home Term not only to resolving individual disputes of individual parties, but serving as a “laboratory” to study family problems and improve court practices.²⁵⁹ Employing both medical and psychological experts, she sought to develop more scientific practices. She established an array of clinics to assist defendants and their families. Kross created an Alcoholism Clinic to provide substance abuse treatment services,²⁶⁰ and established an in-house Psychiatric Unit, run by a psychiatrist from Bellevue Hospital.²⁶¹ Although such interventions might be relatively commonplace today with the advent of modern problem-solving courts, in making use of interdisciplinary innovations involving law and sciences, Kross was clearly ahead of her time, including the male realists.²⁶²

Just as she had with the Wayward Minors’ Court, Kross developed a private organization to assist her with the Home Term Court.²⁶³ This group, called the Home Advisory Council, was also comprised of lay volunteers and representatives from various religious and community groups.²⁶⁴ Unlike the volunteers used in the Wayward Minors’ Court, however, most of these

²⁵⁵ *Id.*

²⁵⁶ *Id.*

²⁵⁷ ALICE W. FIELD & MAX BLAUSTEIN, HOME TERM: A SOCIALIZED COURT FOR FAMILY PROBLEMS IN NEW YORK CITY MAGISTRATES COURT SYSTEM 6 (1948).

²⁵⁸ RICHARD MAISEL & JUNE CHRIST, FAMILIES IN CONFLICT: AN EXPLANATORY STUDY OF THE PROBLEMS, THE PROGRAM AND THE NEEDS OF THE HOME TERM COURT AND THE HOME ADVISORY COUNCIL 8 (1954).

²⁵⁹ See Quinn, *Home Term*, *supra* note 241, at 745 n.69.

²⁶⁰ *Id.* at 750.

²⁶¹ *Id.*

²⁶² This approach may be contrasted with the work of Walter Wheeler Cook and his realist compatriots who left Columbia for Johns Hopkins University, where they established The Institute of Law. The Institute, in existence from 1928–1933, was largely seen as a failed empirical experiment using questionnaires and data compilations to study such things as divorce litigation and choice of forum for lawsuits. See JOHN HENRY SCHLEGEL, AMERICAN LEGAL REALISM & EMPIRICAL SOCIAL SCIENCE 147–210 (1995).

²⁶³ *Id.*

²⁶⁴ Quinn, *Home Term*, *supra* note 241, at 745–46.

volunteers appeared to be from Kross's own social and economic circle.²⁶⁵ Yet its volunteer counselors met with clients not only at court, but also in the community—visiting their homes, talking to their family members, and learning about their lives as lived.²⁶⁶ The counselors were intended to serve as models for families, and also remained ready to help them outside of the confines of the formal legal structures if needed.²⁶⁷

E. Scholarship, the Academy, and the Beginning of the Beyond

As noted, Kross shared her ideas through writing like the traditional male realists. But her publications were not directed at a limited audience of academic elites. Instead, her writing spoke to practitioners and others interested in the law's operation on the ground. Kross used the *Women Lawyers Journal* to reach a broader audience than her immediate circle.²⁶⁸ Her articles, contributing to a rich discourse about issues impacting women lawyers and encouraging others to join her in social justice work, appeared in the *Journal* from the 1910s through the 1960s.²⁶⁹

Once she took the bench, Kross published her work with more traditional academic presses.²⁷⁰ Perhaps most significant was her trilogy of articles published in the 1930s by the *Brooklyn Law Review*.²⁷¹ Co-authoring this series with Harold Grossman, Kross still maintained a much less lofty tone than her male realist contemporaries. Instead, her work was deeply engaged with procedural rules and how they unfolded in New York's Magis-

²⁶⁵ *Id.* at 749.

²⁶⁶ *Id.* at 749–50.

²⁶⁷ *Id.* at 750. In addition to performing casework, Home Advisory Council members were expected to develop and strengthen ties with community groups which could assist families involved with the court. *Id.* at 746.

²⁶⁸ See 1 *WOMEN LAW. J.* 20 (1911); see also DRACHMAN, *supra* note 169, at 235 (“*The Women Lawyers’ Journal* became the major vehicle for women lawyers to share a range of concerns.”).

²⁶⁹ See, e.g., Moscovitz, *Opportunity*, *supra* note 177, at 86; Moscovitz, *The Night Court*, *supra* note 181, at 9; Anna M. Kross, *Conference on Juvenile Delinquency*, 32 *WOMEN LAW. J.* 55 (1947); Anna M. Kross, *Mental Health and the Courts*, 50 *WOMEN LAW. J.* 136 (1964); see also Anna M. Kross, *Hypocrisy Scored in Penal Methods*, *N.Y. TIMES*, Dec. 12, 1937 at 99 (“But let the teachers and the social workers, the clergy and the Y.M.C.A., the juvenile protective units and the penologists and the psychologists sit down together and pool their views and their experiences and their facilities, and less money will be spent and far more work accomplished.”).

²⁷⁰ See, e.g., Anna M. Kross, *The Problems of the Family by Fowler V. Harper*, 62 *YALE L.J.* 292, 311 (1953) (reviewing FOWLER V. HARPER & JEROME H. SKOLNICK, *PROBLEMS OF THE FAMILY* (1952)).

