

## LEGAL FORMALISM AND LEGAL REALISM: WHAT IS THE ISSUE?

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to appear in *Legal Theory* (2010)

In teaching jurisprudence, I typically distinguish between two different families of theories of adjudication, theories of how judges do or should decide cases.<sup>1</sup> “Formalist” theories claim that (1) the law is “rationally” determinate, i.e., the class of legitimate legal reasons available for a judge to offer in support of his decision justifies one and only one outcome either in all cases or in some significant and contested range of cases (e.g., cases that reach the stage of appellate review); and (2) adjudication is thus “autonomous” from other kinds of reasoning, that is, the judge can reach the required decision without recourse to non-legal normative considerations of morality or political philosophy. I also note that “formalism” is sometimes associated with the idea that judicial decision-making involves nothing more than mechanical deduction on the model of the syllogism—Beccaria, for example, expresses such a view.<sup>2</sup> I call the latter “Vulgar Formalism” to emphasize that it is not a view to which anyone today cares to subscribe. It is true enough that deductive reasoning on the model of syllogism is a characteristic feature of most well-done judicial opinions—that is, the conclusion can be reconstructed as following deductively from a statement of the applicable rule of law and the statement of the facts.

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<sup>1</sup> Such theories can be cast in descriptive or normative terms, but I will mostly focus on the descriptive version here. I will turn, later, to what we might call formalist views of rule-application, associated in particular with Frederick Schauer.

<sup>2</sup> Cesare Beccaria, “Interpretation of the Law,” section 4, in *Of Crimes and Punishments* (1764).

But most of legal reasoning in common-law jurisdictions<sup>3</sup> is given over to explaining why the *applicable rule of law* is, in fact, the applicable rule of law, and what the legally significant facts are. And such reasoning is rarely “mechanical” in the sense of “obvious” or machine-like, as the pejorative label implies. Such reasoning is often contestable and contested, which is why “mechanical” does not illuminate much about the nature of legal reasoning. But there are plenty of jurists and scholars committed to (1) and (2) above—we might call them “Sophisticated Formalists.” They are “sophisticated” precisely because they recognize that legal reasoning is not mechanical, that it demands the identification of valid sources of law, the interpretation of those sources, the distinguishing of sources that are relevant and irrelevant, and so on, and they offer a theoretical account of how these various bits of reasoning are done ‘rightly’. Their leading theoretical spokesman is Ronald Dworkin,<sup>4</sup> but in different ways, Robert Bork and Justice Scalia are committed to such a picture of adjudication (at least as a normative ideal),<sup>5</sup> as is the popular culture more generally, as any observer of a Supreme Court confirmation hearing can attest (indeed, one might think the popular culture is the last preserve of Vulgar Formalism!). Judges, of course, continue to write their opinions in sophisticated formalist manner, presenting the binding rules of law as given by the materials correctly interpreted and as then requiring, as a matter of logic, a particular decision.

Against the Sophisticated Formalist theory stands the views of the “realists,” theorists who purport to give us an unsentimental and honest account of what judges *really* do—the theorists who, most famously, came to be known as American Legal Realists, scholars and lawyers and jurists like Karl

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<sup>3</sup> In some civil law jurisdictions, the opinions are often written precisely in the form of Vulgar Formalism!

<sup>4</sup> See, e.g., “Hard Cases” in Dworkin’s *Taking Rights Seriously* (1977) and Chapter 6 of his *Law’s Empire* (1986).

<sup>5</sup> They do not think, to be sure, that every legal question has a unique answer, but where the law, especially the constitutional law, is unclear, they opt for deferring to legislative majorities.

Llewellyn, Jerome Frank, Underhill Moore, Herman Oliphant, Leon Green, Max Radin, and others. (I shall henceforth use Realists, with a capital 'R,' to name this group of thinkers.)<sup>6</sup> As I have argued at some length, the majority of Realists advanced a descriptive theory of adjudication according to which (1) legal reasoning is indeterminate (i.e., fails to justify a unique outcome) in those cases that reach the stage of appellate review; (2) appellate judges, in deciding cases, are responsive to the “situation-types”—recurring factual patterns (e.g., ‘seller of a business promises not to compete with the buyer, and then tries to break the promise’)<sup>7</sup>—that elicit predictable normative responses (‘this is unfair’ or ‘this is economically foolish’) from most jurists, responses that are not, however, predictable based on existing ‘paper’ rules and doctrine; and (3) in the commercial law context (a primary focus of the Realists), judges look to the “normal” practices in the existing business culture in deciding what is the right outcome (that is, the judges treat normal economic practice as the normative benchmark for decision).<sup>8</sup> My former colleague, the late Charles Alan Wright, senior author of the preeminent treatise on *Federal Practice and Procedure*, told me that he thought of himself as a Realist in this sense; my first ‘boss’ in practice, Milton Handler, late professor of law at Columbia for 45 years and name partner of the New York law firm now known as “Kaye Scholer,” understood his scholarly work as Realist in the

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<sup>6</sup> Richard Posner is a contemporary representative: see his *How Judges Think* (Cambridge, Mass.: Harvard University Press, 2008).

<sup>7</sup> The example is from Herman Oliphant, “A Return to *Stare Decisis*,” 14 *American Bar Association Journal* 75 (1928). In this situation-type, courts found a way to enforce the promise. By contrast, in cases involving the ‘situation-type’ “employees promises not to compete with an employer after leaving his employ,” courts found a way to invalidate the promise.

<sup>8</sup> For detailed discussion and evidence, see my *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford: Oxford University Press, 2007), esp. Chs. 1-3. For a more concise account, see my “American Legal Realism,” in *The Blackwell Guide to Philosophy of Law and Legal Theory* (M. Golding & W. Edmundson eds., 2005). The description in the text pertains to what I call the “Sociological Wing” of Realism, which was the dominant strand. The views of Jerome Frank were a bit different on the second and third points.

same way.<sup>9</sup> In their scholarly work, Wright and Handler tried to recast the norms of legal decision in ways that reflected the specific situation-types to which they found the judges to be sensitive—that is, they tried to articulate explicitly the norms of decision (some of them previously inchoate or unstated in the decisions) at a greater level of factual specificity than might be found as boilerplate doctrine in a treatise or court decision.

Brian Tamanaha's provocative book *Beyond the Formalist-Realist Divide: The Role of Politics in Judging*<sup>10</sup> might seem, on casual perusal, to upset this distinction, though in fact (and notwithstanding its title) it ultimately does nothing of the kind. Tamanaha's primary target is an historical, not philosophical, thesis,<sup>11</sup> namely, that, contrary to the presentation by many legal historians and theorists (including Jerome Frank, Grant Gilmore, Thomas Grey, Morton Horwitz, Duncan Kennedy, William LaPiana, and G. Edward White, among others), there was not a "formalist" age in American legal thought that only ended with the arrival of the American Legal Realists in the 1920s and 1930s. In fact, judges and scholars expressed "realist" ideas during what is alleged to be the heyday of "legal formalism." Tamanaha adduces evidence which will, as Sanford Levinson puts it on the book's dustjacket, "generate very wide interest, controversy, and...changes in the way American legal history is presented." Although it seems to me that the evidence is problematic in a variety of ways (especially regarding realism), and that Tamanaha consistently overstates his conclusions, I concur with Levinson

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<sup>9</sup> See, e.g., Milton Handler & Charles Pickett, "Trade Marks and Trade Names: An Analysis and Synthesis," in two parts: 30 *Columbia Law Review* 160 (1930) and 30 *Columbia Law Review* 759 (1930).

<sup>10</sup> Princeton: Princeton University Press, 2010. Cited hereafter by page number in the text.

