

Texas Law Review

See Also

Response

Further (Ms.) Understanding Legal Realism:
Rescuing Judge Anna Moscovitz Kross

Mae C. Quinn*

In his informative and provocative Article, *Understanding Legal Realism*,¹ my colleague-to-be, Brian Z. Tamanaha,² seeks to recast the history of Legal Realism in this country by revisiting the “what” and “who”³ of this important “movement.”⁴ His goal is to dispel common misconceptions about legal realism and provide a fuller account of its community. In part, he seeks to “rescue”⁵ (sometimes from obscurity) those who erroneously may have been left off Karl Llewellyn’s (and others’) all-important Legal Realist lists.⁶

As for realism’s “what,” Tamanaha suggests that it may not be as rooted in skepticism about law and judging as many have previously proclaimed.⁷ Even Realists, he argues, like their formalist forefathers, recognized the importance of the rule of law.⁸ Thus, he offers a more balanced description of the school’s thinking than traditionally understood. For instance,

* Professor of Law, Washington University School of Law, St. Louis, Missouri.

1. Brian Z. Tamanaha, *Understanding Legal Realism*, 87 TEXAS L. REV. 731 (2009).

2. Professor Tamanaha will be joining the faculty of Washington University at St. Louis in January 2010.

3. As Tamanaha explains, he is one in a long line of scholars, beyond the Realists themselves, who have grappled with these questions. *See id.* at 733.

4. *See* Tamanaha, *supra* note 1, at 737 (explaining that “scholars disagree over whether realism was a school of thought, a movement, a full-blown jurisprudential theory, or just a ‘cynical state of mind’”).

5. *Id.* at 732.

6. *See id.* at 736 (referring to the various lists compiled by Llewellyn and included as an appendix in N.E.H. HULL, ROSCOE POUND & KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE 180–81 (1997)).

7. *Id.* at 733–35.

8. *Id.* at 732–33.

Tamanaha fills out the school's contours with at least four possible, although not necessary, attributes.⁹ These include viewing "law as a means to serve social ends, . . . pursu[ing] social-scientific approaches to law," seeking to educate young lawyers in ways "to improve legal practice and judging," and "advanc[ing] a progressive political agenda in and through law" reform efforts.¹⁰

As for the "who," Tamanaha offers that conventional wisdom fails to fully identify those who, historically, engaged in the Realist enterprise. He persuasively argues that much Realist thinking about judging attributed exclusively to a small band of "pioneer[s]" active during the 1920s, 30s, and 40s was shared by "many in the legal fraternity at the time—and for some time earlier."¹¹ Tamanaha therefore offers a wider lens to bring into focus who might be more accurately made a part of this significant legal event.¹²

I write to join in Tamanaha's rescue efforts. I, however, am interested in a slightly different kind of jurisprudential salvation—one that seeks to recover the lost contributions of women jurists over the decades, including those who served in the trenches and on the benches in this country. Thus, I too seek to rewrite our nation's legal history but do so to facilitate gendered understandings of the past, present, and future of U.S. law, including the purportedly male-only enclave of Legal Realism.¹³

Unfortunately, despite his more inclusive revisioning of the Legal Realist landscape, even Tamanaha's formulation fails to provide a single feminist foothold in the fraternity. Yet women lawyers and legal thinkers are among those who embraced some version of Legal Realism—including the more balanced conception offered by Tamanaha—both in its heyday and beyond. Although their numbers may have been limited, and their stature less than Ivy League and ivory tower due to the impediments of the day, they also impacted the law and legal institutions with their efforts. Acknowledging the life and work of these true pioneers would begin to more

9. *Id.* at 737.

10. *Id.*

11. *Id.* at 733. Tamanaha notes "[t]he standard portrait of the Legal Realists as a band of pioneering jurists shining a realistic light on judging to illuminate a previously darkened age advances a gross misunderstanding of our legal history." *Id.* at 734.

12. Tamanaha challenges traditional characterizations of Legal Realists that portray them as an isolated and small group of well-known legal thinkers wholly distinct from their peers, predecessors, and progeny. *Id.* at 733–35. Noting that Legal Realism's tenets, as he more robustly describes them, were widely embraced over time, he posits that many like-minded "judges, lawyers, and legal academics had long been aware of the openness of law and the problematic complexities of judging." *Id.* at 733.

13. Obviously I am not alone in this effort. Indeed, I am among many feminist legal scholars including Felice Batlan, Jill Elaine Hasday, and Margo Schlanger, who have recently come together around this concept to contribute to a book manuscript, *FEMINIST LEGAL HISTORY: WOMEN'S AGENCY AND THE LAW* (book forthcoming N.Y.U. Press), that explores these ideas. This project grew out of an important 2007 symposium, *The New Face of Women's Legal History*, at the University of Akron School of Law organized by the book's editor, Tracy Thomas.

fundamentally rewrite this important event in history, beyond expanding just its timeline and ideological description. One female jurist whose story helps to address such (ms.)conceptions about Legal Realism is Judge Anna Moscowitz Kross.

