Review Essay

A Post-Westphalian Conception of Law

William Twining

Brian Tamanaha, *A General Jurisprudence of Law and Society*. New York: Oxford University Press, 2001. xx + 263 pages. $60.00 cloth; $22.95 paper.

The discipline of law is becoming more cosmopolitan, partly because of "globalization." Jurisprudence, as the theoretical part of law as a discipline, has begun to respond to this challenge. During most of the twentieth century, mainstream Anglo-American jurisprudence focused almost entirely on two forms of law: municipal law (of sovereign nation-states and subordinate legal orders) and public international law (largely but not exclusively treated as the law governing relations between states). From a global or a broad transnational perspective this "Westphalian" focus is inadequate.[1] It leaves out too much: if one were to try to sketch a broad overview of forms of legal orders in the contemporary world, one might quibble about including *lex mercatoria* or *ius humanitatis* or Pasagarda law or Gypsy law or Hindu law or Internet law (*GLT*; Santos 1995, 2002), but it would be difficult to justify leaving out European Community law or

In the text and footnotes of this article five books are abbreviated as follows: Brian Tamanaha, *A General Jurisprudence of Law and Society* (2001) (hereafter GJLS); Brian Tamanaha, *Realistic Socio-Legal Theory: Pragmatism and A Social Theory of Law* (1997) (hereafter *RSLT*); H. L. A. Hart, *The Concept of Law* (2nd ed. 1994) (hereafter *CL*); William Twining, *Globalisation and Legal Theory* (2000) (hereafter *GLT*); and William Twining, *The Great Juristic Bazaar* (2002) (hereafter *GJB*). Unreferenced page numbers in the text refer to *GJLS*. Address correspondence to William Twining, University College London, 4 Endsleigh Gardens, London WC1H OEG.

[1] Cf. Buchanan (2000) criticizing John Rawls (1997) for basing his theory of justice on assumptions about "a vanished Westphalian world."

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Islamic law or major examples of "traditional" or "chthonic" law.[2] Yet it would be strange to try to subsume all of these under municipal law or public international law. (*GLT*:chs. 3, 9) If one were to adopt an historical perspective, other candidates would press for attention, for example, classical Roman law, the medieval law merchant, canon law, to say nothing of major traditions of religious, indigenous, and chthonic law. This is not merely or mainly a semantic issue; rather it involves a judgment about what forms of legal ordering deserve sustained attention by our discipline.

Mainstream Westphalian legal theory does not seem to be well equipped to answer some important questions about the juridical status of particular legal orders. For example, what is the juridical status of EC law, contemporary Islamic law, *lex mercatoria*? Is human rights law merely part of public international law? Can one claim to understand law in Brazil if one ignores the internal ordering of the squatter settlements, made famous by Santos's account of "Pasagarda law" (Santos 1995:ch. 3, 2002:ch. 4)? Are these all "law" in the same sense? It is tempting to try to brush aside such questions as semantic, or trivial, or aridly conceptual, but it is difficult to escape from them completely.

The purpose of this essay is to consider one of the first attempts to confront the problems of theorizing about law at a global or broad transnational level in response to the challenges of "globalization."[3] Brian Tamanaha's *A General Jurisprudence of Law and Society* is bold, ambitious, radical, and challenging. My object is to summarize its central theses, to indicate why I think that this is an important work, to sketch some differences in our perspectives and positions, and to suggest some areas that are in need of development. I shall follow the order of the book, focusing on a few themes rather than trying to follow all of the ramifications of a rich and complex argument. The first section sketches Tamanaha's background, concerns, and conception of his enterprise. The next section considers his critique of "mirror theories" and "the social order thesis." Next, I shall consider how he pares down Hart's model of law to produce a nonessentialist, nonfunctionalist "core concept of law."[4] Rather than dwell on his interpretations of Hart

[2] "Chthonic" means "living in or in close harmony with the earth. To describe a legal tradition as chthonic is thus to attempt to describe a tradition by criteria internal to itself, as opposed to external criteria" (Glenn 2000:57, citing Goldsmith 1992).

[3] See also *GLT* and Santos (1995).

[4] Since neither Hart nor Tamanaha use the distinction between concept and conception that can be traced back to Gallie (1956), I shall follow them in talking of the concept of law. However, in my view, Hart's *The Concept of Law* might more suitably be entitled *A Conception of Law* and is still defensible as a useful basic conception of law for the purposes of a general description of modern state legal systems. Tamanaha is persuasive in showing up the inadequacies of Hart's conception for a realistic sociolegal perspective that includes all kinds of societies and social arenas (modern/traditional; developed/less developed; secular, religious, and transnational, etc.). Both share the same assumptions

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and other thinkers, I shall focus on the clarity and tenability of Tamanaha's own position, especially in regard to his attempt to construct a core concept of law on the basis of folk concepts. Finally, I shall suggest some ways of extending or refining his analysis in respect of "globalization" and "general jurisprudence," "bottom-up perspectives on law," and normative and legal pluralism. Tamanaha's and my own views are quite similar and seem to be converging. As we proceed, I shall indicate some points of divergence in our enterprises and positions, but the main objective here is to clarify and assess Tamanaha's central theses.

A General Jurisprudence of Law and Society

Brian Tamanaha, Professor of Law at St. John's University, New York, was raised in Hawaii and educated in the United States. Early in his career he served as Assistant Attorney General of Yap in Micronesia. This experience made a profound impression on him.

> Law in Micronesia was remarkably unlike what I learned law was, and should be, in the course of my [American] legal training .... Micronesian law was transplanted in its entirety from the United States; even the majority of the legal actors, like myself, were American expatriates. Their customs and values could hardly have been more different from the legal system and its norms. To cite a few examples, from Yap in particular: they had a thriving caste system, yet the law prohibited discrimination; their culture was consensual in orientation, but the law was based upon the adversary model; their understanding of criminal offences required a response by the community itself (literally), but the state insisted that it has a monopoly on the application of force, and any direct community reaction is illegal vigilantism; property ownership was a complex mixture of possession rights, use rights, consultation over use and possession, and community ownership simultaneous with chief ownership, whereas the property and mortgage laws were based upon common law notions of fee simple, life estate, and remainders; their political system was democratic, but for most elections candidates stood unopposed because the approval of traditional leaders was de facto required

about the value and feasibility of a general descriptive jurisprudence—an idea that is regularly contested. I maintain a quite skeptical position about the feasibility and value of a general conception of law outside a given context of inquiry and argue that Tamanaha inadvertently provides support for this position by effectively criticizing leading positivist conceptions of law, but failing to provide a workable alternative. Law does not satisfy all of Gallie's criteria of "an essentially contested concept" in that it is not necessarily "appraisive" (though some would contest this), but it is internally complex, variously describable, ambiguous, and persistently vague (Gallie 1956; Dworkin 1977:134–36; cf. Waldron 1994). It has also been the subject of persistent controversy throughout the ages. Moreover, part of the difficulties surrounding the analysis of conceptions of law stem from the point that it is not "a natural fact" in Gallie's sense, but there is no agreement about whether it is a kind of social fact or something else.

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> of anyone who wished to win; the law was written in English legal language, while many people had a rudimentary command of English, and others could not speak it at all (never mind the more complex and inaccessible legal language); court decisions were filled with legal arguments based upon U.S. common law and constitutional analysis which simply had no parallel or grounding in Micronesian society; many people were ignorant of the law, and feared or avoided it; state law was a marginal force in the maintenance of social order. The law in Micronesia was like an alien presence in their midst, mostly irrelevant, taking care of tasks related primarily to the operation of the government, occasionally intruding on their lives in various unwelcome ways. (*GJLS*:xi–xii)

Tamanaha's experience in Yap has been a major stimulus in all of his work to date (Tamanaha 1993a). His second book, *Realistic Socio-Legal Theory: Pragmatism and a Social Theory of Law*, was published in 1997. This set out to provide a basis in philosophy and social theory for a "thoroughly social, non-essentialist, behaviour-based view of law" (p. 245). The main use of "isms" in jurisprudence is to caricature the views of those whom one seeks to criticize. However, Tamanaha goes in for self-labeling, characterizing himself as a legal positivist (following Hart), a pragmatist (Dewey rather than Rorty), an interactionist (Mead, Goffman, and Geertz), an interpretivist (Weber, Mead, and Schutz), and a conventionalist (again following Hart).[5] These labels at least give a general indication of where the author is coming from and signal likely points of departure for those with different views or perspectives.

An Ambitious Enterprise

Tamanaha's project is to revive the idea of general jurisprudence. For him this means constructing a single framework for a universal jurisprudence as a basis for a theoretical understanding of law anywhere.[6] In particular, he wishes that framework to

[5] Some of these labels are explored below. Tamanaha summarizes the central argument of *RSLT* as follows: "My thesis is that the role of realistic socio-legal theory in the context of postmodern jurisprudence is to be a non-political source of knowledge about the nature, function and effects of legal phenomena. As such, it will be the only predominantly descriptive, non-normative, alternative available among the current schools in legal theory, with a critical capacity which plays no favorites among the competing schools of normative legal theory, be they left, center or right" (*RSLT*:8).

[6] This is not the place to analyze in detail the differences between Tamanaha's and my own conceptions of general jurisprudence. Suffice to say that first, I have a broader conception of the functions of theorizing about law. Tamanaha is mainly concerned with sociolegal studies, while my concern is with the health of the discipline of law broadly interpreted. Second, while he assumes universality, I treat questions of generalizability as central: To what extent is it feasible and desirable to generalize about legal phenomena across two or more legal traditions or cultures (or even jurisdictions)—conceptually, normatively, empirically, and legally? (See *GLT*; Twining 2002b; *GJB*:ch. 11.) Tamanaha's

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embrace the realities of law in transitional and developing countries and transnational levels, as well as in post-imperial countries that are sometimes referred to patronizingly as "advanced," "parent," "civilized," or "mature". His experience in Yap, a colonial situation he soon learned was "not that unusual" (p. xii), stimulated Tamanaha to develop a powerful critique of some commonly held views.[7] He argues that standard Western legal theories fail to capture this kind of situation not only in colonial and post-colonial states, but also in major Western cities and in industrialized societies. The people of Yap clearly considered their own traditional mores, processes, and institutions to be "law."

For Tamanaha, the challenge for legal theory is to accommodate all of these complexities and variety within a single framework:

> Without one, there is no hope of understanding law in situations like those in Micronesia, together with those in the West, as well as everywhere in-between, and no hope of comparing these situations in ways that will be fruitful for all." (Preface, p. xii)

In addition to providing a theoretical framework for viewing law in the world as a whole, the book sets out to provide the basis for a general descriptive sociology of law that claims to be more comprehensive, more illuminating about relations between law and society, and more directly linked to actual sociolegal research than Hart's *The Concept of Law*. As part of the argument, it sets out to identify and criticize some widely-held theories and assumptions, including mirror theories, the social order thesis, and some of the classic pitfalls of Functionalism. Tamanaha also makes some pragmatic claims for his concept in relation to sociolegal studies: that it solves some of the conceptual problems that have bedeviled discussions of legal pluralism and that it is a useful organizing concept for general social scientific and comparative inquiries into legal phenomena. He also builds on the concept to suggest some general questions about relations between law and society (pp. 231–33), some potentially fruitful hypotheses (pp. 234–36), and some new directions for research (pp. 236–40). Although these are presented at the end of the book as tentative and preliminary, the underlying objective is ambitious. For Tamanaha is not only attempting to extend Hartian analytical jurisprudence to apply to

bias is universalistic (with a tendency toward science), my starting point is particularistic, with a bias toward "softer" humanistic disciplines (see below).

[7] "The existence of state law in Yap was a social fact, based upon the activities of legal officials" (p. 146). Tamanaha maintains that not only did the Yapese ignore this imposed legal system, but "[s]ocial order was maintained by sources other than the state law" (p. 145). However, on the basis of his account, some might say that the condition of efficacy was satisfied in Yap in the sense that it was not challenged and did operate, despite having little impact on the daily lives of ordinary people.

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basic concepts of sociolegal theory, he is also claiming a direct link between his general legal theory and detailed sociolegal research. Few disciples of Hart would make either claim for him.

In due course, we shall consider how far these objectives have been achieved. However, a skeptic might raise some preliminary questions about the value of the enterprise as a whole: What can one expect from a revival of the idea of "general jurisprudence"?[8] What is the value of a general "core concept of law"? What relevance, if any, does general jurisprudence have for detailed sociolegal research? It is worth pausing to look briefly at these at these questions.

Tamanaha's conception of general jurisprudence is broad in claiming to be universal, concerned with "law as such" in all times and places.[9] But it seems narrow in that he follows one tradition in analytical jurisprudence in restricting "the fundamental task" of general jurisprudence to identifying and analyzing "elements and concepts common to all systems" (p. xiii). However, it is clear from other passages that he is as concerned with diversity as with common features and that the agenda of issues is much wider than analysis of a few basic concepts, although his perspective falls short of the more ambitious enterprise of providing sound theoretical underpinnings for a cosmopolitan discipline of law. The basic aim is to construct a general theory/framework that extends beyond "modern" or "Western" societies to cover the whole world.

> Without such a theory it is difficult to formulate a sense of the whole, to spot patterns and relationships across contexts, to observe large-scale or parallel developments. (p. xiv)

Do we need "a core concept of law"? Tamanaha thinks so.[10] Some legal theorists and many legal scholars are skeptical about any such quest. Some may be skeptical of all theory, some may doubt the value of conceptual analysis and elucidation or the value

[8] Some may object to talk of "reviving" general jurisprudence on the grounds that many 20th-century jurists, including Kelsen, Hart, Finnis, and Raz have claimed to be contributing to general jurisprudence. The response in this context is that the focus of nearly all Western jurisprudence in modern times has in practice been limited to Western (or "modern") state legal systems, has proceeded largely in ignorance of non-Western religious and traditional legal orders, and needs to adjust to take account of the implications of the complex processes loosely referred to as "globalization."

[9] "Without such a theory it is difficult to formulate a sense of the whole, to spot patterns and relationships across contexts, to observe large-scale and small-scale social developments" (p. xiv). In the Preface, Tamanaha criticizes the idea that the fundamental task of a general jurisprudence is identifying and analyzing "elements and concepts common to all legal systems" (p. xiii) on the grounds that he is as interested in differences as similarities. His conception of jurisprudence includes normative questions, but this book is mainly concerned with basis concepts for a descriptive sociology of law. On the differences between Tamanaha's and my own conceptions of "general jurisprudence," see note 6.

[10] "There is no issue more daunting in legal theory … Despite its complexity, the question is unavoidable for any attempt at a general jurisprudence" (p. 132).

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of descriptive general jurisprudence as an enterprise.[11] Others may share some of Tamanaha's underlying concerns, but they may have decided that it is either not feasible or not important to try to construct a general concept of law.[12]

> The ultimate test for the approach to law I set out, consistent with the goals of a general jurisprudence, is whether it enhances our ability to describe, understand, and evaluate legal phenomena across a variety of contexts." (p. 134)

This claim, reiterated in several places, is almost identical to the claims made by Hart about the nature of his project (*CL*:Preface, Postscript). So a simple answer to some skeptics would be that if one considers Hart's *Concept of Law* to be of limited value because it was the outcome of a trivial or misconceived or useless project, then one is likely to make a similar judgment about Tamanaha's work for both are involved in a shared enterprise of propounding a general descriptive theory of law. This is not the place to consider arguments about the value of theorizing in general or of this kind of abstract legal theory. Similarly, I shall not here enter into a debate about Tamanaha's robustly positivist premises. His central theses are only likely to be acceptable to those who are prepared to work within a positivist framework or who think that the significance of the differences between positivism and its critics is overdrawn and overworked (*GLT*:ch. 5).

For many jurists the quest for a theory that gives an account of the nature of law generally is an end in itself needing no justification. Like Mount Everest, it is a challenge that is just there. Hart's *The Concept of Law* is widely regarded as the most important contribution to the enterprise in the second half of the 20th century. Tamanaha's project is close to Hart's in that it is general, analytical, descriptive, and positivist. For admirers of Hart the main question is: Has Tamanaha improved on Hart?[13] For sociolegal

[11] Here it is important to distinguish between two lines of Dworkinian criticism of Hart's positivism: first, that the idea of a descriptive theory is fundamentally misconceived, because law is essentially a moral, argumentative enterprise and law is an interpretive concept and, second, that even if it is possible to construct general descriptions of legal phenomena and general accounts of the form and structure of legal systems, the concepts are so abstract that the descriptions will be too thin to help theorists engage with concrete, practical problems such as those involved in the interpretation and application of particular laws. Since I do not interpret either Hart or Tamanaha as advancing "semantic" theories, criticism of such theories as trivial does not apply. On the complex debate about "the semantic sting," see Hart (1994:244–48) and Raz (1998).

