Review Essay

Pragmatism's Mundanity: Epistemic Foundations for Practicing Sociolegal Science

Alfonso Morales

Brian Z. Tamanaha, *Realistic Social-Legal Theory: Pragmatism and a Social Theory of Law*. New York: Oxford University Press, 1997. Pp. xv + 280. $75.00.

In 1890 T. C. Chamberlain wrote an essay on "The Method of Multiple Working Hypotheses," urging the rather commonsense idea that scholars should consider multiple hypotheses in order to avoid premature commitment to a favorite theory (Chamberlain 1965 [1890]). Brian Tamanaha's project is superficially the same. His attention is not directed first or solely at method or theory; instead it is first and often directed at the epistemological assumptions that underlie theory.

Notions of science and philosophy dominate Tamanaha's discussion. Tamanaha starts his discussion by acknowledging the breadth of sociolegal studies; adherents are found in the humanities and every social science. He produces many citations to argue that the field is in transition and that sociolegal scholars are reevaluating and retooling their thinking. This is an opportune moment that Tamanaha wishes to exploit. By identifying philosophical assumptions associated with competing definitions and associated practices, he hopes to expose scholars of every discipline and empirical program to the pragmatist method and philosophy. The core of Tamanaha's project is to bring to bear on positivist and interpretist and on foundationalist and antifoundationalist thought a pragmatist theory of law. His hope is to persuade scholars to look at sociolegal life *realistically* and not allow particular politics or a favorite theory to cloud their observation.

Manuela Romero and Richard T. Smith deserve thanks for their editorial comments and support. Address correspondence to Alfonso Morales, Department of Sociology and Anthropology, University of Texas at El Paso, Old Main 109, El Paso, TX 79968 (email alfonso@utep.edu).

Law & Society Review, Volume 32, Number 2 (1998)
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https://doi.org/10.2307/827770 Published online by Cambridge University Press

A strength of the book is that many important questions of social and sociolegal theory are examined. Tamanaha points out that philosophical positions underlie every sort of sociolegal account and that these positions contain biasing assumptions of which scholars are not always aware. Many approaches are found wanting but useful when approached from the pragmatist view, which develops "a realistic theory of law useful as a nonpolitical source of knowledge about legal phenomenon" (p. 8).

A further strength of the book is Tamanaha's eager engagement with scholars of every stripe—legal scholars, scholars of law and society, positivists, interpretivists, and others. In practice, these communities are often distinct, but they are communities in need of sustained dialogue. The book attempts to forge working analogies and a language useful to each while being critical of research from positivist and interpretivist positions.

Despite these ambitions, the book has two distinct problems. First, Tamanaha never produces a summary discussion comparing the implications for a practicing science that are bound into the assumptions of a pragmatist or a positivist philosophy of science. Theories and epistemic positions are regularly evaluated, but these discussions might have been usefully focused in a single section. Although the book is about these implications, we never get an explicit summary of how a epistemological choice, with its associated assumptions, leads to a propensity to adopt a particular theoretical style and methodological tools. Tamanaha wants to admit everyone to the social study of law, and this is fine. He urges us to use the pragmatist lens, and I agree on its usefulness. But he may be too optimistic in urging the use of every type of method. Some methods may unnecessarily constrain theoretical assumptions, and they may make claims that are unwarranted. In his defense, he constantly calls for the self-critical improvement of methods. But methodological work does not often or quickly translate into an awareness of how our work should change in response to such criticism ((see, e.g., the discussions by Stinchcombe (1986) and Lieberson (1985, among many others).

Furthermore, we should acknowledge that habitual acceptance of a canon of methods leads us to impose various philosophy of science traditions on our students as uncomplicated, seemingly innocent graduate or professional school choices. We ask students, Can you learn regression? Do you want to spend time in the field? Will you study jurisprudence? What authorities will you read? Our questions reflect our own preconceptions and experiences and our design of these classes. The point is that in helping students make such "choices," we must strive for an awareness of how the choice binds the chooser into assumptions the chooser might otherwise reject.

Finally, only those readers reading between the lines will begin to understand what these issues imply for how we train our

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students. When introducing our students to theory and method, we are neither engineers whose physics are unchanging nor doctors regularly receiving in-service training. Dissemination of new practices does not guarantee acceptance, but as an inquiring community we should critique the tools we use carefully and consider how best to make them available to students. Perhaps the medical model is one we should think seriously about.

The second problem with *Realistic Social-Legal Theory* is that it produces a politically naive view of science by not sufficiently recognizing science as a tool for knowledge and for professional achievement and recognition. Science, like judging, has political and professional aspirants as well as a general attitude and learned methods that guide its production. Because he does not take full account of the underlying politics of social science research, Tamanaha fails to see how the work of a follower of the Realist tradition might, because of fad, fashion, or other more egregious social dynamics, not be acceptable to those in another tradition. Achievement and recognition can be linked to the practices of networks of scholars as much as to trends in science. Research indicates that identifiable social processes exist that limit inclusion, participation, and dialog within and between scholarly communities, irrespective of biasing assumptions of science per se. Tamanaha's inattention to existing research on the dynamics associated with the systematic exclusion of some scholars is unfortunate, as well as inconsistent with the pragmatist perspective.

