

A NEW HISTORICAL JURISPRUDENCE?

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INTRODUCTION

In his provocative new book, *A Realistic Theory of Law*,¹ Brian Tamanaha offers a variety of insightful analyses and conclusions that may shake up analytical jurisprudence for years to come. In the course of a relatively short and highly accessible work, Tamanaha challenges conceptual theories of law and conventional understandings of international law, clarifies important aspects of legal pluralism, and provides a novel, genealogical approach to thinking about the nature of law. It would take a whole other book (and likely a much longer one) to give due consideration to all of these topics, so the focus of this commentary must necessarily be much narrower. In this article, I focus on Tamanaha's argument for a greater appreciation of historical jurisprudence, and his advocacy for a variation of it, his presentation of this alternative as a necessary supplement to the current widely-accepted understandings of law.

To look at these topics, we need to follow Tamanaha's book by first considering what the original historical jurisprudence offered and what a revived version might add to contemporary debates. Part I offers a brief overview of historical jurisprudence. Part II explores Tamanaha's views of, and claims for, a revived historical jurisprudence. Part III looks at some problems in evaluating historical jurisprudence. Finally, Part IV considers what it means for history to inform legal theory, before concluding.

I. THE HISTORICAL JURISPRUDENCE TRADITION AND LAW

Tamanaha reminds us that historical jurisprudence was, for a significant period of time, one of the two or three most prominent approaches to law (at least among European and English-language theorists), alongside legal positivism, and perhaps natural law theory.² The figure most closely associated with historical jurisprudence is Friedrich Karl von Savigny.³ Through his theoretical work, and his work reforming and administering the

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1. BRIAN Z. TAMANAHA, *A REALISTIC THEORY OF LAW* (2017).

2. *Id.* at 12–14.

3. Spellings of his first two names vary in English texts and translations, which sometimes Anglicize or Americanize the names to "Frederick" and "Carl" or even "Charles."

German university system, Savigny apparently became, in his time, as renowned as Goethe.⁴

Savigny became prominent in the struggle opposing codification of the law in Germany, and his arguments were later used in the United States to oppose codification here. As Tamanaha nicely summarizes, Savigny argued that law arises from the “spirit” of a people (*Volksgeist*),⁵ and, for that reason, it is a serious error to impose a legal code from another country on a community.⁶ For Savigny, law should develop incrementally, expressing the natural development of customs and (what we today would call) social norms. He viewed it as instructive that for ancient Roman Law, “[s]o long as the law was in active progression, no code was discovered to be necessary, not even at the time when circumstances were most favourable for it.”⁷

Savigny’s historical jurisprudence sits uneasily between description and prescription. A country’s rules both do *and* should reflect that society’s particular character or “spirit.” Under this analysis, it is equally unwise and inappropriate to impose another community’s rules on a country, or to replace a country’s customary rules with a sterile code imposed from above.⁸ Followers of Savigny, like followers of Karl Marx and Friedrich Engels, face a problem in their prescriptions. If law or society inevitably reflects some underlying spirit (or, in the case of Marx/Engels, the level of development or the current stage of production), then it seems at best futile and at worst absurd to advocate for or against change (for worker’s rights or against codification), for whatever is determined will happen, and whatever the law is, by theory, will reflect the spirit or the social circumstances of the people. There would seem to be little left to do—either by reformers, revolutionaries, or the forces of reaction. Such is the nature of determinism (or pre-destination, for that matter). The laws—reflecting the consciousness of the people or the economic conditions—can only be exactly what they are.

It is only if there is some chance that bad interlopers could push us from the path our spirit and culture creates that we would have need to intervene.

4. Hermann Kantorowicz, *Savigny and the Historical School*, 53 L.Q. REV. 326, 326–29 (1937).

5. See FREDERICK CHARLES VON SAVIGNY, OF THE VOCATION OF OUR AGE FOR LEGISLATION AND JURISPRUDENCE (Abraham Hayward trans., photo. reprint 2010) (1831).

