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# LAWNESS

FREDERICK SCHAUER\*

One of the more important insights in H.L.A.Hart's *The Concept of Law*<sup>1</sup> comes on the very first pages of the book, where Hart insightfully observes that the typical appeal for a definition of "law" is not really a search for a definition at all, but is instead a mask for any of a number of somewhat different and less definitional questions.<sup>2</sup> We are puzzled about some aspect of law, Hart maintains, such as the relationship between law and morality, or the role of rules in a legal system, or the function of force and coercion in the legal order, but we disguise our specific puzzlements in a quest for a definition.<sup>3</sup>

Hart's admonition about how to understand a request for a definition is sound advice, and it is no less sound because Hart himself turned out in the later chapters of his book to be unfaithful to his initial diagnosis and recommendation.<sup>4</sup> Despite his claims in the first chapter that law might not be susceptible to traditional definition by necessary and sufficient conditions, despite the just-noted view that a request for a definition of law is typically a way of asking a different and more specific question about the character or operation of law, and despite his early explicit denial of the goal of seeking to define law at all,<sup>5</sup> Hart proceeds in much of the balance of his book to offer what looks very much like a definition of law. In particular, he comes close to defining law as the union of primary and secondary rules when combined with the internalization of the ultimate rule of recognition by officials.<sup>6</sup> And although Hart never says precisely that this is a definition of law, many of his followers, critics, and commentators have taken it to be precisely that.<sup>7</sup>

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1. H.L.A. HART, *THE CONCEPT OF LAW* (Penelope A. Bulloch & Joseph Raz eds., 3d ed. 2012) (1961).

2. *Id.* at 1–2.

3. *Id.* at 6–13.

4. See Frederick Schauer, *Hart's Anti-Essentialism*, in *READING HLA HART'S THE CONCEPT OF LAW 237* (Luís Duarte d'Almeida, James Edwards & Andrea Dolcetti eds., 2013); see also Leslie Green, *The Concept of Law Revisited*, 94 MICH. L. REV. 1687, 1692 (1996) (book review).

5. HART, *supra* note 1, at 17.

6. *Id.* at 79–99.

7. See Curtis A. Bradley & Neil S. Siegel, *Historical Gloss, Constitutional Conventions, and the Judicial Separation of Powers*, 105 GEO. L.J. 255, 266 n.56 (2017); Lewis A. Kornhauser, *Governance Structures, Legal Systems, and the Concept of Law*, 79 CHI.-KENT L. REV. 355, 358 n.12 (2004); Ken Kress, *Modern Jurisprudence, Postmodern Jurisprudence, and Truth*, 95 MICH. L. REV. 1871, 1900 (1997).

Brian Tamanaha, in his provocative and important challenge to many of the central themes of contemporary English-language analytical jurisprudence,<sup>8</sup> especially contemporary analytical jurisprudence from a legal positivist perspective, does not appear to make Hart's mistake. In saying that "[l]aw . . . is whatever social groups conventionally attach the label 'law' to,"<sup>9</sup> Tamanaha avoids giving us an actual definition of law,<sup>10</sup> and thus distances himself from the many contemporary and not-so-contemporary efforts to specify the necessary, essential, or sufficient conditions for some social phenomenon being law.<sup>11</sup> And although Tamanaha recognizes, along with Joseph Raz,<sup>12</sup> that different cultures may have different concepts of law, or that one culture's concept of law may change over time, Tamanaha insists that even within *our* concept of law the diversity of phenomena that are labeled or understood as law over time and across cultures is simply too wide to make any attempt at generalization either fruitful or illuminating.<sup>13</sup>

Tamanaha's anti-essentialist project<sup>14</sup> is an important voice in modern arguments about the nature of law. Along with various others who identify

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8. BRIAN Z. TAMANAHA, *A REALISTIC THEORY OF LAW* (2017) [hereinafter TAMANAHA]. The salvo of qualifiers in the text is necessary, because jurisprudence has been practiced at least for generations and probably for millennia, because quite different styles of jurisprudential inquiry have existed in the past, because the style and focus of jurisprudential inquiry is even now different in other countries and other academic cultures than it is in the Anglo-American orbit, and because jurisprudence has been and is now only contingently connected with a particular mode of analytic philosophy.

9. *Id.* at 194.