I begin by establishing and discussing some of the book's dominant themes. These include the presentation of pragmatism that founds Tamanaha's critique and his use of postmodernism, behaviorism, and interpretivism and his associated critique of behaviorism and interpretivism. I then examine the case made for a theory of law based on the epistemological critique and the pragmatist foundation. In the third section I consider Tamanaha's review and critique of sociolegal scholarship on judging from a pragmatist perspective. In the fourth section I return to the opening criticisms and develop these further. In the final section of the essay, I step back to locate Tamanaha's pragmatist sociolegal project as one among similar efforts to systematically recuperate and develop the pragmatist insight in the social sciences.

I. Bridging the Gap between Behaviorism and Interpretation: The Case for a Pragmatically Based Sociolegal Science

A notion of social science underlies, implicitly or not, all social science scholarship (Leaf 1979). Foundationalism and antifoundationalism are the competing notions of social science at

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the heart of Tamanaha's inquiry. Tamanaha's primary goal is to make clear how adopting pragmatism's epistemological assumptions can help us create "a realistic theory of law useful as a nonpolitical source of knowledge about legal phenomenon" (p. 8).

Tamanaha's first philosophical target is the postmodern version of antifoundationalist thought. Postmodernist social thought is the *contemporary* epicenter of the antifoundationalist critique that challenges science and philosophy and particularly the political neutrality of knowledge claims. Based on the pervasive influence of antifoundationalism, postmodern theory rejects the notion that there are ultimate foundations for knowledge or absolute truths. Postmodernism is antifoundationalist, rejecting the idea that there is a single essence related to any phenomena, which results in a view that knowledge, particularly social science knowledge, is subjective. Scientific claims enjoy no special privileges, and the critical impulse of postmodernist thought impairs the foundation for a scientific approach to the study of social life. Beliefs are grounded in nothing more firm than other beliefs. Obviously, this is most regularly articulated as a challenge to positivist sociolegal science, but it begs the question of science itself. How do neutrality and objective knowledge survive the antifoundationalist critique?

Interpretivism has its limits as well, and Tamanaha focuses first on the methodological problem of uncovering the varieties of meaning made in social situations. For instance, interpretivists sometimes fail to address the inequality among actors in their capacity to make meaning public. Access to media and financial resources favor some in the competition for attention and legitimacy. Intepretivists should take care to disclose all meanings made in a particular setting. A second problem for interpretivists is common to positivists as well and has to do with the creation and use of ambiguous concepts. For interpretivists, "ideology" is often mentioned in sociolegal studies, yet is a concept that is ambiguous and inconsistently applied. Nonetheless, Tamanaha suggests that using "analytic devices" or "experience far concepts" like "structures" or "figurations" are supported as lenses through which we might examine "matters on a grand scale" (p. 69). He calls us to skepticism regarding the use of the term "ideology" and suggests instead that we study how domination manifests itself observably instead of substituting ideology for observable behavior.

Tamanaha's other philosophical target is positivist epistemology and the theory of law it produced. His critique of positivist epistemological projects is like that of the postmodernists, but because Tamanaha's antifoundationalist critique is pragmatist, he leaves room for science as a project, an attitude rejected by postmodernists and reified by positivists. Positivist epistemology

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is based on the idea that each phenomenon has some essence that exists and is comprehensible using concepts and relations logically arranged by the scholar. The truth of a theory is mostly based on how it captures or comes closest to capturing the essence in question. This logic contributes to producing science of a kind concerned with definitions of concepts, arrangements of theories, and characteristics of methods which are not about the complexity of social life but instead is about attempting to overcome the constraints bound into theories as a result of this "essentialist" epistemological assumption.

Tamanaha's critique of positivism is articulated in his evaluation of Donald Black's project (pp. 61–69; see Black 1995). The problems he identifies stem from the positivist's philosophical search for conceptual determinacy, which ironically produces an ambiguous relationship between observations on the one hand and concepts, theories, and methods on the other. Positivism's demands for categorization are problematic because "social reality is gloriously complex and chaotic, filled with phenomena and variations of phenomena in shades and degrees that do not come in categorical boxes" (p. 62). Besides this obvious problem, a less obvious but very important problem, is the tendency for positivist scholars to look at the box into which reality is squeezed and then think the box is reality (p. 63; see also Leaf 1979:chs. 9 & 12). Classification, a hallmark of positivist social science, ultimately constrains observation and predetermines explanation. Other objections to the positivist project include arbitrary quantification (but see some developments of the Rausch measurement model; Andrich 1988), the exclusion of meaning from the subject's point of view, and claims regarding causality. Still, Tamanaha suggests that some aspects of the positivist tradition might be useful. Descriptive statistics, for instance, can be a useful tool. Nonetheless, Tamanaha suggests, the weight of the critique retains "very little of the original positivist project" (p. 70).

The pragmatist position on science has two threads: a position on truth and one on method of inquiry. The pragmatists reject both the excesses of postmodernism and the misplaced concreteness of positivism in favor of an operative theory of knowledge, where knowledge is "the active control of nature and of experience" (Dewey, in Tamanaha, p. 28). Truth is an aspect of meaning, described by William James as "what works." "New truths can be created as we work in the world, contributing and shaping reality through our activities" (p. 30). Truth is not purely a subjective matter, however. It demands the congruence of expectation and belief, irrespective of whether or not one is satisfied with the circumstances. Since reality is constituted through our perception of it, truth can change. Truth is instrumental and consists of what works in science, which is itself limited on the one hand by the community of scientists and on the other by the

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realm of humanities. Change and truth are constrained and developed over time by the community of perceivers. The pragmatist's approach is thoroughly grounded in experience and process and involves a *community* of practitioners investigating existing conduct and its antecedents within particular material contexts.