<sup>11</sup> He also wants to take on contemporary political scientists in Chapter 7 and 8, who have often taken a straw-man view of adjudication as their target. I have no brief here on behalf of their accounts, and if Tamanaha's book has the salutary effect of improving the quality of their work, that will be to his lasting credit. (I do agree with Fred Schauer, though, who points out to me that the political science work on courts is a useful corrective to much doctrinal scholarship in constitutional law, which talks as though the doctrine is *really* explanatory of Supreme Court decisions.)

that Tamanaha has articulated a *prima facie* challenge to the standard historical narrative about a certain kind of formalism, identifying, in particular, several instances where Frank and Gilmore grossly mischaracterized earlier writers.

But Tamanaha also purports to have a substantive jurisprudential thesis—suggested by the volume’s title and the explicit ambition of the final two chapters—namely, that he is moving us “beyond” the distinction between formalism and realism about judging: “legal theory discussions of legal formalism are irrelevant, misleading, or empty. Debates about judging are routinely framed in terms of antithetical formalist-realist poles that jurists do not actually hold” (3).<sup>12</sup> Unfortunately, the thesis that jurists do (or do not) “hold” formalist or realist views turn on sloppy characterizations of these views by Tamanaha (sometimes simply echoing sloppy characterizations by others). And even if jurists did not hold the views when precisely characterized, that would do nothing to show there was not an important jurisprudential distinction between formalist and realist conceptions of adjudication: the question is whether these conceptions count as plausible reconstructions of judicial practice (regardless of what judges say), ones that illuminate important conceptual and normative issues about adjudication. The argument of Tamanaha’s book is, in the end, irrelevant to philosophy of law. Perhaps more seriously from the standpoint of Tamanaha’s primary ambition—namely, to revise the standard historical narrative about American legal thought—some of the sloppiness in stating the competing positions, formalism and realism, creates problems for the historical evidence Tamanaha adduces and raises questions about the reliability of his presentation of it.

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<sup>12</sup> This non-sequitur is not simply an artifact of the introduction to the book. Tamanaha repeats it again much later: “Any approach that defines ‘formalism’ in these terms has doubtful validity, as earlier chapters demonstrated. These ideas were *not* widely held in the U.S. legal tradition, if they were held by any jurists at all” (p. 160).

## Formalism and Realism: The Historical Narrative

Let us begin with the historical thesis, which is a coin with two sides, one about formalism and one about realism. Regarding legal formalism, Tamanaha's target is legal historians and theorists like Gilmore, Horwitz, and Kennedy<sup>13</sup> who claim that the 1870s to the 1920s in the United States were "the heyday of legal formalism" according to which "lawyers and judges saw law as autonomous comprehensive, logically ordered, and determinate and believed that judges engaged in pure mechanical deduction from this body of law to produce single correct outcomes" (p. 1). On this account, legal formalism was brought to an end by the Realists, who "building upon the insights of Oliver Wendell Holmes, Roscoe Pound, and Benjamin Cardozo" showed "that the law is filled with gaps and contradictions, that the law is indeterminate, that there are exceptions for almost every legal rule or principle, and that legal principles and precedents can support different results" (p. 1). Judges, according to these realists, "decide according to their personal preferences" and come up with *post-hoc* legal rationales for the decisions so reached.<sup>14</sup>

Tamanaha distinguishes between two aspects of the "formalism" assigned by legal historians to thinkers of the 19<sup>th</sup>-century (see Ch. 2). First, there was a "formalist" "theory of the nature of law (the common law, in particular)" according to which "in new situations judges *did not make law* (even when declaring new rules) but merely discovered and applied preexisting law" (p. 13). Second, there was a "formalist" theory about judicial decision, about "how judge mechanically apply law (precedents and statutes) to the facts in particular cases" (p. 13). Tamanaha claims the connection between the two

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<sup>13</sup> See esp. pp. 60-61.

<sup>14</sup> It's not clear the Realists held the views so described, as I discussed many years ago in "Rethinking Legal Realism: Toward a Naturalized Jurisprudence," 76 *Texas Law Review* 267 (1997), reprinted as Chapter 1 in my *Naturalizing Jurisprudence*. But we can bracket that issue for the moment.

stories “is tight” (p. 13),<sup>15</sup> though I do not see that he makes the case, and as a conceptual matter, the two theses are obviously distinct. The first “formalist” view—call it “Natural Law Formalism”—is an instance of a standard “natural law” canard according to which there is always a pre-existing answer to every legal question, usually one that requires moral reflection (or, in earlier forms, insight into the divine will) to discover. One could, quite obviously, reject Natural Law Formalism and still think that *where there are binding legal sources*, judicial decision is a matter of mechanical application of the rules derived from those sources to the facts of the case.<sup>16</sup>

Tamanaha spends an entire chapter (Chapter 2) showing that lots of jurists and scholars in the 19<sup>th</sup>-century thought that judges do make law in new circumstances, but that is perhaps not surprising, since one would expect this to be common wisdom among common lawyers in the modern era in the wake of Bentham’s attack on the natural law canard in the early 19<sup>th</sup>-century (an attack Tamanaha notes in passing at p. 15). Every beginning law student is taught, for example, that one of the key differences between common-law and (at least a caricature of) civil-law systems is that in the former *judges make law*.<sup>17</sup> An attack on Natural law Formalism was no significant part of the attack on ‘formalism’ by the

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<sup>15</sup> Later remarks suggest that Tamanaha may only mean that those he is criticizing think the connection is tight: see esp. his p. 54.

<sup>16</sup> This appears to be very roughly what H.L.A. Hart thinks, for example, about “easy” cases. See H.L.A. Hart, *The Concept of Law* 126-130 (2<sup>nd</sup> edition 1994), and the discussion, below.

<sup>17</sup> I was surprised to see Tamanaha acknowledge the point towards the end of the book: “*All lawyers know that judges make the common law*. This has been acknowledged for at least two centuries, as earlier chapters documents” (p. 175). The surprise is that this recognition did not lead Tamanaha to suspect the triviality of the issue, and the fact that it is orthogonal to any interesting formalist theory of adjudication. To be sure, this contrast, though indeed drawn in common-law classrooms, is a caricature of what really goes on in civil law courtrooms, as the legions of Legal Realists in civil law countries—from François Gény in France a century ago to Riccardo Guastini in Italy today—have demonstrated.

American Legal Realists, and, in any case, is of little jurisprudential interest, given how few proponents the alternative view has.<sup>18</sup>

Against the second formalist thesis, about “mechanical” adjudication, Tamanaha argues *contra* Roscoe Pound that “judges at the time [i.e., the purported ‘formalist’ age] did not widely believe that judging was an exercise in mechanical deduction” (p. 28). Of course, “mechanical deduction,” while central to Vulgar Formalism, also has little to do with any philosophically interesting jurisprudential thesis about formalism, and it is not wholly surprising that skeptics about mechanical deduction are to be found in the 19<sup>th</sup>-century too. Still, Tamanaha’s approach to Pound is representative of the general argumentative strategy of the book, and so warrants notice: Tamanaha adduces quotes from 19<sup>th</sup>-century jurists and scholars--whom Tamanaha generally describes as important or leading figures (some of them are, while some, one worries, have been rescued from obscurity by the needs of Tamanaha’s argument) or who published their views in prominent journals--that are inconsistent with the historical thesis in question.<sup>19</sup> Is this method adequate to establish the claims at issue in this chapter and elsewhere in the book?