10. Tamanaha's purported definition—law is whatever social groups think it is—bears some affinity with those institutional definitions of art that define art in terms of what artists (or other members of the art culture) believe it to be. *See, e.g.*, ARTHUR DANTO, *THE TRANSFIGURATION OF THE COMMONPLACE: A PHILOSOPHY OF ART* (1981); GEORGE DICKIE, *ART AND VALUE* (2001); GEORGE DICKIE, *THE ART CIRCLE: A THEORY OF ART* (1984); GEORGE DICKIE, *ART AND THE AESTHETIC: AN INSTITUTIONAL ANALYSIS* (1974). This is not the place to pursue the similarities and the differences between art and law, or between theories of art and theories of law, but the parallels might well be worth exploring, especially if we wonder, as we do with both art and law, and as I suggest at the end of this paper, just what functions a definition or theory is designed to serve.

11. It is perhaps worth noting that Tamanaha and I share a skepticism about the value or possibility of identifying the essential (or necessary) features of law. *See* Frederick Schauer, *On the Nature of the Nature of Law*, 98 ARCHIV FÜR RECHTS- UND SOZIALPHILOSOPHIE 457 (2012); Frederick Schauer, *The Best Laid Plans*, 120 YALE L.J. 586 (2010) (reviewing SCOTT J. SHAPIRO, *LEGALITY* (2011)).

12. Joseph Raz, *Can There Be a Theory of Law?*, in *THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY* 324 (Martin P. Golding & William A. Edmundson eds., 2005). *See also* JOSEPH RAZ, *BETWEEN AUTHORITY AND INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASON* 91–97 (2009).

13. TAMANAHA, *supra* note 8, at 65–73.

14. The book under principal discussion here is part of Tamanaha's longer and larger project, and thus includes BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* (2010), BRIAN Z. TAMANAHA, *LAW AS A MEANS TO AN END: THREAT TO THE RULE OF LAW* (2006), and, most directly, BRIAN Z. TAMANAHA, *REALISTIC SOCIO-LEGAL THEORY:*

themselves as legal pluralists,<sup>15</sup> Tamanaha is struck far more with the vast and seemingly foundational differences among so-called legal phenomena than with what, if anything, they may have in common. But in pursuing this agenda, and especially in purporting to offer a theory of law at all, Tamanaha may find himself closer to the essentialists whom he criticizes than he suspects, and the focus of this commentary is to explain why this may be so, and why searching for a theory of law, whether realistic or not, may be more the problem than it is the solution.

### I. MUST THEORY BE REALISTIC?

As the title of Tamanaha's book announces, he purports to offer us a *realistic* theory of law. And what could possibly be wrong with that, we might ask? But we cannot answer that question unless we have some idea of just what it is to be realistic. And here we might take as our guide the important observation about what it is to be "real" from the philosopher J.L. Austin. Using an unfortunately sexist metaphor and label, Austin explained that there were some words that were "trouser-words," in the sense that it is not the word under inspection but some other word, often its opposite, that "wears the trousers."<sup>16</sup> Shorn of the sexist label, the basic idea is that we cannot know what some words mean without understanding what they are to be distinguished from. We do not know what is meant by "direct" or "directly," for example, without understanding just which notion of "indirect" the speaker had in mind and intends to distinguish.<sup>17</sup> But "real" was Austin's principal example,<sup>18</sup> and he insists that "a definite sense

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PRAGMATISM AND A SOCIAL THEORY OF LAW (1997). See also Brian Z. Tamanaha, *A Non-Essentialist Version of Legal Pluralism*, 27 J.L. & SOC'Y 296 (2000).

15. Perhaps most prominent among the contemporary legal pluralists is William Twining. See, e.g., WILLIAM TWINING, *GENERAL JURISPRUDENCE: UNDERSTANDING LAW FROM A GLOBAL PERSPECTIVE* (2009); WILLIAM TWINING, *GLOBALISATION & LEGAL THEORY* (2000); WILLIAM TWINING, *LAW IN CONTEXT: ENLARGING A DISCIPLINE* (1997); *LAW'S ETHICAL, GLOBAL AND THEORETICAL CONTEXTS: ESSAYS IN HONOUR OF WILLIAM TWINING* (Upendra Baxi, Christopher McCrudden & Abdul Paliwala eds., 2015). Tamanaha understands, correctly in my view, that there are multiple versions of legal pluralism. See Brian Z. Tamanaha, *Understanding Legal Pluralism: Past to Present, Local to Global*, 30 SYDNEY L. REV. 375 (2008). Perhaps most important is recognizing that legal pluralism as a claim about the vast diversity over time and place of legal systems is different from legal pluralism as the identification of multiple legal systems, including especially various forms of non-state law, within the same geographic space. See Margaret Davies, *Legal Pluralism*, in *OXFORD HANDBOOK OF EMPIRICAL LEGAL RESEARCH* 805 (Peter Cane & Herbert M. Kritzer eds., 2010); Sally Engle Merry, *Legal Pluralism*, 22 L. & SOC'Y REV. 869 (1988).