Methodologically, Tamanaha's pragmatists commit themselves to "disinterested and impartial inquiry" with any available tool. This is not to say that the scientist is precluded from investigating problems in which she has particular political interests. Rather, the idea is that investigations should not predetermine outcomes or foreordain observations or particular ideas. This is the pragmatists' thoroughly antifoundationalist, yet scientific, orientation.

Beginning with this theory of truth and knowledge, Tamanaha indicates how pragmatism's epistemology is empty of dogma or substantive concerns. This epistemic foundation is oriented toward investigating meaning-making relationships and social processes. Tamanaha defends this theory of knowledge against various critics (pp. 31–35), but he excludes pragmatism's joint ethical/problemsolving stance (see sec. IV).

Tamanaha has a final task: to articulate a resolution to the fact/value distinction. Pragmatism provides a position on science that speaks to both facts and values but speaks first to the question of fact. For people, context, tradition, and reflection are all resources for interpreting aspects of the phenomenon in question. Obviously, we interpret with our values, and so: "*Given* that we cannot perceive the world except from within a perspective, the fact-value distinction must be understood as arising out of our acting in the world, where both values (preferences, ideals, *oughts*) and facts (*is*) are naturalistically conceived as functionally distinct aspects of our experience" (p. 51: paraphrasing Dewey, Tamanaha's emphasis). Common to interpreting beings are "*minds*" to which they are socialized, and as long as a similar worldview embraces those beings, they can apply the same standard regarding what facts are (ibid.). Tamanaha's example for this is the contrasting response by blacks and whites to the fact that O. J. Simpson was acquitted, a response based on distinct values. So pragmatists take the fact/value problem and locate it as an aspect of ongoing interaction (see also Emirbayer 1997).

From the pragmatist position, science has two roles. On the one hand, science "discloses empirical conditions—the facts—of our existence" (p. 52). On the other, it provides a way to critique values. Here, Tamanaha discusses the work of John Dewey, William James, and George Herbert Mead: "Knowing how the facts stand in relation to our objectives and beliefs helps us critically evaluate those objectives and beliefs" (p. 52). "[I]n common sense terms this means carefully watching what people do, figur-

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ing out why they are doing it and trying to grasp how it all comes together" (p. 57). Science is an *attitude* of impartial inquiry that includes attention to the facts, experiment, and testing. It is most certainly not a method limited strictly to scientists but is practiced every day by people of various means, pursuing various ends in particular material contexts. It is in this sense that pragmatist-based science is radically inclusive.

Although pragmatism has not been consistently understood or evenly applied, Tamanaha suggests that it is a resource for various sociolegal camps competing to supersede the Legal Realist tradition. He notes that the 19th-century formalism that Realism/Pragmatism overtook is not completely absent. Scholars of various camps—among them, Critical Legal Studies and Law and Economics—legitimize themselves with reference to varying aspects of Realism/Pragmatism. Here and elsewhere Tamanaha demonstrates his taste for irony in his attempt to establish dialog and reconcile the competing positions. Despite the dominance of the Realist tradition, CLS and Law and Economics scholars debate which "Realists" are best (p. 44). This sort of debate exemplifies a negative characteristic of positivist (and often all) social science, a debate of the "who said what" variety that is typically empty of direct consequences for inquiry.

Pragmatism, then, is an equal opportunity tool of critique; interpretivism, however, fares better than positivism largely because it is an epistemic inheritor of some pragmatists' positions. Since phenomena have no inherent meaning, taking on (or not) new force for actors living their lives in distinct circumstances, Tamanaha calls on interpretivist scholars to produce scholarship that reveals the various meanings understood by actors in their situations. He insists that epistemic approaches to interpretation and the associated problems of meaning should be "evaluated by the same standards applied to all such interpretations: the degree to which it fits the behavior and meaning for the persons involved (it fits the facts) and the extent to which the political vision underlying the interpretation is an attractive one" (p. 83). He also urges comparisons of accounts of the same situation by different scholars. In his comparison of ethnographic accounts of the Zapotec, he addresses various meaning-related questions, for example, of false consciousness and "epistemological authority." These are not problems for consistent pragmatist/interpretivist scholars attentive to context and experience (e.g., MacLeod 1987; Moore 1986) because meaning is "time-bound, contingent upon attention, context and lived experience . . . and claims that the meaning actors attach to their actions is wrong, or the product of ideologically induced delusion . . . erroneously presuppose that there is a true meaning" (pp. 80–81).

For many sociolegal scholars, the pragmatist position will appear overly simple. However, part of the pragmatists' lesson is

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that no matter how useful positivist (or any) ideas and methods may have been for practicing a profession with its associated rewards, those ideas and methods may produce an insufficiently useful science.

This first portion of the book promises and delivers much, some reviewed above and more within the chapters. However, it is clear that Tamanaha seeks both a useful reconciliation of behaviorism and interpretivism and a science that does not exclude politics, but rather relocates politics as one among many aspects in the formation and execution of pragmatist inquiry.