6. See *id.*; TAMANAHA, *supra* note 1, at 17–18.

7. SAVIGNY, *supra* note 5, at 50.

8. Few seem to comment on the irony that Savigny’s paradigm for the law in Germany was not the rules and customs of the German barbarian tribes, but rather the rules of ancient Rome. Savigny does in fact note this possible objection, commenting: “As the religion of nations is not peculiarly their own, and their literature as little free from the most powerful external influence,—upon the same principle, their having also a foreign and general system of law, does not appear unnatural.” *Id.* at 54.

However, if law reformers persuade officials to enact a civil code – based on the French Code or ancient Roman Law or some other source—perhaps that is what the current spirit of the people requires. Yet there always remains the argument for a kind of purism: to bring us back to the true spirit of the people (as others have argued for going back to the Early Church, or the true Constitution).⁹

There is an even more basic problem with Savigny’s position. Tamanaha is right to be critical of Savigny’s approach—at least to treat it as missing an important part of the truth. As Tamanaha points out, one can as often explain historically (causally) the content of a country’s law by reference to the exploitation of the masses by an elite or a conquering country as by the immemorial customs of the *Volk*.¹⁰ Over the centuries there has been at least as much “top down” lawmaking—imposition on the masses—as “bottom up” emanation from the spirit of a people.

Another well-known figure in historical jurisprudence was Sir Henry Maine. Maine emphasized the study of other societies and legal systems,¹¹ both ancient and modern; and he (like theorists such as Vico,¹² Hegel,¹³ and Marx¹⁴) asserted, or at least assumed, that there were set patterns of historical change that all societies went through.¹⁵ His famous comment about the progress “from Status to Contract”¹⁶ was part of one such claim (though, strangely, “[i]n later works, Maine left this phrase unamended and never sought to elaborate the most famous of his insights).”¹⁷

Historical jurisprudence, at its most ambitious, offered a grand vision, in which society, history, and law were connected in a way which explained the developments of communities and communities’ laws over time, as part of a larger historical or sociological story. Tamanaha speculates that

9. As to the last, see, e.g., RANDY E. BARNETT, *RESTORING THE LOST CONSTITUTION: THE PRESUMPTION OF LIBERTY* (rev. ed. 2014).

10. TAMANAHA, *supra* note 1, at 93–105.

11. See RICHARD A. COSGROVE, *SCHOLARS OF THE LAW: ENGLISH JURISPRUDENCE FROM BLACKSTONE TO HART* 126–31 (1996) (on Maine’s emphasis on the comparative method).

12. See GIAMBATTISTA VICO, *NEW SCIENCE* (David Marsh trans., Penguin Classics 1999) (1744); see also ISAIAH BERLIN, *THREE CRITICS OF THE ENLIGHTENMENT: VICO, HAMANN, HERDER* 21–167 (Henry Hardy ed., 1st ed. 2000).

13. From an outsider’s perspective, it would seem natural to group (the theories of) Hegel and Savigny, but apparently the two theorists were not on good terms. See Kantorowicz, *supra* note 4, at 333 (describing Savigny and Hegel as “intimate enem[ies]”).

14. See generally G.A. COHEN, *KARL MARX’S THEORY OF HISTORY* (1979).

15. HENRY SUMNER MAINE, *ANCIENT LAW* (10th ed. 1912).

16. *Id.* at 174, quoted (as part of larger quotation) in TAMANAHA, *supra* note 1, at 18–19.

17. COSGROVE, *supra* note 11, at 126.

historical jurisprudence (at least under that name) “faded from the jurisprudential scene”¹⁸ due to a variety of factors: “No systematic theory was articulated by its founders” and later theorists in the tradition¹⁹ “failed to organize its fundamental propositions.”²⁰ A related explanation would emphasize that grand historical narratives of all kinds have lost favor: it is hard to find support these days for grand and universal historical narratives—whether of the kind favored by Vico, Hegel, Marx, or Maine—or, even that old favorite, the so-called “Whig Theory of History.”²¹

Of course, one need not buy into any grand theory of history to believe that the past affects the present, and that we should learn from what came before. The role history does have, and should have, in law and legal theory will be considered at greater length in the next two sections.