²⁷¹ Anna M. Kross & Harold M. Grossman, *Magistrates Courts of the City of New York: History and Organization*, 7 *BROOK. L. REV.* 133 (1937) [hereinafter Kross & Grossman, *History and Organization*]; Anna M. Kross & Harold M. Grossman, *Magistrates Courts of the City of New York: Jurisdiction, Powers and Duties of Magistrates*, 7 *BROOK. L. REV.* 295 (1938) [hereinafter Kross & Grossman, *Powers and Duties*]; Kross & Grossman, *Suggested Improvements*, *supra* note 204

trates Courts on a daily basis.²⁷² Even after joining these more academic conversations, she did not forget the power of the press outside of the Ivory Tower's walls and the importance of connecting with those she wished to assist.

Throughout the 1930s and 1940s, Kross used New York Times coverage, as well as cultural events, to raise awareness of her work in the Wayward Minors' Court.²⁷³ In a true show of interdisciplinary prowess, Kross organized a theatre production whose proceeds benefited her innovative court programs.²⁷⁴ After the Home Term Court was in operation for two years, Kross also helped produce and disseminate a brochure—*Home Term: A Socialized Court for Family Problems in the New York City Magistrates Court System*—to describe the court's day-to-day operations.²⁷⁵ Kross hoped to share her developing expertise and provide a blueprint for other jurisdictions considering such a model.²⁷⁶

Kross's work in the Magistrates Court continued until 1953, when she was named Commissioner of New York City's Department of Corrections.²⁷⁷ She held that position, using it to continue engaging in criminal justice innovations, until 1966²⁷⁸—when New York City's Magistrates Court system was entirely restructured and subsumed into a unified, state-wide court system.²⁷⁹ Her innovations in the Magistrates Court continued in her absence until the Court's closure.²⁸⁰ Replications of her court innovations currently abound—generally without any attribution.²⁸¹

III. IMPLICATIONS OF THE NEW NARRATIVE AND “DOING” FEMINIST LEGAL REALISM IN THE FUTURE

This burgeoning alternative account of Legal Realism—which I have termed Feminist Legal Realism—has many important implications for not only reframing the history of Legal Realism, but also rethinking the future of Feminist Jurisprudence work. These consequences may be best described by

²⁷² See generally Kross & Grossman, *History and Organization*, *supra* note 271; Kross & Grossman, *Powers and Duties*, *supra* note 271; Kross & Grossman, *Suggested Improvements*, *supra* note 271.

²⁷³ See, e.g., *Women Organized to Assist Courts*, N.Y. TIMES, Dec. 15, 1935, at 41; *Welfare Bureau Will Meet at Tea*, *supra* note 240, at D6; *Welfare Project is Reorganized*, N.Y. TIMES, Apr. 20, 1940, at 31; *Charity Will Gain by Theatre Party*, N.Y. TIMES, Mar. 10, 1941, at 14.

²⁷⁴ See Quinn, *Feminizing Courts*, *supra* note 230, at 213.

²⁷⁵ FIELD & BLAUSTEIN, *supra* note 257.

²⁷⁶ See *id.*

²⁷⁷ Quinn, *Revisiting Kross's Critique*, *supra* note 146, at 693; see also Joan Cook, *Anna M. Kross Dies; An Ex-City Official*, N.Y. TIMES, Aug. 29, 1979, at D19.

²⁷⁸ Cook, *supra* note 277, at D19.

²⁷⁹ Quinn, *Revisiting Kross's Critique*, *supra* note 146, at 695.

²⁸⁰ *Id.*

²⁸¹ See *id.* at 710; see also Quinn, *Feminizing Courts*, *supra* note 230, at 217; Quinn, *Untold Stories*, *supra* note 212, at 69; Quinn, *Home Term*, *supra* note 241, at 757.

noting at the outset what this new account does *not* do. This story is not presented as blind reinforcement of legal history's canon and all that canon entails. I recognize there are dangers of reification by even repeating the story I seek to challenge. But to offer a meaningful counter-account, some context and traditional history would seem essential.

In addition, this telling is not intended to suggest that the work of Kross and her cohorts, as compared to Llewellyn's compatriots, should be seen as inherently female or solely in gendered terms. Indeed, since men alone occupied the halls of the legal academy until well after the start of the traditional legal realist movement, women's working space was outside of those walls in the larger world. These differing boundaries and zones of influence, at least in part, likely account for the different kinds of realist work each group did—the traditional Ivory Tower realists's work is mostly theoretical, removed, and impersonal as compared to the contextualized and engaged work of on the ground women realists. It is likely that many men outside of the academy—excluded for reasons other than gender—were hard at work applying Legal Realism's thinking, too. Thus, Feminist Legal Realism as a history should not be read as a counter-narrative focusing only on sex. Rather, it provides new thinking about the different modes and means of production operating within the movement, with activist methods serving as an important focus of its own.

Finally, this new account is not intended to serve as an unqualified celebration of Kross's work. Kross's engagement with the law, spanning more than fifty years, certainly is not above critique. But this is not a reason to continue to ignore her groundbreaking efforts, which did contribute to a kind of legal realist agenda.