II. Establishing a Pragamatist Theory of Law

The second section is concerned with establishing a pragmatist notion of law useful to sociolegal practice. Tamanaha maps the concept of law by describing distinct theories of law, operationalizing his pragmatist theory of law, and addressing concerns about how to deploy the theory. Behaviorism and positivism (Tamanaha exchanges the terms freely) and interpretivism have been articulated in opposition to each other, and so Tamanaha's problem is to present and combine them usefully for sociolegal studies. Consistent with the epistemology developed in earlier chapters, Tamanaha claims that "a theory of law is not of law as such . . . it is about consensus regarding the force of law in any given empirical situation" (pp. 128; 142–52). His discussion turns on a twofold problem: How do competing (positivist/behaviorist vs. pragmatist/interpretivist) definitions distinguish legal norms from other types of social norms and with what implications for the definition of law and the process of social-scientific inquiry? Interested in reconciling the two, he rehearses the common criticisms of both approaches; that is, interpretivists cannot clearly demarcate legal from social norms and positivists sidestep the debate by declaring what law is (government social control) instead of dealing with the complexities of social behavior.

The positivist response to the question, What is law? is represented by Weber and Hoebel and has at its core the idea of state-created and applied law. Law exists where there are persons whose task is to apply coercion in support of a norm. This definition and its elaboration over time has produced much scholarship that amounts to quibbling over distinct definitions as one might predict from the problems associated with positivist philosophy of social science.

Law in the interpretivist view that is associated with Ehrlich and Malinowski is not part of the state but is instead part of the social creation of *consensus*. The contrast in positions could not be sharper. According to positivists, law is a whole that exists or is applicable evenly across a society (law is government social control). Pragmatists (S)keptically (as opposed to the (s)kepticism

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associated with postmodernists) insist that law has a variable presence in society that is investigated in terms of how *present* law is to various people in their day-to-day life. We have no reason to doubt that as a source of information for behavior, law has different effects for lawyers than it has for high school teachers. However, this is too general an analysis. Pragmatists want to understand how law is incorporated into everyday social practices in terms of knowledge of law, use of law, and how people are differentially subject to law. In short, pragmatists want to understand how law is present in any given empirical situation.

For Tamanaha, the pragmatist project is to understand the formation of consensus. Here consensus is not used as normative concept. Rather, Tamanaha uses consensus descriptively to indicate whether or not meaning has been made between actors about how "law" is present in a social practice. Take, for instance, the choice prosecutors face when deciding whether to bring a rape case to trial. Frohmann (1997) finds that prosecutors produce consensus about images of places and people and about when to incorporate information about a victim's neighborhood and culture in the decision whether to prosecute a rape trial. Frohmann's case study indicates substantial uniformity—consensus—among prosecutors. The meaning made about law's presence in the decisionmaking process implies differential access to justice (law) for citizens by demographic group and geographic location.

The pragmatist approach requires us to recognize that some societies lack law and that many laws on the books would be excluded from consideration because "they have nothing to do with lived social rules" (p. 123). Any attempt at joining the two traditions is bound to fail because attempting to say what law *is* blinds us to much of social life. "[M]any enforced legal norms have no relations to actually lived social norms," so that "the social order lens . . . artificially constricted the scope of scientific inquiry into law and legal phenomena" (pp. 122–23). Criticizing this "essentialist" approach to law and releasing the problem of order from law yields much. One potentially contentious insight is that we should be skeptical of the "centrality of law" thesis, which has it that the "lifeworld" is increasing colonized by law. Tamanaha's skepticism is not of the increase in law-on-the-books; rather it is with the idea that "the law is all over." Is it? And to what effect? Analysts of the thesis should attend carefully to the possibility that "law as a cultural symbol and mode of cultural discourse has a life of its own quite apart from what the state legal apparatus actually does." Given this possibility, scholars inspired by pragmatism would realize that "the legalization of society encompasses several qualitatively distinct processes, which can be benign, beneficial, or threatening depending upon their nature and how they operate" (pp. 126–27).

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Law has no particular empirical referent. "Law *is* whatever we attach the label law to" (p. 128). The prescription that follows from the critique of "essentialist" positions is to investigate *all* phenomena that go by the name of law with the idea of describing how, and with what effect, people make law present and legitimate in any given activity or event. In this, Tamanaha disentangles the study of law and definitions of law from the study of social order or control and definitions of order and control. His second contribution is to open the door for analysts to consider how people assign the label *law* to any particular activity or event. The process and implications of how the state makes law present is the theoretical problem addressed next by a social theory of law that must take seriously both behavior and meaning. To this we now turn.

A social theory of state law, according to Tamanaha's pragmatist approach, must begin with the "presence" of state law, which involves all "those activities having to do with articulating, effectuating and applying the law of that state system . . . legislative, judicial, administrative, policing, sanctioning, and prosecutorial apparatuses within the government, which includes all persons allowed to participate" (p. 142). Setting the boundaries precisely is unimportant because it is law's *social* presence we are concerned with, not the analyst's a priori definition of who is present to a legal moment.

Tamanaha uses Mead's pragmatist-inspired symbolic interactionism as a theory concerned with actors' interpretive processes as well as with people's behavior. The core ideas of this approach are intersubjectivity and reciprocal orientation. Language makes possible intersubjective agreement regarding an activity, and it establishes the basis for collective action. For interpretivists, language and social rules vary across situations and thus are open to interpretation, albeit not completely. Institutions—coordinated complexes of human interaction—are formed by those people and places party to the language of that collective activity. State law is built up from a variety of such "co-ordinated complexes," which themselves are articulated in different ways depending on the context and the perspective in question.