[12] In the past I have followed Karl Llewellyn in refusing to attempt a general definition of law outside a specific context (e.g., *GLT*:75–79, 243–44). The book under review provides a good test of whether a satisfactory general concept of law is feasible. Giving up on constructing a core concept of law is not inconsistent with thinking that general jurisprudence is an important enterprise for the reasons stated in n. 4 above.

[13] Julie Dixon suggests criteria of success for an analytical jurisprudential theory: "A successful theory of this type is a theory which consists of propositions about law which (1) are necessarily true, and (2) adequately explain the nature of law" (Dixon 2001:17). One

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scholars a further question is: How useful is Tamanaha's theory for sociolegal research?

To develop a broad theory of law that goes beyond state law to include religious law, traditional law, and much else besides, a theorist has two main options: to abandon any attempt to hold on to a single coherent conception of law or to attempt to construct a minimalist core concept of law. For reasons that will be explored below, Tamanaha chooses the latter strategy. The first half of the book is a sustained critique of three central ideas that he claims pervade Western legal theory. His main targets are theories that suggest, first, that law mirrors society; second, that law is essential to social order; and third, that efficacy is a necessary condition of the existence of a legal system. The second part of the book takes H. L. A. Hart's concept of law as its starting point but strips it of all elements that the author associates with functionalism, essentialism, and efficacy. What is left is a lean "conventionalist" legal positivism that is presented as an overarching framework for sociolegal inquiry.

Mirror Theories and the Social Order Thesis

The first concern of *A General Jurisprudence of Law and Society* is the relationship between law and society. Almost half is devoted to an examination of the history, motivation, and falsity of various forms of the thesis that "law mirrors society." These "mirror theories," Tamanaha claims, pervade our heritage of legal thought, represent a comfortable delusion, and normally are used to legitimate positive law.

My initial reaction to Tamanaha's attack on mirror theories was one of skepticism. First, what prominent jurist has ever seriously held a strong view that law mirrors society? Second, is there not a core of truth in weak versions of the mirror thesis? This skepticism was based on dissatisfaction with the debate between Alan Watson and his critics about Watson's thesis that the main agent of legal change is imitation or imposition.[14] This debate is a prime example of false polemics in which each side has tended to draw the contrasts in over-sharp colors.[15] "Strong Watson" was as vulnerable to criticism as "strong mirror theories," but weak versions of each position are quite easily reconciled.

can infer that Tamanaha would consider such a theory to be "essentialist" (Dixon talks explicitly about "essential properties" (ibid.).) and he would wish his theory to be judged by its usefulness in furthering the general objectives indicated above (n. 5).

[14] The subject of diffusion of law is considered at length in Twining (2002d:Tilburg Lecture IV).

[15] The most accessible and balanced account of Watson's "transplants thesis" is Ewald (1995). Watson has continued to publish on this topic and presents a constantly moving target. A useful brief summary in Watson's own words is in R. Schlesinger et al. (1998).

Tamanaha follows Watson in some respects, but his argument is less simple, less radical, and more interesting than first impressions may suggest. To explain why this is so involves parsing the simple phrase "law mirrors society." What mirrors what? What does "mirroring" mean in this context?

What Mirrors Society?

In discussing past jurists, Tamanaha focuses on "positive law" in the general sense of "rules articulated and enforced by an institutionalized authority" (p. 4). This includes, but is wider than, state law. This definition is not intended to bear much weight because Tamanaha is careful to clarify the various conceptions of law of nearly all of the main jurists he considers as subscribers to one or another version of the mirror thesis. As we shall see, within his own theory he advances an even broader conception of law. In the present context a mirror theorist is someone who holds that whatever he or she conceives to be "law" in fact "mirrors society."

What Does Law Mirror?

Tamanaha considers the concept of "society" no longer to have any analytical value (p. 209). However, he uses it here as shorthand for a quite complex set of ideas, because the phrase "law and society" is a standard term that he wishes to "unpack," especially in respect of the relationship between the two elements. Mirror theories fall into three groups: (a) those that maintain or assume a close connection between positive law and the *customs, usages, habits, and practices of society*; (b) those that maintain a close connection between positive law and *morality*; and (c) "selective mirror theories," such as Marxism, feminism, and critical race theory, that see a close connection between law and the *interests, values, or ideology* of a particular group or class (pp. 40–41). Thus "society" is here no more than a shorthand for custom, morals, interests, or other related concepts.

Tamanaha presents an elaborate account of nonlinear, complex shifts within Western legal theory from emphasis on custom to emphasis on consent in group (a) and from emphasis on substantive morality to emphasis on procedural rationality in group (b). Moreover, with the growth of legal expertise there has been an interjection of a class of professionals—Weber's legal *honoratiores*—who mediate relations between law and society and use law to further their own interests and values (an example of a group (c)). The transnationalization of professional legal culture tends to further increase the distance between positive law and any

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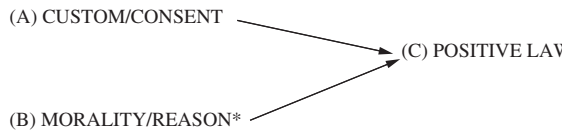
given society. In short, the legal expertise of lawyers and judges contributes to the relative autonomy of law.[16]

The basic structure of this part of Tamanaha's argument is summed up in the following diagram.



This brief summary does not do full justice to Tamanaha's quite nuanced account of some significant patterns that he discerns in the heritage of Western legal thought. But it is the bold picture that is of most interest, rather than his more detailed analysis or his sometimes surprising claims about which of these thinkers can be labeled as strong adherents of the mirror thesis.[17]

What Does "Mirroring" Mean?

"Mirror" is a strong metaphor; "reflection" is weaker; "connection" may be weaker still. In discussing the transplants thesis, William Ewald has usefully distinguished between "strong Watson" (rash, overstated, and vulnerable) and "weak Watson" (cautious, sensible, but still significant in respect of the claim that imitation and imposition are important factors in legal change) (Ewald 1995). Following Ewald, Tamanaha also distinguishes between "strong" and "weak" mirror theories. Lawrence Friedman provides a striking example of a strong statement.

> Legal systems do not float in some cultural void, free of space and time and social context: necessarily, they *reflect* what is happening in their own societies. In the long run, they assume the shape of those societies, *like a glove molds itself to the shape of a person's hand*. (Friedman 1996:72, emphasis added)[18]

Leaving aside whether this is a fair representation of Friedman's general views, this illustrates the idea of strong mirror theories quite well. Tamanaha produces a reasonable range of

[16] This is a central theme of classic accounts of reception, including Franz Wieacker (1995) and Alan Watson (1977, 1993). Although legal professionals are very important mediators between imported law and "society," there can be other important ones, such as NGOs, churches, corporations, or political parties.

[17] See pp. 25–30 (discussion of Austin, Hart, Savigny, and Montesquieu); cf. pp. 35–36 (Durkheim).

[18] This passage clearly involves a rhetorical flourish, but it is fair to say that Friedman is generally dismissive of Watson's transplants thesis (see his treatment of Watson in Friedman 2001).

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examples of jurists explicitly using terms like "mirror" and "reflect" and, even more persuasively, examples of a widespread assumption of a close connection between the content of substantive law and custom/consent or morality/reason or a combination of these or other factors that can be subsumed loosely under the notion of "society."

Some of Tamanaha's interpretations of individual thinkers may be controversial, but they should not be dismissed as simplistic. His treatment of Ehrlich's "living law" thesis is a good example of his method of attributing "mirror theories" to thinkers not widely perceived to be associated with the idea. Ehrlich intended to directly challenge assumptions about law being a state monopoly, that social behavior generally conformed to state law, and that state law was the main source of social order.

> In an important sense, Ehrlich's observations raised a sharp critique of the mirror thesis and the social order function of law .... In another important sense, however, Ehrlich's work is the ultimate extension of the mirror thesis and the social order function of law. In effect his argument is that if positive law does not mirror social norms and does not in fact maintain social order, it has lost its superior entitlement to the claim of being *the* law, and the label must be given back, or at least shared with the "living law", the actually lived social norms that do satisfy these criteria. (p. 31)

Ehrlich was an important forerunner of legal pluralism. This acute observation lays the ground for Tamanaha's sharp critique of "the folly of social scientific pluralism" that will be considered below.

"Strong" and "Weak" Tamanaha

It is useful here to distinguish between the strength of three different claims that Tamanaha makes in relation to mirror theories. His historical thesis and his assertion that the main use of mirror theories is to legitimate positive law are expressed forcefully, but his criticism of mirror theories is actually rather cautious.

First, the historical claim is expressed in strong terms. The following passage is an example.

> Almost every major strain of Western legal and social theory has articulated, or taken for granted, an account of the relationship between law and society as one of close integration and association. It is widely assumed that law reflects/mirrors society, and operates to maintain order. (p. 51)

One could quibble with some details of Tamanaha's interpretation of particular thinkers, but he does show convincingly that the

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use of mirror metaphors is much more widespread than I, for one, had previously realized. It is not surprising that they are pervasive in juristic discourse, especially in unanalyzed form, for others have pointed out that "the mirror is one of the most powerful and pervasively applied metaphors of the last two thousand years, central in philosophy (citing Rorty 1979), in literature and art (citing Torti 1991 and Grabes 1982), and in the social sciences (citing Haglund 1996)" (p. 2).

What is the justification for lumping together such a wide range of ideas under a single label? Tamanaha's answer is robust. "Mirroring" is a comforting metaphor mainly used for the purpose of legitimation,[19] the precise basis for which varies within and between mirror theories. By and large they converge on two great myths about the genesis of law. The evolutionary myth tells the story of the emergence of law in institutionalized form from out of undifferentiated custom. The myth serves to legitimate law by emphasizing its origin in custom, its function in holding increasingly complex societies together (the social order function), and by implying that law is progressive—as societies evolve and progress, so does law. By contrast, the social contract myth sets up a basis for authority in rational conscious consent by free and equal individuals (p. 57). These myths can stand alone or compete with or complement each other. Sometimes the two myths combine, one emphasizing historical origins, the other individual consent. "So reassuring are these stories that the wish to believe is compelling" (p. 59).

Tamanaha sets against these two stories a countermyth that unabashedly depicts law as an instrument of power, roots the story of its origins in conquest, imposition, or seizure of power, portrays its exercise in terms of the self-interest of the rulers,[20] roots obedience in fear and self-interest, and grounds the whole in a pessimistic view of human nature. The counterstory not only treats "the gunman writ large" as a clear example of law, but also suggests that the majority of state legal systems today originated through imposition or by imitation by local elites in order to resist conquest (p. 69). Moreover, the social contract is a historical fiction; the evolutionary myth is purely speculative; but there is plenty of evidence that most, but not all, legal systems were imposed from

[19] "Standing alone, positive law represents power and authority: its degree of conformity to custom/consent and morality/reason is what confers legitimacy" (p. 4); cf. the suggestion that theorists, including Hart, underestimate "the belief that the power to rule entitles one to rule"(p. 66).

[20] Cf. Jeremy Bentham's constitutional axiom: "the actual end of government is in every political community the greatest happiness of those, whether one or many, by whom the powers of government are exercised" (Bentham 1989:232).

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outside by conquest or colonialism and that power struggles are an important part of local, more evolutionary stories.[21]

Chapter 5 sets out a number of grounds for doubting mirror theories. These fall under two main heads: the importance of transplantation, with particular reference to colonialism; and some implications of globalization, illustrated by transnational commercial law and transnational legal culture. Tamanaha produces sufficient examples to counter almost any strong version of the mirror thesis. But weak mirror theories (that there is some close connection between law and society) are confronted by a correspondingly "weak" (or moderate) Tamanaha. His examples claim to show "the possibility of a systematic mismatch between law and morality, or law and custom, inherent in the mirror thesis" (p. 35). He does not suggest that there is no connection between law and society (p. 209). Rather, his aim is to open up a critical distance from the assumption that law is a mirror of society—to scrutinize rather than assume that this is true for any given manifestation of law (p. 231).

Tamanaha's conclusion is more cautious than the tone of his polemic against mirror theories might suggest. He develops a "weak" version of Watson's thesis and links it clearly to several traditions of legal and social theory. His achievement is to identify a significant thread that runs through almost all of Western legal theory, to connect that thread to legitimation, and to pose a question in empirical terms about the relationship between law (of any kind) and society (in respect of custom, consent, morality, and/or reason), leaving open with regard to any particular example how close is the connection in fact between positive law and society (p. 231).

A Riposte from "Society"?

Alan Watson rightly drew attention to the importance of the diffusion of law; Tamanaha has usefully linked diffusion to social theory.[22] However, Watson's accounts of the processes of diffusion and legal change are too simple and Tamanaha perhaps follows him too closely. It is clearly true that imitation, imposition, and interaction between legal systems and cultures have played an important role in legal change; but understanding legal phenomena requires familiarity with their historical, economic, political,

[21] In relation to the "gunman writ large," Tamanaha states: "It is difficult to disqualify this scenario from constituting positive law" (p. 66) and is sharply critical of Hart and others for buying into the legitimating myths (pp. 66–67). However, Tamanaha only accepts the *possibility* of a legal system being based on force alone, but he is no way committed to treating this as *typical*.

[22] Diffusion is to be preferred to metaphors such as "transplants" and "imports" not least because it establishes a direct link to diffusion theory in sociology, which has to a surprising extent lost touch with the legal literature on reception and transplants.

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and cultural contexts.[23] Watson has made a useful contribution by drawing attention to and documenting the phenomena and processes of diffusion, but his thesis mainly concerns "surface law" and a superficial account of legal change (Twining 2001).

Bruno Latour's dictum "No transportation without transformation" (Latour 1996) may be an overstatement if applied to legal phenomena, but no serious student of diffusion can assume that what is borrowed, imposed, or imported remains the same. This is not just a matter of the interpretation and application of received law, but also of its use or neglect, impact, and local political, economic, and social significance. The story of any reception is in large part a local story that begins long before any imputed "reception date" and continues long after. For example, commentators on Ataturk's famous reforms in Turkey in the 1920s now insist on beginning the story in the 19th century and continuing it up to the present day (e.g., Örücü 2000). In the case of family law, standard accounts tell how, over a period of more than 70 years, rural society has only partially accommodated itself to the requirements of marriage, even though Ataturk's successors made very few concessions to custom or consent or local *mores*—a rare example of society having to adjust to law. Sometimes, it is true, a particular legal institution may remain in force and operative because it is part of the intellectual capital of a legal elite,[24] but most stories of reception are at least in part stories of interaction between the "imported law" and "local conditions," which presumably include all the factors that Tamanaha subsumes under "society." How and to what extent any particular "import" is accepted, ignored, used, assimilated, adapted, rooted, rejected, interpreted, enforced selectively, and so on depends largely on local conditions. Widespread transplantation from abroad is a significant fact, but so is the story of its interaction with local conditions and this tends to be a largely local story.

Tamanaha and Watson may overstate the case, but they are right to leave open questions about the nature of the interaction between imported law and local society. It is also important to bear in mind three further points. First, from many perspectives, diffusion or transplantation may not be a good organizing concept.

[23] In my view, the "transplants" thesis does not seriously challenge the law in context tradition, nor does studying law in context involve treating law *as* context. See n. 14 above. Cf. Alan Watson's recent title *Law Out of Context* (2000). The first sentence of the Introduction is less provocative: "The theme of this book is the complexity of the relationship between law and the society in which it operates" (p. xi).

[24] For example, the Indian Evidence Act, 1872, which has survived with only minor amendments and little public debate, despite the fact that it deals with potentially controversial issues about criminal process and crime control (discussed in Twining 2002d:IV). The most likely explanation is that it is now a cherished part of the intellectual capital of the legal profession.

When practicing or expounding law in a given context, the origins and material sources of law will often be peripheral or irrelevant.

Second, interaction between legal orders takes place at and between all levels of ordering, not just between countries. If one is considering the interaction between European law and public international or regional human rights regimes, it cannot be assumed that the context is a clearly defined social arena. Interlegality is a much more complex phenomenon than most of the literature on diffusion suggests (*GLT*:229–31).