So then, what does this developing feminist legal realist narrative affirmatively offer? Complete with tensions, inconsistencies, and less-than-flattering features, it holds itself out as a possible tool of transformation. It may be used both as a way to challenge the past's givens, including accepted historic periodizations, and a means of rethinking contemporary legal feminism's norms. It challenges givens by arguing that an important and potentially empowering vision of Legal Realism has been erroneously overlooked, not only by the movement's historians, but also by modern feminists who have sought to distance themselves from what they have assumed to be a male-only tale.

In addition, this account rethinks current feminist projects by suggesting that there is important work to be done in recovering and embracing the unwritten feminist legal realist past. With such embrace we can, indeed, take a break from the kinds of feminist activities that presently dominate the legal academy—including jettisoning wars of words that are often unproductive or unkind. We would be better served by following Kross's lead, working across disciplines to engage in greater activism to affirmatively impact contemporary lived experience. This narrative further suggests that by "do-

ing” Feminist Legal Realism, rather than merely thinking and talking about feminism, we may begin to imagine a more productive future.²⁸²

Many pragmatically minded feminist historians, as well as feminist legal scholars, acknowledge limitations of focusing on “women” as a class. However, they see it as a useful point of departure.²⁸³ Once a full enough body of women’s history has amassed, we may not need to make such distinctions.²⁸⁴ But until then, we must continue to assemble the components of women’s past to “make the larger patterns visible,” allowing us to move towards a “new holistic history.”²⁸⁵ Women’s narratives can be used as a way to enter larger conversations about injustice or inequity generally—not just about women, sex, or gender.²⁸⁶ Characterized in this way, women’s historical narratives do more than merely document static past events and groups. They become “doubly subversive”²⁸⁷ devices, telling us something different about history while also serving “to destabilize the present.”²⁸⁸ Additionally, when we examine the actual details of women’s lives as lived, rather than arms-length imagined or intentionally constructed concerns, often we are able to see the kinds of authentic intersections and interconnectedness at work that we only aspire to articulate through theories.

The feminist legal realist narrative above, spotlighting Kross and her cohorts, seeks to chart such a path. It suggests that the currently accepted account of Legal Realism fails to credit the work done by many women in law during its heyday. This new history does not purport to speak for all women, or even all women in law. Instead, it recommends that further discussions of Legal Realism—particularly as they rethink and expand the

²⁸² This shift in frame and focus is consistent with the calls of others to find a project that would allow feminist legal scholars—old and new—to find connections. See Dixon, *supra* note 122, at 307 (“New ways of connecting newer and older feminist theories are . . . required.”); see also Cossman et al., *supra* note 121, at 608 (suggesting the possibility of “[t]aking a [b]reak” from modern legal feminism to, in part, enable feminists “to see around the corners of its own construction”); see generally Martha Albertson Fineman, *Grappling With Equality: One Feminist Journey*, in *TRANSCENDING THE BOUNDARIES OF LAW: GENERATIONS OF FEMINISM AND LEGAL THEORY* 47 (Martha Albertson Fineman ed., 2011) [hereinafter Fineman, *Grappling with Equality*] (urging a fundamental shift from gender-based, feminist equality discourse to more generalized and generalizable concerns about vulnerability within the human condition, in part through a reexamination of American legal history).

²⁸³ See LERNER, *supra* note 117, at 177; Fineman, *Grappling with Equality*, *supra* note 282, at 60 (suggesting that “gender” can become the door through which one enters the feminist legal discussion about equality, but it should not remain the entire focus of the conversation); see generally Darren Hutchinson, *Resistance in the Afterlife of Identity*, in *TRANSCENDING THE BOUNDARIES OF LAW: GENERATIONS OF FEMINISM AND LEGAL THEORY* 176, 186, 189 (Martha Albertson Fineman ed., 2011) (warning about the dangers of post-race/post-gender approaches).

²⁸⁴ Cf. Joan W. Scott, *Feminism’s History*, 16 J. WOMEN’S HIST. 10, 17 (2004) (“[M]uch remains to be done in this unevenly developed field [of feminist history] . . .”).

²⁸⁵ *Id.*

²⁸⁶ See BENNETT, *supra* note 7, at 9.

²⁸⁷ Scott, *supra* note 284, at 18.

²⁸⁸ *Id.* at 21.

traditional tale—must attend to experiences of women lawyers and others like them who may be seen as contributing to its agenda in some way from outside of the Ivy League and Ivory Tower. Indeed, whether one is to accept Llewellyn’s own framing of the conversation, Fisher and Horowitz’s “big tent” account, or even Tamanaha’s even broader and more nuanced conception of realist legal activity,²⁸⁹ it is clear that Kross and many other women of her day were engaged in such efforts.

Beyond shaking the foundations of the movement’s accepted population, the feminist legal realist story also works to challenge many present understandings of the project’s periodization. Kross began her realist activities well before the commonly understood start of the realist age. When this chapter is added to the related recovered women’s histories offered by Felice Batlan and others,²⁹⁰ a pattern emerges that fundamentally reframes the birth of realist legal work. Moreover, pushing her innovative, interdisciplinary legal projects forward for over fifty years, Kross’s account contests the now-accepted end of that era. Indeed, as Kross’s own specialized criminal court projects continue to find replication in today’s problem-solving courts,²⁹¹ it could be argued that the feminist legal realist era has never ended.