Tamanaha gives insufficient attention to two key evidential questions. First, are the anti-formalist quotations he adduces representative of views in the putatively ‘formalist’ age? Second, even if the quotations are representative, are they as common as such sentiments became in the 1920s and

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<sup>18</sup> While historically, Natural Law Formalism was associated with Blackstone, it does still have one well-known defender, who is almost entirely absent from Tamanaha’s book: Ronald Dworkin. For Dworkin does believe that the duty of the judge is always to discover the law that already exists in every case, though Dworkin does not subscribe to Tamanaha’s second “formalist” thesis, about which more momentarily. The absence of Dworkin, the ‘ideal type’ of the interesting legal formalist, from Tamanaha’s analysis betrays the superficiality of the jurisprudential argument of the book.

<sup>19</sup> *Vide* p. 34: “All of the preceding statements were made in the heart of the so-called formalist age. They were made by leading lawyers and judges in high-profile settings. What they say is manifestly at odds with the conventional story about purportedly dominant legal formalist beliefs at the time.”



1930s? We are trying to assess, remember, whether there was something that deserves to be called a “formalist” age. Presumably no one committed to the existence of such a period thinks that everyone thought monolithically at that time. It is often said, for example, that “free market” thinking triumphed in the West in the 1980s, giving rise to a so-called “neoliberal” era. That obviously doesn’t mean that Marxists, socialists, and free market skeptics stopped writing or thinking. Indeed, it would be easy to adduce prominent example of market skeptics publishing their views in prominent journals during the last thirty years. But this would hardly show that the past thirty years was not properly characterized as a “neoliberal era” in the West.

The evidential questions here are, admittedly, hard, but Tamanaha does not even attempt to tackle them. It is not enough to quote this-or-that judge or scholar saying anti-formalist, proto-realist things in 1880. We need to know: how were these remarks received by their professional peers? Were they widely echoed and repeated? Or were they criticized and rejected by others at the same time—or simply ignored? Tamanaha demonstrates in several different cases that thinkers alleged to be “formalists” by later historians and theorists in fact held some anti-formalist views, and that is a welcome and important corrective. But it simply does not establish his central historical theses.

The evidential issue, however, is even more complicated than this.<sup>20</sup> Even if we suppose, in the best-case scenario for Tamanaha, that a significant minority or even a bare majority of scholars and jurists in the late 19th-century were saying “realist-sounding” or “anti-formalist” things, we would still need to know how this *compares* to the received professional wisdom of the 1920s and 1930s. After all, it would still make perfectly good sense to call the late 19th-century the “formalist age” if it turns out

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<sup>20</sup>Here I am indebted to Stefan Vogenauer.

that a larger proportion of leading scholars and jurists said "realist-sounding" things in the 1920s and 1930s than in the 1870s and 1880s. Tamanaha, alas, sheds no light on this issue.

These worries are compounded by the fact that Tamanaha's historical evidence is only probative to the extent his account of the competing positions is illuminating.<sup>21</sup> We have already noted that showing that 19<sup>th</sup>-century jurists and scholars recognized that common-law judges "make law" in new circumstances and that they do not decide cases "mechanically" does not illuminate much about formalism as a philosophically interesting theory of adjudication. But let us turn to the flip-side of Tamanaha's historical thesis about formalism: "Realism about judging was commonplace decades before the legal realists came on the scene" (p. 68). This historical claim turns out to trade on a sloppy and loose characterization of realism, that does no justice to the distinctive theses of Realists like Karl Llewellyn, Herman Oliphant, Max Radin, Underhill Moore, and others.

Tamanaha offers a motley assortment of "evidence" that there was realism about judging before the Realists.<sup>22</sup> It runs the gamut from Teddy Roosevelt's claim in 1908 that, "The decisions of the courts on economic and social questions depend upon their economic and social philosophy" (pp. 71-72); to an 1893 law review article observing that, "To say that no political prejudices have swayed the court...is to maintain that its members have been exempt from the known weaknesses of human nature" (p. 75); to an unsigned essay in *Albany Law Review* in 1870 claiming that "the excision of politics from

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<sup>21</sup> There is also the question whether Tamanaha represents his quoted sources fairly. I discuss some cases where he has not, below. I leave it to intellectual historians to carry out a more systematic examination of the sources on which Tamanaha's argument depends.

<sup>22</sup> Some of the 'evidence' from scholars and jurists in the early 1900s is hardly apposite: no one thinks Realism arose *ex nihilo*; it, of course, had a pre-history in earlier thinker, like Holmes and Cardozo. And Jerome Frank famously cited Chancellor Kent, writing a century earlier in support of the thesis that judges *first* get a 'hunch' about the fair outcome, and then search for legal reasons to support that conclusion. See footnote 3 in Chapter XII of Jerome Frank, *Law and the Modern Mind* (1930). Even Tamanaha notices that Frank cites jurists from the 19<sup>th</sup>-century (see p. 93). I concentrate on Tamanaha's evidence that is further removed from the 1920s.

the judicial mind is impossible” (p. 77). From all this, Tamanaha concludes that, “By the time the legal realists arrived on the scene [in the 1920s], realism about judging had circulated inside and outside of legal circles loudly and often for at least two generations” (p. 78).

But does Tamanaha’s evidence show anything of the kind? Critical Legal Studies writers may have believed that “law is politics,” but this was barely a footnote in Realism, which was largely silent on the political influences on decision.<sup>23</sup> Yet Tamanaha’s mistaken reduction of Realism to the view that judges are influenced by politics runs throughout his discussion, and is even reflected in the title of the book and the extensive attention he accords the recent political science literature on courts. Thus, it is unsurprising that at the conclusion of his purported exposition of Realism in Chapter Six, Tamanaha announces that, “Rantoul in 1836, Hammond in 1881, the legal realists in the 1920s and 1930s, and Critical Legal Studies in the 1970s and 1980s (and others along the way) all argued in interchangeable terms that judges have the freedom to decide cases in accordance with their political views...” (p. 107). *But it was not the thesis of the Realists that judges decided in accordance “with their political views”!*<sup>24</sup> Tamanaha himself adduces no textual evidence

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<sup>23</sup> The closest one comes in a central Realist text is the comment by Holmes in “The Path of the Law,” 10 *Harvard Law Review* 457 (1897) about the three possible explanations for why a judge might make a particular legal argument (e.g., implying a condition in a contract in a particular case): “It is because of some belief as to the practice of the community or a class, or because of some opinion as to policy, or, in short, because of some attitude of yours upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions.” *Id.* at 466. The Realists of the 1920s and 1930s focused almost wholly on the first and third possibilities, not the second.

It should be noted that the CLS version of “law is politics” is generally not the same as the political science version, which Tamanaha mostly emphasizes. For the CLS writers, law was often “political” in the sense that the indeterminacies in the law were filled in based on underlying but inchoate philosophical views of a moral and political kind. The *locus classicus* for that kind of CLS view is Duncan Kennedy, “Form and Substance in Private Law Adjudication,” 89 *Harvard Law Review* 1685 (1976). But this theme was also not one of interest to the Realists.

<sup>24</sup> I discuss this, and the evidence, in Chapters 1 and 3 of my *Naturalizing Jurisprudence*.

otherwise. If one looks at classic Realist studies like Llewellyn on sales law<sup>25</sup> or Moore on check-cashing practices,<sup>26</sup> there was no interest, at all, in the political party of the judge, the judge's political ideology, or the political objectives of the appointing President. Rather, in each case, the Realists tried to show that non-legal norms of fairness or efficiency, often deriving from normal practice in the relevant business context, explained the decisions. Rather than judges imposing an "economic and social philosophy" (as Teddy Roosevelt put it, in the quote above), the emphasis in most Realist writings was on the sensitivity of judges to non-legal norms prevalent, e.g., in the regular practices of merchants or banks.