Third, and perhaps most important, is the obvious point that most accounts of "reception of law" have concentrated on the diffusion of state law or of whole legal traditions or cultures (e.g., the reception of Roman law in medieval Europe or the spread of the common law). A broad concept of law that includes religion and natural law leads to a broadening of the focus of attention in respect both of social change and of reception or transplantation. There is accordingly a need to rebuild links with general sociological diffusion theory, especially in respect to diffusion of religion, language, and technology (Twining 2002d:2d Tilburg Lecture IV).

The Social Order Thesis

In clearing the ground for constructing a core concept of law for his realist sociolegal theory as part of general jurisprudence, Tamanaha has three main aims. First, to distinguish between criteria of identification of law and any account of its actual or possible functions. Talk about what law does presupposes an idea of what law is (*RSLT*:106–07; cf. *GJLS*:138–39, 177–81, 191). Second, to pare away from the criteria of identification any necessary conceptual link between "law" and any essential characteristics or functions. And, third, to attack "the social order thesis," that is, empirical claims or assumptions that "law functions to maintain social order."

Functionalism, the concept of function, and functional analysis are long-established arenas of controversy in social science. The first problem is with the word "function" itself. Statements such as "The main function of X is to promote/further Y" are, without more, radically ambiguous. As Merton put it succinctly: "The large assembly of terms used indifferently and almost synonymously with 'function' includes use, utility, purpose, motive, intention, aim, consequences" (Merton 1967:77). One can add further words, which are themselves ambiguous, such as role, contribution, and point.

In the present context let us start by distinguishing three primary uses of function: (1) social consequences or effects;

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(2) purposes or goals; (3) purposes *plus* effects.[25] Tamanaha follows orthodox social scientists in focusing on effects, thereby avoiding the difficulties of attributing motives, intents, or purposes to collectivities such as groups or institutions.[26] For him the proposition "Law functions to maintain order" is a claim about the actual consequences of law (what law in fact does) or possibly a statement that combines purposes and effect to mean "The purpose of law is to maintain order and it is effective in doing so" (use (3)).[27] Many prominent jurists treat law as a purposive enterprise, so that some idea of purpose or point is a necessary element in their conception of law.[28] We shall have to return to this

[25] Part of the problem arises because the word sometimes links subjective and objective elements: "The function of X is Y" can mean: "The purpose or goal or aim of X is Y *and* it has these effects." Sometimes the claim is weakened by introducing some idea of role or expectation: "The purpose and expected effect of X is Y," without any claim that it succeeds in producing the effects.

[26] Ideas such as purpose or intent are mental states that can be attributed to individual human beings but not so easily to groups or societies. The difficulty is illustrated by the much-discussed problem of "legislative intent." Even if it is meaningful to ascribe purposes analogically or metaphorically to conscious collective decisions, the difficulty is even greater where some social practice or custom or institution has evolved over time through repeated, sometimes random, interactions rather than through clearly focused action. For example, in what sense can Sumner's (1960) "folkways" and "mores" be treated as intentional or purposive? The idea of "point" is useful here because it covers all reasons why an institution or practice is valued or observed, including collective responses to perceived problems, unconscious motives, and conscious purposes. Interpreters may disagree about what is "the point" of a social institution, or whether it has only one, or whether it is in fact pointless. Such interpretive differences may not be resolved solely or mainly or even at all by reference to origins or to some idea of "original intent." On "point" see further *GJB*:462–72.

[27] For the most part he uses "function" to mean consequences. A great deal of his critique of the proposition that "law … functions to maintain order" is concerned with arguing that law is not the only, nor a necessary, nor always an effective source of social order. It is a critique of claims about what law does (e.g., at p. 60), not what it is meant to do. Most of Tamanaha's criticism is directed at Functionalist theories in uses (1) and (2) of function. In some passages his use of "function" seems ambiguous: for example, in a key passage about the functions of law other than social ordering he says: "But state law often *does* more things, or is *used to do* more things, than just maintain social order, including among other *functions or purposes,* enabling, facilitating, performative, status conferring, defining, legitimative, distributive, power conferring, and symbolic; or being used *as an instrument of* harassment, manipulation, revenge, or vindication, or as a resource of raw power" (p. 179, italics added). It is difficult to read this, and some other passages, as being confined to actual consequences with all idea of purpose read out. Tamanaha quotes several jurists, for example Aquinas (p.16), talking explicitly in terms of purpose (cf. *RST*:109, quoted below at n. 33), which seems to refer to consequences.

[28] This is clearly the case of leading figures in the traditions of natural law and normative jurisprudence. But it is also true of positivists, such as Hart, Raz, and MacCormick. In discussing leading positivists (especially Raz), Dixon (2001) uses function interchangeably with point (e.g., 2001:37, 112) or goal (p. 112). Some jurists explicitly talk about the purpose(s) or goals of law or implicitly use "function" in use (2). Typically they make no empirical claims about the actual consequences of law and could produce no evidence to support such claims. For their enterprise is analysis of concepts, which is anterior to empirical enquiry. One needs concepts to describe, interpret, or explain social phenomena.

later, but here let us focus on Tamanaha's critique of the social order thesis in uses (1) and (3).[29]

Tamanaha's second target is the proposition that "law functions to maintain social order." As we have seen, "function" in this context refers to effects, consequences, or contribution to society rather than to purpose or point.

In ordinary usage "order," "ordering," and "orderly" have several meanings; some of the differences are quite nuanced. According to Wrong, "The 'problem of order' has come to be widely recognized as a major, often the major, perennial issue of social theory" (Wrong 1994:37, cited at p. 208) One of Tamanaha's concerns is to separate the conceptual problem of identification of law from empirical questions about its actual effects. In this context it is useful to distinguish between three main usages of "order," which differ from each other mainly in respect of scope: (1) social control; (2) social order; and (3) ordering of relations between legal persons or units (legal subjects).[30] I shall suggest that Tamanaha's critique is concerned with (2).

Often, but not always, "social control" carries associations of control by the state or other authority. Although it may include some factors that have the effect of controlling behavior without human agency, it is often difficult to sever the association of "control" from ideas of purpose and agency (Cusson 2001:2730, citing Gibbs 1989) For this reason the term often has a negative connotation, implying "coercion, manipulation, labeling, and stigmatization."[31]

A great deal of literature on law has been directed against the quite common assumption—suggested by the phrase "law and order"—that the sole or main function of law is coercive social control of deviant behavior by authority. This assumption treats criminal law as the paradigm case of law, and punishment as the

[29] Tamanaha distinguishes between Functionalism (exemplified by Durkheim, Malinowski, and Luhmann) and functionalism (with a small f). Functionalism postulates that law is characterized by "the necessary function that law satisfies as an integral element within society" (*GJLS*:35, 187; cf. *RSLT*:105–07). In this view, society is an organism of which law is an essential part. "The second version of functionalism (with a small f) … says that law is what law does and what it does is maintain order" (p. 187). All Functionalists hold functionalist views, but many jurists are not Functionalists in the sense of holding organic views of society or considering law as essential to society's survival (*GJLS*:187). Malinowski was a Functionalist, Ehrlich was not (ibid.). Tamanaha's critique applies to both groups, i.e., anyone who maintains a necessary conceptual connection between law and social order or who makes strong general claims about law's actual effects. However, he leaves the door open for functional analysis and allows for the fact that manifestations of law often do satisfy certain kinds of functions in uses (1) and (3).

[30] "Ordering" is used here as a broad residual category to include constituting, facilitating, defining, legitimating, and all other supposed "functions" of law not covered by social control and social order.

[31] Functionalists have often been criticized for assuming that maintaining order is always good; Tamanaha explicitly distances himself from any such assumption (pp. 211–12).

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characteristic form of sanctioning. Today, within legal and social theory this narrow "social control" model of law can be considered a soft target for it is generally agreed that the prevention and punishment of deviance is only one of the typical concerns of state law.[32] Most jurists accept that in addition to group survival, coordination, and flourishing, law's functions can be constitutive, symbolic, regulatory, benefit conferring, facultative, facilitative, and educative.[33]

When Tamanaha attacks "the social order function," he clearly intends something wider than, but inclusive of, social control in this narrow sense.[34] Since "function" here refers to consequences, without any necessary association with purpose or agency, it differs from "social control" as it is used in much modern criminology and legal theory, where "function" usually implies purpose, goal or point.[35]

However, by implication, Tamanaha's "social order" seems to be narrower than a more general concept of "ordering relations between subjects." In several places he asserts that law can have other functions besides "social ordering" or "contributing to social order."[36] For example, in a passage that needs clarification he gives

[32] Tamanaha criticizes Donald Black (1976) for making the essentialist claim "that law is governmental social control," thereby excluding other functions of law from his inquiries and eliminating the possibility that government has access to other forms of social control (*RSLT*:127).

[33] For example, Hart speaks of "the diverse ways in which the law is used to control, guide, and plan life out of court" (*CL*:39). In this and other passages Hart talks in terms of "social control" (ibid.; cf. pp. 165, 188, 208) but he probably intended it in a broader sense than is suggested in the text. Cf. Tamanaha's formulation: "Law performs many functions besides social control, including inter alia, enabling or facilitative, performative, status conferring, defining, legitimative, integrative, distributive, power conferring and symbolic; and there are many forms of social control besides law" (*RST*:109). See Summers (1971) and Twining and Miers (1999:147–56). Joseph Raz (1979:163–79) outlines a useful classification of the functions of (state) law dividing them into (1) primary functions, preventing undesirable behavior and securing desirable behavior, providing facilities for private arrangements between individuals, the provision of services and the redistribution of goods, and settling unregulated disputes and (2) secondary procedures for changing the law and procedures for enforcing the law. Raz defines function in terms of "actual or intended consequences" (1979:164) and clearly makes some empirical claims for the functions of state law. Note how the aspirational (purpose) and empirical (actual consequences) uses of "function" tend to be blurred by phrases such as "law is used to …" (cf. *GJLS*:179).

[34] However, he treats Parsons's (1937) purely "factual order," i.e, "regularity of conduct, patterns of behaviour, predictability" (p. 210) as too wide, because many observable patterns of human behavior (e.g., eating and sleeping) are not meaningful for *social investigators* (p. 211, italics added) On the other hand, the idea of "normative order" is too narrow because it excludes sources of order that are not normative (ibid.). Tamanaha settles for a bald statement that "to say that a social arena is 'ordered' is to assert that that arena reflects *a substantial coordination of behaviour*" (ibid., italics in original).

[35] See pages 238–41.

[36] For example, "this view of law blinds us from seeing the many other things that law (in all of its various kinds) does and is used to do" (p. 209). In *RSLT* pp. 109–11, Tamanaha differentiates between a narrow (conformity/deviance) conception of "social control" and a broader (social order) sense of "social control." In *GSLS* he mainly uses "social order" in

examples of law that has "little to do with general social order," including law as the formal structure underlying the market, transactions constructing the infrastructure of government bureaucracy, and law as a form of instrumental action that is different in operation from law as the enforcement of norms (pp. 237–38). "Law as a means and form of government action is a different animal—in purpose, use and function—from law governing everyday social life"(p. 238).

Tamanaha therefore seems to be making a distinction between "social order" on the one hand and other functions, which include providing infrastructure for market and governmental activity. But surely most of his examples are concerned with contributing and maintaining orderly relations? As articulated in this book the distinction is obscure.[37] What is significant is that Tamanaha restricts the concept of "social order" quite tightly. If this is a correct interpretation, his critique of the proposition that law maintains social order is correspondingly restricted.

Tamanaha's critique of the social order thesis is sustained and powerful. Perhaps its main conclusions can be summarized in the following propositions.

1. Law is only one of the sources of social order.[38]
2. Primacy for maintaining social order usually lies in the other sources of social order (p. 236).
3. It is a fallacy to assume or believe:[39]

   - That law is the only institution that contributes to ordering (pp. 137–38, 176–77, 211–23).
   - That ordering cannot occur without law (pp. 35–36, 145–46, 208ff).
   - That law in fact always promotes ordering (p. 240).
   - That the only functions of law relate to dispute processing or social control or social order in a narrow/restricted sense (pp. 36–37, 179, 237–40; cf. *RSLT*:109).
   - That law is generally effective (ch. 5).

sense (2) in the text, but he draws a not entirely clear distinction between social order and other functions of law. See also *RSLT*:109 n. 8 and 123 (quite close to social control).

[37] One possible basis for a distinction between "social order" and "ordering of relations between subjects" is that some functions may contribute significantly to group life, but some may merely promote orderly relations between individuals and other subjects/units, including relations with and between outsiders, and relations between groups in contexts in which these groups cannot be said to be part of a larger group or community.

[38] Others include the unarticulate substrate; shared norms and rules (not only legal); self-interested instrumental behavior; consent; and a catch-all category—love, altruism, sympathy, group-identification; social instinct; coercion and threat of coercion (not only legal sanctions) (pp. 213–21). I shall not attempt to analyze this preliminary typology here.

[39] These propositions arise largely from Tamanaha's extensive critique of Functionalism, which is spread throughout both *RSLT* and *GJLS* (see especially pp. 175–81 and the index).

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- That law is effective in the maintenance of social order by virtue of its reflective quality (ch. 5).
- That law never promotes conflict or disorder (p. 240; cf. *RSLT*:128).

4. *The natural social condition is one of order, permeated at various levels with regular episodes of conflict* (p. 223, original italics).
5. "The traditionally assumed relationship [between law and social order] gets things precisely upside down. It is state law that is dependent on these other sources of social order if it is to have a chance of exerting an influence" (p. 224).

These propositions provide a sharp contrast to the versions of "the social order thesis" that Tamanaha attacks. However, I shall argue later that none of these propositions is incompatible with a "thin" functionalist position.

Although Tamanaha claims that there is empirical support in existing studies for most of these propositions, his concern is not to advance an empirical theory, but rather to free social inquiry from presuppositions and beliefs embodied in the mirror and social order theses.

> The cumulative effect of this sustained argument should have been to open up a critical distance from the assumption that law is a mirror of society and the notion that the function of law is to maintain social order …. For a given social arena, the core initial questions posed will be: *(1) to what extent is (state, customary, international, religious, natural, indigenous, etc.) law a mirror of prevailing customs and morals? And (2) to what extent does (state, customary, international, religious, natural, indigenous, etc.) law contribute to the maintenance of social order?* (p. 231, original italics)

Constructing a Core Concept of Law

For Tamanaha, the challenge for legal theory is to accommodate traditional, religious, colonial, transnational, and Western legal phenomena within a single framework (p. xii).

If one wishes to construct a concept that encompasses a diversity of phenomena, it is usually necessary to relax or pare down the conditions for its use. The statement "X is true under conditions A, B, and C" will typically cover a narrower range of situations than "X is true under conditions A and B." Tamanaha recognizes that his "core concept" of law has to be quite thin and that there is a price to be paid for such abstraction (p. xvi). But he is also concerned to have criteria of identification that differentiate law from other social phenomena. Such dilemmas confront any jurist who is concerned with constructing conceptual frameworks that transcend languages, cultures, and traditions and that cover

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the whole globe. The main concepts also need to be freed, so far as is feasible, from identification with theoretical baggage that has local or narrow associations. Tamanaha sets about the task with a determined use of Occam's Razor.

Tamanaha's treatment of "society" illustrates his method. The term "society" has been so widely used for so many purposes that it is both ambiguous and vague. Yet it has acquired strong associations with the idea of a territorial area delimited by relatively precise boundaries that are often roughly co-extensive with those of a nation-state or country ("the state-society unit") (Albrow 1996). Recently, there has been a strong reaction against treating "societies" as discrete, impervious units that can be studied in isolation (e.g., Giddens 1990; Collier & Starr 1989). Because of such factors, Tamanaha concludes that "society" as a concept "is no longer serviceable as an analytical device" or as an orienting concept (p. 206).[40] Instead, he proposes and uses "social arena" as an orienting concept that can be used at many different levels in a flexible way.[41]

Tamanaha uses a similar method of abstraction for most of his key concepts. The biggest challenge is presented by the concept of law, a challenge that he feels is unavoidable (p. 133). Here he employs a rather different strategy, focusing in detail on a single work. He responds to the challenge by taking Hart's *The Concept of Law* as his starting point and subjecting it to a bold, but sympathetically critical, reassessment. The outcome is a radically thinned down and modified version of Hart.[42]

Tamanaha shares Hart's aim to develop a positivist descriptive theory about the form and structure of legal systems generally that is not immediately concerned with their evaluation or legitimation. However, he finds Hart's concept of law too narrow in its reach, too closely linked to the idea of the modern state, subject to some debilitating internal tensions,[43] and, like nearly all Western jurisprudence, quietly ethnocentric (pp. 150–51; cf. pp. 56–57).