16. J.L. AUSTIN, *SENSE AND SENSIBILIA* 15–19, 70–71 (G.J. Warnock ed., 1962). See also J.L. AUSTIN, *Other Minds*, in *PHILOSOPHICAL PAPERS* 76, 86–96 (J.O. Urmson & G.J. Warnock eds., 3d ed., 1979). For useful commentary on the idea, see KEITH GRAHAM, *J.L. AUSTIN: A CRITIQUE OF ORDINARY LANGUAGE PHILOSOPHY* 173–84 (1977).

17. AUSTIN, *SENSE AND SENSIBILIA*, *supra* note 16, at 15–19.

18. *Id.* at 70–71.

attaches to the assertion that something is real . . . only in the light of a specific way in which it might be, or might have been, *not* real.”<sup>19</sup> A real duck might be contrasted with a toy duck, or a picture of a duck, or a duck decoy, and thus “the function of ‘real’ is not to contribute positively to the characterization of anything, but to exclude possible ways of being *not* real—and these ways are both numerous for particular kinds of things, and liable to be quite different for things of different kinds.”<sup>20</sup>

And so too, we might think, with claims of theories to be realistic, including claims of theories of law to offer a realistic theory of law. Following Austin, we do not know just from the self-appellation of “realistic” exactly what the theory purports to tell us with its purported realism unless we have an idea of the kind of allegedly unrealistic theory that the realistic one seeks to rebut or supplement. With respect to Tamanaha’s realistic theory, therefore, we would initially want to know at least something about the theories that he believes are in some important and interesting way unrealistic.

In the case of Tamanaha’s realistic theory, it is plain that his target and his contrast is with those theories of law that he believes to be unrealistic in the specific sense that they fail to capture the diversity of phenomena that are understood to count as law in different cultures and at different historical periods. To be even more specific, Tamanaha believes that the theories of law offered by such prominent positivist analytical jurists<sup>21</sup> as Joseph Raz,<sup>22</sup> Scott Shapiro,<sup>23</sup> Julie Dickson,<sup>24</sup> Jules Coleman,<sup>25</sup> and especially H.L.A. Hart<sup>26</sup> are not theories of law as much as they are theories of the law as it contingently happens to be manifested in contemporary liberal democratic industrialized societies. But once we realize that societies that are not contemporary, not liberal, not democratic, and not industrialized

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19. *Id.* at 70 (emphasis in original).

20. *Id.*

21. Tamanaha occasionally uses the term “jurisprudent” to designate those who study law from a theoretical academic perspective. TAMANAHA, *supra* note 8, at 57, 61. “Jurisprudent” certainly has an older and more distinguished provenance, see *Jurisprudent*, 1 OXFORD ENGLISH DICTIONARY 1522 (Compact Edition 1971), but I prefer to follow Karl Llewellyn and use “jurisprude,” KARL LLEWELLYN, *THE THEORY OF RULES* 37 (Frederick Schauer ed., 2011), on the assumption that lack of pretentiousness trumps provenance almost every time.

22. JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986); JOSEPH RAZ, *THE AUTHORITY OF LAW: ESSAYS ON LAW AND MORALITY* (1979); JOSEPH RAZ, *PRACTICAL REASON AND NORMS* (2d ed., Princeton University Press, 1990).

23. SCOTT J. SHAPIRO, *LEGALITY* (2011).

24. JULIE DICKSON, *EVALUATION AND LEGAL THEORY* (2001).

25. Jules Coleman, *Incorporationism, Conventionality, and the Practical Difference Thesis*, in *HART’S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW* 99, 112 n.24 (Jules Coleman ed., 2001).

26. HART, *supra* note 1.

have had what they understood as law, and have had what even might be considered law under our own concept of law, we are forced, Tamanaha argues, to confront the essential unreality of conventional theories of law, an unreality he seeks to correct with his own realistic theory of law.<sup>27</sup>

Tamanaha situates his inquiry within the broad tradition of social legal theory,<sup>28</sup> sometimes called socio-legal theory<sup>29</sup> and sometimes sociology of law,<sup>30</sup> and accordingly supports his claim about the provincialism of contemporary analytic positivist legal philosophy with an impressive array of historical and cross-cultural examples drawn from the sociological, anthropological, and historical literatures.<sup>31</sup> These examples, and the secondary literature that analyzes them, provide extensive support for the conclusion that different societies at different times have had different views about the nature (or even the existence) of the distinction between law and other normative systems, such as those of etiquette and morality, and those that regulate sports and games; and that different societies have had different understandings of the functions of law, of its relationship to the political state, and of its systemic character, among other things. And thus, one of the many contributions of Tamanaha's book is to bring this literature and this empirical dimension into contemporary jurisprudence, which all too often treats factual inquiry and empirical observation as beyond the scope of the jurisprudential project.<sup>32</sup>

In attempting to incorporate this plurality or diversity of phenomena into a realistic theory of law, Tamanaha appears, at least on surface, to ignore one possible conclusion that follows from his empirical data—the possibility that there can be no theory of law at all. If the word “law” or its equivalents in other languages simply refers to a wide range of unconnected phenomena, or, more likely, refers to a cluster of interrelated phenomena sharing no common properties,<sup>33</sup> one conclusion might simply be that there

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27. TAMANAHA, *supra* note 8, at 80–81, 82–117.