Even when Tamanaha tries to produce evidence that *more precise and distinctive* Realist theses about adjudication were common well before the Realists came on the scene, he mostly produces either inapposite evidence or, more seriously, mischaracterizes his sources. Noting, for example, that Realists believed that to predict judicial decisions, one needed to attend to "the reactions of the judges to the facts and to the life around them" (quoting Llewellyn at p. 80), Tamanaha claims "this too was said much earlier" and then cites Frederick Pollock noting that "legal science" aims to predict "the decisions of courts of justice" (p. 80). *But Pollock endorses nothing like Llewellyn's claim about the need to attend to the factual "situation-types" to which the judges were sensitive in order to predict the decision!* So the Pollock quote is irrelevant: what was distinctive of Realism was its view about the factors relevant to predicting a decision, not some vague and general interest in prediction, which was of course a common concern of all lawyers faced with the prospect of going to court.

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<sup>25</sup> See, e.g., Karl Llewellyn, *The Common Law Tradition* 122 ff. (1960).

<sup>26</sup> See, e.g., Underhill Moore & Theodore S. Hope, Jr., "An Institutional Approach to the Law of Commercial Banking," 38 *Yale Law Journal* 703 (1929).

Tamanaha also quotes Judge Thomas Cooley observing in 1886 that “when a case is such that just and well-instructed minds differ as to its coming within the intent of the statute, the rule laid down by the [presiding judge] or the prevailing majority of its members becomes a rule of law” (p. 81). But this banal observation—that if there is a dispute about the intent or purpose of the statute, the court’s decision will settle the matter and create a binding precedent—has nothing to do with the distinctive Realist theses about statutory interpretation,<sup>27</sup> which suggest that across a wide range of statutory interpretation cases, the judge has available equally proper, but utterly conflicting, principles of statutory interpretation so that the actual “rule” of the statute is “up for grabs.”

On the key issue of the influence of situation-types on judicial decision (which Tamanaha says “has been identified by a theorist [citing me] as *the* distinctive innovation the legal realists brought to American jurisprudence” [p. 83]), he cites *only one* earlier author, James C. Carter, who, in fact, says *nothing of the kind*. Here is what Tamanaha quotes from Carter (pp. 83-84):

It is in *new* cases that nearly all the difficulty in ascertaining and applying the law arises. The great mass of transactions of life are indeed repetitions of what has before happened—not exact repetitions, for such never occur—but repetitions of all substantial features. They have once or oftener been subjected to judicial scrutiny and the rules which govern them are known. They arise and pass away without engaging the attention of lawyers or the courts. The great bulk of controversy and litigations springs out of transactions which present material features never before exhibited, or new combinations and groupings of facts. It is here that doubt and

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<sup>27</sup> See Max Radin, “Statutory Interpretation,” 43 *Harvard Law Review* 863 (1930); Karl Llewellyn, “Remarks on the Theory of Appellate Decision and the Rules and Canons About How Statutes Are To Be Construed,” 3 *Vanderbilt Law Review* 395 (1950).

difficulty make their appearance....Several different rules—all just in their proper sphere—are competing with each other for supremacy.<sup>28</sup>

What does this have to do with the distinctive Realist thesis according to which appellate judges are largely applying non-legal norms to recurring situation-types, while reciting general legal doctrines that are mere window-dressing and which obscure the normative considerations influencing their decisions? Literally nothing, as far as I can see, which is quite apparent when one attends to the context of Carter's argument.

Carter wants to defend the common-law tradition of judges making new law for new situations against proponents of complete codification of the law, such as Jeremy Bentham, the target of the preceding pages in Carter's article. Against the proponents of codification, Carter argues that codification is impracticable, but also that it is undesirable because it will entail arbitrary and unjust decisions in "new" or "future" transactions:

Our power to subject objects to a scientific classification being necessarily limited to those which are submitted to observation, the jurist, or the codifier, can no more classify future human transactions, and, consequently can no more frame the law concerning them, than the naturalist can classify the *fauna* and *flora* of an unknown world.<sup>29</sup>

To be sure "unwritten" common law,

takes the transactions of the past, and, by classifying them, makes its rules; but it makes them *provisionally* only. It declares that they are binding upon courts only so far as respects

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<sup>28</sup> James C. Carter, "The Provinces of the Written and the Unwritten Law," 24 *American Law Review* 1, 15 (1890).

<sup>29</sup> *Id.* at 10.

transactions substantially like those from the examination of which the rules have been framed.

In respect to future cases which may wear different aspects, it suspends judgment.<sup>30</sup>

So the “future cases” at issue for Carter are those which are sufficiently different from the past cases, on the basis of which common-law doctrines were crafted, that the unwritten rules of the common law should not be binding. Codification, for a radical reformer like Bentham, was meant to do away with the “unwritten” judge-made rules, but at the cost, says Carter, of laying down rules for unknown situations. What leads to the passage Tamanaha quotes is Carter’s consideration of the rejoinder of the “Benthamite” that, even if codification might produce unjust and arbitrary results for genuinely new cases, such cases are “so small in number” that the “miscarriages” of justice resulting would be trivial.<sup>31</sup> The quoted passage is then Carter’s response, and thus part of his continued defense of the need for “unwritten” rules crafted by judges in response to new circumstances. We can now see that what Carter *really* says in this passage has nothing at all to do with the Realist theory of appellate decision based on responsiveness to situation-types. Rather, Carter makes the sensible point that where the problems are familiar ones, settled common-law doctrines are so clear that the matters do not end up in court at all, which means it is precisely the *new* or “future” cases—ones for which no legal rule governs—that will command the attention most often of judges. The genuine Realist, by contrast, would be skeptical that even the settled common-law doctrines, at least at the level of abstraction at which they are typically articulated, will really explain the decisions of the courts in later cases. On this distinctive Realist thesis, Carter is completely silent.

Tamanaha’s over-reaching of the evidence in this and other instances leads me to think that legal historians would do well to consider his other examples with care and some skepticism. Even

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<sup>30</sup> *Id.*

<sup>31</sup> *Id.* at 15.

when Tamanaha seems to do better—e.g., finding examples of earlier writers (in particular William Hammond, whom he cites quite a bit) making something like Llewellyn’s point about the “strict” and “loose” view of precedent (p. 81) and Frank’s point about the latitude judges have in characterizing the facts of a case in terms of their legal significance (p. 82)—one has the sense that he is too quick to be satisfied with quotes and snippets considered in isolation. Tamanaha does not mention, for example, that Hammond concedes that his Realist-sounding claims constitute “a bold and harsh statement,” but one that can be backed up “on much higher authority than my own”<sup>32</sup>—that is, Hammond appears to recognize that his claims go against the common wisdom (perhaps because his was a ‘formalist’ age?) and thus demand some support. Also unnoted by Tamanaha is that Hammond’s article is quite clearly a brief for *university education of lawyers by full-time academics*, in the place of “schools...in the hands of busy lawyers and judges” who devote “their scanty leisure to this (commonly ill-paid and too often underrated) work.”<sup>33</sup> This is hardly surprising, given that Hammond was Dean of the law schools at the University of Iowa and then Washington University, St. Louis. Hammond’s realist-sounding description of the state of the law<sup>34</sup>--his “bold and harsh statement”—is quite clearly, in context, something he *deplores*, but that he offers as a reason for entrusting legal education to full-time academics, who might, it is implied, set things right (making the law more formalistic, perhaps?). Given his rhetorical objectives, one might at least wonder how representative Hammond’s realist-sounding claims are of the prevailing understanding. Tamanaha does not.

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<sup>32</sup> William G. Hammond, “American Law Schools, Past and Future,” 7 *Southern Law Review* 400, 413 (1881)

<sup>33</sup> *Id.* at 417.

<sup>34</sup> *Id.* at 412.