Kross, a poor Russian immigrant who came to this country as a child in 1890, went on to become one of the first women to actively practice law in this country, to serve on the bench, and to be recognized for innovative judicial thought and practice.¹⁴ Like the “core group of Realists” who were educated between 1910 and 1920,¹⁵ Kross received her law degree from New York University Law School in 1910.¹⁶ She quickly stood out as a progressive practitioner who sought to address social problems through her representation of disempowered groups—accused prostitutes, factory workers, children, and others.¹⁷ She did this work as a volunteer lawyer, a union attorney, and the first woman appointed as an Assistant Corporation Counsel for the City of New York.¹⁸ Although deeply committed to addressing injustice and improving lives of the downtrodden through lawyering, Kross also pointed out the profound limits of the law as written.¹⁹

Her talents quickly realized, in 1934 Kross was appointed to New York City’s Magistrates’ Court bench.²⁰ As a judge in the Magistrates’ system, a low-level criminal court that handled the prosecutions of hundreds of thousands of New Yorkers a year, Kross called for rejection of purely legal processes like trial, conviction, and sentence. Rather, she proposed more ““medical-social”” approaches to the problems brought before the court and development of interventions consistent with ““a scientific age.””²¹

14. See, e.g., 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, 737 (2008) [hereinafter Quinn, *Home Term*] (noting that Anna Moscowitz Kross received her first law degree in 1910); Mae C. Quinn, *Revisiting Anna Moscowitz Kross’s Critique of New York City’s Women’s Court: The Continued Problem of Solving the ‘Problem’ of Prostitution with Specialized Criminal Courts*, 33 FORDHAM URB. L.J. 665, 669 (2006) [hereinafter Quinn, *Women’s Court*] (observing that Anna Moscowitz was admitted to New York University Law School at a time when the law school had only been admitting women for less than two decades); Mae C. Quinn, *When Lady Vols Called the Shots: Judge Anna Moscowitz Kross and Her Army of Auxiliary Criminal Court Case Workers*, in FEMINIST LEGAL HISTORY: WOMEN’S AGENCY AND THE LAW (chapter on file with author, book forthcoming N.Y.U. Press).

15. Tamanaha, *supra* note 1, at 738.

16. Quinn, *Women’s Court*, *supra* note 14, at 678.

17. *Id.* at 678–79.

18. *Id.* at 682.

19. For instance, while calling for the abolition of the Women’s Court in 1935 in a report submitted to her law school friend and long-time political ally, Mayor Fiorello LaGuardia, Kross noted it was ““a naïve faith in the omnipotence of the law”” that had resulted in the creation of a court that sought to address and deter prostitution through criminal convictions. *Id.* at 686–87.

20. Kross’s law school friend, Jean Norris, was the first woman to hold the post but was ousted from the position amidst a scandal relating to prostitution case-fixing. *Id.* at 681–84.

21. *Id.* at 687.

With this plan in mind, Kross created various innovative court parts within the Magistrates' system to address particular kinds of problems like "sexual delinquen[cy]" in young women and domestic violence.²² She infused these specialty courts with in-house social services programs and psychological counseling groups, some run by volunteers connected with private nonprofit groups she established.²³ Using the coercive power of the court and threat of conviction to encourage rehabilitation, she held proceedings in abeyance with the promise that reformed defendants would be rewarded with case dismissal.²⁴ Noncompliant defendants might be met with summary conviction and incarceration. Although she conceded such practices were not wholly consistent with the letter of the law, Kross argued they were consented to by the defendants who preferred help to penal treatment.²⁵ Moreover, the realities she confronted on the bench warranted her working between the cracks of the law²⁶ to engage in social engineering.²⁷

Kross did not limit her thoughts on judging and courts to her work on the bench. Rather, like other celebrated Realists, she sought to perpetuate her progressive ideas and promote her concept of best judicial practices through writing. She did this in a variety of ways, including use of the popular press and white papers, in addition to participation in academic conversations through more traditional law review publications. For example, she wrote a *New York Times* article in 1936 to urge courts to be less punitive and more social-scientific in their approach to dealing with young wayward women, as she was in the Wayward Minors' Court.²⁸ As for white papers, Kross used funds from the Works Progress Administration to produce and disseminate a brochure on her development of the Wayward Minors' Court, describing its rationale and goals, along with its features, to encourage replication of the court in other jurisdictions.²⁹

22. *Id.* at 676; *see also* Quinn, *Home Term*, *supra* note 14, at 740.

23. Quinn, *Home Term*, *supra* note 14, at 740; Quinn, *Women's Court*, *supra* note 14, at 688.

24. Quinn, *Home Term*, *supra* note 14, at 741; Quinn, *Women's Court*, *supra* note 14, at 675.

25. *See* Anna M. Kross & Harold M. Grossman, *Magistrates' Courts of the City of New York: Suggested Improvements*, 7 BROOK. L. REV. 411, 439 (1938) [hereinafter Kross & Grossman, *Suggested Improvements*].

26. *Cf.* Tamanaha, *supra* note 1, at 753 ("The Realists asserted that cases arise that are not addressed by existing legislation or case law—that there are gaps in the law—and in these situations judges try to work out the right outcome, thereby making new law.").