28. *Id.* at 30–33.

29. See TAMANAHA, REALISTIC SOCIO-LEGAL THEORY, *supra* note 14.

30. See John Griffiths, *The Idea of Sociology of Law and its Relation to Law and to Sociology*, in LAW AND SOCIOLOGY 49 (Michael Freeman ed., 2006).

31. TAMANAHA, *supra* note 8, at 82–150.

32. A noteworthy exception is MICHAEL GIUDICE, UNDERSTANDING THE NATURE OF LAW: A CASE FOR CONSTRUCTIVE CONCEPTUAL EXPLANATION (2015), which valuably emphasizes the empirical dimension of philosophical conceptual analysis, a dimension that is often mentioned but rarely given more than lip-service.

33. I refer here to the idea of a cluster concept as developed by Max Black and John Searle and to the idea of a family resemblance most prominently associated with Ludwig Wittgenstein. See MAX BLACK, PROBLEMS OF ANALYSIS: PHILOSOPHICAL ESSAYS (1954); JOHN R. SEARLE, INTENTIONALITY: AN ESSAY IN THE PHILOSOPHY OF MIND 231–61 (1983); JOHN R. SEARLE, *Proper Names*, 67 MIND ASS'N 166 (1958); LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS ¶ 66 (G.E.M. Anscombe, P.M.S. Hacker & Joachim Schulte trans., 4th ed. 2009). The basic idea is that, as with Wittgenstein's

neither is nor can be a theory of law that captures this full diversity or normative phenomena.

Indeed, although Tamanaha takes his view that whatever social groups conventionally label as “law” is law<sup>34</sup> as a way of encapsulating his realistic theory, perhaps a better conclusion might be that this view summarizes the position that there neither is nor can there be a theory of law at all. And we might further conclude that this may not be such a bad thing. If legal phenomena are as plural and diverse as Tamanaha, William Twining,<sup>35</sup> and other modern legal pluralists suppose, then maybe there is simply no theory of law at all.

That there neither is nor can be a theory of law that captures law’s trans-historical, trans-cultural, and trans-systemic diversity and complexity need not doom the enterprise of legal theory. Legal theory as a valuable activity is to be distinguished from, and is not dependent on, the production of theories of law.<sup>36</sup> Although it might seem as if we should expect legal theorists to produce legal theories in the same way that we expect analysts to produce analysis, perhaps we should follow Oliver Wendell Holmes and have more modest insights for the enterprise. Commenting on the legal theories that were being produced during his time, Holmes quipped that “I care nothing for the systems—only the insights.”<sup>37</sup>

Assuming that Holmes meant by “systems” what others, then and now, have meant by “theories,” there is more than a germ of truth in his observation. Some theories might fail in searching for coherence at the expense of ignoring important features of the phenomenon being explained, and much of Tamanaha’s critique of contemporary positivist analytic jurisprudence is of this variety. Joseph Raz, for example, sees law’s claim to authority as among the essential or necessary properties of our concept of law,<sup>38</sup> but in searching for the properties that *all* instances of law possess, Raz may ignore the vast number of properties that most, even if not all, legal systems possess and that most, even if not all, non-legal phenomena do not

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famous example of “games,” there may be certain words or concepts that include various connected instances, but where there are no properties that all of the instances possess, and thus no properties the possession of which is necessary for proper application of the term. Interestingly, Hart himself entertained the possibility that law was a cluster or family resemblance concept, HART, *supra* note 1, at 13–17, but he seems to have left this possibility by the wayside in subsequent chapters.

34. TAMANAHA, *supra* note 8, at 194.

35. See sources cited *supra* note 15.

36. See Susan Haack, *The Pragmatist Tradition: Lessons for Legal Theorists*, 95 WASH. U. L. REV. \_\_\_\_ (2018).

37. Letter from Oliver Wendell Holmes, Jr. to Harold J. Laski (Jan. 5, 1921), in 1 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI 1916–1935 300 (Mark DeWolfe Howe ed., 1953).