[40] He rejects Sally Falk Moore's (1978) useful "semi-autonomous social field," Bourdieu's "field," and Elias's "figuration" as being weighed down by "baggage that limits what can be observed" (pp. 206–07).

[41] "The boundaries of the social arena in any given study can be drawn *in any way desired*, as determined by the purposes of the study, with only one condition: when moving from the first context to the next in the course of a single study (or follow up studies) care must be taken that the boundaries in each instance are drawn in precisely the same way" (p. 207).

[42] Tamanaha treats Hart's as the classic modern text that has survived "relatively unscathed" after 40 years of criticism and refinement and is only strongly repudiated by Ronald Dworkin and his followers. Yet it failed, in Tamanaha's view, to achieve a satisfactory descriptive general jurisprudence (p. 133).

[43] He follows Marmor (1998) in seeing a profound tension between Hart's conventionalism and his (alleged) functionalism (pp. 148–49, 189).

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Tamanaha summarizes the relationship of his theory to Hart's as follows.

> Socio-legal positivism remains true to Hart's conventionalism and his focus on social practices, but to a greater extent even than Hart did, because it discards the essentialist and functionalist aspects of his approach, which often came into conflict with his conventionalism. To Hart's account, it adds the conventional identification of legal actors qua legal actors. It retains Hart's abstraction of primary and secondary rules at the (most reductive) core of state legal systems. However, it eliminates from Hart's account the requirement that the primary rules must be generally obeyed by the populace, and it eliminates the requirement that the legal officials accept the secondary rules. It makes no presuppositions about the functional effects that law might have, if any. It makes no presuppositions about the normative aspects, if any, that law might possess. It re-characterizes Hart's account to be an abstraction of state law, not a concept of law as such. It is one among several types or kinds of law, and a multitude of specific manifestations of law. Other kinds of law, each of which can be conceptualized in more abstract terms based on their focal meanings need not necessarily involve institutions and they need not necessarily qualify as "systems". Finally, the elements discovered in the course of this abstraction are simply features—features that can change, features of which there may be variations within a given kind of law—not essentialist elements. This bare—some might say impoverished—view of legal phenomena is well suited to achieving the positivist goal of constructing a general jurisprudence." (p. 155)

This passage requires some elucidation. Tamanaha's interpretations and criticism of Hart's views will, no doubt, attract controversy. Here we are more concerned to clarify Tamanaha's own position and the claims he makes for his own theory. He purports to retain, but modify, Hart's conventionalism, but to reject entirely all functionalist and essentialist elements in his theory. The introduction of these three elusive "isms" at this point is not very helpful. There is controversy about whether Hart was a "functionalist,"[44] what is meant by "essentialism,"[45] and Tamanaha confusingly uses "conventionalism" to refer to two loosely related ideas that are best kept separate (see below). If we strip away these

[44] Hart denied being a functionalist (*CL*:248–49), but Tamanaha points out that the condition of efficacy implies that it has to be an effective mechanism of social control and is therefore functionalist (see note 43).

[45] If "essentialism" refers to conditions for the use of a concept, then the functional elements that Tamanaha pares away are also essentialist (see p. 150).

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abstract labels, the main divergences from Hart appear to be as follows.

1. Tamanaha retains as illuminating the idea of the union of primary and secondary rules, but confines it to state law and drops it as a necessary element in his core concept of law.[46]
2. Like Hart, Tamanaha rejects any necessary conceptual link between law and morality, but he also goes on to reject any such link between law and any social functions, such as social control, social order, or dispute processing. He boldly extends the separation thesis to read: "*There is no necessary connection between law of whatever manifestation or kind, and morality or functionality*" (p. 157, original italics).
3. Since the link between law and function has been severed, so has any requirement of effectiveness in performing any function (pp. 143–48).
4. Tamanaha rejects as essential or necessary any link between law and state, any idea of institutionalized norm enforcement (pp. 138–40), or claims to comprehensiveness, to supremacy, or to monopoly of power within a particular geographical territory or to exclusivity or openness.[47]
5. Tamanaha drops the ideas of normativity, of institution, and of "system" as necessary features of the core concept of law.
6. Tamanaha accepts the "social sources thesis" of Hart and Raz (pp. 159–61), but extends it beyond state law "to all manifestations and kinds of law" (p. 159). In other words, the source of law is recognition of social practices as law by those subject to them.
7. Tamanaha extends the rule of recognition beyond officials to include all social actors. But he retains "the internal point of view" as crucial. So his formulation becomes: *"Law is whatever people identify and treat through their social practices as 'law' (or 'droit,' 'recht' etc.)"* (pp. 166–71, 194, original italics).

Thus, law can be said to exist even if it has no functions, is ineffective, has no institutions or enforcement, involves no union of primary and secondary rules, and even if there is no normative element. This radical paring down of Hart's conception of law enables Tamanaha to include within a single conception of law, state law, customary law, religious law, international law, transnational law, religious law, and, perhaps surprisingly, natural law

[46] Tamanaha points out that since a union of primary and secondary rules can be found in the internal governance of some institutions, such as corporations and universities, this can hardly be a defining characteristic of "law" (p. 138).

[47] In paring away these "essentialist" elements, Tamanaha criticizes Raz (especially the views expressed in Raz (1979)) and Kelsen (1945) at some length (pp. 138–48). Most of these elements are connected to the idea of state law, but some religions claim to be comprehensive and supreme.

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(secular as well as religious).[48] "All of these manifestations and kinds of law are social products. The existence of each is a matter of social fact"(p. 159).

Some may be surprised to find natural law included in this list, perhaps because it is generally thought of as a body of ideas or doctrine rather than a social practice.[49] Furthermore, natural law tends to lack institutionalized enforcement, often has no institutional presence (p. 230), is not necessarily conceived of by its practitioners as belonging to a system,[50] and falls outside most jurists' definitions of law, "*despite the fact that the people involved see them as such*" (p. 193, italics added).[51] However, it can satisfy Tamanaha's own test:

> Natural law has a real social existence, consisting of a complex of ideas and a set of social practices comprised by people who believe in it and act upon its existence. Unlike state law, it usually does not amount to a concrete system. But it has a social existence and presence nonetheless, one which often interacts in various ways with state law. (p. 159)

Examples of natural law embodied in American social practice include the anti-abortion movement and Martin Luther King's campaign of civil disobedience, both of which have been carried out in the name of natural law. Natural law has also been embodied in parts of the U.S. Constitution, in the practice of philosophers and jurists, and in the daily practices of citizens. It has regularly been enlisted to bolster state legitimacy (pp. 158, 241) and many iniquitous actions have been committed in its name. "No particular

[48] Tamanaha emphasizes that his typology of seven categories of law by label is merely a rough list of the main types of phenomena that attract the label "law." The categories overlap, linguistic conventions may change, and some borderline examples (e.g., Mafia law and gypsy law) are not included in the list (p. 225; cf. p.227).

[49] "Again, it might be difficult to conceive of natural law in terms of the social sources thesis, especially with regard to those versions of natural law which claim to exist independently of human convention, or those which claim to be derived from God. The key is that while natural law principles themselves *might* be derived from a non-human source, as many adherents believe, natural law is manifested through human social practices. Natural law has a real social existence, consisting of a complex of ideas and a set of social practices comprised by people who believe in it and act upon its existence. Unlike state law, it usually does not amount to a concrete system" (p. 159, elaborated at pp. 159–62).

[50] "Likewise many kinds of norms, like most moral norms, do not exist in what would be called 'systems'" (p. 198).

[51] Tamanaha quotes Finnis's observation that principles of natural law "are traced out not only in moral philosophy or ethics and 'individual' conduct, but also in political philosophy and jurisprudence, in political action, adjudication, and the life of the citizen" (Finnis 1980:23). However, he criticizes Finnis for acceding to the idea that state law is the paradigm case and unnecessarily conceding that natural law "is only analogically law" (Finnis 1980:280; *GJLS*:151).

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version of natural law principles has a *necessary* connection with morality" (p. 158).[52]

The inclusion of natural law as one of the kinds and manifestations of law as a social practice neatly uses linguistic convention to tweak the tail of juristic convention. This links with a plea for a greater emphasis on the perspectives of social actors and it opens up a range of possible lines of sociolegal inquiry that have not received much attention. Natural law also exemplifies a type of law that often lacks some of the essentialist criteria that Tamanaha has excluded.

Except in one particular, relating to the internal governance of institutions,[53] Tamanaha's core concept of law embraces a wide range of phenomena that have been the labeled "law." Its attraction lies in suggesting a coherent path out of the Westphalian bind, in moving away from treating a modernist conception of state law as paradigmatic, and in suggesting a simple criterion for identification of law, separate from questions about function, legitimation, evaluation, generalization, and comparison. However, Tamanaha's position is likely to be challenged from a number of directions. In what follows I shall confine myself to three main questions: Is the labeling test workable? If not, is this core conception too broad? If so, is there a single better general post-Westphalian conception of law? I shall argue that the labeling test is inadequate, that there are some usable, slightly less thin alternatives, but that Tamanaha has convincingly shown why no general "core concept of law" can claim to be the best one.

Labeling

Tamanaha's lengthy account of the intellectual history and defects of mirror theories and their inadequacy to explain relations between law and social change leads to the conclusion that "there is a necessity to reconceptualise the very notions of 'law' and 'society'" (p. 133). As we have seen, he substitutes the flexible

[52] "*Natural Law*. Of all of the kinds of law set out herein, this is the most inchoate and diverse in its specific manifestations. Unlike the others (except indigenous law), it often has no institutional presence, though it may be supported and perpetuated by institutions (like academic philosophy departments and Church taught Sunday school). In many social arenas, natural law is believed and acted upon, and thus has a measurable influence, a social presence" (*GJLS*:230). Tamanaha suggests that natural law has its most powerful presence in two situations, viz. when there is a clash between natural law and other bodies of law leading to disobedience and when natural law principles are expressly incorporated into state law (ibid.).

[53] Tamanaha criticizes Galanter (1981) and others for including institutions such as hospitals, schools, and sports leagues in their conceptions of law (pp. 178, 183–84). In my view, he does not distinguish clearly enough between institutions and their systems of governance: a hospital or school needs such a system for ordering relations, but ordering relations is not the point of a hospital or school (see below).

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term "social arena" for "society" and leaves it to the sociolegal researcher to give precision to the term for the purposes of a particular inquiry. In short, "social arena" is a flexible *analytic concept* to be clarified and refined by the observer for her immediate purposes.

Many jurists and legal scholars have adopted a similar approach in relation to "law." In ordinary usage the word "law" has so many different meanings and is applied to such varied phenomena that attempts to construct a satisfactory general concept of law, even of state law, seem doomed to failure and to have very limited utility. One can orient one's field of inquiry and delimit its scope without resort to an abstract definition or conception of law. Or one can stipulate how law is being conceived for a particular purpose.

Apart from giving up on constructing a general concept of law, jurists have resorted to a number of other strategies. Some have shifted the focus of attention away from law onto some other concept, such as dispute processing or institutionalized norm enforcement. For example, Simon Roberts in his excellent *Order and Dispute* almost completely abandons the word "law" as an organizing concept, even though he continues to call himself a legal anthropologist.[54] A second option is to identify and analyze a paradigm case, but leave the boundaries vague or even completely undefined. Thus, Herbert Hart took Western municipal legal systems as the paradigm case of law, analyzed their form and structure, and acknowledged that there were a few close analogies, the most important being public international law (*CL*:ch. X). Tamanaha rejects this approach as being too narrowly focused for his purposes, which require the inclusion of various manifestations of "non-state law" (pp. 150–51).

A third approach is that of "family resemblances," following Wittgenstein's famous analysis of the word "game," which cannot be analyzed satisfactorily by specifying necessary and sufficient conditions for its use. But it can be elucidated in terms of activities that have overlapping characteristics linking them in ways members of a family may be linked.[55] Clearly, "law" in all its usages is a good deal more complex than "game," but if the

[54] Roberts (1979) discussed at pp. 203–04. Tamanaha's main objection is that this remains linked to a functionalist set of concepts.

[55] Wittgenstein (1922, 1953:para. 66, 1969:17). "Game," for Wittgenstein, was a term that "in ordinary usage cannot be adequately analyzed either in terms of core and penumbra or by stipulating a set of necessary and sufficient conditions for its use, or even in terms of a jointly sufficient set of conditions. Rather "game" seems to cover a range of interconnected activities which are all related to one another in that they all share some characteristics with some other activities, some of which are typically thought of as games and some not, but they do not share all of the same characteristics" (Twining & Miers 1999:194–95, 396–99; cf. Waldron 1994:517–20, usefully discussing "religion," which is relevant here to analyzing the concept of "religious law").

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analysis is conceived in terms of law as a species of social practice or social institution or normative order, it may be illuminating to build up a conception that accommodates nearly all or most of the phenomena that a sociolegal scholar might be concerned to include in a general theory without having to formulate a stipulative general definition or set of criteria of identification. Law conceived in such a fashion can serve as a flexible orienting concept, leaving open the possibility of drawing more precise boundaries for the purposes of a particular study. However, there is unlikely to be sufficient consensus about which conditions to select as criteria of identification outside a specific context.

These are some of the techniques available to a theorist or researcher in constructing a conception of law as an analytic concept.[56] Tamanaha rejects all of them in favor of a labeling approach: *"Law is whatever people identify and treat through their social practices as 'law' (or 'recht,' or 'droit' etc.)"* (pp. 166, 194).

This suggestion is counterintuitive and, in my view, unworkable. Tamanaha tries hard to anticipate some objections. First, purely idiosyncratic or arbitrary usages are out because what is identified has to constitute an actual social practice (pp. 166–67). So Humpty Dumpty is disqualified as an informant.[57]

Second: Whose usage is to count and how many?

> a minimum threshold to qualify is if *sufficient people with sufficient conviction consider something to be "law", and act pursuant to this belief, in ways that have an influence in the social arena*. This admittedly vague test is intended to set a low threshold for inclusion. (p. 167, original italics)

Far from being a low threshold this might prove to be a rather stringent condition, if, for example, the nature of the practice is contested, or the practice is not familiar to most members of the group, or is otherwise obscure. There may be no consensus among informants about the meaning(s) of the label(s) chosen by the investigator or about their application to particular phenomena. For example, in England, Quakers may differ among themselves as to whether the rules governing "business" at Meeting are "law" or about the appropriateness of labeling any aspects of Quaker governance in this way or, indeed, whether "Quaker law" has any referent at all.[58]

[56] There are, of course, other techniques, such as the use of metaphors and ideal types.

[57] "When *I* use a word", Humpty Dumpty said in a rather scornful tone, "it means what I choose it to mean, neither more nor less" (Carroll 1871:ch. 5).

[58] Anthony Bradney and Fiona Cownie, *Living Without Law* (2000). Despite the title, the authors maintain that Quaker law can be distinguished from Quaker custom, mainly in respect of the "business method" at meetings. I shall argue below that in this context the authors use "Quaker law" as an analytic rather than as a folk concept.

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Third, Tamanaha tries to anticipate problems of translation.

> Every nation in the world has state law, and the term "law" has already been translated in most languages in the world. Whatever translations there are for "law", including whatever indigenous terms are used to designate the existing state legal apparatus, will satisfy the requirements of the conventionalist approach. Thus, existing translations of the term "law" will have already done most the necessary work for the identification of "law" in non-English contexts (keeping in mind that disputes and borderline cases will remain, with the default rule being inclusion).[59]

This passage does not meet some quite obvious objections to the labeling test. To consider these, let us adopt the standpoint of a sociolegal researcher about to embark on a comparison of certain aspects of law in her own country (A) with law in country B. Let us assume that she has established that all seven of Tamanaha's kinds of law, including religious law, natural law, and international law, are recognized as being established as social practices in A. Her first step is to discover which of their social practices representative local informants treat as "law" in country B. But she may encounter a number of difficulties.[60]

First, for which of the multiple meanings of "law" in English usage is she to look for an equivalent? *The Oxford English Dictionary* lists 22 major entries under "law," each with variants. Seventeen of these refer to human law, the rest to "scientific and philosophical uses." The latter might be discarded even though the two sets of usages are connected. A few more can be eliminated as belonging to some local context, for example, when law is used in expressed or implied opposition to *The Gospel* (OED:10b). Some usages are differentiated by elements that Tamanaha dismisses as "essentialist," such as obedience (OED:3a) or enforcement (OED:3a) or a species of human institution (OED:3b), or emanating from an authoritative source (OED:1a) or obligatoriness (OED:3d).[61] There does not appear to be a single entry in *The Oxford English Dictionary* treatment of "law" that, on its own, can be selected as the sole candidate for translation into other languages.[62] Second, our

[59] P. 203; cf. pp. 168–70, where Tamanaha is rather dismissive of problems of translation.