27. In this way, some might argue Kross's work was more consistent with the teaching of Sociological Jurisprudence than Legal Realism. But as other commentators have explained, the latter can be seen as a subcategory of the former. *See, e.g.*, AMERICAN LEGAL REALISM xiii (William W. Fisher III, et al. eds., 1993). Indeed, Tamanaha seems to embrace this conception.

28. *See* Anna M. Kross, *Hypocrisy Scored in Penal Methods*, N.Y. TIMES, Dec. 12, 1937, at 5 (describing the success of the Wayward Minors' court in recognizing that the defendants before it were "girls with problems and not problem girls").

29. ANNA M. KROSS, U.S. WORKS PROGRESS ADMIN., PROCEDURES FOR DEALING WITH WAYWARD MINORS IN NEW YORK CITY (1936).

Similar to Realist Roscoe Pound, Kross also produced an important trilogy of academic articles, hers examined the New York Magistrates' Court system. Published in the *Brooklyn Law Review* at the height of the traditional Realist moment, the well-researched, rich series provided a history of the institution, including the finer points of its statutory establishment and limitations.³⁰ Citing Pound's work on criminal courts, she suggested the Magistrates' Court had great potential for effectuating social change.³¹ Indeed, providing accounts of her own innovations like the volunteers she used in lieu of probation officers, she described the Magistrates' system as "the greatest social force for the correcting of individual maladjustments and the prevention of crime in our civilization."³²

As this brief overview makes plain, Kross's life and work embodies the four attributes Tamanaha offers as more fully descriptive of the real Realists.³³ What is more, consistent with his more balanced view of Realism, she was a jurist who at once held skeptical views of mechanistic interpretation of law while articulating high regard for the legal system and its rules.³⁴ To be sure, it may be understandable that Tamanaha and others would overlook Kross as a Realist given her failure to make it to lists of the likes of Llewellyn—indeed, no woman did.³⁵ Now that she has been rescued from obscurity, and as Legal Realism conversations continue,³⁶ those

30. See Anna M. Kross & Harold M. Grossman, *Magistrates' Courts of the City of New York: History and Organization*, 7 *BROOK. L. REV.* 133 (1937); Anna M. Kross & Harold M. Grossman, *Magistrates' Courts of the City of New York: Jurisdiction, Powers and Duties of the Magistrates*, 7 *BROOK. L. REV.* 295 (1938); Kross & Harold M. Grossman, *Magistrates' Courts of the City of New York: Suggested Improvements*, 7 *BROOK. L. REV.* 411 (1938). Kross's coauthor, Harold M. Grossman, is another obscure figure about whom this author has found no biographical account.

31. See Kross & Grossman, *Suggested Improvements*, *supra* note 30, at 415, 455–56 (citing Roscoe Pound, *Criminal Justice and the American City*, in *CRIMINAL JUSTICE IN CLEVELAND* (1922)).

32. Kross & Grossman, *Suggested Improvements*, *supra* note 30, at 415.

33. See Tamanaha, *supra* note 1, at 737.

34. See *id.* at 767 ("[The Realists'] position is easily misunderstood if their target is not kept in mind: they were attacking the notion that judging merely entailed the logical application of legal rules and principles. Their refutation of this view . . . did not mean that they embraced its polar opposite, the notion that legal rules and principles do not have a significant role in judges' decisions.")

35. See N.E.H. HULL ET AL., *supra* note 6, at 343–46 (appendix with lists compiled by Hull and referenced by Tamanaha). And indeed at the time Llewellyn was compiling his lists most law schools were not even admitting women law students. *Id.* at 95.

36. Most law schools now admit classes evenly split between women and men and have done so for some time. Yet, a shadow of the Realist experience persists within today's legal academic discussions about Realism despite the lifting of the express impediments that existed for women during the traditional Realist age. That is, the legal academy's important "lists" (including those who are published in the top 10 law journals, and who are being cited most frequently) remain dominated by men. See, e.g., Minna J. Kotkin, *Of Authorship and Audacity: An Empirical Study of Gender Disparity and Privilege in the "Top Ten" Law Reviews* (July 13, 2009) (Brooklyn Law School Legal Studies Research Papers, Accepted Paper Series, available at <http://ssrn.com/abstract=1140644>).

offering revisionist histories might begin to reference the work of Kross and other women like her. Such acknowledgment may promote an even richer understanding of U.S. jurisprudence. In the end, however, this author believes development of a comprehensive account of Feminist Legal Realism is necessary to truly “loosen the hold of [the] distorted [historical] framework” in this country³⁷—and to facilitate a more empowering salvation.³⁸

37. Tamanaha, *supra* note 1, at 782. Cf. WILLIAM FISHER III, MORTON J. HOROWITZ & THOMAS A. REED, *AMERICAN LEGAL REALISM* (1993) (compiling an anthology of exclusively male Realist writings).

38. This short response serves as a starting point for this author’s effort to contribute to that comprehensive history and salvation in a full-length book. See MAE C. QUINN, *FEMINIST LEGAL REALISM? REALISTIC WOMEN OF LAW ON THE BENCHES, IN THE TRENCHES, AND BEYOND* (manuscript in progress and on file with author; working title).