38. RAZ, THE AUTHORITY OF LAW, *supra* note 22.

possess. As a result, Raz's essentialist approach may fail to capture the way in which law is differentiated from other social phenomena.<sup>39</sup> Much the same problem appears to infect Scott Shapiro's focus on planning as the organizing theory of law,<sup>40</sup> and, if we go outside of the positivist tradition but still remain within the modern analytic jurisprudence canon, the same can be said of Ronald Dworkin's view of law as interpretation.<sup>41</sup>

But if all of these theories of law are, according to Tamanaha, deficient and unrealistic because of their incompleteness, we might worry that Tamanaha's more complete (and thus, to him, more realistic) account is deficient precisely because of its completeness. There can be no doubt that Tamanaha views completeness and comprehensiveness as virtues, and the frequency with which he uses the word "holistic" to describe his own view,<sup>42</sup> a view that encompasses the "totality" of the legal experience,<sup>43</sup> punctuates his impatience with those theories of law he perceives to be incomplete in important ways. Thus, Tamanaha wants us, he says, to include within the notion of the legal the possibility that there may be no demarcation or differentiation among legal and other normative systems,<sup>44</sup> the reality that many legal systems—international law, for example<sup>45</sup>—are unconnected with single political states,<sup>46</sup> and the fact that many sources of normative guidance do not have the systemic character<sup>47</sup> that Hart took to be the defining and necessary feature of a legal system properly so called.<sup>48</sup> But if all of this—and much more—is law, then perhaps so much counts as law, even if not now and here than at other times and elsewhere, that we may have lost not only any sense of what law is, but also an understanding of just how law is differentiated in the sociological sense from various other social phenomena.<sup>49</sup> A theory of law that tries to include too much, or explain too much, may wind up explaining too little.

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39. See FREDERICK SCHAUER, *THE FORCE OF LAW* 37–41 (2015); Schauer, *On the Nature of the Nature of Law of Law*, *supra* note 11; Schauer, *The Best Laid Plans*, *supra* note 11; Frederick Schauer, *Necessity, Importance, and the Nature of Law*, in *NEUTRALITY AND THEORY OF LAW* 17 (Jordi Ferrer Beltrán et al. eds., 2013).

40. SHAPIRO, *supra* note 23.

41. See RONALD DWORKIN, *JUSTICE IN ROBES* 221–27 (2006); RONALD DWORKIN, *LAW'S EMPIRE* 45–90 (1986); RONALD DWORKIN, *A MATTER OF PRINCIPLE* 119–77 (1985).

42. *E.g.*, TAMANAHA, *supra* note 8, at 2, 4, 15, 16.

43. *Id.* at 1.

44. *Id.* at 48–51.

45. *Id.* at 151–93.

46. *Id.* at 51–56.

47. *Id.* at 84–93.

48. Hart, *supra* note 1, at 79–99.

49. On the sociological differentiation of law, see NIKLAS LUHMANN, *A SOCIOLOGICAL THEORY OF LAW* (Elizabeth King-Utz & Martin Albrow trans., 1985). For an attempt to connect the question of law's differentiation from other social phenomena and other normative systems to the



## II. TAKING HOLMES SERIOUSLY

Following Holmes' lead and abjuring the theories (or systems) in favor of the insights,<sup>50</sup> we might understand some of Tamanaha's principal targets in a rather more charitable light. Scott Shapiro does indeed refer to his account as the "planning theory of law,"<sup>51</sup> but rather than debate whether this is or is not a successful account of law's essential properties in all possible legal systems in all possible worlds, we might perhaps say only, and more modestly, that understanding law's planning function enables us to understand most modern instances of law better than we were able to previously. Similarly, even if Joseph Raz is mistaken in believing that the claim to authority is one of the very small number of properties that law must necessarily possess in order to be law,<sup>52</sup> one would be foolish to ignore Raz's profoundly insightful and properly influential account of the very nature of authority, both in law and elsewhere.<sup>53</sup> The union of primary and secondary rules<sup>54</sup> may not be the only or even the most important dimension of what makes a legal system a legal system, but Hart's distinction between primary and secondary rules<sup>55</sup> remains a remarkably useful tool in understanding how a large number of complex normative systems operate, just as his idea of internalization<sup>56</sup> enables us to understand the foundations of a legal order and to appreciate, *pace* Tamanaha, the legal character of international law.<sup>57</sup> And even if Ronald Dworkin's attack on legal positivism ultimately fails both as an attack on positivism and as a self-standing account of the nature of law,<sup>58</sup> his observations about the role of interpretation in law and about the inability of a rule-like rule of recognition to explain what counts in legal decision-making<sup>59</sup> have advanced our understanding both of what law is and of how it operates.