II. TAMANAHA AND HISTORICAL JURISPRUDENCE

As already noted, Tamanaha, in *A Realistic Theory of Law*, emphasizes the prominence historical jurisprudence once held. As another scholar described, that approach had been “the dominant school of legal theory in the United States in the late nineteenth and into the first decades of the twentieth century, both among legal scholars and the courts.”²² Tamanaha also notes the way that this approach offered an important supplement to natural law approaches and legal positivism (a theme taken up further below). What does a historical approach add to natural law and legal positivist approaches? Harold Berman wrote of “the normative significance of the historical dimension of law.”²³ He added: “what is morally right in one set of circumstances may be morally wrong in another.”²⁴

Tamanaha reports the views of others, declaring the demise of historical jurisprudence, but comments: “That view . . . while superficially correct, is wrong in substance. Although the label fell into disuse, the core theoretical propositions espoused by historical jurists . . . carried on and spread, descending to the present within a cluster of views now attributed to the legal realists.”²⁵ At another place, Tamanaha’s narrative is slightly different: that historical jurisprudence “morphed into” sociological jurisprudence—

18. TAMANAHA, *supra* note 1, at 21.

19. *Id.* Tamanaha names Frederick Pollock and Paul Vinogradoff.

20. *Id.*

21. See HERBERT BUTTERFIELD, *THE WHIG INTERPRETATION OF HISTORY* (1965).

22. Harold J. Berman, *The Historical Foundations of Law*, 54 EMORY L.J. 13, 16 (2005) [hereinafter, Berman, *Historical Foundations*].

23. *Id.* at 15.

24. *Id.*

25. TAMANAHA, *supra* note 1, at 14.

which was (or is) part of the same “broad[] jurisprudential tradition” but which has “different emphases and . . . new methodologies.”²⁶

Historical jurisprudence, for Tamanaha, is thus ultimately just an element, or an exemplar, of his third branch of jurisprudence, “social legal theory,” which takes an empirical angle on law.²⁷ This is to contrast with the “normative” angle of natural law theory, and the “conceptual or analytical” angle of legal positivism.²⁸

III. EVALUATING HISTORICAL JURISPRUDENCE

Law differs from one society to the next. Law changes over time. Law reflects the society in which it exists, either by reflecting widely shared norms, or by reflecting the views and interests (primarily or exclusively) of the most powerful groups within that society. These are important points, but also (to modern scholars) highly uncontroversial ones.²⁹ Why do they seem obvious? Perhaps “we are all social legal theorists now” in much the same way that “we are all legal realists now.”³⁰ As with the legal realism, the sense of “obviousness” scholars might feel reading the claims Tamanaha offers on behalf of social legal theory may mean that what are being claimed are simple truths. Alternatively, it might mean that there are contrary positions, but that these were (or seemed to be) so thoroughly rebutted that they are no longer seriously considered (as is claimed in relation to the legal realists’ critique of formalism, though some theorists, not least Tamanaha himself, claim that such formalists never existed, and the legal realists were badly mischaracterizing the views of their time).³¹

Again, where theories like historical jurisprudence—or, for that matter, legal positivism—are at risk of asserting only the obvious and the uncontested,³² it is important to interpret those theories in a way with which

26. *Id.* at 23.

27. *Id.* at 30.

28. *Id.* (emphasis removed).

29. *Cf.* COSGROVE, *supra* note 11, at 127 (“If historical jurisprudence meant only that the law must be studied in its historical dimension, then it would have amounted to little more than cant. . . . [But] [i]f Maine had a more perceptive insight about the relation of history to law, he kept it to himself.”).

30. Joseph W. Singer, *Legal Realism Now*, 76 CAL. L. REV. 465, 503–32 (1988) (explaining what it means to say that “we are all legal realists now”).