[60] These are potential, rather than necessary, difficulties. But anyone doing this kind of comparative research needs to be aware of them and of the problems of surface similarities and differences, e.g., shared words describing quite different phenomena (e.g., ombudsman) and almost identical phenomena that are conceptualized quite differently.

[61] This is the criterion adopted by Bradney and Cownie (2000) for differentiating Quaker law and Quaker custom. In discussing the relationship between law and society, Tamanaha uses the term "positive law" (p. 4), but he makes it clear that this term is too narrow for his core concept. Indeed, it would be extending ordinary usage to treat natural law or many forms of religious laws manifested in social practice as being "posited."

[62] It is very doubtful that the multiguous English word "law" has clear and exact counterparts in other languages. Are the ambiguities and nuances all mirrored?

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researcher may find that in country B (1) there are several words roughly equivalent to the word "law" (e.g., droit, loi); (2) there are several meanings attached to one or more of such words; or (3) there is no word equivalent to "law."[63]

The more generalized senses of "law" in English usage do not make distinctions to be found in such obvious examples as ius/lex, droit/loi, recht/gesetzen—distinctions that may have different nuances in different contexts.[64] Tamanaha airily suggests that "droit" and "recht" are usable equivalents in French and German, but this seems arbitrary (e.g., pp. 166, 194).[65] Why privilege the words that have a distinct normative association in a strongly positivist legal theory?[66]

Suppose our researcher has cleared the hurdles of identifying representative informants and linguistic equivalents, but finds that in country B the supposed linguistic equivalent is applied to a strikingly narrower range of social practices than in country A. Suppose she asks her informants why they do not attach the label "law" to, for example, any Hindu social practices or to any local customs. Suppose the answer is: "Because they are not recognized by the state" or "Because the culture of our law schools is highly positivistic" or "Because the National Academy has decreed that the word 'law' should be confined to state law." Is our researcher then committed to comparing a broad range of A's social practices with the state law of B? It seems quite plausible to expect that the conventional patterns of local linguistic usage may be explained by arbitrary, random, or peculiar local contingencies that provide no adequate benchmarks of comparability. It is quite possible that in

Tamanaha's own examples, "droit," "recht," and "adat" (p. 226) are not exactly rendered by "law." Given the complexity of the underlying concepts, it is to be expected that the labels used to express them should be prone to vagueness, ambiguity, and shifting usages in other languages, but not in exactly parallel ways.

[63] Cf. Philip Gulliver's claim that the Arusha had no word for "justice" (Gulliver 1963:240–42).

[64] This is rather clearly illustrated by the awkwardness of translating *ius humanitatis* and *lex mercatoria* into English. There would be significant changes of meaning if the phrases were *lex humanitatis* and *ius mercatoria*, but such significance would be lost if they are rendered by such phrases as "humanitarian law" and "transnational mercantile law." No doubt this is one reason why, despite the Plain English movement, English jurists persist in using the Latin terms.

[65] "It is hard for the English-speaking jurist to conceive of one idea including 'law', 'a law', and 'a right', as it is for a French jurist to think of them as other than sides or phases of one idea" (Pound 1959:II 8n., citing an earlier article by himself).

[66] There is a further arbitrary element in focusing only on the word "law" in this context. In considering what social practices attract a label that is an appropriate focus of attention, analysis of some closely related English words may show up some suggestive distinctions. While "law" is radically ambiguous, there are some nuanced differentiations close by. For example, in some contexts distinctions may be made between illegal, unlawful, and lawless; between legality and legalism; between legalistic and lawyerlike. What difference, if any, is suggested by the titles between a School of Law and a Faculty of Laws? Such differentiations are glossed over by the vagueness of our blanket term "law," but are these differentiations exactly replicated in other languages and cultures?

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many social arenas linguistic usage will reflect a common perception or assumption that state law is the paradigm case of law or some other kind of functionalist or essentialist assumption that Tamanaha is trying to escape. If the reasons for established linguistic conventions are different in country A and country B, linguistic usage provides no basis for comparing or generalizing about legal phenomena in the two countries. It does not make sense to compare state law in B with a much wider variety of phenomena in A just because of the vagaries of usage. This is one of the standard pitfalls of comparative work.[67]

An example of the difficulties facing researchers is to be found in a recent study of the ordering of a Quaker community in central England (Bradney & Cownie 2000). This book is in the best tradition of legal anthropology and is directly relevant to contemporary debates about legal pluralism and alternative dispute resolution. The Quakers are particularly interesting in emphasizing and being good at dispute prevention, but they appear to be less adept at handling disputes when they arise. The authors argue strongly for the view that there is such a thing as "Quaker Law."

> Quaker law lies in the very fact of nature of the intimate interlinking of the community that is Meeting …. One objection to the analysis of "law" above is that it fails to distinguish Quaker law from Quaker custom. It might be said that there is nothing in the above that separates out and raises up Quaker law from the life of the community as a whole. It might be argued that we have identified no specific legal institutions; that we have not delineated either legal rules or even legal symbols; that we have ignored those actors in Quaker life which either in Quaker theory or in actual practice have disciplinary power such as Elders or weighty Friends; that we have shown what is at best a bureaucratic procedure. However, what makes the business method law, what separates it out from other aspects of Quaker life, is precisely its obligatory character. In a community where little is prescribed … the method is one of the few obligatory points." (Bradney & Cownie 2000:169–70)

Bradney and Cownie suggest that Quakers themselves consider only those few parts of *Quaker Faith and Practice* that are obligatory, required, or constituting "responsibilities" to be "law," the rest consisting of advice, general counsel, or suggestions.[68] This is not a

[67] "In my own teaching of comparative law I have felt that, like Bagehot's monarch, I had a duty to warn and a duty to encourage, a duty to teach students not to be lured by homonyms and not to be afraid of synonyms" (Kahn-Freund 1978:285).

[68] The authors maintain that Quaker law can be distinguished from Quaker custom, mainly in respect of the "business method" at meetings. The authors have confirmed that they did not ask their informants whether they used the term "Quaker law" (personal communication). So it is unclear whether their informants, if asked, would have addressed

semantic test of how Quakers use the label "law," but rather a way of elucidating a working distinction that is important for participants in Quaker meetings. The term "Quaker law" does not feature in *Quaker Faith and Practice*; it is used as an analytic concept by the researchers to relate their study to discussions in the sociolegal literature about legal pluralism and alternative dispute resolution.[69]

The problem that Tamanaha faces is reminiscent of the debate between Paul Bohannan and Max Gluckman about the use of "folk" and "analytic" concepts in legal anthropology.[70] Briefly, Bohannan accused Gluckman of imposing the English concept of "the reasonable man" on the Barotse, thereby wrongly trying to interpret Barotse law in terms of English "folk concepts." Gluckman's defenders were able to say that "the reasonable man" was not a translation of the English term, but rather illustrated the point that the Barotse had flexible standards that were functional equivalents of the English standard. "Flexible standards" and "functional equivalents" are analytic terms.[71] Most of Tamanaha's framework consists of analytic concepts and the switch to relying on folk labels for "law" seems unworkable. Careful analysis of local linguistic conventions relating to social practices may be useful in bringing out significant local distinctions and associations in the thought and discourse of local actors, and in achieving accurate and nuanced interpretation of their internal points of view. It may bring to light internal differences or disagreements that may not be apparent on the surface. However, comparison and generalization about social practices and institutions need both a grasp of internal meanings and a vocabulary and a conceptual framework that

this issue, or whether they had thought about it, or, if they had, whether they thought it a matter of any significance. It seems unlikely that doubt about the term "Quaker law" on the part of informants would have made any difference to the authors' adoption of it for analytic purposes.

[69] Entries in *Quaker Faith and Practice* (1995) refer to state law or to international law or moral law, but not "Quaker law." In a faith that leaves so much to individual conscience it is understandable that the amount of obligatory or formal prescription is quite limited. The authors are both academic lawyers. It is probably of no great significance that they decided to use "Quaker law" as an analytic concept.

[70] The debate in legal anthropology is usefully summarized in Nader (1969:Introduction, Part IV). This reflected a protracted debate about "emics" and "etics" in social anthropology (see Headland, Pike, & Harris 1990).

[71] In criticism of Bohannan (1957) it was pointed out that comparison between legal systems would be impossible if scholars had to rely solely on "folk concepts." Hoebel was one of those who resolved the issue by insisting that "folk" concepts and "analytic" concepts are both necessary for comparative law. Hoebel also acknowledged that in *The Cheyenne Way* (1941) he and Llewellyn may have missed some nuances of meaning in Cheyenne law-ways by paying too little attention to their linguistic usages and folk concepts, but this did not mean that they ignored the internal point of view (communication to the author).

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transcend local cultures. They cannot be based on linguistic conventions alone.[72]

By going down the "emic route," Tamanaha may be making things unnecessarily difficult for the researcher who has first to inquire into subtleties and vagaries of local linguistic usage, the origins or reasons of such usages, and the extent to which they are embedded in social practice. Such inquiries may be illuminating and one way into understanding local practices and institutions, but they are not the only way and may not always be fruitful. Furthermore, as we have seen, the contingencies of local linguistic usage may arbitrarily limit the focus of inquiry.

One suspects that Tamanaha may have been misled by his conflation of two distinct meanings of "conventionalism": this has become a much debated label in contemporary jurisprudence and Tamanaha uses it in two distinct senses. First, associated with the movement known as "linguistic analysis" or "ordinary language philosophy," a "conventionalist" is someone who analyzes ordinary usage to identify which phenomena are included under a term (at least by most educated people) (*CL*:2–4; *GJLS*:150). Second, a "conventionalist" in jurisprudence is someone who seeks to identify law on the basis of social conventions or practices.[73]

It is true that Herbert Hart was part of a movement in analytical philosophy that used analysis of "ordinary language" to elucidate concepts and to dissolve philosophical puzzlements. But Hart's aim in *The Concept of Law* was to elucidate law as an analytic concept in terms of other analytic concepts, such as rule of recognition, sovereignty, sanction, primary and secondary rules—terms of art that do not feature much or at all in the everyday discourse of educated people; some of them were coined by Hart himself. Analyzing ordinary usage was only a starting point of Hart's method. Hart is widely identified as a "conventionalist" in

[72] The distinction between "folk" and "analytic" concepts has problems that are shared with the distinction between "emics" and "etics." These are not entirely resolved by Geertz's more flexible concepts, "experience near" and "experience far" (Geertz 1983:57–58). Tamanaha discusses these distinctions in terms of "first level" (the concepts of the people being studied) and "second level" (the concepts of the social scientists doing the study) categories (pp. 195–97). He treats the second-level concepts as parasitic on the first-level ones, but that is more likely to be true of first-level concepts of the observer's own culture. I am not convinced that the distinctions folk/analytic, emic/etic, or experience far/experience near are adequate in some contexts, but this is not relevant here, where the main point is that "folk" or "first-level" concepts cannot do the job that Tamanaha wants them to do.

[73] Dworkin treats Hart's position as "conventionalist" in this sense because the rule of recognition is based on social conventions that identify the sources of law (Dworkin 1986:ch. 4, and pp. 114–17). These social conventions represent the community's acceptance of a scheme grounding the criteria of valid law. There is a link between these two senses of "conventionalism" in that linguistic usage may be viewed as a species of social convention or practice, but this is different from the kinds of social practices that are the main subject of sociolegal research. See Dworkin's distinction between semantic and interpretive theories (1986:115–16).

jurisprudence for the quite different reason that he locates the rule of recognition in social practice or convention.[74] Here the label "conventionalism" refers to his conclusions rather than to his method of analysis. The concept of social practice is an analytic concept; to interpret a given social practice involves taking into account the internal point of view of actors, in addition to externally observable phenomena such as behavior or discourse. But the concept is the observer's not the subject's.

One value of analytic concepts is that they can be applied to peoples and cultures that do not have such concepts or do not think in such terms. It is commonplace that the speakers of a language are often unable to articulate and may not be aware of the basic structure and rules of grammar underlying the language; that a social institution or practice may be interpreted and explained partly or even largely in terms of its latent functions, of which all or most participants are unaware; and that local beliefs, myths, and so forth can sometimes be interpreted as substitutes for scientific knowledge about diseases, for example, that certain myths are designed to explain symptoms that Western medicine would attribute to a recently identified virus.[75] It is now widely accepted that both analytic and folk concepts are important in interpreting and explaining social practices and cultures as well as physical phenomena. Constructing an analytic concept of law does not involve abandoning the hermeneutic principle of taking account of internal points of view.[76]

Social Practices, Institutions, and Norms: Is Tamanaha's Concept Too Thin?

Tamanaha treats norms, the existence of a group, institutions, enforcement, acceptance by officials, claims to supremacy, claims to comprehensiveness, the union of primary and secondary rules, and the idea of a system as contingent features of examples of law, but not as necessary features of his core concept of law. For example, one may talk about Islamic law or natural law existing as a social practice in a particular place, even if there are not any institutions for their application and enforcement.[77] The state legal system of

[74] This interpretation of Hart is contested. See the useful discussion in Marmor (2001:ch.1).

[75] Analytic concepts apply to both social and natural phenomena, e.g., latent function, population growth, and gross domestic product are analytic concepts that are not dependent or parasitic on folk concepts.

[76] For an excellent discussion of the problems of the internal/external distinction see *RSLT*, ch. 6.

[77] Islamic law is also "institutionalized" transnationally in respect of literature, juristic traditions, recognized figures (e.g., muftis, ayatollahs) etc., yet may exist and be observed as a social practice in a place where there is no mosque or Islamic school or *imam*.

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Yap, on Tamanaha's account, made little contribution to social order or the everyday life of ordinary people. European Community law does not claim to be comprehensive; and member states appear to have given up their claims to supremacy and comprehensiveness. Natural law may exist as a social practice without institutions or enforcement or even as part of a "system." A preliterate people or group may have social practices that are undifferentiated from general custom or religious belief, but they may be viewed as having law if they label some of their social practices in such terms. All these examples fall within Tamanaha's conception of "law" in so far as the social actors involved recognize or label their social practices as such.

If the labeling test does not work, is there an alternative? There are three main possibilities: to reinstate one or more elements that Tamanaha would dismiss as "essentialist"; or to fall back on a thin version of functionalism that might be defended against Tamanaha's criticisms of Functionalism; or to accept that Tamanaha's reasons for thinning down Hart's concept are cogent, but that they amount to a *reductio ad absurdum* of any attempt to construct a satisfactory core concept of law for positivist sociolegal studies, given that the labeling test is also unsatisfactory.

Before considering whether Tamanaha has pared away too much, it is worth emphasizing that his use of Occam's Razor is radical, consistent, and potentially elegant. The result is a very thin set of criteria for identifying law, but by no means a radically impoverished view of the landscape of law. The greater the inclusiveness, the more diverse and more complex the panorama. It is also worth repeating that Tamanaha does not suggest that concepts such as group, norms, rules,[78] institution, dispute, sanction, authority, system, and enforcement are unimportant or useless. They are not deleted from the vocabulary of sociolegal theory. Indeed, each of them may be characteristic elements of many, perhaps most, maybe nearly all examples of legal phenomena. Tamanaha undertakes functional analysis (while trying to avoid the pitfalls of traditional Functionalism) (pp. 60, 137) and he uses all of these concepts when discussing particular manifestations of law. He is even willing to accept "dispute processing," "institutionalized norm enforcement," and "normative orders" or "rule systems" (e.g., pp. 185, 198, 204) as useful categorizations for orienting or limiting or focusing particular lines of inquiry,

[78] "Norm" in this context is used as a synonym for "rule" in the generic sense of general prescriptions of which precepts, guidelines, principles, standards, regulations, maxims, conventions, etc. are species. When rules are contrasted with standards or with principles, the term "rule" is being used more narrowly in a sense close to "categorical precepts." See Twining and Miers (1999:123–27). In this context "normative" is used in the positivist, e.g., Kelsenian, sense that includes, but is much wider than, moral or ethical or evaluative.

provided that they are kept conceptually distinct from his more abstract core conception of law.