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analytic jurisprudential tradition, *see* SCHAUER, *THE FORCE OF LAW*, *supra* note 39, at 154–68; Frederick Schauer & Virginia J. Wise, *Legal Positivism as Legal Information*, 82 CORNELL L. REV. 1080 (1997).

50. *See supra* note 7 and accompanying text.

51. SHAPIRO, *supra* note 23, at 195.

52. RAZ, *THE AUTHORITY OF LAW*, *supra* note 22, at 28–33; Joseph Raz, *Hart on Moral Rights and Legal Duties*, 4 OXFORD J. LEGAL STUD. 123, 131 (1984).

53. *See* authorities cited *supra* note 22; *see also* Joseph Raz, *Introduction*, in *AUTHORITY* 1 (Joseph Raz ed., 1990).

54. HART, *supra* note 1, at 79–99.

55. *Id.*

56. *Id.* at 88–91.

57. On the use of Hart's idea of internalization to explain the fundamentally law-like character of international law and the similarity between international law and foundational domestic law, *see* Jack Goldsmith & Daryl Levinson, *Law for States: International Law, Constitutional Law, Public Law*, 122 HARV. L. REV. 1791 (2009).

58. As I believe it does, although not for the reasons commonly offered. *See* Frederick Schauer, *The Limited Domain of the Law*, 90 VA. L. REV. 1909 (2004).

59. RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 14–45 (1977).

All of this applies as well, of course, to Tamanaha's genuinely novel insights about the diversity of normative systems and his careful and thorough use of empirical information. We understand more about law when we understand the way in which different cultures or different parts of a larger society have dealt with the production and enforcement of social norms, with the resolution of disputes between and among citizens, and with the allocation of tasks between those with legal training and experience and those without. And we understand a great deal when we understand how law has changed and developed over time—Tamanaha thinks of this change and development as “genealogical”<sup>60</sup>—in response to political, psychological, economic, technological, and other changes in society. In all of this and more, Tamanaha's socio-legal and empirical information, insights, and analysis have advanced our understanding in much the same that Raz's analysis of authority, Hart's of internalization and systematization, Shapiro's of planning, and Dworkin's of interpretation and legal sources have done using slightly different tools.

In this sense, Tamanaha may have saddled himself with unnecessary burdens by choosing to designate his contribution to legal understanding as a theory of law, for in doing so he invites others to advance their own theories and attack his. Insofar as a theory purports to be a comprehensive account of an important social (or, for that matter, natural) phenomenon, we find ourselves in a zero-sum game, in which only one theory can be correct, and all of the others therefore mistaken.

Thus, part of my worry about Tamanaha's highly valuable book is that calling it a “theory” may undercut its value and may lead others with their own theories to discount what Tamanaha has to say. But part of my worry is also about the designation of his theory as “realistic.” As natural scientists who conduct laboratory experiments know, and as social scientists who search for natural experiments know as well, often we learn a great deal from isolating a particular variable, even if in doing so we ignore all of the other relevant variables by holding them constant, however artificial and therefore unrealistic the process of holding them constant may be.<sup>61</sup>

In the context of theorizing about law, I prefer to designate this process as “analytic isolation.”<sup>62</sup> Just as the medical researcher attempting to

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60. TAMANAHA, *supra* note 8, at 82–117.

61. On the application of scientific method to thinking about non-natural social phenomena, see especially GARY KING, ROBERT O. KEOHANE & SIDNEY VERBA, *DESIGNING SOCIAL INQUIRY: SCIENTIFIC INFERENCE IN QUALITATIVE RESEARCH* (1994).

62. See FREDERICK SCHAUER, *PLAYING BY THE RULES: A PHILOSOPHICAL EXAMINATION OF RULE-BASED DECISION-MAKING IN LAW AND IN LIFE* vii–viii (1991).

determine whether substance *X* is a causal factor in the incidence of disease *Y* ignores questions about the economics, politics, and morality of producing *X* as well as the economics, politics, and morality of treating *Y*, so too might one who theorizes about law pluck one feature of law out of its sociological and cultural home for closer inspection and analysis, in the hope that what we have learned from this process of isolating one feature or property or phenomenon will, along with numerous other exercises that isolate various other features, help in the totality of things to understand the larger setting in which the isolated feature occurs. And if looking closely at one feature while intentionally ignoring all of the others with which that feature is combined in reality produces the claim that the enterprise of analytic isolation is unrealistic, then so be it.