> We tend, for example, to see police under the authority of state's attorneys, and that often is how the official chain of command is constructed, but the actual everyday relation is one in the which the latter is substantially reliant upon the former for co-operation and assistance in providing the material necessary to successfully make a case. Each has power in different aspects of the relationship. (P. 147)

Law's presence is uncovered in the study of the "behavior/talk" axis.

The pragmatist theory of state law, then, has two key elements: (1) the communicative behavior enacted, developed, and

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changing in the practice of a collective activity, which Tamanaha refers to as a legal meaning system; and (2) those people socialized into the practice of that system. They are referred to as the intersubjective legal community. Together, and over time, these constitute a *legal tradition.* Tamanaha summarizes best how these articulate:

> [T]he legal meaning system refers to a discrete cluster of shared meaning strains; intersubjective legal community refers to the group informed by this shared legal meaning system; there are individual state legal institutions, which are co-ordinated complexes of activities with a material base, usually organized around a practice or set of practices; a practice involves integrated aspects of engaging in a distinct activity; the internal attitude is the cognitive style or framework of thought which characterizes thinking while engaging in a given practice; the state legal system consists of the state legal institutions and their constituent practices considered as a whole. Each of these elements can also be broken up into lesser inclusive sub-units, where appropriate. (P. 149)

The nonlegal community are those people who are not socialized into the intersubjective legal community, and they participate in this tradition as "consumers, or users or subjects or victims, voluntary or involuntary" (p. 150). Law is *present* to these unsocialized or partly socialized actors in a variety of ways that we can study. In this sense and in this context, Tamanaha offers us an image of law: "a complex of institutional structures constituted by people (legal actors and supporting actors), operating within a material base, serving as a resource used by people for innumerable purposes, though usually still only at the margins of social interaction" (pp. 150–51). Tamanaha uses Peter Winch's (1964) analysis to support the idea of social science based on understanding, "grasping the *point* or *meaning* of what is being said or done" (p. 157, quoting Winch; Winch's emphasis). Behavior is understood when the rules by which people's behavior is rendered intelligible are uncovered. Winch's point is that action and belief can only be assessed within the context executed and especially within the conventions or meaning systems that give rise to behavior and belief.[1] The distinguishing feature scientists enjoy is a training that enhances their ability to produce an account of context and actors' action and belief.

Tamanaha is careful to set the pragmatist approach apart from the positivist approach. His claim is twofold: Pragmatist rule-finding method is inclusive, demanding, first, sharp skills of observation by anyone interested in how law is present in a given situation and, second, that the theory produce informative de-

[1] At this point Tamanaha discusses problems regarding the nature of rationality that result from this position. Those readers interested in this discussion might benefit greatly from Murray Leaf's discussion of pragmatist-inspired rationality in *Song of Hope* (1984:esp. chs. 2, 9, & 10).

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scriptions that "get to the facts of the matter about law" (p. 152). In "getting to the facts about law," Tamanaha's pragmatist project enables everyone to observe. While the internal/external distinction provides authority and distance for social scientists, Tamanaha presumes that social practices are, by and large, available to all, and he wants scientists to take seriously the accounts made by scientists and nonscientist observers. Some may find this stance on the source of admissible evidence overly generous, but Tamanaha convincingly deploys examples of legal writings by judges (Cardozo, for instance) that compel us to take seriously the participant-observer's accounts of changes in judicial behavior.

Practice is the term Tamanaha deploys to elaborate the internal/external distinction as a source of accounts about the way interpretive communities and institutions work. Practice is

> any coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity, with the result that human powers to achieve excellence, and human conceptions of the ends and goods involved, are systematically extended." (P. 168, quoting Alisdair MacIntyre).

Tamanaha suggests that this description need not be limited to "positively oriented social endeavors" (p. 168), and so the idea includes activities ranging from judging to drug dealing. Practices differ from institutions in the same way that judging is distinct from the courts and street-corner drug dealing is distinct from organized crime, or how the practice of law is distinct from the American Bar Association, Likewise, there are various scholarly practices (Critical Race, feminist, Law and Economics, etc.) each with adherents in distinct scholarly institutions.

Grounded in meaning, practice requires the socialization of members that itself opens up the possibility of change. Practices change not only because of their internal complexity and coherence (the rules of baseball over time are less complex and more coherent than the practice of judging) but also because of the heterogeneity of participants and their individual and group experiences. Moreover, external changes—in an institution, for instance—can lead to changes in practices (as can changes in how human capacities are developed; see, e.g., instance Gould 1996 on baseball).

Tamanaha's conceptualization of practice, in combination with his discussion of the internal/external distinction, produces a fourfold table of potential accounts of behavior. Along one dimension, observers can be internal or external to a practice. On the other, the observed behavior might be accounted for by its meaning to the participant or as part of a pattern of behavior in

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the sense of a statistical analysis. This particular framing of accounts indicates how, from the pragmatist epistemological position, scholars' accounts are not the only accounts useful to understanding a practice. Tamanaha then considers Justice Cardozo's book *Judicial Process* (1921) as an internal account of judging conducted from an internal, participatory perspective. Through Tamanaha's analysis of that work, he establishes the usefulness of a subject's account of the practice of judging and makes clear and lends weight to the impulse to let the studied speak for themselves. However, Tamanaha clearly appeals for multiple accounts of a practice from various internal/external subject positions.