Some jurists who sympathize with the enterprise of moving beyond the Westphalian duo of municipal/nation state and public international law and who are prepared to accept Tamanaha's positivist premises may nevertheless think that he has pared away too much. This applies particularly to the exclusion of normativity and of the idea of "institution," both of which are often treated as essential elements in the idea of law. I shall suggest that this is not as radical as it may seem because both normativity and institution can be incorporated by slightly modifying Tamanaha's concept of social practice.

Nearly all mainstream jurists, both positivist and antipositivist, emphasize the normative nature of law. The idea of law as a system of rules, or of norms, or of rules and principles, is explicitly at the core of the theories of Kelsen, Hart, Raz, Dworkin, Finnis, and many other jurists, and most sociologists of law and legal anthropologists. Attacks on such ideas as "talk of rules is a myth" or "the radical indeterminacy of rules" have consistently been shown to be caricatures of the jurists associated with such views.[79] Although few jurists can be found who ever supported strong behaviorism[80] or "a brute fact" conception of law, criticism of such positions by Hart and others are widely accepted as well taken (*GLT*:ch. 5). So a move to exclude any idea of normativity from a "core concept" of law is likely to be viewed with suspicion. Is this a revival of a discredited set of ideas?

Tamanaha excludes any requirement of normativity as an essential element in his core concept of law (pp. 154–55, 210–11). In so far as acceptance by officials or other subjects implies a degree of normative approval, "Hart's [strong] acceptance requirement must be dropped" (p. 154). It follows from this that a wicked or repressive or rapacious legal regime, which is obeyed solely out fear or corrupt self-interest or force of habit still counts as a legal system if people subject to it identify and treat it as law in their social practices (pp. 152–54).

Tamanaha not only pares away any possible moral element in Hart's idea of "acceptance," but he also excludes the idea of the normative from the concept of "social practice" (pp. 154–55,

[79] For example, on Llewellyn as "rule-skeptic" see Twining (1973:32, 148–51, 488–96; Leiter 2001); on "radical indeterminacy" see *RSLT* (index under indeterminacy).

[80] Donald Black is a possible exception. In *RSLT*, ch. 3 Tamanaha seeks to reconcile "behaviorism" and "interpretivism" (the social scientist needs to pay attention both to external behavior and internal meanings) and in the course of this he subjects the behaviorist approach of Donald Black to a pungent, but not unsympathetic, critique (see n. 32).

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210–11).[81] Traditionally in sociology and jurisprudence, distinctions have been drawn between empirically observable behavioral patterns, such as habits, folkways, and usages, on the one hand, and social norms, such as mores, conventions, or rules that involve some standard or measure of rightness or correctness or approval or permittedness from an internal point of view.[82] Concepts like custom or convention or good practice that combine the factual and normative elements are usually treated as normative because they involve the use of terms such as "ought," "may," and "can."[83]

Where does "social practice" fit into this scheme? Tamanaha seemingly places it in the empirical category, but nevertheless retains the internal point of view.[84] Elucidation of the concept of "social practice" involves combining externally observed patterns of behavior with the internal meanings that the practice has for the social actors involved.[85] These meanings may have a normative aspect, and many manifestations of law are infused with normativity, but that is not necessarily so. The idea of an internal point of view is necessary for making sense of a practice, but it is as important for understanding nonnormative meanings as for normative ones (e.g., Kemper 2001; Bourdieu 1990).

This empirical interpretation of "practice" does not commit Tamanaha to a "brute fact" view of law of the kind that Hart attacked.[86] For to say that normativity is not an essential aspect of law involves no denial of the fact that the idea of norms is pervasive, important, and usually central to interpreting, analyzing, and describing almost all legal phenomena. If it proves to be the case that in practice social actors often/usually/almost always attach the word "law" to practices that have a normative element, that is a contingent fact, not a conceptual necessity. "The gunman writ large" is included under "law"; how typical or common such regimes are in fact is a matter of empirical inquiry.

Under this broad concept of social practice one can perhaps subsume some chestnuts of legal anthropology: for example (1) the

[81] Situations where law claims normative authority, but social actors do not accept this, or where social actors believe that de facto power grants authority (p. 66) are on the borderline of normative/nonnormative concepts of social practice. I prefer to treat authority as a normative concept.

[82] See, for example, Hart's classic differentiation of "habit" and "rule" (*CL*:9–11, 54–59).

[83] Of course, from a positivist perspective norms do not necessarily signify approval; it is not paradoxical to talk of cruel or silly or outdated customs.

[84] The concept of "social practice" is discussed at length in *RST* at pp. 147–49 and ch. 6 and in *GJLS* at pp. 162–66.

[85] In a passage at p. 164, Tamanaha seems to suggest that "norms" are a necessary element in his concept of "social practice" and he goes on to cite passages from Alisdair MacIntyre (1984) and Stanley Fish (1989) that overtly associate "authority," "standards," and "appropriate" with reference to the idea.

[86] See note 21.

practices of a group that does not articulate or think in terms of rules (but they may not use "law" as a label either); or (2) a social arena in which the outcomes of dispute processes rarely, if ever, conform to the articulated norms of the group; or (3) where competing sets of norms co-exist and are regularly invoked by disputants ("normative ambiguity").[87] All of these are included if they satisfy the labeling test. Conversely, Tamanaha can quite consistently agree with the view that for understanding legal phenomena the "study of rules alone is never/rarely enough" and he can join in the criticism of those who treat rules as being self-enacting, self-interpreting, self-applying, or self-enforcing.[88] In short, he is consistent in treating rules as very important, but neither essential nor sufficient for conceptualizing law.

However, there may be an ambiguity here that requires clarification. "Normative" can mean evaluative or it can, more broadly, mean related to rules (in the sense used here). Tamanaha clearly wishes to exclude evaluation as an element in his idea of "social practice." If "acceptance" implies some idea of approval or authority or sense of obligation, then it is not a necessary element in his concept of social practice.[89] A pattern of social behavior may be recognized to exist and to have some meaning as a social practice by actors who may disapprove of it, resent it, and only observe it out of fear or unthinking habit or perceived self-interest. It is less clear whether or not he also wishes to exclude rules altogether as well. Chess, communication through language, dueling, and confidence tricks can all be said to be constituted by or at least to involve rules, without any necessary suggestion of approval or willing acceptance. However, if one interprets normativity (like patterning) as a relative matter and if one treats some folkways as social practices, it is arguable that one can talk of a nonnormative social practice. But this point does not seem important for Tamanaha's analysis. Much closer to ordinary and juristic usage is to treat the idea of "practice" as combining an empirical behavioral element with some idea of standard or prescription. In this usage, a social practice exists if there is a pattern of behavior that is meaningful for participants who recognize that it prescribes some norm or standard of correctness or appropriateness or value, even though they may not approve of that standard. A social practice in this sense implies social

[87] These examples are taken from Llewellyn, Hoebel, Gulliver, and others and are discussed in Twining (2002d:Tilburg Lecture I). See also Twining and Miers (1999:14–29, 278–79).

[88] Such ideas may be rarely made explicit by theorists, but they are quite common as assumptions in discourses that treat rules as things in themselves and in law making, for instance in discussions of legal reform that overlook problems of implementation.

[89] At pp. 168–69 he puzzlingly talks of authority in nonnormative terms, suggesting that he is using "normative" to imply evaluation.

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expectation, or obligatoriness, or reason for acting. The advantage of this move is that it does not make an unnecessary, seemingly radical, break with juristic orthodoxy.

Tamanaha treats law as a species of social practice, but he explicitly rejects the idea that his core concept of law necessarily involves "institutions" (pp. 164, 221; *RSLT*:142–52, 168–73). Here again, a very slight adjustment of the idea of "institution" can avoid some unnecessary controversy. Following Mead and Blumer, Tamanaha uses this term to refer to "Coordinated complexes of human interaction, often supported by a material base (office buildings etc.)" (p. 164, citing Blumer 1969:58). For him, the idea of institution is narrower than social practice: chess is a practice, a chess club is an in institution; adjudication is a practice, a court is an institution.[90] Legal institutions may be a species of social institution, but not all examples of law are necessarily institutionalized in this sense. For example, one can talk about Islamic law or natural law existing as a social practice in a particular place, even if there are not any institutions for their application and enforcement.[91]

In ordinary usage, "institution" has many nuances of meaning.[92] The term is significant here because many jurists treat law as a species of social institution and because of the close link between the concept of institution and both norms and functions. It is also important because it provides a potential, somewhat underexploited, link with two important fields in social science, organization theory and the new institutionalism.[93]

In the present context, Tamanaha appears to adopt a quite narrow interactionist conception of institution, not very much broader than "organization." His usage needs to be differentiated from two broader ones. First, many theorists interpret institutions in terms of norms. In this view, social behavior becomes "institutiona-

[90] Tamanaha does not appear to draw any clear distinction between institutions and organizations and uses "institution" quite narrowly. W. Richard Scott criticizes early institutionalists up to the mid-20th century for paying too little attention to organizations as distinct institutional forms: "On re-examination we observe such conflation of the concepts of institutions and organizations in the writing of Veblen and Commons, Burgess and Willoughby, Durkheim, Cooley and Hughes. Perhaps Weber may be regarded as an exception to the generalization because, in much of his work, he was attentive to the effects of broader institutional forces in shaping and supporting differing administrative systems" (Scott 1995:14).

[91] See note 52.

[92] The term is often used to denote organizations; sometimes it is equated with rules. (e.g., Voss 2001). It can be confined to organizations or arrangements that have an existence on the ground, such as a school, or hospital, or a club (which does not necessarily have premises). It can refer more broadly to norms, processes, or bodies of ideas that have been instituted, that is, established with some degree of stability, including such legal institutions as trusts, corporations, and contracts.

[93] On organization theory see Scott (2001) and Suchman (2001) (and in respect of law, the writings of Philip Selznick (Selznick 1992; Krygier 1994)); on the new institutionalism, see North (1990), and in relation to law, see Powell and DiMaggio (1991).

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lized" when it becomes *established* into a stable and significant pattern. For instance, a repeated pattern of behavior becomes established as a convention or custom when the social actors involved accept it as meaningful and that meaning relates to some idea of expectation, obligatoriness, or reason for acting. Similarly a social norm becomes institutionalized when it becomes part of an established pattern of behavior. Again this approximates more closely to ordinary juristic usage without significantly altering Tamanaha's position.

To sum up, Tamanaha's exclusion of the ideas of both norm and institution from his concept of law involves a narrow use of "institution" and a rigid separation of normativity and practice. A slight adjustment of the idea of "social practice" can link it to two concepts that are central to legal theory without compromising a strong positivist position. This adjustment might slightly narrow the range of application of the suggested core conception of law, but does nothing to resolve the problem of differentiating between "legal" and "nonlegal" practices, institutions, or norms. There is, however, a different usage of "institution" that might provide the basis for an alternative to the labeling test. This will be considered in the next section.

Alternatives to Labeling

If we need a core concept of law at all, it will be more useful if it is an analytic concept. But, can such an analytic concept be constructed if all functional and essential elements have been pared away?[94] If law is a species of social practice, as Tamanaha suggests, what might be other ways of differentiating it from other social practices such as table manners, the rules of table tennis, gang bangs, or the internal governance of multinational corporations or sports leagues?

Let us consider four possible options. First, narrow Tamanaha's core concept by reintroducing one or more essentialist criteria. Second, use some version of the method of family resemblances. Third, reintroduce an element of what I shall call "thin functionalism." Fourth, treat Tamanaha's effort as a *reductio ad absurdum* of all attempts to construct a general core concept of law that is sufficiently broad to encompass all important phenomena that attract the label "law" from those subject to them.

A Narrower Conception

Tamanaha's method was to list seven broad species of social practices that satisfy his labeling test and then to argue that they

[94] If by "essentialist" and "functionalist" criteria of identification Tamanaha means necessary conditions for the use of a concept, then this question is tautologous.

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share no necessary features that differentiate them from other species on the list. In the course of his argument he convincingly illustrates the difficulty of finding a basis for differentiating "nonstate law" from other social institutions, rules, and practices. One could shorten the list, for instance by dropping natural law,[95] but there would still be unresolved problems of making clear differentiations without giving up the notion of "nonstate law," as is illustrated by debates within legal pluralism. For example, not all custom and religious law is recognized on its own terms by one or more states.[96] In a particular context, there may be good reasons for limiting the focus to one or more types of legal phenomena from Tamanaha's list. Indeed, there are often good reasons for limiting a particular inquiry to municipal law, but such considerations do not bear on the problem of constructing a general conception of law for the world as whole.

Wittgenstein's Family Resemblances

One possibility is to use the "family resemblances" approach, and introduce as relevant, but not necessary, some of the elements that Tamanaha has eliminated as nonessential, such as effectiveness, sanctions, and the distinction between primary and secondary rules. In the context of a specific project this has real promise, but I shall not pursue it here, as it would invite a rerun of the arguments about which such elements would be sufficiently relevant to be considered significant.[97] It is unlikely that any agreement would be nearer about which elements would be strong criteria for inclusion in a general core concept of law. By contrast, Tamanaha's thin solution has the merit of simplicity.

Thin Functionalism

Another option is to admit a minimalist functional requirement. We have noted that Tamanaha's criticism of F/functionalist criteria is mainly directed at claims that law functions in the sense of having consequences or effects. But "function" can also mean

[95] Another candidate might be examples of transnational law that could not be reabsorbed into slightly broadened versions of state law or public international law. Much regional and human rights law might be treated in this way; the price is that the sui generis nature, e.g., of EU law or certain kinds of "soft" transnational and international law, may be obscured.

[96] For example, in the Sudan what the Dinka consider to be their own law is much broader than "Dinka law" recognized by the official (northern-dominated) legal system or even by the Sudan People's Liberation Army (Kuol 1997). Similar considerations apply to the meaning and scope of "Islamic law" and "customary law."

[97] See n. 55 above. Tamanaha appears to treat law as a species of social practice in much the same way as one can treat Wittgenstein's game as a species of activity. He does not explore the "family resemblances" option, but it is unlikely that his conclusion would be different.

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purpose, aim, or point. The objections to attributing "purpose" and "intention" to all social practices have been noted and need to be borne in mind. But "point" is broader, for it can include the idea that a practice is valued or justified, whatever its historical origins, as in Dworkin's famous example of courtesy.[98]

Now, the idea of institution is sometimes linked to the idea of response to, orientation toward, or even differentiation or specialization in relation to a perceived need or problem.[99] For example, Karl Llewellyn, following Walton Hamilton, treats an institution as behavior organized in response to one or more perceived group needs or "jobs."[100] He uses this to provide a flexible criterion of identity for "law-government." Law-government is the main, but not the only, institution oriented toward the special jobs of dispute prevention, dispute settlement, adjustment of behavior and expectations to change, allocation of authority, and laying down procedures for authoritative decision. "Law-government" is not the only institution that contributes to the law jobs and the law jobs are not the only jobs of law-government. But what is special about law is its special or specialized *orientation* to these particular group needs. In this approach, normativity and differentiation or specialization are generally treated as relative matters—folkways grow into mores, conventions emerge, practices become more or less differentiated over time. There are no sharp lines to be drawn between habit, practice, custom, convention, and usage in relation to degrees of patterning, normativity, and special orientation.

In this context, it makes sense to identify relatively specialized institutions by their "point": the point of a hospital is to combat disease; the point of a school is education. Similarly, some jurists suggest that the point of legal institutions is dispute processing, or group survival and flourishing, or any combination of the "functions" that they attribute to law. In this usage, the idea of "point" is *part of the concept* of a hospital or a school or legal institutions.[101]

At first sight this suggestion seems opposed to Tamanaha's positivism and his objections to functionalism. But this is not

[98] Dworkin (1986:46–49) illustrates the idea of an "interpretive attitude," as part of which there is an assumption that "the practice of courtesy does not simply exist but has value, that it serves some interest or purpose or enforces some principle—in short that it has some point—that can be stated independently of just describing the rules that make up the practice" (1986:47).