31. BRIAN Z. TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE* (2010).

32. *See* John Finnis, *On the Incoherence of Legal Positivism*, 75 NOTRE DAME L. REV. 1597, 1611 (2000) (describing legal positivism as “redundant”). I am not here endorsing Finnis’s view. I respond to Finnis’s criticism (and comparable criticisms by other theorists) in Brian H. Bix, *Legal*

reasonable people might disagree; otherwise, they are not theories worthy of notice. The related danger is that theorists sometimes make their own approaches seem distinctive and valuable by mischaracterizing competing approaches. A number of legal positivists have been accused—often with good reason—of misstating the views of natural law theory.³³ One might wonder if there is a similar problem with historical jurisprudence, or even with social legal theory. This ties in with the next point.

One possible approach to showing that a theory is distinctive and valuable is to emphasize the critical aspects of the theory rather than its affirmative aspects. One's argument for historical jurisprudence might be based less on its (and social legal theory's) uncontroversial claims about the importance of history and culture to law, and more on the assertion that contemporary alternative approaches—legal positivism, natural law theory, etc.—have important defects and gaps. One can see aspects of this sort of analysis throughout *A Realistic Theory of Law*. For example, Tamanaha traces a social-historical critique of natural law approaches to law back to Montesquieu, and in particular, his book, *The Spirit of the Laws*.³⁴ Montesquieu observed that laws and norms vary from place to place and may be responsive to local (physical and social) circumstances. This is offered as a contrast to natural law approaches.

However, there is an important difference between Montesquieu and the cultural theorists who supported, or developed ideas parallel to, historical jurisprudence. Montesquieu's argument did not deny that there were the sort of universal truths one found in natural law theory, but he asserted that the application of these universal principles might need to be different where the physical or social circumstances are different.³⁵

Under Tamanaha's approach (and in that of Harold Berman before him),³⁶ historical jurisprudence, or social legal theory, is a correction for the natural law view that there is one, universal correct approach to law. And it

Positivism, in THE BLACKWELL GUIDE TO THE PHILOSOPHY OF LAW AND LEGAL THEORY 29 (Martin P. Golding & William A. Edmundson eds., 2005).

33. See, e.g., John Finnis, *Natural Law: The Classical Tradition*, in THE OXFORD HANDBOOK OF JURISPRUDENCE & PHILOSOPHY OF LAW 3, 8–15, 20–23 (Jules Coleman & Scott Shapiro eds., 2002).

34. MONTESQUIEU, THE SPIRIT OF THE LAWS (Univ. of Cal. Press 1977) (1748); TAMANAHA, *supra* note 1, at 14–15. Comparable observations, regarding different customs and ways of life among different communities can be found even earlier, in Montaigne's Essays. See, e.g., MONTAIGNE, OF CANNIBALS, *reprinted in* THE COMPLETE WORKS OF MONTAIGNE 150 (Donald M. Frame trans., 1958); MONTAIGNE, OF THE CUSTOM OF WEARING CLOTHES, *reprinted in* THE COMPLETE WORKS OF MONTAIGNE 166 (Donald M. Frame trans., 1958); MONTAIGNE, OF ANCIENT CUSTOMS, *reprinted in* THE COMPLETE WORKS OF MONTAIGNE 215 (Donald M. Frame trans., 1958); see also Richard Handler, *Of Cannibals and Custom: Montaigne's Cultural Relativism*, 2 ANTHROPOLOGY TODAY 12 (1986).

35. See, e.g., ISAIAH BERLIN, THE ROOTS OF ROMANTICISM 31, 37 (Henry Hardy ed., 1999) (“All Montesquieu said was that, although all men in fact sought the same things . . . different circumstances made different means of attaining these things necessary.”).

36. See, e.g., Berman, *Historical Foundations*, *supra* note 22.

is true that even if Montesquieu's status as a critic of natural law theory is uncertain, Savigny seems to have natural law theory as *his* target, for example, when he criticized the "conviction that there is a practical law of nature or reason, an ideal legislation for all times and all circumstances, which we have only to discover to bring positive law to permanent perfection."³⁷ However, Savigny might be giving us an uncharitable reading of that tradition. For even Aquinas expressed the idea that while general truths of morality (natural law) are the same everywhere, their application to particular cases will necessarily vary.³⁸

And similarly, when legal positivism equates law with the order of a sovereign (Austin),³⁹ the combination of primary and secondary rules (Hart),⁴⁰ a systematic, hierarchical normative order (Kelsen),⁴¹ or a nested set of plans (Shapiro),⁴² nothing in any of those systems is inconsistent with the observation that law frequently tracks the customs and social norms of a community. So why is there a need for historical jurisprudence or social legal theory?