III. Employing the Pragmatist Approach: A Look at Judicial Decisionmaking

In the final two chapters, Tamanaha examines studies of judicial decisionmaking with two questions in mind: Are judges politicians in black robes? Does law govern judges' decisionmaking? He locates these questions in the discussion developed regarding practices and elaborates and complicates the context further by reminding us that law's indeterminacy is implied by the Pragmatist/Realist position. A triumph of the Legal Realists is to "refute a specific belief that prevailed about this body of rules: that they could mechanistically, without the interposition of choice, lead to definite outcomes" (p. 199). With this antifoundationalist finding, the problem became: What informs judges' choices? Ideology? Law? Personal biography? The answer might depend as much on the politics of the analyst as on the actual composition of characteristics. Tamanaha discusses the scholarship that focuses on decisionmaking in the Supreme Court and in appellate and district courts with particular attention to the judge's role orientation and measures for influence of law on decisionmaking.

Consistent with the approach taken thus far, Tamanaha is quick to point out that his review tells us more about what is not the case rather than what is. First, he notes that decisionmaking processes seem to differ between the Supreme Court and the other courts. In the Supreme Court,

> [A]ttitudes have had a dominant influence in determining the decision-making of many of the individual Justices, and by implication determining the outcome for the Court as a whole in many cases, though whether or not this holds true for any given case depends upon the issues involved and the particular configuration of Justices. (P. 221)

At other levels, values play a more modest role. In other words, the judge's individual background and attitude (as measured in

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differing but similar ways by the scholars reviewed) is not as much an influence on judges' decisionmaking as is the law.

Tamanaha's explanation for this relative coherence is founded on his formulation of the problem of consensus as *the* central problem for social science. If at the appellate and district level, 85–90% of the cases are settled on legal factors (p. 212), this indicates an amazing accomplishment: that judges established determinacy in rulings despite the indeterminacy of legal rules. The practice of judging is coherent because judges are united by their socialization into an intersubjective legal community. One policy implication of this finding is that since attitudes matter little in judges' decisionmaking, then social inequality—in sentencing, for instance—is due to law and not to judges (pp. 223–25). Fundamentally, it is the practice of judging in a particular social context that makes law determinant. But this context, this environment, is made up of two components: social and institutional. Judges learn the assumptions and other rules associated with the practice of judging, and these learned habits and dispositions help create determinacy. Institutionally, each court is positioned in particular relation to other courts. Each court has its particular participants, caseloads, and associated social dynamics. Taken together, these institutional aspects further shape the practice of judging. In summary, most judges become predisposed to practice a rule-bound instrumental rationality on the basis of a combination of an impartial orientation and an interest in "doing the right thing."

If agreement in judicial behavior diminishes beyond some critical point, or if the determining influences shift from legal factors to nonlegal ones, the law will no longer determine judicial decisionmaking, as, Tamanaha argues, is partly the case with the Supreme Court. He reviews various theories to conclude that the shifting basis for judicial decisionmaking has created a "hybrid" legal system that applies rule formalism and instrumental rationality. The judicial *disposition* evolving in this hybrid situation is characterized by judges "being *bound yet not bound*" (p. 242; Tamanaha's emphasis) by a rule orientation. Judges are bound by the responsibility of the office and their socialization as judges to do the right thing. But in hard cases, by which Tamanaha means cases where there is clear law but the law is contrary to the judges' personal values, we would expect judges to evaluate their role orientation and to reason more instrumentally than usual. Of course, there will be variation, but Tamanaha appeals to descriptions of types of judges as a starting point to assess cases over time. As with every other theoretical point in this book, Tamanaha urges that these generalizations be tested further.

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IV. Some Problems

The preceding sections have provided a summary of some of the key arguments made in this nuanced book. Here I address a few problems associated with the two concerns listed at the outset. None of the problems I identify threaten the argument, nor will I do more than sketch the positions, but the discussion below might usefully flesh out some of the notions Tamanaha addresses. The first criticism is philosophical; the second is epistemical, theoretical, and methodological; and the third focuses on the problem of inclusion in and exclusion from scholarly communities.

My philosophical criticism cuts to Tamanaha's assumption regarding our "common progressivism." A realistic theory of law needs a body of adherents. Tamanaha asserts that a "genuine community of discourse" is being established by sociolegal scholars' common progressivism (p. 2). But what ethical basis underlies our progressive impulse? The pragmatists speak "nonpolitically" to the question of ethics and values, but more inquiry is required to reveal the connection between pragmatists' ethical positions and their theory of knowledge. Here I can sketch a line of inquiry. Tamanaha's discussion of pragmatism is focused on its theory of knowledge. The pragmatist method and philosophical position were developed to address problems associated with everyday social life, particularly the life of the Progressive Era (Rucker 1969). To address the concerns of social life, pragmatists developed an ethical position and participated in various civic and professional associations (Diner 1980; Danbom 1987; Pegram 1992) as well as developing prescriptions for how to translate pragmatist philosophy into practice (Mead 1900a, 1990b, 1923). These developments, professional and intellectual, are found in other intellectual and professionals bodies in that era (Diner 1980). Sociology is one discipline established in the United States with the idea of ameliorating social problems (Bulmer 1984), and it should be no surprise to learn that pragmatists infused early sociologists with much of their theory and method.