With Kross as a central character, this account also helps to bring home the utility, as well as challenge the unitariness of categories like “woman.” By the end of her career, Kross may have been seen as an “insider,” given the positions she held as judge and then Commissioner of the City’s Department of Corrections.²⁹² But it is important to remember that she did not start out from a place of power or privilege.²⁹³ Even operating as an insider within governmental institutions, she was not part of the legal academy’s elite; seeing her only in light of the roles she held at the end of her life fails to account for her whole person and experiences. As a poor Russian immigrant who endured discrimination and harsh treatment, Kross serves as an example of a complicated identity reflecting many strands that cannot be described monochromatically.²⁹⁴ Moreover, her position as a woman contributed to her life chances, choices, and decisions in a particular way, setting the scene for her approach to law, lawyering and judging. Simply telling her story helps give life to identity’s complexity. Kross serves as an important model for the multiplicity of most accounts.

²⁸⁹ See *supra* Part II.A.

²⁹⁰ See *supra* note 61.

²⁹¹ See Quinn, *Revisiting Kross’s Critique*, *supra* note 146, at 710; see also Quinn, *Feminizing Courts*, *supra* note 229, at 217; Quinn, *Untold Stories*, *supra* note 212, at 69; Quinn, *Home Term*, *supra* note 241, at 757.

²⁹² See *supra* Part III.C.

²⁹³ See *supra* Part III.A.

²⁹⁴ As a further part of this complicated identity, and as will be further examined in my biography of Kross, while married to a man and the mother two children, her lifestyle and life choices with varied friendships and interests do not fit neatly within heteronormative and maternal frames of the day. See MAE C. QUINN, ANNA MOSCOWITZ KROSS: MOTHER OF SOCIO-LEGAL MOVEMENTS (forthcoming).

One might question, then, why we should adopt the term “Legal Realism” to help tell this story now. Embracing this term, some might say, simply bolsters the traditional male-centered account of a particular approach to law. Here, too, I suggest that as we look ahead, the practical must trump the theoretical. While completely new names and new frames may be something that emerges in the future through feminist legal and historical work, we are where we are now. That is, we are currently situated in a system of knowledge and learning where the American legal realist tradition serves as one of the most powerful accounts, if not myths, relating to the rise of the modern legal state.²⁹⁵ Rather than remaining purists in our efforts to topple this Goliath, clinging to currently divisive and binary deconstructive approaches that may be summarized as “us” versus “them,” it may better serve our purposes to more slyly usurp the power of this parable. By actively appropriating existing terminology and infusing it with an understanding of feminist activities—much in the way that Kross did with her own work—we may make more headway. Indeed, I would suggest that wedding the names of two of the most referenced legal movements in the United States—“Realism” and “Feminism”—is a powerful strategic tool that might serve women and other marginalized groups quite well in the present and in days to come.²⁹⁶

Why should we use the term “Feminist” to label this new account of Legal Realism, Kross’s work, or anything at all? Many women’s legal historians have documented the problem of attempting to label women of history with the term “Feminist.”²⁹⁷ This difficulty arises in part because the word “Feminist” has many different meanings.²⁹⁸ In her own day, Kross had been labeled a feminist for her focus on women’s issues.²⁹⁹ And despite the historical contestation of the term, looking at Kross and her colleagues through our own contemporary lens, we recognize many of the same themes and motivations expressed by the feminist legal scholars documented earlier in this work.³⁰⁰

²⁹⁵ See *supra* Part I, notes 2–5.

²⁹⁶ See generally Parks, *supra* note 90 (recognizing that strategic allegiance with some traditional legal realist thinking provides potential benefits for non-dominant groups).

²⁹⁷ See, e.g., Mary Jane Mossman, “*Le Féminisme*” and Professionalism in Law: Reflections on the History of Women Lawyers, in *TRANSCENDING THE BOUNDARIES OF LAW: GENERATIONS OF FEMINISM AND LEGAL THEORY* 9, 10 (Martha Albertson Fineman ed., 2011) (describing the “recurring historical debate about whether early women lawyers in the United States were ‘feminists’”).

²⁹⁸ See *id.* at 12.

²⁹⁹ Howard Whitman, *Annie, The Poor Man’s Judge*, *COLLIER’S*, Mar 1, 1947, at 46; cf. Mossman, *supra* note 297, at 9, 12, 24 (taking issue with law professor Barbara Babcock’s claim that nearly every early woman lawyer was a “self-conscious feminist” and agreeing that such women lawyers “never effectively challenged the gender premises of the law and the legal profession”).

³⁰⁰ See *supra* Part III.C; see also LERNER, *supra* note 117, at 15 (noting that biographers must tell stories in light of “the subject’s own consciousness and from the context of her time”).

For instance, from her days as a law student, Kross sought to challenge the boundaries of law as commonly understood, pushing past the traditionally litigation-based, binary construction of lawyering and legal institutions.³⁰¹ Lawyers were not only client representatives in individual cases, but counselors at law who should employ a holistic vision, helping defendants re-enter society following incarceration and avoid incarceration in the future.³⁰² Kross did such work with a view towards improving the lives and opportunities of women—not only those who were accused defendants, but also the women attorneys providing such representation.³⁰³

Indeed, foreshadowing sentiments of feminist legal scholars like Patricia Cain, Kross's early lawyering work embodied true interconnectedness. This vision of unity in social justice efforts extended beyond the attorney-client relationship, reaching outside of her profession, outside of her faith, and outside of her gender. While Kross and her cohorts may have been shut out of elite legal institutions, she did not waste her time trying to scale the walls of the legal academy's Ivory Tower. Nor did she spend time thinking about how she could make it onto their lists. Rather, she figured out how to collaborate with others in the community and in other disciplines, who could help her make an impact on the law and lived experiences. Deeply practical and authentically interdisciplinary, her day-to-day work spoke for itself. It also sounded in the same practical terms as heard in the discourse of Cain and other early feminist legal theorists.