[99] Institution is defined in *Webster's International Dictionary* as "Something that is instituted—a significant and persistent element in a practice, a relationship, an organization, in the life of a culture that centers on a fundamental human need, activity or value, occupies an enduring cardinal position within a society." On rules as responses to perceived problems, see Twining and Miers (1999:ch. 2).

[100] For detailed accounts see Twining (1973:175–84; *GLT*:75–82).

[101] See note 26.

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necessarily so. First, "point" need not refer to a moral purpose or value. In Dworkin's example, the point of the practice of doffing one's hat as an example of courtesy is based on the moral principle of respect for persons. But to elucidate a social practice or institution in terms of its point is to explain it in terms of the reasons why the relevant actors promote or participate in it. These may be motives, purposes, or values that have little or nothing to do with morality or social utility. Consider for example, such varied practices as professional football, tax planning, money laundering, holidays, mountaineering, or advertising. There is no good reason why a legal positivist should not interpret social practices and institutions in terms of their point.

"Point" in this context is about motive, purpose, or expectation rather than actual consequences.[102] On this interpretation, a thin functionalist (small f) is not committed to any of the fallacies about law that gave Functionalism a bad name, such as that law is the only institution that contributes to ordering; that social order cannot occur without law; that law in fact always promotes social order and does not stimulate or sustain conflict; that the only functions of law relate to social control; or any of the other propositions that Tamanaha has criticized in terms of the alleged consequences or effects of law.[103]

A thin functionalist general concept of law might be developed along the following lines. *Law is a species of social practice concerned with the ordering of relations between subjects at various levels of relations and of ordering*.[104] If "concerned with" refers to function in the aspirational rather than the impact sense, this at least takes most of the wind out of the sails of the critics of functionalism. If "ordering" is interpreted to be wider than social control and social order to include constitutive, facilitative, facultative, symbolic, benefit-conferring, and educative functions, this allows for the possibility that a given example of law is not necessarily concerned with any particular function, such as dispute processing or authoritative regulation, but still invites attention as "law."[105]

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[102] See note 26.

[103] See pages 217–18 above.

[104] This suggestion is elaborated in a forthcoming paper, which argues that on a charitable interpretation, Karl Llewellyn's "law jobs" theory can fit "thin functionalism," but that it needs to be refined and developed especially in regard to its key concepts. On my interpretation this is useful as heuristic theory that suggests an illuminating set of questions to ask about the ordering of relations and institutional arrangements in any human group, while making minimal empirical assumptions. However, this does not give it the status of an overarching general theory of law.

[105] Tamanaha gives three examples of functions performed by modern law that fit this model: "*Law as the formal infrastructure underlying the market and transactions*" (p. 232), "*state law serving to construct the infrastructure of the government bureaucracy … a way of doing things*" (p. 238), and "*law as a form of instrumental action*, which is distinctly different in operation from law as the enforcement of norms. … Law as the means and form of government

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The reinsertion of the ideas of rule, institution, and point into a possible core concept of law may well be moves that are unacceptable to Tamanaha. These are thin essentialist elements that only slightly alter the range of phenomena covered by his core concept. Although these represent moves which reestablish some links with mainstream theory that Tamanaha has severed, I would not claim that this is the best or the only defensible core concept of law and I remain quite skeptical of the value of constructing such a concept in the abstract. Indeed, I shall argue in the next section that Tamanaha's main contribution has been to show why any such general core concept is neither feasible nor useful.

A *Reductio ad Absurdum* of the Quest for a General Core Concept?

To eliminate all "essentialist" features from the criteria of identification of a concept means that there are no necessary conditions for its use. Similarly, separating a concept from any idea of function has the same implication. In short, both essentialist and functionalist ideas are eliminated as necessary conditions for a core concept of law in Tamanaha's critique of Hart.[106] The labeling test prescribes a necessary and sufficient criterion for differentiating law from other species of social practice, but I have argued that this may often not be workable and is unlikely to provide a satisfactory basis for comparison or generalization because of the vagaries and contingencies of local linguistic usage. Some may wish to include ideas of normativity and institutionalization as necessary aspects of their conception of a social practice, but as we have seen, neither norms nor institutions provide a basis for differentiating legal from other social practices. If Tamanaha's arguments about the essentialist and functionalist features are correct, and if my criticism of the labeling test is also valid, then we are left with no general criteria of identification of a useful core concept of law.[107] If this is so, the effect of Tamanaha's analysis is not to construct such a concept, but rather to give some cogent reasons for showing why it does not seem to be feasible to produce one that can be useful as a general orienting or organizing concept, let alone provide a basis for making valid comparisons and generalizations.

At first sight this may seem to confirm the view that the whole enterprise is just a trivial pursuit. "It just doesn't matter," says Patrick Glenn, writing about "chthonic" (i.e., traditional) law

action is a different animal—in purpose, use and function—from law governing everyday social life" (p. 238). One might also say that the state legal system in Yap, as described by Tamanaha, exists, but has very little to do with maintaining social order.

[106] On difficulties associated with "essences" and "necessary conditions" in respect of social phenomena, see Bix (1995), discussed *GJLS* at pp. 147–48.

[107] This assumes that the "family resemblances" and "thin functionalist" strategies may be useful in some contexts, but not in general.

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(Glenn 2000:65). I have some sympathy with this attitude when the concern is merely semantic. However, many respected scholars consider the enterprise to be important either as an end in itself or as providing a useful master framework for legal theory. One can respect this concern without sharing it. A different view is that the enterprise, though potentially worthwhile, is impossible and that we are at least wiser for knowing why this is so. Our discipline is just too diverse to permit the reduction of perspectives and phenomena to a single overarching theory or framework of concepts.

It does not follow that Tamanaha's efforts have been a waste of time, for he has provided a wealth of provocative arguments and ideas that challenge our existing stock of theories. Furthermore, he has, perhaps inadvertently, made a cogent case for abandoning the quest for a single, usable worldwide conception of law and for focusing attention on a whole group of concepts at a slightly lower level of abstraction, including functionalist ideas such as dispute processing, norm enforcement, and various kinds of regulation. In respect of the candidates that were eliminated as necessary conditions he has at least indicated some of the considerations that bear on their suitability as organizing or working concepts at a lower level of abstraction for specific inquiries.

An additional reason for refusing to specify general criteria for differentiating law from other social practices is that we are dealing with phenomena that involve continuous variation along several axes: institutionalization, normativity, and effectiveness/efficacy are all matters of degree. "Bright-line" criteria tend to be artificially sharp and hence arbitrary in gray areas. If one postpones such determinations until one has identified a clear context and purpose of an inquiry, that context and purpose can provide more specific criteria for less arbitrary inclusion and exclusion.[108]

There is another respect in which Tamanaha's contribution is useful. If one wishes to look at law from a global perspective or set a particular study in a global context, it can be helpful to have a total picture of all the main phenomena involved. With some refinement, Tamanaha's rough typology of seven kinds of law could provide categories for such a mapping exercise. By juxtaposing state law, transnational law, religious law, and other categories, Tamanaha has broadly indicated some neglected and potentially significant lines of inquiry (and hypotheses) for both comparative law and sociolegal studies. The overall picture is more inclusive,

[108] For example, if my purpose is to draw for my students a reasonably comprehensive map or picture of all the main kinds of legal order—a map of law in the world—I might justifiably decide that Islamic law and Hindu law are too important to leave out, but that it is not necessary to include smaller or less familiar religious movements or sects, especially given the practical difficulties of mapping them. On mapping law and its limitations, see *GLT*, ch. 6.

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but it is not significantly different from attempts, especially in comparative law, to present panoramic overviews of the great legal traditions of the world or "*les grands systémes de droit contemporains*" (e.g., Glenn 2000; David 1992; David & Brierley 1985).

Most comparative lawyers, perhaps wisely, have in this context ducked questions about criteria of identification of law or whether the traditions or systems listed are all species of the same genus. The taxonomic debates about such issues are notoriously unsatisfactory (*GLT*:178–84; cf. pp. 150–52; Twining 2000b; Huxley 2002) Tamanaha's effort is more sophisticated conceptually, but the effect of his thinning down exercise is to provide no criteria for inclusion on the list of types of law. So, almost by his own admission, his list is hardly less arbitrary than, for instance, those of Patrick Glenn or René David. Such grand panoramas have their uses, but the organizing concepts cannot bear much conceptual weight. It would, for example, probably be illuminating to have one or more geographically and juristically sophisticated atlas of world law. But it would be difficult to assess its value or validity without a clear idea of its purposes. Furthermore, modern cartography emphasizes the role that ideology has played in map making. It is unlikely that such an atlas would plausibly claim that it would be directly useful to particular sociolegal research.

Some Themes in Need of Development

Introduction

Reviving general jurisprudence is so vast an undertaking that it has to be a collective enterprise. Although *A General Jurisprudence of Law and Society* is the third work in what is essentially a trilogy, it ends with some modest disclaimers. The focus of the book is analytical, concentrating on elucidating a small group of abstract concepts that might provide a general framework for a positivist realistic sociolegal theory. Many jurists, myself included, will want to include normative jurisprudence within their conception of general jurisprudence; some may wish to privilege it. In a brief two pages on "Abstaining from the legitimation enterprise," Tamanaha reemphasizes the importance of trying to keep description distinct from legitimation and evaluation and makes two provocative comments to the effect that "the legitimation enterprise should be abandoned" and "that the question of rightness is always a particular one" (pp. 240–41). These assertions seem to be unnecessary for his purposes and may provoke criticism that could obscure the positive aspects of his contribution. Questions about universalism in ethics and about normative generalization are as central to general jurisprudence as problems about the adequacy of our conceptual apparatus to compare and to generalize across the

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boundaries of legal orders, legal cultures, and traditions (*GLT*:ch. 9; *GJB*:ch. 10). One may acknowledge some past biases in legal theorizing without removing questions about legitimacy from the agenda of normative jurisprudence.

Rather than getting drawn into some overworked debates, I shall pass over these provocative assertions and just make some brief constructive remarks about some themes that deserve further development.

Globalization, Universalism, and General Jurisprudence

Tamanaha treats "globalization" as challenging "law-society paradigms," especially in respect to assumptions about national autonomy in law making and in weakening the idea of "society" as a self-contained bounded unit (pp. 128–30). He sensibly resists the temptation to move directly to some idea of "international civil society" as a useful analytical concept (p. 130). But he is not totally immune from globalizing rhetoric.

A general social theory of law needs to make nuanced differentiations between legal phenomena in respect to both space and time. Tamanaha is sensitive to the problem, but in this book he is perhaps vulnerable to the criticism that he sometimes moves too sharply from the level of the nation-state (the state society unit) to the world as a whole (*GJLS*:120–30). "G-words," such as "global," "globalization," and "globalizing," are notoriously overused and abused, often in ways that are misleading, exaggerated, superficial, or ethnocentric (Twining 2001:14–16). In the context of developing usable concepts for dealing with or discussing or studying law in extensive frameworks of space and time, the most important point is that "g-words" are often used in misleading ways that overlook intermediate levels of relations and normative ordering between the world as a whole (or even outer space) and the national or local. There is a need to differentiate between genuinely global, regional, international, transnational, national, subnational, and various grades of "local,"[109] and the enormous range of networks, coalitions, alliances, diasporas, and groupings that are an increasingly prominent feature of the contemporary world.

This is only a rough schema of geographical levels, but it is sufficient to serve as a reminder of some basic points. First, a few

[109] On the flexibility of "local," see *GLT*, pp. 245–46. Paul Street, among others, has pointed out that thinking in terms of different levels of geophysical relations is only a first step (Sassen 1999). For example, one need also to think in terms of hierarchies of power, geographies of injustice (Baxi 2002), and transnational relations involving almost instantaneous communication (e.g., in financial dealings, where the actors are located in a shared operational context even though they are geographically dispersed). I agree that extending the analysis of levels of relations beyond the geophysical is important, but I am reluctant to extend the meaning of heavily used words like "local" to "nonphysical spaces."

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phenomena and issues are genuinely "global" in a precise sense; and it is sometimes useful to adopt a global perspective or to set some more limited inquiry in a global context. But "g-words" are often used to refer to much more limited spaces, which in turn need to be differentiated from each other, especially in regard to law.

Second, these different levels do not represent a series of concentric, expanding circles neatly ordered in some simple hierarchy: they overlap, intersect, interpenetrate, and meet in endlessly complex, often fluid ways. That is one reason why the idea of pluralism is now so important in legal theory (*GLT*:82–88, 224–33).

Third, one needs to distinguish between the ideas of levels of relations and levels of ordering. A single transnational transaction may be governed by legal regimes that exist at one or more levels, for example, a single commercial transaction that involves *lex mercatoria*, trade usages, English, Chinese, EC, and public international law. Conversely, a geographically extensive regime such as the Torture Convention or EC law, may have direct effect on highly localized relations. The principle of "subsidiarity" in the European Union is concerned with problems of setting appropriate levels of decision making and ordering in respect to a huge variety of different relations and transactions, many of which may not be of mainly local significance. There is not a one-to-one relationship between levels of relations and levels of ordering.

A related but different point is the equation of "general jurisprudence" with universal jurisprudence (e.g., Preface, p. 230). Tamanaha's aspiration to be comprehensive is both understandable and admirable.

> The ability to gather information on *all* kinds of social arenas, on *all* state legal systems as well as on other kinds of law, is precisely what qualifies this proposal as general jurisprudence." (p. 233)

Similar considerations apply to the term "general jurisprudence" as to the overuse of "global." "General" in this context has at least four different meanings: (1) abstract, as in "*Théorie générale du droit*," which refers to levels of abstraction rather than geographical spread (Van Hoecke 1985); (2) universal, at all times in all places; (3) widespread, geographically or over time; and (4) more than one, up to infinity.

While Bentham and some 19th-century jurists equated "general" with "universal" (2), Austin and others explicitly limited their theories to "mature" or "advanced" societies (3). So by implication do Hart and his followers by treating modern state law as the paradigm case of law. The geographical reach of much contemporary juristic discourse is strikingly indeterminate (*GLT*:ch. 2).

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"General" in senses (3) and (4) is a flexible, relative category in a way that "global" and "universal" are not (*GJB*:338–41).

Nineteenth-century proponents of general jurisprudence, influenced by scientific models of inquiry (e.g., Darwinism) and by universalism in ethics (e.g., both utilitarianism and natural law), tended to *assume* the universality of their theories. Today, however, claims to universality and generality need to be treated as problematic. A central issue of a revived general jurisprudence should be: How far is it meaningful, feasible, and desirable to generalize—conceptually, normatively, empirically, legally—across legal traditions and cultures? To what extent are legal phenomena context- and culture-specific? In treating generalization as problematic, usage (4) may be the most useful because of its flexibility. "General jurisprudence" here refers to theorizing (at different levels of abstraction) about two or more legal traditions, cultures, or even jurisdictions.[110]

Tamanaha wants to be genuinely universal in respect to time and place in ways that many jurists do not. But he is not a universalist in ethics, neither is he a strong cultural relativist. He is well aware of the variety and complexity of different forms and manifestations of legal phenomena. He has a social scientist's concern to generalize, but he is well aware of the difficulties. It would be quite consistent with his overall position to move from the idea of universal jurisprudence (sense (2)) to a more modest and more flexible use of "general" in sense (3) or even sense (4).

Actors, Users, and Subjects

It has sometimes been pointed out that most legal discourse adopts "top-down" perspectives and that legal scholars and theorists have generally followed suit, ignoring or downplaying the viewpoints of those subject to the law (*GLT*:ch. 5). At various points in the book Tamanaha adverts to this theme, but does not push it very far. For example, he says: "The mirror thesis and the social order function of law privilege the societal standpoint in orientation and approach" (p. 239).

The instrumentalist tradition saw law mainly as means to achieve social purposes (ch. 2; cf. p. 240). On their own, such perspectives are one-sided and unrealistic. Legal anthropology has made moves in the direction of taking user perspectives seriously (e.g., Nader 1984), but "to make the final step, theories about law and society must create an integral place for understanding and

[110] Theorizing about the common law or Islamic law (both rather vague terms) belongs to general jurisprudence in this sense if the subject involves legal phenomena in several jurisdictions; but in practice, much general talk about common law focuses mainly on England, or "the Anglo-American systems," or is quite indeterminate about its geographical reach (Twining 2002b).

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incorporating the strategic approach of individuals (lay and legal actors) toward law (of every kind) … Understood in these terms there would be nothing sacred about law (of every kind)" (p. 240).