Tamanaha regularly claims that pragmatism is empty of normative prescriptions. However, early pragmatists clearly articulated an interest in social problems and in an ethical approach to conduct. These ethics do not dictate research, nor do they predispose findings. Ethics encompasses the study of conduct, particularly of the conflict of ends, interests, and values. For Mead (1908), people start with narrow interests and hence are narrow selves. They can make themselves larger, but only by sacrificing the narrow scope in the interest of identifying with other interests. This process of identifying with the interests of others is ethics in practice and an opportunity for growth. Pragmatists recog-

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nize that it is hard to harmonize and account for various claims. However, they insist that moral ideas only grow out of situations. By making various people aware of their connection to problem situations, pragmatists hoped they could get actors to attempt to harmonize various claims and so to act ethically. Examining situations and how they represent and are nested in interests is the starting point for pragmatist ethics.

Here experience is only a guide. The pragmatist process orientation acknowledges that each new situation has new requirements for action. Pragmatists recognize that social problems will always exist. So even if ideals may not be realized or realizable, their attempt to harmonize competing claims is at the root of the *ideal* of practice. Pragmatists argue that new situations present the opportunity to practice their ethical position as part of their epistemological position. West (1989), among others, has recently sought to address the ethical concerns in tandem with philosophical/intellectual concerns. These concerns are very much a matter of politics and policy, and Leaf (1996) begins to indicate how distinct philosophical traditions shore up various sorts of politics. Similar attention to process and observation links ethics and the theory of knowledge. But here I can no more than suggest that ethics is commensurable with the theory of knowledge.

My theoretical criticism has two aspects. The first aspect is based on the idea of interpretation as Tamanaha presents it, and here I have two concerns. The first has to do with Tamanaha's discussion of interpretivism. Tamanaha identifies the position espoused by Clifford Geertz and others that meaning is ambiguous and so interpretations are always contestable. Tamanaha accepts the idea that behavior is socially constructed and that all events have multiple meanings. He goes further to recommend that interpretivist scientists follow Clifford Geertz and Alfred Schutz by developing "experience far" concepts to render meaning of two types: meaning for participants and meaning of, or about, participants' behavior (pp. 78–83). But there is a problem here, even if a scholar checks with subjects regarding the adequacy of the concepts used to describe meaning for them, and/or developing "experience far" concepts or ambiguous "analytical devices" is a suspiciously positivist (foundationalist) move that can lead to the relatively arbitrary assignment of concepts to data. It can also lead to the reification of concepts and the subsequent substitution of concepts for explanations of social phenomenon. It illustrates how a determinism like the one Tamanaha critiques can creep into interpretivist work.

My second concern is with an apparent contradiction in Tamanaha's assessment of positivism, interpretivism, and the problem of meaning. Tamanaha suggests that we be skeptical of our conceptual apparatus, but at the same time he argues, "It is

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essential to observe matters on a grand scale, using analytic devices like 'structures' or 'figurations,' because social reality is more than just an accumulation of individual meanings and behaviors" (p. 69). Besides this sole example of an interest in ambiguous notions like structure, Tamanaha's dominant strategy is to replace such amorphous "devices," or "experience far" concepts, as structures or figurations with substantive ideas and rules for identifying the idea as in the idea of the legal meaning system. In short, the "grand scale" of meaning and behavior is best understood with reference to the communicative individual and the meaning systems of which they are a part.

Tamanaha's idea of "meaning system" can be refined with Leaf's idea of "information system" since Leaf addresses the idea of information and its relationship to behavior. However, Leaf goes even further to diagnose how information systems are organized and related to each other in the course of everyday life with the result that law (or whatever phenomenon is in question) is *present* to the subjects and the analysts. So, in sum, instead of substituting "experience far" concepts or "analytic devices," pragmatist scientists should address the "rules by which behavior is understood" (Winch 1964) or similarly how Wittgenstein's "language games" are constituted and change in order to avoid confusion among the participants. Attention to the articulation of meaning systems addresses how social change and stability are present among the same people at the same time (Leaf 1984).

I also have concerns about Tamanaha's critique of order as the central concern for law. This is an important epistemic moment in the book because he is setting the foundation for his social theory of law. I concur with his discussion. Disembodied problems of order or control should not be the central concerns of a social theory of law. Instead, our interest should be with how law becomes present to people in particular activities. Although his discussion is satisfactory, interested scholars might consider nesting his discussion of order in a broader philosophical context. There are two dominant positions on the question of order: the contractualist associated with Hobbes and Locke and the Skepticism of Hume and Montaigne and Montesquieu (Leaf 1979:chs. 2 & 3; Laursen 1992; Mead 1915). Tamanaha focuses solely on the former to found his critique of Weber and other "foundationalist" theories of law.

Locating Tamanaha's concern with order in the Skeptical tradition dovetails rather nicely with his concern with consensus. The Skeptical tradition associated with Montesquieu and Montaigne was also concerned with law's presence in the sense of an interest in consensus. In effect, these early antifoundationalist authors and their antecedents (e.g., Sextus Empiricus 1994) are our early guides to the interpretivist foundation for consensus. In summary, Tamanaha notes that law is order and control in the

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Hobbesian tradition, but only in that tradition. Order is developed as a problem of consensus in the distinct tradition associated with Skeptical philosophy as developed by Montesquieu and Montaigne and other philosophers (Laursen 1992; Leaf 1979).