Once appointed to the bench, Kross continued in a similar vein with her interdisciplinary efforts to empower women so that they might have greater agency in their own lives. Interestingly, however, perhaps more than her lawyering activities, many of her judicial practices may be viewed in multiple lights, each potentially speaking to and against contemporary feminist values and concerns. For instance, while some feminists today would agree it is appropriate to seek to protect and rehabilitate young women who find themselves working in the sex trade under harsh conditions and overbearing bosses, others might find such judgments laden with value about sexual activity and intimacy that fail to account for the experiences and desires of all women.³⁰⁴ Similarly, Kross's efforts to hire minority women to work in the

³⁰¹ Cf. Moscovitz, *Opportunity*, *supra* note 177, at 86 (noting that women—like many men—may have the “keen knowledge of human nature, a clear insight into character, a logical and analytical mind and a sympathetic temperament” necessary for criminal court work).

³⁰² Quinn, *Revisiting Kross's Critique*, *supra* note 146, at 677–78 (discussing Kross's participation in litigation based re-entry work).

³⁰³ See *supra* notes 171–176 and accompanying text (describing, in part, Kross's focus on interconnectedness among women lawyers and between such lawyers and their clients).

³⁰⁴ See, e.g., Drucilla Cornell, *A Defense of Prostitutes' Self-Organization*, 1 CARDOZO WOMEN'S L.J. 121, 121–24 (1993) (calling for reimagination of prostitutes as workers with rights); Beverly Balos & Mary Louise Fellows, *A Matter of Prostitution: Becoming Respectable*, 74 N.Y.U. L. REV. 1220, 1301 (1999) (rejecting the notion that “prostitution is an expression of sexual autonomy”).

Harlem Wayward Minors program might be seen as strikingly modern in their understanding of intersectionality principles and recognizing that privileged white women may not be in the best position to speak to the needs of poor, urban African American women.³⁰⁵ On the other hand, such practices could be coded as manipulative and disrespectful—both exploiting the African American women social workers and misleading the defendants, whom they were sent to assist.³⁰⁶

Much of her Home Term work, too, can be seen in these variegated ways. Many modern feminists would shudder to think of an alleged batterer and complainant sitting together on a couch to talk about difficulties in their relationship with a view towards addressing the discord.³⁰⁷ But for others, this is an appropriate approach to dealing with complicated human relationships, acknowledging that not all women are victims in waiting and not all men are inchoate abusers.³⁰⁸ Kross's use of volunteers and outsiders within the workings of the courts could be lauded as a feminist challenge to legal norms which erected walls between the law and the larger society. Yet some feminists could see such between the cracks efforts as an abuse of power that could mislead uneducated litigants.³⁰⁹ Sending privileged society women to instruct poor families how to better live their lives could also be seen as disempowering by today's feminist standards.³¹⁰

³⁰⁵ See Crenshaw, *supra* note 90, at 154 (“Not only are women of color overlooked, but their exclusion is reinforced when *white* women speak for and as *women*.”); see also Alvin Hadley, *Cultural Sensitivity in African American Health Care: Strategies for Outreach to African American Communities*, DIVERSITY MATTERS (2006), <http://www.diversity-matters.net/publications-csih.pdf> (“[D]escribing strategies that have been employed by groups and institutions to reach out to families in African American communities relating to the provision of health care.”); Ken Resnicow et al., *Cultural Sensitivity in Substance Use Prevention*, 28 J. CMTY. PSYCHOL. 271, 277 (2000); Isis H. Settles, *Use of an Intersectional Framework to Understand Black Women's Racial and Gender Identities*, 54 SEX ROLES 589, 597 (2006) (studying the “value of an intersectional framework [in] examin[ing] . . . black women's identities and well-being”).

³⁰⁶ See, e.g., Cheryl D. Hicks, “*In Danger of Becoming Morally Depraved*”: *Single Black Women, Working-Class Black Families, and New York City's Wayward Minor Laws, 1917–1928*, 151 U. PA. L. REV. 2077, 2117–19 (2003) (describing how some Black families came to the court system seeking assistance but ultimately had their children removed from their homes for long periods of time).

³⁰⁷ See, e.g., Alana Dunnigan, Comment, *Restoring Power to the Powerless: The Need to Reform California's Mandatory Mediation for Victims of Domestic Violence*, 37 U.S.F. L. REV. 1031, 1052 (2003) (“[M]ediation assures that the abuser's actions will go unpublished and unaccounted for”); Sarah Krieger, Note, *The Dangers of Mediation in Domestic Violence Cases*, 8 CARDOZO WOMEN'S L.J. 235, 235 (2002) (“[M]andatory mediation has an overall negative impact on gender relations”).