Let me conclude by recapping the main lines of argument regarding Tamanaha's historical thesis. Tamanaha adduces enough evidence, in my view, to state at least a *prima facie* case against any historian who wants to claim that in the 19<sup>th</sup>-century jurists and scholars generally believed that common-law judges did not make law in new circumstances and that judging was simply a mechanical exercise in deductive reasoning. We still need to know how representative Tamanaha's evidence is, and its relation to the received wisdom of the time. It would certainly not be at all surprising to find that most common-law jurists and scholars did not accept Natural Law Formalism, and it would also not be wholly surprising if most jurists and scholars then were not really Vulgar Formalists. Whether 19<sup>th</sup>-century jurists and scholars held or rejected more sophisticated forms of formalism is simply not addressed at all by Tamanaha's evidence. With regard to realism, Tamanaha's evidence is much less probative: he shows that many people recognized the influence of politics on the courts in the 19<sup>th</sup>-century, but it was no significant part of Realism to establish this thesis. With respect to more distinctive Realist theses, Tamanaha's evidence fares worse: in several important cases, it is either inapposite or its content is misunderstood. In the end, Tamanaha does not make even a *prima facie* case that the distinctive theses of the Realists had widespread traction in the 19<sup>th</sup>-century.

### **Formalism and Realism: The Jurisprudential Issues**

Tamanaha says he wants to rebut a "common misapprehension about the realists... [namely] that they were radical skeptics about judging" (p. 68).<sup>35</sup> Rather, the Realists embraced what Tamanaha calls "balanced realism" (p. 6), an awareness that,

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<sup>35</sup> He also denies that "the legal realists formed a group or movement" (p. 68). His evidence is that "the main characterizations of legal realism put forth by theorists and historians"—he cites only Laura Kalman, Robert Summers, John Henry Schlegel and Morton Horwitz—are "the promotion of an instrumental view of law as a means to serve social ends, the pursuit of social scientific approaches to law, the efforts of reformers to transform legal education in order to improve legal practice and judging, and attempts by reformers to advance a progressive

judges sometimes make choices, that they can manipulate legal rules and precedents, and that they sometimes are influenced by their political and moral views and their personal biases (the skeptical aspect [of balanced realism]. Yet [balanced realism] conditions this skeptical awareness with the understanding that legal rules nonetheless work; that judges abide by and apply the law; that there are practice-related, social, and institutional factors that constrain judges; and that judges render generally predictable decisions consistent with the law (the rule-bound aspect). (p. 6; cf. pp. 95-96)<sup>36</sup>

Since Frederick Schauer and I developed more refined versions of these same points about American Legal Realism in widely cited scholarship going back twenty years now,<sup>37</sup> it is puzzling, indeed, to see Tamanaha announce this as though it were a discovery. Of course, the bulk of our work was devoted to rendering precise issues such as (1) the actual influences on judicial decision, (2) how often judges “make choices,” (3) when legal rules *really* constrain decisions and when they don’t, and (4) the difference between *legal* factors constraining decisions (and rendering it predictable) versus non-legal factors that

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political agenda in and through the law—or some amalgamation of all four” (p. 70). He then fairly notes that those often listed as Realists “did not agree among themselves on these positions.” *Id.* Since he, inexplicably, omits attempts by jurisprudential writers to explicitly state distinctive jurisprudential theses characteristic of Realism—namely, mine and Fred Schauer’s (though he otherwise cites our work)—this is hardly surprising. But we will return to this issue, below, in the text.

<sup>36</sup> Note that Balanced Realism is not simply an empirical observation about judicial behavior; it is predicated on a jurisprudential view about the indeterminacy of legal reasoning, such that judges do have choices to make and can *quite properly* construe rules and precedents in different ways, etc.

<sup>37</sup> See, e.g., my “Legal Realism,” in *A Companion to the Philosophy of Law and Legal Theory*, ed. D. Patterson (Oxford: Blackwell, 1995) and my 1997 paper “Rethinking Legal Realism: Toward a Naturalized Jurisprudence,” *op. cit.*, which Tamanaha does cite *but not for its precise characterization of realism*. And for Schauer’s work on Realism, see, e.g., Frederick Schauer, “Judging in a Corner of the Law,” *61 Southern California Law Review* 1717 (1988) and Frederick Schauer, *Playing by the Rules* (Oxford: Clarendon Press, 1991), pp. 191-196; Schauer gives a concise summary of his views on Realism in Chapter 7 of his recent *Thinking Like a Lawyer* (Cambridge, Mass.: Harvard University Press, 2009).

have the same effects (Tamanaha runs them together under the heading of “rule-bound aspect”).<sup>38</sup> In this respect, Tamanaha’s treatment of Realism in Chapter 6 marks a somewhat unhappy step backwards in the jurisprudential discussion of Realism.<sup>39</sup>

To make matters worse, though, Tamanaha also argues that Schauer and I have gotten the Realists wrong on the basis of either mischaracterizations of our views or misuse of evidence. For example, Tamanaha quotes (pp. 93-94) Schauer as follows:

The Realists believed that decision-makers, especially judges deciding hard cases, initially make an ‘all things considered’ judgment about who ought to win. That preliminary judgment, taking into account moral, political, economic, and psychological factors, is not arbitrary, but is particularistic in focusing on the optimal results *for this case*...To the Legal Realist, rules serve not as sources of *ex ante* guidance, but as vehicles of *ex post* legitimation of decisions reached without regard for the rules.”<sup>40</sup>

According to Tamanaha, Schauer “misconstrues their position” (p. 94). His argument against Schauer bears quoting:

The realists believed in the law and fervently labored to improve it. Llewellyn unabashedly proclaimed his “faith about the Good in this institution of our law”; and he waxed poetically on

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<sup>38</sup> In my own case, an important part of the aim was to show that the Realist theory can be reconstructed in a way that reflects recognizable philosophical motivations, of a naturalistic kind, and insulates it from well-known criticisms in the philosophical literature. But these points are not at issue here.

<sup>39</sup> A contrast is usefully drawn here with the work by Michael Steven Green on Realism. See, e.g., his “Legal Realism as Theory of Law,” 46 *William & Mary Law Review* 1915 (2005). While I think Green wrong, partly on textual and partly on philosophical grounds, Green’s work is jurisprudentially interesting because it articulates precise and distinctive Realist theses about law and adjudication.

<sup>40</sup> Schauer, *Playing by the Rules*, p. 192.

“the aesthetics of certain legal arts I deeply love.” In defense of the realists, Eugene Rostow, the dean of Yale Law School who knew many of the key players, remarked that “the legal realists were among our most devoted and effective reformers, both of law and of society.” Jerome Frank confessed, “I am—I make no secret of it—a reformer.”

The various goals of the realists were to increase the certainty and predictability of law, to train better lawyers, to advance legal justice, and to reform the law to better serve social needs. (p. 94)

It is unclear, however, how these points are relevant to the adequacy of Schauer’s gloss on the Realist position, unless one assumes that his use of “especially” means that Schauer is claiming that Realists believe judges *always* decide in the way described, as opposed to so deciding in that small number of “selected”-for cases that reach the stage of appellate review, which has always been Schauer’s expressed view.<sup>41</sup> That judges in those kinds of cases make result-oriented decisions based either on particularistic grounds or by reference to non-legal norms prevalent in the context where the dispute arose, and then cite legal doctrines as a *post-hoc* rationalization for the decision, is compatible with, *inter alia*, loving the law, thinking the law delimits the range of permissible outcomes, thinking most legal cases (e.g., those that do not reach the stage of appellate review) are determinate as a matter of law, thinking that decisions can be made more predictable by attending to the situation-types to which the judges were actually responsive, restating the law to capture the pertinent level of fact-specificity to which judges were sensitive, and so on.<sup>42</sup>

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<sup>41</sup> See Schauer, “Judging in a Corner of the Law,” *op cit.*, and, even earlier, Frederick Schauer, “Easy Cases,” 58 *Southern California Law Review* 399 (1985).