One might argue that a difference in emphasis can be important. While legal positivism and natural law approaches might each be *compatible with* observations about social and historical context,⁴³ they do not direct our attention to them. As Tamanaha writes, "[a]nalytical jurists and natural lawyers . . . pay limited attention to the myriad ways to which 'pressures in society' course through legislation and judge-made law, informing legal interpretation and application; and they do not examine legal consequences, which can only be discerned empirically."⁴⁴ Also, as *A Realistic Theory of Law* notes, these other approaches do not sufficiently focus on certain other important problems, like "the enduring challenge law faces to reconcile legal stability with social change."⁴⁵

37. SAVIGNY, *supra* note 5, at 23 (part of this same text is quoted TAMANAHA, *supra* note 1, at 17).

38. ST. THOMAS AQUINAS, *THE TREATISE ON LAW* 260–62 (R. J. Henle ed. & trans., 1993).

39. See JOHN AUSTIN, *THE PROVINCE OF JURISPRUDENCE DETERMINED* (1995).

40. See H.L.A. HART, *THE CONCEPT OF LAW* (3d ed., 2012).

41. See HANS KELSEN, *INTRODUCTION TO THE PROBLEMS OF LEGAL THEORY* (B.L. Paulson & S.L. Paulson trans., 1992).

42. See SCOTT J. SHAPIRO, *LEGALITY* (2011).

43. See, e.g., Kantorowicz, *supra* note 4, at 334 (observing that John Austin's legal positivism was compatible with Savigny's historical jurisprudence—though quickly adding the author's view that both theories were wrong).

44. TAMANAHA, *supra* note 1, at 31.

45. *Id.*

As Tamanaha's book observes, the way many well-known analytical theorists have responded to similar observations has been to distinguish their project from other projects or other disciplines.⁴⁶ For example, Hans Kelsen argued that his "pure theory of law" was not to be confused with sociology of law or moral-political theory (without denying the value of those approaches to law).⁴⁷ More recently, Ronald Dworkin similarly distinguished his own project from sociology of law.⁴⁸

Here one is reminded of the debate between Leslie Green and John Finnis. Green wrote the following in his *Stanford Encyclopedia of Philosophy* entry on "legal positivism," in the course of noting the narrow focus and ambition of that school of thought: "No legal philosopher can *only* be a legal positivist."⁴⁹ Green's point had been that legal positivism makes claims over a small domain of issues and does not deny the importance of other inquiries (e.g., into how judges should decide cases). However, John Finnis saw Green's comment as (unintentionally) displaying the inadequacy of legal positivism.⁵⁰ Tamanaha's claim (and, again, Berman's as well)⁵¹ can be seen as analogous to Finnis's argument: that legal positivists cannot simply marginalize or bracket inquiries about social context, because one cannot offer a theory of the nature of law without covering *all* the main aspects of law—conceptual, normative, *and* social/empirical. Thus, to be more precise, Tamanaha's point perhaps is that legal positivism *can* stand on its own, *but only* if it goes forward with the disclaimer that it is explaining only one aspect of law, rather than (as it is often presented) as explaining *the* essence or nature of law.

IV. THE LESSONS OF HISTORY

But what about history? Tamanaha chides readers (and other theorists) for ignoring the school of historical jurisprudence, but his own defense of its relevance is primarily along the lines of reasserting its emphasis on social context and the fact that societies change, insights that he observes were taken up by other approaches to law. The book does not really offer a defense of historical jurisprudence focused on the value of history.⁵²

46. *Id.* at 30–31 (on Hans Kelsen).

47. *See, e.g.*, Hans Kelsen, *The Pure Theory of Law and Analytical Jurisprudence*, 55 HARV. L. REV. 44, 44, 52–54 (1941).