³⁰⁸ See Leigh Goodmark, *Autonomy Feminism: An Anti-Essentialist Critique of Mandatory Interventions in Domestic Violence Cases*, 37 FLA. ST. U. L. REV. 1, 26–27 (2009); Aya Gruber, *The Feminist War on Crime*, 92 IOWA L. REV. 741, 801–20 (2007) (challenging binary conceptions of batterers and abused).

³⁰⁹ See Sally Engle Merry, *The Criminalization of Everyday Life*, in EVERYDAY PRACTICES AND TROUBLE CASES 14 (Austin Sarat et al. eds., 1998).

³¹⁰ Cf. RUTH CROCKER, *SOCIAL WORK AND SOCIAL ORDER: THE SETTLEMENT MOVEMENT IN TWO INDUSTRIAL CITIES, 1889–1930*, at 27 (1992).

Finally, Kross's changing views and practices regarding legal representation present further layers of complexity for resolving her feminist identity. Despite her early efforts to provide free representation for adult women defendants charged with sex acts in the Women's Court, most of the young people who passed through the Wayward Minors part went unrepresented.³¹¹ The "consent" obtained from the young women to enter into the court's treatment regime could be seen as problematic based on their age and other factors.³¹² In addition, Kross implied that some girls received court intervention even when the evidence against them was insufficient.³¹³ In doing so, Kross's failure to apply contemporary liberal legal standards relating to autonomy and individual rights could be seen as anti-feminist.³¹⁴

The same informality applied in the Home Term Court, where men accused of assault and other acts of domestic violence were encouraged to proceed without counsel. Such practices, which allow for swift incarceration of faltering batterers without resort to legal formalities or formal representation, could easily be embraced by some of today's feminist legal camps. Indeed, some modern domestic violence courts, driven by women's and victims' rights advocates, retain a similar feature in which defendants periodically report to judges for reviews without being accompanied by counsel.³¹⁵

Rather than seeing these sites of complexity as problems for our characterization of Kross's work as feminist in nature, perhaps we should embrace

³¹¹ See FISHER, *JUSTICE FOR YOUTH*, *supra* note 215, at 26 ("It is an interesting fact that defense attorneys are nowhere to be seen during proceedings in this court. The diminishing role of the legal counselor is but another corollary of the intention of the social court to minister to those in distress lest they fall into evils ways.")

³¹² CLARKE, *supra* note 214, at 15. Social worker and special probation officer Dorris Clarke, one of Kross's protégés, claimed in her 1941 review of the Wayward Minors' Court that, "[a]ctually, no harm was done to any of these girls and all were glad to consent to such shelter—and as a matter of fact, many, on the adjourned date, requested to be returned to the institution." *Id.* "Regardless of the legal aspects[.]" she asserted, the "procedure has more than justified itself socially" as the court was able in most instances to ensure adjustment of the youth without the "stigma of adjudication." *Id.* at 28. Ultimately, Clarke was able to place her writings about the Court in a legal academic publication, in which she advocated for amending statutes to comport with many of the informal pre-trial practices that Kross had implemented on the ground. See Dorris Clarke, *Treatment of the Delinquent Adolescent Girl: By Court or Administrative Tribunal?*, 21 N.Y.U. L. Q. Rev. 225, 248 (1946).

³¹³ Cf. KROSS, *WAYWARD MINORS*, *supra* note 213, at 2. Kross noted that "prior to the establishment of this Wayward Minors' Part of the Women's Court, it was customary for presiding Magistrates to hear charges against Wayward Minors in the Women's Court proper (or in Chambers), and either to dismiss charges or to adjudicate." *Id.* A youth was not supposed to be adjudicated a Wayward Minor unless "competent evidence" was presented at a hearing and the youth was afforded "all the rights secured by law to defendants" in adult criminal courts. Wayward Minors' Act, *supra* note 215.

³¹⁴ It is important to note here that Kross's work pre-dates the landmark right-to-counsel case of *Gideon v. Wainwright*, 372 U.S. 335 (1963).

³¹⁵ As a New York City public defender, I appeared with clients at such domestic violence court review dockets, where I witnessed countless other defendants appearing without representation to answer the questions of the reviewing court. Cf. Robyn Mazur & Liberty Aldrich, *What Makes a Domestic Violence Court Work? Lessons from New York*, 42 JUDGES J. 5, 8 (2003).

these complexities as acknowledgments of the nearly endless ways in which any individual feminists may define themselves. For, there is no absolute litmus test for discerning true belonging to the feminist family. Wasting time trying to divide ourselves and precisely label is largely unhelpful, and the application of unforgiving binaries may work to unduly exclude some from the feminist fold. Kross shows us in concrete ways how feminism may be seen as more than concern for “women’s issues.” Thus, as suggested by many legal scholars and historians starting over twenty-five years ago—and repeated more recently with renewed verve—all of us who attempt to challenge existing hierarchies to advance the liberation of all people, not just women, may feel comfortable in seeing their work as contributing to a feminist agenda.³¹⁶

Although she was largely focused on concerns of “women,” Kross did not have a single subject of concern in mind. For instance, her approach to domestic violence saw improvement of men’s lives as connected to the improvement of the lives of their wives and children. And looking back on her entire career, it is hard to say whether Kross was more troubled by women’s oppression, disenfranchisement caused by race or poverty, the marginalization caused by mental impairment, or perhaps something different altogether. Kross’s focus was not solely on women as marginalized and oppressed persons. Perhaps this is because she wanted to help a variety of causes and concerns.