And I have a political concern. As Delgado has pointed out (1984, 1992), there have been limits on participation in scholarly practices. So, despite the perspective and contribution one might expect from marginalized scholars (e.g., women or people of color), social/professional dynamics have acted to limit dialog and access to some practices and interpretive communities. Furthermore, the positivist impulse of dividing empirical reality to comprehend it also divides and constrains dialog between progressive (and all) scholars investigating "different" parts of reality. Though Tamanaha critiques critical projects, he does not attend to these dynamics as articulated in Delgado's research; it is clear that those findings are important with respect to recruitment and acceptance of some scholars. Thoroughly ridding ourselves of these socially constructed limits is an ongoing concern.

My final observation concerns Tamanaha's concept of law. His image of law is the most illuminating I have yet encountered. What law is changes over the lifecourse, and we would expect that people might change attitudes toward law. The adage "nothing is certain but death and taxes" may not be taken as seriously by graduate students as by senior professors. Some might want to avoid taxes or other people might require socialization about taxes (e.g., in the case of changing citizenship). Stable group norms toward taxes are unlikely, so people might be neutral with regard to tax law. But over time Tamanaha's conception urges us to observe and account for changes in a person's aspirations or circumstances that lead that person to make present a law originally avoided. For example, some people start out cheating on their taxes but later discover that taxpaying fits in with their entrepreneurial strategy (Morales 1997).

V. New Directions

This is an important book because it indicates to us that when doing sociolegal (or any social-scientific) study, we should be asking more than just what theory or "framework of inquiry" one is working within. We should also ask what tradition of science one is elaborating. We should also ask about the implications for social research and society (Leaf 1996). Tamanaha's book is important both for itself and for how it describes sociolegal scholars' choices for the type of science they do. Tamanaha's project is as thoroughly scientific as Black (1995) claims his to be, but Black makes a case for quite a different epistemic position. The choices are not innocent, and the choice demands of us reflection about and action for our own scholarship and behavior

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in the world and about our responsibility for training future scholars.

Note that sociolegal studies is not the only discipline or community of scholars with the impulse toward epistemic reflection and subsequent scholarly debate (Mills 1959; Gouldner 1970). However, we are most fortunate in that the social study of law admits many disciplinary affiliates to its ranks. Scholars of bureaucracy, organizations, kinship, politics, and more are found in law and society. So we should not be surprised that law and society scholars are regularly exposed to, or often at the forefront of, the interpretivist/positivist issues in their own disciplines or in the way they mix empirical and policy interests with law and society work.

I now turn to examine parallel movements of potential interest to scholars of law and society. I offer the following with hopes of stimulating reflection among readers regarding their philosophical assumptions and how these map with respect to the authors cited below. Furthermore, I hope to generate some dialog between scholars who knowingly or not are following similar philosophical tracks in their empirical work. Anyone who does policy research or who engages in empirical research around such theoretical problems of social change, rationality, agency/structure, micro/macro, or freedom/determinism implicitly engages competing epistemological positions. Scholars demonstrate differing degrees of awareness and understanding of the epistemic positions that found theoretically informed empirical investigations. By increasing our awareness of the epistemological positions behind existing debates, we enhance the possibility of constructive dialog and research based on scholars' common progressive ideas and similar epistemological assumptions and foundations.

Not all of the following are explicitly pragmatist, but those who find Tamanaha's analysis compelling will find allies in much cited here. First, in criminological circles the interpretivist/positivist debate is heating up, often with reference to the philosophical positions that underlie current theoretical positions. For instance, juxtaposing Braithwaite's (1993) articulation of interpretivism, Sampson's (1993) concern with processes and measurement, and Hirschi and Gottfredson's (1990) interest in the philosophical foundations of social action reveals how philosophical assumptions are, welcome or not, pushing into current theoretical debates. These authors' concerns have induced them to look at the roots of theory and beyond to the epistemological concerns that underlie theory. Although not explicitly pragmatist, they have adopted the pragmatist's concern with process, interpretation, and action.

In policy circles Schneider and Ingram (1990, 1993), Ostrom (1991), and Lindblom (1977) are all exploring useful articula-

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tions of social science theory and philosophy. In the study of organizations, Weick (1976, 1989) and Weick & Roberts (1993) develop pragmatist concerns with process, and Barley, Meyer, and Gash (1988) consider the usefulness of scholars' research for practitioners. Greeley (1996) on religion and Zald (1996) have interests in the overlap of humanities and social science and how the latter speak to the former. Chambliss (1989) works from the interpretivist perspective in sociology; Shamir (1996) in law and society. Shalin (1986, 1992), Joas (1993), and Emirbayer (1997) develop pragmatism in social theory, and Griffin (1995) speaks to the roots of a "constructivist" postmodern philosophy. In feminist history Seigfried (1996), in anthropology Leaf (1972, 1984, 1992, 1996), Moore (1986), and Turner (1974, 1986); and economists like Neale (1987, 1990) all are working in, and identify with, the broadly pragmatist/interpretivist tradition. These scholars are of disparate empirical persuasions using various methods, and they express differing mixtures of social science philosophy, but most are clearly identifiable as employing pragmatist elements or concerns recognizable to those of the pragmatist tradition. Fundamentally they are united by similar concerns with understanding social *process*. Further, despite what would probably be different concerns for history of science and policy problems, they would all be somewhat alike in attempting to understand how actors understand and relate to the *presence* of ideas-in-practice in their everyday lives.

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