### III. LAWNESS

One possible consequence of examining the various components of many different manifestations of law over time and across cultures is that we may wind up, as Tamanaha helps us to understand, identifying a large number of features of many modern legal systems that do not appear in some of those systems and did not appear in other systems at other times. There is nothing amiss and nothing that should be startling about this state of affairs, and thus we might come up with a list of characteristic features of most of the legal systems in most twenty-first century industrialized democracies, including a differentiated (from other professions) legal profession, a systematically organized collection of social rules, a mechanism for engaging in common transactions of commerce and exchange, a system of coercion to enforce both the constitutive and regulatory rules, and various other noteworthy features. In some sense, and while acknowledging the provinciality of the characterization, we might then consider this a prototype of law or, to use Max Weber's terminology, an "ideal type"<sup>63</sup> of law, even as we recognize that there is nothing ideal in any broader or evaluative sense about an ideal type and even as we acknowledge that others at other times and in other cultures might have different prototypes or ideal types.

Once we have identified a prototype or ideal type, we might then proceed to characterize other normative systems by their degree of relevant resemblance to the prototype, and we might further designate this degree of resemblance—or similarity—as the *lowness* of a system. In doing so, we

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63. See Werner J. Cahnman, *Ideal Type Theory: Max Weber's Concept and Some of Its Derivations*, 6 SOC. Q. 268 (1965).

avoid the hoary debates about, for example, whether international law really is or is not law,<sup>64</sup> or whether customary law is law.<sup>65</sup> Instead we can say that international law, for example, shares many properties with the standard or prototype case of a municipal legal system—primary and secondary rules, internalization (in the Hartian sense) by officials, the claim of authority (in the Razian sense), and an identifiable cohort of specialist practitioners—and lacks some of the properties that those systems possess—an elaborate and effective system of coercion, and what John Austin called a “habit of obedience.”<sup>66</sup> In that sense international law possesses a considerable degree of lawness, but differs from the ideal type in some interesting and important ways. And it is not clear that anything more needs to be said about whether international law is “really” law or is really not.

Much the same could be said about another topic that Tamanaha explores—the status of non-state rule systems,<sup>67</sup> whether those systems be formally unconnected with political states, as with the National Football League or the American Philosophical Association, or whether they be extra-national coalitions of political states, such as the World Trade Organization or Organization of Petroleum Exporting States, or whether they be extra-legal and illegal organizations, such as the Mafia. Again, in some respects each of these systems resembles the ideal type in having primary and secondary rules, in making claims of authority over their participants, and in containing a formal dispute-resolution mechanism, among others, but each also lacks the connections with the political state and the pretensions of comprehensiveness that characterize the typical state-based legal system.<sup>68</sup>

Thinking of the degree of similarity between some normative system and the ideal type in terms of a degree of lawness has some virtues, but I do not mean to suggest that developing a metric of lawness is the necessary corollary of being skeptical—as is Tamanaha—about the possibility of defining law in terms of necessary and sufficient conditions,<sup>69</sup> or of being skeptical—against Tamanaha—about the virtue of developing a comprehensive theory of law. Indeed, one of the ways in which Tamanaha’s account of law might be considered expansive—and perhaps excessively

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64. See Glanville Williams, *The Controversy Concerning the Word ‘Law,’* in PHILOSOPHY, POLITICS AND SOCIETY 134 (Peter Laslett ed., 1956).

65. See R.W.M. DIAS, JURISPRUDENCE 190–91 (5th ed., 1985).

66. JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 168–69 (Wilfrid E. Rumble ed., Cambridge Univ. Press, 1995) (1832).

67. TAMANAHA, *supra* note 8, at 51–56.

68. *Id.* at 2–3. On assertions of comprehensiveness as characteristics of prototypical legal systems, see SCHAUER, THE FORCE OF LAW, *supra* note 39, at 162–63.

69. See *supra* note 11.

so—is in terms of trying to develop an account—or theory, if you will—that combines the reasons for having law (or the origins of law) with the identification of what law is with the consequences of having law. If we were thinking of hammers, we might suppose it obvious that the history of the development of hammers, the properties of a hammer, and the functions and values of hammers are three different—but admittedly interconnected—topics. And perhaps the same holds true of law.