Through activism, Kross pushed past the limitations presented by theoretical identity binaries.³¹⁷ By just “doing” the work—without the privilege or time to over-think such positions—individual constructed categories became more muted in the context of trying to achieve substantive equality.³¹⁸ In these ways, Kross was arguably both an early feminist and post-femi-

³¹⁶ See, e.g., Martha Albertson Fineman, *The Vulnerable Subject: Anchoring Equality in the Human Condition*, in *TRANSCENDING THE BOUNDARIES OF LAW: GENERATIONS OF FEMINISM AND LEGAL THEORY* 161 (Martha Albertson Fineman ed., 2011) (reframing feminism to focus not exclusively on “women’s issues” but issues of vulnerability shared by the human race); Laura Spitz, *Theorizing the More Responsive State: Transcending the National Boundaries of Law*, in *TRANSCENDING THE BOUNDARIES OF LAW: GENERATIONS OF FEMINISM AND LEGAL THEORY* 305, 308–11, 314–18 (Martha Albertson Fineman ed., 2011) (calling on feminists to play an activist role in addressing vulnerability across national lines by engaging in the North American integrationist project); CHRISTINE STANSELL, *THE FEMINIST PROMISE: 1792 TO THE PRESENT* 368–94 (2010) (describing the emergence of Global Feminism, which made human rights issues, including health concerns and anti-poverty movements, part of the feminist agenda).

³¹⁷ See LINDA NICHOLSON, *IDENTITY BEFORE IDENTITY POLITICS* 185–86 (Jeffrey C. Alexander & Steven Seidman eds., 2008) (urging readers to think of “identity categories like threads in a tapestry that is the social whole . . . [where] the meaning of any identity category will change as it intersects with other identity category ‘threads’”).

³¹⁸ See generally Ian F. Haney López, *The Social Construction of Race: Some Observations on Illusion, Fabrication and Choice*, 29 *HARV. C.R.-C.L. L. REV.* 1, 27 (1994) (arguing that social constructions, such as race, “must be seen as the source and *continued* basis for . . . categorization”) (emphasis added).

nist.³¹⁹ With the very act of renaming Legal Realism—with an expansively framed notion of “Feminism”—we, too can push past traditional theoretical boundaries and destabilize the power of list-making. And, so, by telling Kross’s story as an example of this new feminist legal realist narrative, we begin to elide perceived limitations of labels, as well as confound differences between insiders and outsiders more generally.

Using this new history may also provide some much-needed space and perspective for contemporary feminist work. As historian Judith Bennett notes, “the passage of time provides . . . clearer understandings” and “the distance of the . . . past is especially useful” for analyzing modes of thinking, allowing us to engage in less personal challenges and heated discourse in our exchanges.³²⁰ Such new knowledge may also help blunt contemporary claims of absolute originality, helping us to see that others before us have grappled with many of the same issues.³²¹ For, we may decide, with the benefit of healthy hindsight, to reject certain of these methods that we see as faulty in light of our contemporary commitments.³²² We may also decide that particular ways of operating provide the most promise for our future.

CONCLUSION

In these ways, Feminist Legal Realism suggests a particularly promising route for greater productivity. Seeking to actively recover feminist legal history—which includes Kross and her cohorts as a component of our lineage—seems more useful than continuing to unsuccessfully reject completely Legal Realism as part of Legal Feminism’s past or, alternatively, buying into its traditional androcentric conception and Ivory Tower practices. Rather, seeing Kross as one example of a legal feminist who engaged with lived injustices and inequality may provide a template for ensuring our work is more than an inchoate set of ideas.³²³ Thus, this new feminist legal realist

³¹⁹ Cf. HALLEY, *supra* note 127, at 11–15.

³²⁰ See BENNETT, *supra* note 7, at 52.

³²¹ See LERNER, *supra* note 117, at 183.

³²² See BENNETT, *supra* note 7, at 46.

³²³ Thus, like the work of Charlotte Bunch, a women’s historian and human rights activist, Feminist Legal Realism seeks to merge past and present, theory and practice by (1) describing and telling stories of the past, (2) analyzing why things happened the way they did, (3) offering a vision of what should exist, and (4) strategizing about how to achieve that vision. See Charlotte Bunch, *Not by Degrees: Feminist Theory and Education*, in LEARNING OUR WAY: ESSAYS IN FEMINIST EDUCATION 248, 248 (Charlotte Bunch & Sandra Pollack eds., 1983) (“A solid feminist theory would help us understand present events in a way that would enable us to develop the visions and plans for change that sustain people engaged in day-to-day political activity.”). Judith Bennett embraces, advances, and expands upon this approach in her important recent work. See BENNETT, *supra* note 7, at 47–49.

account may respond to those frustrated with the devolution of modern feminist legal debates.³²⁴

As noted, many legal feminists have begun to urge more reality-based and rooted responses to lived inequity. This is true among feminist historians as well.³²⁵ Interestingly, these calls are not only being made in the course of scholarly sparring matches. Rather, many of those who began these movements are looking back on the course of their careers—offering their own histories—and arguing that feminism needs to rethink its current methods and goals if it wants to progress.