Toward the end of the book Tamanaha suggests that "perhaps the biggest change in theories relating to law that must take place" (p. 239) is a switch to the perspective of those who resort to law as actors, users or subjects.

> The vast bulk of people who resort to the law (of whatever kind) have no interest or concern about social order in the context of their use …. From the lay standpoint, (state) law is often seen in terms of a resource of power; from a lawyer standpoint (state) law is seen as an arena of business, and the rules are approached in purely instrumental terms (as a barrier or tool) relative to their strategic goals. The disjunction between the theoretical view, which focuses obsessively on social order, and the intentions and motivations of people when they resort to or participate in law, could not be greater. Resort to law, and the way law operates, often creates and perpetuates conflict." (pp. 239–40; cf. p. 50)

This theme is consistent with Tamanaha's strong positivism and his sympathy with interactionist perspectives (*GJLS*:216–19; *RST*:142–52). It is a welcome move, but it can be developed much further. For one thing, there is a need for conceptual clarification. Terms such as "user," "actor," and "participant" may be too narrow in this context as they do not encompass the whole range of "bottom-up" and "outsider" perspectives with which realistic sociolegal studies should be concerned. Not all of those who "resort to law" are individuals. Other legal subjects, such as corporations and groups with full or partial legal personality, may resort to or manipulate law as well. Not all legal subjects who interact with law do so "strategically." Furthermore, not all those who interact with law are "actors" or "users" or even "participants."[111] In this context, the formal category of "legal subjects" or "legal persons" (right-and-duty bearing entities) is broader and hence potentially more useful: persons accused of crime, victims of accidents or discrimination, infants, illegal immigrants, and Holmes's Bad Man may be legal subjects who are affected by law without resorting to it.

Questions about the distribution and structuring of power suggest the need for further differentiations: there is, for example, a significant difference in the situation of those with power and opportunity to design or reform or significantly change a legal order and for those who have to take the existing legal order as a given and operate or exist inside it. Within a legal order some users

[111] In *RST* (pp. 153–95), Tamanaha usefully explores the difficulties surrounding the distinction between internal and external points of view. On the distinction between participants and observers, see *GLT*, pp. 132–33.

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may have power to manage, to exploit, to manipulate, avoid, or evade the existing order for their own ends; for others law is a manifestation of other people's power that confronts them; and, of course, there are many gradations in between (*GLT*:ch. 5).

Further differentiations need to be made between those who make use of a system for their own ends in ways that are in tune with its purposes, spirit, or point, for example, by making wills or forming companies or using religious or customary norms as a guide, and those who "play the system" in ways that are contrary to its spirit, such as tax advisors exploiting "loopholes," money launderers setting up complicated financing regimes, or political actors invoking religion or tradition for their own secular ends.

Once again, differentiation of standpoint appears as a key tool of juristic analysis. It is not possible to explore this theme further here, but one can agree with Tamanaha that more attention needs to be given in legal theory to the viewpoints of users, actors, and other legal subjects.

Normative and Legal Pluralism

If one's concept of law extends beyond municipal law to include "nonstate law," one is almost inevitably led to taking legal pluralism seriously. For this move opens the door to recognition of the possibility of more than one legal order co-existing in the same context of space and time. As the discipline of law and legal relations and practices become more cosmopolitan, the importance of the phenomena of legal pluralism is further increased.

The concept of "legal pluralism" has a complex and controversial history.[112] Neither the concept nor the various phenomena to which it has been applied are new. During the modern colonial and immediately post-colonial periods the attention of legal scholars was drawn to "mixed legal systems," which recognized, to a greater or lesser extent, as official sources of law bodies of personal, religious, and customary law belonging to different groups. This "state legal pluralism" is still an important phenomenon, but the concept of legal pluralism was extended and became more significant when sociologists of law and legal anthropologists took the step of recognizing various forms of nonstate ordering as "law." Unfortunately, for much of the twentieth century, discussions of this broader "new legal pluralism" became bogged down in obsessive and largely unproductive

[112] On state legal pluralism, see Hooker (1985); on earlier periods, see Berman (1983); on recent theoretical debates, see *The Journal of Legal Pluralism*, especially Woodman (1998) and Griffiths (2002). See also, *GLT*, pp. 82–88, 224–33.

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debates about the definition of "law." It is not necessary here to comment on these debates, except to suggest that they have distracted attention from a host of other significant issues. This is an increasingly important area in which theory has so far provided very little help to detailed research.[113] There is still a need to break out of the definitional bind.

In several of his writings Tamanaha has been highly critical of "the new pluralism," which in various forms (e.g., Griffiths, Galanter, Santos, Teubner) has emphasized the co-existence of multiple legal orders in the same time-space context. He recognizes them as a diverse group, but they all seek to establish criteria of identification of law as a single phenomenon, rather than as a variety of phenomena that have attracted a shared label. Because of this alleged mistake, they end up with solutions that are either too broad or too narrow. For example, identifying law in terms such as dispute processing or social order commits the theorist to including within the concept of law all functional equivalents that contribute to order, such as language, custom, education, or reciprocity (p. 178). On other hand, those who treat "institutionalized norm enforcement" as the criterion have to concede that some societies do not have law, and yet include organizations such as universities and hospitals that do have this feature (pp. 173–74, 178).

> Legal pluralists' inability to sharply distinguish legal from non-legal is a result of the fact that both categories suffer, in different ways, from this problem. The first category cannot distinguish law from the other functional equivalents that contribute to social order, like language, customs, moral norms, and etiquette. The second category cannot distinguish those forms of institutionalized norm enforcement which are "legal" (like state law) from forms of instititutionalized norm enforcement like sports leagues." (p. 180)

I shall not enter here into the details of Tamanaha's critique of "the folly" of leading theorists of pluralism (Tamanaha 1993b; *GJLS*:ch. 7). Suffice to say that he has identified some reasons why the literature of legal pluralism seems mushy and unsatisfactory. Although it has produced some excellent specific studies, it continues to struggle with the problem of constructing an adequate theoretical framework.

[113] Tamanaha sums up his view of the current situation as follows: "Without agreement on fundamental concepts that allow for the careful delineation of social phenomena, there can be no cumulative observation and data gathering. Moreover, current versions of legal pluralism, especially in their conflation of normative systems and legal systems, flatten and join together distinct phenomena, resulting in less refined categories, leading to less information, and a reduction in the ability to engage in careful analysis. Consequently the use value of the concept is open to serious question" (pp. 174–75).

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However, Tamanaha's solution is no more satisfactory. Quite consistently he pares away all essentialist elements and uses his labeling test.

> A state of "legal pluralism," then, exists whenever more than one kind of "law" is recognized through the social practices of a group in a given social arena, which is a relatively common situation … Thus the plurality I refer to involves different phenomena going by the label "law", whereas legal pluralism as typically conceived involves a multiplicity of one basic phenomenon, "law" (as defined). (p. 194)

The trouble is that the labeling test does not work. Even if it did, one would need to be conscious of the possibility that where members of a group were aware of potential conflict or competition between co-existing normative orders some might seek to privilege one of the contenders by giving it the honorific "law" and in such cases pluralism would not be found to be as common as Tamanaha suggests. Indeed, the very existence of pluralism depends on standpoint: an English judge presented with an issue involving a potential clash between English and Islamic principles may not even perceive or acknowledge that there is a conflict, let alone accept that Islamic law is valid "law" in this context, whereas a devout Muslim may believe that Islamic law trumps English law. All the objections to the labeling test apply in this context.

Given the importance of the phenomena of normative and legal pluralism, it is important that we should try to move beyond this definitional trap. Given that consensus about a general definition or a core concept of law is unlikely, the best hope is to start with a given context and objectives and stipulate how the key terms are being used. My approach has been to focus on the phenomena of normative pluralism as a social fact, to treat legal pluralism as a species of normative pluralism, but to leave open the criteria for differentiating between "legal" and other "normative orders" for determination in a given context of inquiry (*GLT*:224–33). This involves talking in terms of norms and orders (nonessential elements for Tamanaha) and making the context and purposes of the inquiry supply criteria for distinguishing "legal" from other normative orders.

This approach has some advantages. First, human beings live, work, and love in a context of normative pluralism. We all experience the phenomenon every day of our lives. So it is not unfamiliar, even if it can be theoretically puzzling (*GLT*:231–33). Remembering this can help to demystify the idea of legal pluralism, which lawyers brought up with a vision of law as a state monopoly find puzzling. Second, one can draw on the vast and varied heritage of theorizing about norms to help to address specific problems of legal pluralism. There is a need for a closer integration

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of jurisprudence and general normative theory in respect of pluralism.

Moving beyond problems of defining the "legal" and linking normative and legal pluralism are only first steps. Another move would be to stop referring to those who acknowledge the existence of normative and legal pluralism as "pluralists," because few can deny that normative pluralism is a social fact, even if it is difficult to conceptualize. Beyond that there is a daunting agenda of issues that cannot be pursued here. For example, the concept of normative orders raises many of the issues that have surrounded the concept of a legal system: criteria of identification, ontology, individuation, validity, legitimacy, effectiveness, and so on. What counts as a normative "system" or "order"? Can norms exist outside a system or order or set?[114] If normative orders are permeable and fluid, how is it possible to talk of relations between them?[115] To what extent is acknowledgment of a situation of pluralism a question of standpoint? To what extent do debates about form and formalism apply to nonlegal normative orders? And, of course, there is a wide range of questions about power (e.g., Griffiths 1997). And so on. These are puzzling questions deserving more attention. Many of them may be more directly relevant to particular research projects than problems of differentiating the legal and the nonlegal.[116]

Tamanaha uses his discussion of pluralism to make some important points about functionalism and essentialism and the magnetic force of the idea of state law as a paradigm case. He also provides an illuminating account of at least some of the reasons why the theoretical literature on pluralism is so unsatisfactory. But like other contributors to the topic, he has allowed concern with problems of differentiating legal from other social phenomena—whether norms, practices, or orders—to distract attention from other theoretical questions that are badly in need of attention.[117]

[114] Tamanaha suggests that "certain kinds of law (such as natural law and versions of customary law) often do not amount to rule systems but still qualify as 'law'" (p. 198). But important questions arise about the possibility of individuated norms or rules having an independent, solitary existence.

[115] One of Santos's useful contributions is to introduce the notion of "interlegality" and to emphasize that relations between co-existing legal orders do not necessarily involve conflict or competition (see further *GLT*:229–31).

[116] In particular studies it may often be unimportant whether some of the phenomena under consideration count as "law." For example, if a researcher sets out to compare and contrast the internal governance of a multinational corporation, a drug cartel, and a small island state, it may be of little or no significance whether one, two, or three of these satisfy the criteria of identification of law. It is often possible and illuminating to compare legal and nonlegal phenomena, provided that there is an adequate basis for comparison. Little turns on the identification of "Quaker law" in Bradney and Cownie's comparision of Quaker dispute handling with other forms of "alternative dispute resolution."

[117] Tamanaha's treatment of Santos on pluralism is an example of the way definitional issues can divert attention from more important matters. Santos makes some important

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Conclusion

A General Jurisprudence of Law and Society is an important book. In addition to being a rich source of particular insights, fresh interpretations, and provocative criticisms, it makes a number of significant contributions to the development of a broad-based positivist theory of law in response to the challenges of so-called globalization.

1. Tamanaha's first objective is to free sociolegal studies from the legacy of three pervasive assumptions: that law mirrors society; that law in fact contributes to social order; and that a primary function of legal theory is to legitimate the exercise of state power. Even those who disagree with some of his specific interpretations and arguments may be forced to acknowledge that by turning these assumptions into questions he has freed sociolegal theory and jurisprudence to investigate, describe, explain, compare, and critically evaluate legal phenomena, both generally and in particular contexts, without taking any of these ideas for granted.
2. Tamanaha has contributed to the development of post-Westphalian theorizing about law by bringing together a wide variety of forms and manifestations of law under one conceptual roof. These include both municipal/state law, state-related forms of law (e.g., public international law and European Union law), and several kinds of "nonstate law." All of these can be important elements in a reasonably comprehensive vision of law from a global perspective.
3. The key step, and the most problematic, is to move beyond treating modern municipal law as the only or the paradigm case of "law." In approaching this problem, Tamanaha builds on and significantly extends the work of Herbert Hart, especially *The Concept of Law*, in three main ways. First, by paring down Hart's criteria of identification of law, he is able to include a broader and more varied range of phenomena within the framework of his general core concept of law. Second, Hart failed to bridge the gap between analytical jurisprudence and sociolegal studies. By applying the techniques and insights of the former to important concepts of the latter, Tamanaha shows that, far from being in constant tension, these two approaches are complementary and need each other. Third, he proposes some significant, if controversial, refinements of Hart's ideas while remaining true to the spirit of legal positivism.

contributions to the theory of pluralism (not least in respect of "intelegality"), but Tamanaha focuses his critique on Santos's adoption of Hoebel's much-debated general definition of law (see Twining 1985:177–79).

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4. In seeking to construct a broad "core concept of law," Tamanaha advances powerful arguments for the elimination of all "essentialist" and "functionalist" elements as necessary elements in the criteria of identification of law. It is arguable that he has pared away too much by adopting a vague interpretation of social practice and interpreting "function" to mean consequences or effects. However, even if one reinstates the concepts of norm, institution, and purpose or point into the concept of social practice, these do not provide adequate criteria for differentiating between "legal" and "other" (or "nonlegal") social practices. Having rejected all necessary elements from his "core concept" and having ignored a "family resemblances" approach, Tamanaha is left with the proposition that "law" is whatever those subject to it attach the label "law"to. In my view, this "labeling test" fails, largely because it attempts to use "emic" or "folk" concepts for the "etic" or "analytic" purposes of constructing a "core concept" that can be the starting point for comparison of and generalization about legal phenomena across legal cultures and traditions. However, it is an illuminating failure in that it illustrates rather clearly why many jurists, including this reviewer, think that the construction of such a general core concept is not feasible.
5. Tamanaha makes some ambitious claims for his enterprise. His approach points the way to constructing general conceptions of law identified by features that are relevant to and appropriate for particular sociolegal purposes and projects. Bringing into focus a very wide range of diverse phenomena as part of one "whole view" can assist in the process of spotting patterns and relationships across contexts and observing large-scale and small-scale developments (p. xiv). Tamanaha also poses some general questions about relations between law and society (pp. 231–33), and at the end of the book suggests some potentially fruitful hypotheses (pp. 233–36) and some new directions for research (pp. 236–40). These are useful at a strategic level, but they may be too abstract to be of immediate application to specific problems of particularistic empirical research and comparison. In this respect Tamanaha provides a general orientation without having the heuristic value of a theory, such as Llewellyn's law jobs theory, that suggests some sharp, specific questions to ask about any institution or group.
6. Although *A General Jurisprudence of Law and Society* is his third book in what is essentially a trilogy, it is cautiously presented as a prolegomenon (pp. xix, 242). Given the ambition of the enterprise, this caution may be sensible. Perhaps because his focus is so much on the idea of a core concept of law, Tamanaha does not attempt a systematic analysis of concepts relating to features that he considers to be contingent. If instead of

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focusing mainly on the elusive "core concept" of law, he had systematically constructed a framework of analytical concepts, including key ones relating to important contingent features of legal phenomena, his contribution would be even more significant. Taken together, his three books contain illuminating discussions of a number of such concepts (e.g., social order, custom, ideology, and coercion), but I, for one, would have welcomed a more extensive analysis of many other concepts, including function, group, dispute, norms, normative orders, system, institutionalization, and legal subjects, some of which are touched on in this essay. Analytical jurisprudence needs to move beyond focusing on individual concepts to concentrate on groups of concepts, conceptual frames, and specific discourses (Twining 2002d: Tilburg Lecture II).

7. *A General Jurisprudence of Law and Society*, read in conjunction with its two predecessors, provides a wealth of specific insights and provocative suggestions. As our discipline becomes more cosmopolitan, many issues concerning problems of comparison and generalization about legal phenomena now claim a high priority on the agenda of legal theory. Apart from "globalization," these include difficult issues relating to normative and legal pluralism; the relative importance of nation-states and other actors, users, and victims in law; normative questions about universalism and various kinds of relativism; and, as a crucial preliminary, critical examination of the adequacy of our conceptual tools for analyzing and discussing these issues. Brian Tamanaha has made a major contribution to this enterprise.

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