48. *See* RONALD DWORKIN, JUSTICE IN ROBES 1–5 (2006) (distinguishing "doctrinal" from "sociological" approaches).

49. Leslie Green, *Legal Positivism*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2003), <https://plato.stanford.edu/entries/legal-positivism/>.

50. John Finnis, *Natural Law Theories*, in STANFORD ENCYCLOPEDIA OF PHILOSOPHY (Edward N. Zalta ed., 2015), <https://plato.stanford.edu/entries/natural-law-theories/>.

51. *See* Berman, *Historical Foundations*, *supra* note 22.

52. *See* TAMANAHA, *supra* note 1, at 23–27.

A historical perspective has an obvious claim in law (at least in the United States legal system, and many of the legal systems with which we are familiar), as the system is built around the idea that the past has intrinsic significance. Most saliently, precedent, the practice of *stare decisis*, is precisely the idea that we should follow a decision (of a court in our legal system, at the same level in the judicial hierarchy or a higher level) simply because it is past.⁵³ As lawyers and legal theorists trained in common law countries, we are so accustomed to the idea of precedent that we have stopped noticing how strange it is in some ways. Precedent tells us to act in a certain way—more precisely, to decide disputes in a certain way—simply because that is the way that matters were done before. Under precedent, one is bound to decide in a particular way, *not* because the way things were done before worked out very well, *not* because the decision was made by well-known or especially wise decision-makers, and, indeed, *not* because the prior decision was *right*. It would, of course, be nice if the prior decision *had been* made by a wise judge, *was in fact* the right decision, and *did in fact* work out well, but it is sufficient for precedential effect that the decision was *past* (and on point). One of the significant points of precedent is that one is to follow the past decision, even if it was *not* made by a wise judge and even if the current court thinks that the past decision was *mistaken*. Of course, even without precedent, the fact of the past decision may create a reason for treating the next case the same way—treating like cases alike, and all that—but that is only *one reason* in favor, and in a normal practical reasoning context, it would be overridden in many situations if the prior decision was considered seriously wrong.⁵⁴

And even precedent is not history as a historian would understand it.⁵⁵ Precedent is using the past on the terms of the present: how does this old case apply to these new facts? A historian would want to understand the past in terms of its own time: e.g., how intention, or mens rea, or consideration, or interstate commerce were understood in the legal system and society *of that time*. Concepts and categories of a previous period can frequently be

53. See generally Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571 (1987).

54. Most courts in common law systems do not have the authority to ignore or overturn past decisions they consider mistaken, and even those courts (usually the highest courts in the jurisdiction) who do have that power, use it sparingly, and, by their own explanation, only for the most egregiously mistaken past decisions. See generally FREDERICK SCHAUER, THINKING LIKE A LAWYER: A NEW INTRODUCTION TO LEGAL REASONING 36–60 (2009)

55. I am grateful to Edward Rubin for the point on which this paragraph is based.

“applied” to current circumstances only by ignoring or discounting important aspects of the context in which they arose.

In some of his work, Harold Berman associated historical jurisprudence with the great English common law judges and commentators, who formalized and defended the common law method of incremental growth of the law through judicial decision-making, and who also formalized and defended the system of precedent.⁵⁶ It is those judges and commentators who offered the characterization of law as “immemorial custom.”⁵⁷ That is, these are the people who established or reaffirmed legal practices that depend on the idea that history is important. (Though, of course, one could justify the system of precedent without invoking any special power or significance to history, but that is a discussion for another time.)⁵⁸

But that still does not explain in what way history *should be* important. Berman elsewhere wrote that “history [is] the remembered experience of society” and that law should be understood as “the balancing of justice and order in the light of historical experience.”⁵⁹ These are powerful and well-crafted phrases, but their meaning is far from obvious. One problem is that there is an unhelpful ambiguity in the claim that history is or should be important to law. Sometimes there is an *historical* explanation for the content of the law (and why *this* legal system has different rules than *that* legal system), but the explanation is less about the “spirit” or “culture” of a people, and more about arbitrary and accidental developments. For example, Guido Calabresi discussed how central aspects of the structure of Anglo-American tort law may have more to do with where there were gaps in the criminal law in the past (and therefore more need for deterrence through the civil law) and less to do with grander claims about corrective justice or efficiency.⁶⁰ Charles Donahue speculated that the divergence between English and French marital property systems in the thirteenth century may have been grounded on the relative powers of the monarch, the nobility, and families; or may have simply been the product of “the uncontrolled and to some extent irrational force of legal ideas operating away from the influence of conscious policy choice.”⁶¹ And John Kilcullen