<sup>42</sup> I confine my comments on Tamanaha’s mistaken criticisms of me to a footnote. I have already commented, above, on Tamanaha’s misrepresentation of James Carter’s views in the context of his criticism of my claim that the distinctive Realist thesis is about responsiveness to situation-types as the best explanation of

If Tamanaha's positive claims about realism are (mostly) old news--albeit somewhat loosely repackaged and with the "law is politics" thesis much overplayed--his thesis in the final two chapters is more ambitious and radical: namely, that the distinction between formalism and realism, once each view is rightly understood, should be abandoned. It is not always clear why exactly it should be abandoned, but I take it Tamanaha's argument boils down to two kinds of considerations: first, Tamanaha does not think the distinction illuminates what judges do, or what they say they are doing, because everyone is alleged to be a "balanced realist" (I will refer to this claim as "the Banality of Balanced Realism"); and second, it is impossible to state an interesting or relevant version of "formalism" (I will refer to this claim, following Tamanaha's chapter title, as "the Emptiness of Formalism").

The Banality of Balanced Realism is a recurring theme in Tamanaha's argument. "Judges...have consistently and candidly expressed a balanced realism about judging," he says (p. 7).<sup>43</sup> "The formalist-realist antithesis obscures...balanced realism, a view that the legal realists shared with their entire generation as with their historical jurisprudence forebears" (p. 69). "[R]ealist insights about judging"

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appellate decisions. Tamanaha also purports at one point to be disputing my claim that "American Legal Realism was, quite justifiably, the major intellectual event in 20<sup>th</sup> century American legal practice and scholarship" (*Naturalizing Jurisprudence*, p. 1), but since he does not, as we have seen, actually discuss the distinctive views of the Realists, on which my claim was predicated, there is no dispute. Everyone can agree with Tamanaha that before Realism, there were at least some jurists and scholars who recognized the influence of politics on judicial decision and were skeptical that mechanical deduction did any justice to the nature of legal reasoning, but this would do nothing to show that "Realism about judging was commonplace decades before the legal realists came on the scene" (p. 68). An more egregious case--because I had pointed out the error to Tamanaha in an earlier version of this material--is the purported criticism (on p. 2 of his book) of my account of formalism in "Positivism, Formalism, Realism," 99 *Columbia Law Review* 1138 (1999), without noting that I was articulating competing substantive views of adjudication, not making an historical claim of the kind he is criticizing. Even if most late 19th-century writers were "realists" instead of "formalists," this would have no bearing on the jurisprudential question about how we ought to understand adjudication.

<sup>43</sup>Alas, most of Tamanaha's examples are of Realist judges like Cardozo or post-Realist judges like Walter Schaefer.

are, in fact, “*plainly evident aspects of judging*” (p. 91). Is it really evident that in appellate cases, judges are primarily responding to factual situation-types and then finding post-hoc legal rationales for what they think would be ‘fair’ or ‘sensible’ given the situation-type? (The critics of my interpretation of Realism certainly have not thought so!<sup>44</sup>) But as we have already seen, by “realism” Tamanaha often does not mean the views distinctive of the Realists. What is “plainly evident,” he says, is that “the law has inconsistencies, runs out, and routinely comes up against unanticipated situations and that judges possess a substantial degree of flexibility when working with legal materials. It was obvious to observers that the law can be interpreted differently by judge with different views” (p. 91).<sup>45</sup> That view, stated at this level of generality, may be banal (except for Natural Law Formalists), but it is not clear it is what is

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<sup>44</sup> See, e.g., Green, *supra* n. \_\_; see also Michael S. Moore, *Educating Oneself in Public: Critical Essays in Jurisprudence* 32-35 (2000). H.L.A. Hart, who seems to embrace what Tamanaha is calling “balanced realism” (again, it is hard to say for sure, because the characterization is vague and shifting) thought he had a dispute with the Realists, and rightly so.

<sup>45</sup> In Chapter 10 (esp. pp. 186-196), Tamanaha expands on his earlier description of “balanced realism,” attributing to realism about adjudication nine claims (his rambling discussion is somewhat repetitive, so I have trimmed the list a bit here): (1) “When judges perceive facts, interpret the law, and render judgments, they are influenced by cognitive framing in the same ways that all cognition is influenced” (p. 187), but the inevitability of cognitive framing is not the same as “willful judging,” which, unlike the former, “is not ubiquitous and is not inevitable” (p. 188); (2) “when judges render legal decisions, except in the most routine cases, the purposes behind the applicable rules and the consequences of the decision will have a bearing” (p. 189); (3) “uncertainties will inevitably arise in interpretation and application of legal rules and principles” (p. 190); (4) “the region of legal uncertainty is where judges render decisions with the least legal guidance, and where judges’ mix of legal and social views has the most leeway and impact—though still in a context thick with legal norms” (p. 190); (5) “judges are sometimes confronted with what they consider ‘bad rules’ or ‘bad results,’” though they “do not take a uniform position or follow the same course in such situations” (p. 191) though sometimes in cases of this kind there “is an enhanced potential for the influence of the personal values of” the judge to affect the decision (p. 192); (6) “the common law and statutes contain a variety of standards like fairness and reasonableness, or provisions that require balancing, or that requires judges...to make judgments. The judgments called for cannot be made in a rule-like fashion and are not determined by legal factors alone,” though judges may often agree due to their sharing “similar training in the legal tradition and its values” as well as “social views” (p. 192); (7) “judges are not machines or computers” (p. 194); (8) “judicial decisions frequently are consistent with and determined by the law” (p. 194); (9) “law is continuously being worked out by judges” (p. 195). Some of these claims are, at this level of generality, quite banal or merely the flip-side of the denial of Vulgar Formalism (e.g., 3, 7 & 9); some are of dubious Realist pedigree (e.g., 1, 2 & 6); and some are contested by other accounts of adjudication, as discussed in the text.

really at issue. The key questions are what is meant by “a substantial degree of flexibility when working with legal materials” and that “law can be interpreted differently by judges with different views.” The American Realists, as I have argued, thought that appellate judges routinely confronted cases in which there are equally legitimate (i.e., legally proper) ways of interpreting authoritative sources of law, and so there is generally more than one decision that could be justified with the available legal materials and the tools of legal reasoning and interpretation. If there is evidence that that view is or was widely accepted, Tamanaha does not produce it.