At the beginning of his book, Tamanaha aligns himself closely with the American Pragmatists, and thus with their skepticism about abstraction, a priori reasons, and fixed principles, among the other vices that the Pragmatists saw in non-Pragmatist philosophy.<sup>70</sup> But in the very same passage from William James that Tamanaha quotes in order to reaffirm this point, James advocates a philosophical method focused on “action and towards power.”<sup>71</sup> As other Pragmatists might have put the same point, the focus ought to be in function, purpose, and payoff. Indeed, as James also said, “[i]deas become true just in so far as they help us to get into satisfactory relations with other parts of our experience.”<sup>72</sup> Whether Pragmatism is sound as a theory of truth has been long debated,<sup>73</sup> but a somewhat less controversial dimension of the Pragmatist project is its desire to evaluate or understand philosophical contributions by the extent to which, and the way in which, they assist us in managing the tasks that we confront in our non-philosophical lives. But it is not so clear what payoff is to be derived from offering or even having a theory of all of law, and the well-known Pragmatist skepticism about abstraction<sup>74</sup> might lead to skepticism about the very value of a category as large as the category of law. Insofar as Tamanaha seeks to expand the categories of law and legality even further, it becomes in at least one way more abstract, however much the expansion is grounded in non-abstract empirical observations. Thus, given the diversity of law that Tamanaha so insightfully describes and explores, it may be that the production of a general or comprehensive theory of law, whether realistic or not, is in the final analysis unfaithful to the core ideas and goals of the Pragmatist project.

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70. TAMANAHA, *supra* note 8, at 3.

71. *Id.* (quoting WILLIAM JAMES, PRAGMATISM AND THE MEANING OF TRUTH 31 (1975)).

72. WILLIAM JAMES, PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING 28 (Harvard Univ. Press 1975).

73. See Christopher Hookway, *Pragmatism*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Oct. 7, 2013), <https://plato.stanford.edu/entries/pragmatism>.

74. See Charles L. Barzun, *Three Forms of Legal Pragmatism*, 95 WASH. U.L. REV. \_\_\_\_ (2018); Susan Haack, *The Pragmatist Tradition: Lessons for Legal Theorists*, 95 WASH. U.L. REV. \_\_\_\_ (2018).

CONCLUSION: THE VIRTUES AND LIMITS OF NON-EMPIRICAL PHILOSOPHY  
AND NON-PHILOSOPHICAL SOCIOLOGY

Joseph Raz has observed, notoriously for some of us, that “[t]he sociology of law provides a wealth of detailed information and analysis of the functions of law in some particular societies. Legal philosophy has to be content with those few features which all legal systems necessarily possess.”<sup>75</sup> Even if we ignore what seems to be more than a bit of a condescending sniff at sociology from the perspective of the lofty perch of philosophy, there still emerges the claim that sociological and philosophical inquiry into the phenomenon of law are two largely distinct enterprises. One of the many virtues of Tamanaha’s work, including but not limited to this most recent book, is that it challenges this separation. The Tamanaha oeuvre contains the subtext that we cannot do serious philosophizing about, or conceptual analysis of, law unless we have a much better empirical sense of the terrain that has traditionally characterized the enterprise of philosophy of law. But by engaging in serious and knowledgeable engagement with the most important contemporary and non-contemporary works of legal philosophy, he also can be understood as claiming, even if less overtly, that one cannot do serious empirical examination about the characteristics and operation of law without the kind of conceptual clarification, terminological precision, and analytic acuity that philosophy at its best is able to offer. Indeed, if one understands the main theme of *A Realistic Theory of Law* as castigating contemporary analytical philosophy of law for its empirical ignorance and narrowness, perhaps Tamanaha’s next book, and one he is almost uniquely qualified to write, should be *An Analytic Sociology of Law*.<sup>76</sup> As it is, far too much legal sociology is less systematic and careful about its empirical categorizations and causal attributions as it might be, and if sociological inquiries into law were as well-informed by contemporary philosophy of law as Tamanaha urges philosophical inquiries into law to be informed by the best empirical research, we might wind up with the kind of

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75. RAZ, THE AUTHORITY OF LAW, *supra* note 22, at 104–05. See also DICKSON, EVALUATION AND LEGAL THEORY, *supra* note 24, at 17–25.

76. In recent history, the most prominent efforts to combine philosophical jurisprudence with the strong empiricism of sociology come from JULIUS STONE, LEGAL SYSTEM AND LAWYERS’ REASONINGS (1964); JULIUS STONE, THE PROVINCE AND FUNCTION OF LAW (1946); LON FULLER, THE PRINCIPLES OF SOCIAL ORDER (Kenneth I. Winston ed. 1981); SELECTED ESSAYS OF LON L. FULLER (Kenneth I. Winston ed., 2d ed. 2001). See also KRISTEN RUNDLE, FORMS LIBERATE: RECLAIMING THE JURISPRUDENCE OF LON L. FULLER (2013). Earlier one might think most obviously of ROSCOE POUND, JURISPRUDENCE (1959), and, later, TWINING, *supra* note 15. Even more recently, see Gerald J. Postema, *Jurisprudence: The Sociable Science*, 101 VA. L. REV. 869 (2015).

advances in understanding that rigid disciplinary boundaries sometimes advance but perhaps even more often impede.