Feminist historian Gerda Lerner, now in her eighties,³²⁶ has made a forceful call for a return to action and pragmatism in a retrospective on her career, admonishing that feminist historians should focus less on academic issues and more on the most oppressed groups—men and women alike.³²⁷ Ann Scales, who tried to distance Feminist Jurisprudence work from Legal Realism at the outset of her career,³²⁸ has also recently called for a return to

³²⁴ I do not mean to suggest this is the only route of transformation. Other promising and productive feminist proposals have recently come to the fore. Kristin Kalsem and Verna Williams, as part of the New Women's Movement Initiative, also call for greater pragmatism in Legal Feminism. See Kristin Kalsem & Verna Williams, *Social Justice Feminism*, 18 UCLA WOMEN'S L.J. 131 (2010). Without considering the relationship of Legal Feminism and the traditional realist narrative, they offer other lessons from Feminism's first and second waves. See *id.* at 192 (“[d]rawing on history” to “broadly defin[e] social justice feminism as . . . productive, constructive, and healing”). Nor do I mean to suggest that this way of thinking should trump other emerging takes on Legal Realism. See, e.g., Victoria Nourse & Gregory Schaffer, *Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory*, 95 CORNELL L. REV. 61, 64 (2009) (“[N]ew realists share a vision that provides an alternative to new formalism, the theory of neoclassical law and economics, and the variants of new formalism derived from it.”); see also Parks, *supra* note 90, at 685 (calling for the creation of a Critical Race Realism rooted in “Critical Race Theory, empirical social science, and public policy”). Indeed, further conversation among all of these related groups—scholars and practitioners—would likely be productive. See also Dixon, *supra* note 122, at 321 (suggesting mining comparative constitutional law “to encourage greater attention to the full range of critical feminist perspectives at a theoretical level . . . [and] encourage more careful and effective forms of practical legal interventions aimed at achieving gender justice, both now and in the future”).

³²⁵ See e.g., BENNETT, *supra* note 7, at 5 (“The feminist potential of this particular sort of women's history—focused on feminist issues, aware of the distant past, attentive to continuities, and alert to the workings of patriarchal power—is the subject of this book.”). Lerner writes,

Social change is made by strategic analysis and by consistent and continuous organizational work. An adequate strategic analysis—that is, one that can be proven successful by pragmatic application—needs to be based on deep analysis that takes many factors into consideration, and on an understanding of what can be learned from historical precedent.

LERNER, *supra* note 117, at 1–2; see also Scott, *supra* note 284, at 23 (“[A]rguing that the primary role of feminist history has not been to produce women as subjects but to explore and contest the means and effects of that subject production as it has varied over time and circumstance.”).

³²⁶ LERNER, *supra* note 117, at 19.

³²⁷ *Id.* at 180–87.

³²⁸ See *id.* at 1–2.

some of feminism's basics.³²⁹ Decidedly less optimistic about the movement than she was twenty-five years ago, she seems to fear its failure if it continues down its present path, and urges renewed commitment to application of feminist methods beyond the academy.³³⁰ Less concerned about what we call such endeavors,³³¹ Scales's main goal is to push past nihilistic circularity offered by purely deconstructive debates. Our focus, she reminds us, should be on "collective forward motion."³³²

Like Kross, we must be brave, step outside of academic debates, roll up our sleeves, and get our hands dirty with the messy matter of presently lived inequality. As we engage with such problems, we will not necessarily know all of the answers in advance.³³³ And as each new issue of marginalization or oppression presents itself, we may need to construct a slightly different practical approach to addressing it. Step-by-step, we will need to feel our way along, not always following a straight path or necessarily presenting a coherent picture. Making our way with perpetual, if plodding, progress may serve to reenergize contemporary feminist activities and restart stalled efforts.³³⁴ Following Kross's method provides a way to address injustices more directly.

Through Kross and her cohorts, we may begin to imagine a feminist future that is less concerned about life in the academy, winning debates about ideas, and adding our names to the list of elites. Instead, we should begin to see our work as both more practical and more radical—in a way that abdicates absolute definitions, seeks to bridge divides, and provides some semblance of substantive justice for individual people in their individual lives. With Feminist Legal Realism, we may begin to embrace our yet-to-be-written past and fulfill the potential of our yet-to-be-known future.

³²⁹ See ANN SCALES, *LEGAL FEMINISM: ACTIVISM, LAWYERING AND LEGAL THEORY* 3–4 (2006) ("[I]ntend[ing] to take the reader back to some feminist basics . . . to steer away from the problems lawyers invite when we imagine that legal theory is separate from what lawyers do.").

³³⁰ See *id.* at 151.

³³¹ *Id.* ("I want to enlarge feminism's range, and I don't even care very much what we call it."); see also *id.* at 10 (implying a connection between Feminism and Legal Realism in stating, "The day may not be too far off when no one can remember who first said, 'We are all feminists now.'").

³³² *Id.* at 145.

³³³ See LERNER, *supra* note 117, at 19 ("Up to now, in my life, action was usually motivated by thought; theory led to practice. [Now] . . . the reverse is happening. I'm living the experience and it is forcing me to reflect on it, to think about it, to meet it with awareness.").

³³⁴ As noted by Joan Scott, "Feminism's history [is] so exciting . . . precisely [because of] its radical refusal to settle down, to call even a comfortable lodging a 'home.'" Scott, *supra* note 284, at 21.