But perhaps the dispute is about how *often* the preceding is true, i.e., about what “routinely” in this context means? Tamanaha appeals to comments by Cardozo, Patricia Wald, and Harry Edwards to the effect that 5-15% of appellate cases are “very hard” or indeterminate as a matter of law, and so judges in those cases have great latitude in deciding (e.g., p. 144). So perhaps it is *this* claim that is the hallmark of Balanced Realism and is supposedly banal? Here is Judge Edwards, presumably a “balanced realist” in Tamanaha’s sense:

Appellate judges sometimes make law. Both participants in and observers of the judicial process have recognized this fact for many years [citing Frank, Dewey, and Roger Traynor]. One might expect that today, more than a half-century after the Legal Realist movement, the phenomenon of the exercise of “judicial discretion” would have been so exhaustively studied as to merit no more than a passing reference in preparation for the examination of more controversial matters. That turns out not to be true. Not only does the activity of judicial lawmaking remain mysterious, but a

surprisingly large number of people, both within and without the legal community, question its legitimacy in any form.<sup>46</sup>

Judge Edwards recognizes that his “balanced realism” is a controversial position, contrary to Tamanaha’s supposition of banality. His evidence, in a footnote to the passage I have just quoted, includes the jurisprudential views of Ronald Dworkin and the representative comments of a U.S. Senator during Judge Wald’s confirmation hearings. Both data points are surprisingly absent from Tamanaha’s book. At one point, in the course of a generally dismissive discussion of Judge Posner’s Realism, Tamanaha quotes Posner’s comment that, “most judges are cagey, even coy, in discussing what they do. They tend to parrot an official line about the judicial process (how rule-bound it is), and often to believe it, though it does not describe their actual practices.”<sup>47</sup> In reply, Tamanaha allows that,

Judges no doubt bear some responsibility for perpetuating the belief that they are deluded or deceptive. They *occasionally* say things that ring false, like Justice Roberts’s claim in his Senate confirmation hearing that judging on the Supreme Court is akin to calling balls and strikes. (p. 124)

“Occasionally” seems an understatement. Judge Sotomayor of the 2<sup>nd</sup> Circuit spoke like a true “balanced realist” before her nomination to the U.S. Supreme Court,<sup>48</sup> but toed the official formalist line

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<sup>46</sup>Harry T. Edwards, “The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication,” 32 *Cleveland State Law Review* 385, 388 (1983). Notwithstanding the admission of “Balanced Realism” by Judge Edwards, it is perhaps worth noting that he, himself, may be understating the role of non-legal influences on the decisions of his own court, as the discussion in Richard L. Revesz, “Ideology, Collegiality, and the D.C. Circuit: A Reply to Chief Judge Harry T. Edwards,” 85 *Virginia Law Review* 805 (1999) suggests.

<sup>47</sup> *How Judges Think*, *op. cit.* at 2.

<sup>48</sup> See the video of her remarks at the 2005 regarding policy-making by courts at: <http://www.youtube.com/watch?v=OfC99LrrM2Q> (visited July 19, 2010).



at her confirmation hearings about the role of the judge to apply the law, not “make” law, leading Georgetown law professor Louis Michael Seidman to denounce her as a liar.<sup>49</sup> Formalism (both Natural Law and Vulgar versions!) is, quite obviously, the official story about adjudication in the public culture in the United States, as confirmation hearings, including the most recent one,<sup>50</sup> regularly confirm. Thus, already, there appears to be a useful role for the formalist-realist distinction, namely, as a way of framing political discourse about adjudication.

If such affirmations of formalism were merely an artifact of the pathologies of American political life, then perhaps we should simply concede that “all insiders” are Balanced Realists, even if the hoi-poloi and the grandstanding politicians are not? Yet surely it also matters that Tamanaha’s “Balanced Realism” is not the norm in the other major common-law jurisdiction, England. I have recounted the story elsewhere<sup>51</sup> of the quip from Peter Birks, late Regius Professor of Civil Law at Oxford University, that legal realism is “immoral”—not simply wrong, but reprehensible, precisely because it encouraged what he took to be the false view that legal categories and concepts do not in fact and should not

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<sup>49</sup> <http://www.fed-soc.org/debates/dbtid.30/default.asp>, visited July 10, 2010. Seidman says: “I was completely disgusted by Judge Sotomayor’s testimony today. If she was not perjuring herself, she is intellectually unqualified to be on the Supreme Court. If she was perjuring herself, she is morally unqualified. How could someone who has been on the bench for seventeen years possibly believe that judging in hard cases involves no more than applying the law to the facts? First year law students understand within a month that many areas of the law are open textured and indeterminate—that the legal material frequently (actually, I would say always) must be supplemented by contestable presuppositions, empirical assumptions, and moral judgments. To claim otherwise—to claim that fidelity to uncontested legal principles dictates results—is to claim that whenever Justices disagree among themselves, someone is either a fool or acting in bad faith. What does it say about our legal system that in order to get confirmed Judge Sotomayor must tell the lies that she told today? That judges and justices must live these lies throughout their professional careers? Perhaps Justice Sotomayor should be excused because our official ideology about judging is so degraded that she would sacrifice a position on the Supreme Court if she told the truth. Legal academics who defend what she did today have no such excuse. They should be ashamed of themselves

<sup>50</sup> Consider Elena Kagan’s repeated claim, reported in multiple news outlets, that it is “law all the way down” in appellate adjudication.

<sup>51</sup> “Rule and Reason,” *Times Literary Supplement* 24 (Feb. 26, 2010)

constrain and explain the decisions of the courts. Birks was not Vulgar Formalist, nor was he a Natural Law Formalist, but he was certainly a Sophisticated Formalist, who thought the duty of the scholar was to take seriously the way courts reason with legal concepts, and then help them do it even more successfully. In the land where the law is still standardly taught from black-letter treatises written by the leading scholars, it should hardly be surprising that Balanced Realism is manifestly not the received wisdom of scholars and jurists.

Perhaps, though, we should interpret Tamanaha's thesis about the Banality of Balanced Realism as confined to the United States--though such a restriction would require him to abandon his broad claims about the uselessness of the distinction between formalism and realism. (If the distinction helps make sense of major jurisdictions, it has some utility!) But here the failure to even discuss Dworkin's jurisprudential views is especially surprising, since Dworkin is *manifestly* not a Balanced Realist, and his Sophisticated Formalism (in the terms I introduced at the start) is offered as a way of making theoretical sense of American judicial practice, among other jurisdictions. Perhaps Tamanaha does not see the relevance of Dworkin because of his own excessive emphasis on "mechanical deduction" and his repeated tendency to run together the autonomy of legal reasoning with the claim about mechanism, e.g.: "No one thinks that law is autonomous and judging is mechanical deduction" (p. 197). Or perhaps since not many other scholars accept the full package of Dworkin's views,<sup>52</sup> and since most legal philosophers find Dworkin's actual jurisprudential theory implausible,<sup>53</sup> Tamanaha deems it not worth

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<sup>52</sup> The "Dworkin Lite" that is popular among constitutional theorists does not appear to commit them to Dworkin's views about the rational determinacy of law and the autonomy of legal reasoning. Most constitutional theorists are simply attracted to the idea that moral considerations are relevant to adjudicating weighty constitutional issues—a view, of course, that does nothing to distinguish Dworkin's jurisprudence from that of the legal positivists. See my "The Radicalism of Legal Positivism," *Guild Practitioner* (2010).

<sup>53</sup> See, e.g., my "The End of Empire: Dworkin and Jurisprudence in the 21<sup>st</sup> Century," 36 *Rutgers Law Journal* 165 (2004), and the references therein.

noting. If so, he should have at least said so clearly. If the slogan “we are all Balanced Realists now” means we should not take Dworkin seriously, I am happy to sign on,<sup>54</sup> though I fear I am not typical. Still, if a distinction between realism and formalism is useful for thinking about the dispute between a well-known contemporary theoretical edifice and its critics, must we really just give it up? It is hard to see why.

If Balanced Realism is not, then, wholly banal, perhaps the problem is really with the Emptiness of Formalism? Tamanaha begins his explicit discussion of jurisprudential issues in Chapter 9—tellingly titled “The Emptiness of ‘Formalism’ in Legal Theory”—by invoking H.L.A. Hart, who devoted a whole chapter of *The Concept of Law* to “Formalism and Rule-Scepticism” (p. 159). Tamanaha emphasizes Hart’s puzzlement about the meaning of formalism, yet fails to mention that *the whole point of Chapter VII* was to render the issue more precise. “Easy” cases, for Hart, are cases in which the facts of the case fall squarely within the core meaning of the words in the applicable legal rule; these cases can be decided largely “mechanically” by deducing the required result from the rule and the facts. “Hard” cases, by contrast, are ones for Hart in which the facts fall within the ‘penumbra’ of the meaning of the words in the applicable rule; these cases require the judge to exercise discretion. Hart is, in Tamanaha’s terms, probably a “balanced realist,” but his discussion certainly does *not* show that we can move “beyond the formalist-realist divide.” Rather, it shows that there is an important question about where and how often the formalist model of decision in “easy” cases applies, and where and how often the “realist” model of decision in “hard” cases apply—which is precisely Hart’s dispute with Realism.<sup>55</sup>

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<sup>54</sup> See my “In Praise of Realism (and Against ‘Nonsense’ Jurisprudence”), available at: [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1113461](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1113461).

<sup>55</sup> See my “Legal Realism and Legal Positivism Reconsidered,” 111 *Ethics* 278 (2001), reprinted in my *Naturalizing Jurisprudence*, op. cit.

Again, that looks like a useful conceptual role for the formalism/realism divide in thinking about adjudication.

The relevance of the formalist-realist divide is also suggested by Tamanaha's subsequent discussion of formalism, though that was not his intent. Considering the views of Duncan Kennedy and Frederick Schauer on formalism, Tamanaha concludes that, "formalism entails rule-bound judging that prohibits consideration of purposes or consequences" (p. 166). So here is a clear formalist thesis, if not about legal reasoning as a whole, then about one important piece of it, namely rule-application: judges should, on this view, apply the rule without regard for its ultimate purposes. Tamanaha, in response, tries to argue that it is impossible to distinguish applying a rule as written from consideration of its purposes. To do so, he revisits one part of the old Hart-Fuller debate, arguing that Fuller was correct that there is an "artificial separation of purposes from rule interpretation" (p. 167). Tamanaha points, fairly enough, to Hart's famous example of the rule: "No vehicles in the park." Tamanaha asks why Hart is entitled to think that automobiles are "obviously" prohibited while "bicycles and roller skates" fall in the penumbra of the rule (p. 168)? Tamanaha thinks this is only obvious if one assumes something about the "purpose" of the statute. To show that the distinction is not obvious (and to establish that there is no "meaning of the rule"/"purpose of the rule" distinction), he quotes an Internet dictionary<sup>56</sup> as follows, but omitting the part I have put in bold:

(1) any means in or by which someone travels or something is carried or conveyed; **a means of conveyance or transport: a motor vehicle; space vehicles**; (2) a conveyance moving on wheels, runners, tracks, or the like, as a cart, sled, automobile, or tractor.

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<sup>56</sup> <http://dictionary.reference.com/browse/vehicle>, viewed July 2, 2010.

Put to one side the fact that Hart's method of ordinary-language philosophy was not meant to track lexicographic results, Tamanaha's omission is telling: the fact that *even an Internet dictionary* uses as its core example "motor vehicle" does jibe nicely with Hart's intuition that automobiles are indeed core instances of "vehicles" (without any regard for the 'purpose' of the rule) while bicycles and roller skates are not. Remember, too, that Hart was not claiming that it was a clear mistake of language to deem a bicycle a "vehicle," but rather that competent speakers of English will have different intuitions about that usage (with some adopting it, some eschewing it), such that it is indeterminate whether or not a rule covering "vehicles" covers bicycles. By contrast, competent speakers will all agree that an automobile is a "vehicle," as the very dictionary Tamanaha cites, but selectively quotes, demonstrates. To be sure, there can be contexts of interpretation where the pragmatics, as distinct, from the semantics of meaning come to the fore, and "meaning and considerations of purposes are intertwined" (p. 170), as Tamanaha puts it, but his discussion does not show that the distinction between meaning and purposive interpretation is not a real one.

Tamanaha is aware, of course, that there are self-described formalists in America today. Yet in discussing contemporary self-identified formalists, like Justice Scalia and Harvard law professor John Manning, the best Tamanaha can do is to note that they are not, in my terms, Vulgar Formalists (i.e., they don't think judicial decision is just mechanical deduction) (p. 178). Ironically, Tamanaha himself gives a perfectly apt characterization of their Sophisticated Formalism (footnotes omitted):

[T]hey want clear contractual terms to be enforced as written rather than be modified by courts; they prefer the constraint and predictability of legal rules over the openness of legal standards; they emphasize the text of legislation; they objective to giving weight to legislative history in the interpretation of statutes; they would not permit purpose to trump the plain meaning of statutory terms; they advocated adherence to precedent; they argue that courts ought to defer to

other institution bodies (legislatures, administrative agencies, etc.) when the applicable legal provisions are vague or uncertain, or not rule-like; most argue that courts should decide in accordance with clear rules even if the legally indicated outcome in a particular case would be unjust. (p. 179)

These views give expression to “formalism” as a kind of normative ideal of completeness for the legal system<sup>57</sup>: there may well be indeterminacies and gaps in the law now, but the ambition of the formalist is to eliminate them, to produce a system of law and legal reasoning that is determinate throughout. Tamanaha admits that these views mark a distinction between “contemporary jurists” who self-identify as “formalists and their opponents” (p. 179), and it certainly does: many theorists, Hart perhaps most famously, rejected formalism as a normative ideal.<sup>58</sup> Given this concession, one wonders why Tamanaha thinks his argument moves one “beyond the formalist-realist divide”? Perhaps the correct title of Tamanaha’s book should have been: *refining the formalist-realist dispute about adjudication*. I suppose such an ambition, though intellectually legitimate, would have been less exciting, and would overlap too obviously with well-traversed terrain.

Let me conclude by recapping the main lines of argument regarding Tamanaha’s jurisprudential thesis that we can (or should) move “beyond” formalism and realism. Tamanaha attributes to the Realists a view he calls “balanced realism,” a somewhat looser version of the account of Realism developed by Schauer and myself in the 1990s, though Tamanaha’s version tends to over-emphasize the role of politics in judicial decision-making. He claims, falsely, that everyone is a “balanced Realist”

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<sup>57</sup> I owe this way of putting the point to Scott Shapiro.

<sup>58</sup> *The Concept of Law*, pp. 130-131.

largely on the basis of remarks by post-Realist judges, and, at the same time, accords little or no attention to the evidence that “balanced realism” is not accepted, such as public political debate about adjudication in the U.S. (which is quite formalistic in its assumptions), theoretical accounts of adjudication like Ronald Dworkin’s, and the self-understanding of other common-law legal cultures, like England’s. Tamanaha also argues, unsuccessfully, that “formalism” is “empty,” but, in the process, actually reveals its substantive meaning as a normative theory or ideal of adjudication and rule-application.

## **Conclusion**

Tamanaha’s book reflects some striking research into the views of (largely forgotten or neglected) 19<sup>th</sup>-century law professors and jurists, and the material he has brought to our attention will demand attention from legal historians. One often has the sense, though, that having unearthed this material, Tamanaha was determined (no matter what!) to show that it really matters, that it really *must* change our views about realism and formalism, and about the originality of the Realists. Tamanaha’s lack of conceptual clarity about the different kinds of formalist and realist theses about adjudication, together with his penchant to sometimes poach quotes out of context, warrants some skepticism about this ambition of the book. At the same time, one must acknowledge that many of Tamanaha’s targets are as conceptually confused as he is, and that by disabusing those readers of the idea that most jurists thought legal decision-making was mechanical (Vulgar Formalism) or that common-law judges never make law (Natural Law Formalism), the book will have a salutary effect. Notwithstanding the preceding criticisms, then, I think we should be grateful to Tamanaha for his provocative historical research, for laying down a vigorous challenge that should be met by historians of ideas and social scientists, and for imparting appropriate intellectual caution and modesty to future writers who might otherwise be prone to casual talk about a “formalist” age in American legal thought.