56. See, e.g., Harold J. Berman, *The Origins of Historical Jurisprudence: Coke, Selden, Hale*, 103 YALE L.J. 1651 (1994).

57. I leave aside the question of whether the common law judges generally believed that they were in fact uncovering past customs or whether they thought that this was just a “convention of presentation” for judicial legislation.

58. See Schauer, *supra* note 53.

59. Berman, *Historical Foundations*, *supra* note 22, at 15.

60. Guido Calabresi, *Supereditor or Translator: Comments on Coleman*, in ANALYZING LAW: NEW ESSAYS IN LEGAL THEORY 107, 113–15 (Brian Bix ed., 1998).

61. Charles Donahue, Jr., *What Causes Fundamental Legal Ideas? Marital Property in England and France in the Thirteenth Century*, 78 MICH. L. REV. 58, 88 (1979).

argued that certain central aspects of property theory might have arisen due to a particular thirteenth century dispute between the Pope and the Franciscans regarding Franciscan poverty.⁶² Thus, “historical explanation” in all of these cases is important for understanding why each legal system has the legal rules, institutions, concepts, and practices that it has. But it is not the kind of historical explanation that is conducive to a particular theory, much less a school of theories, of law. Too much of the explanation is accident—in the sense of happenstance, as contrasted with the predictable or rational.

This touches upon a more basic question. What, if anything, *can* we learn from history? Isaiah Berlin summarized the debate around the time of the Enlightenment. On one hand, Descartes doubted the value of history (why spend your life studying ancient Rome, when at the end one knows no more than Cicero’s handmaiden knew simply from being alive?), favoring instead “certain,” a priori truths.⁶³ On the other hand, some of the critics of the Enlightenment, who developed the modern study of cultures (and, indeed, invented that concept), thought that there was a way of understanding societies that involves a different kind of knowledge than what one finds in mathematics and the physical sciences. This idea of different cultures, separate from or supplement to a unified human nature, is the forerunner of Savigny and his *Volksgeist*.

At a more modest level, theorists from Montaigne⁶⁴ to the contemporary critical legal studies theorist, Robert Gordon,⁶⁵ have argued that history can serve us, at least through the fairly modest purpose of informing us that our way of living, our way of thinking, and our set of legal rules and practices, is not the only way. Once we see that, we will be less inclined to believe that our way (in the case of law, our rules, institutions, and practices) is the only possible way to do things or a self-evident way to do things, and we will become more cautious about concluding that it is the *best* way.

62. John Kilcullen, *The Origin of Property: Ockham, Grotius, Pufendorf, and Some Others*, MACQUARIE UNIVERSITY (2001), <https://perma.cc/MM4C-G5SL> (last visited Oct. 31, 2017). I am grateful to Gerald Postema for the example.

63. See ISAIAH BERLIN, *THE PROPER STUDY OF MANKIND: AN ANTHOLOGY OF ESSAYS* 27–58 (1997) (describing Cartesian attacks on history and the response of trying to create a “scientific study of history”); see also JESSE HAUKE SHERA, *HISTORIANS, BOOKS, AND LIBRARIES: A SURVEY OF HISTORICAL SCHOLARSHIP IN RELATION TO LIBRARY RESOURCES, ORGANIZATION AND SERVICES* 37–39 (1953) (summarizing Descartes’ attacks on historians).

64. See MONTAIGNE, *supra* note 34.

65. Robert W. Gordon, *Critical Legal Histories*, 36 *STAN. L. REV.* 57 (1984).

Tamanaha offers a fair portion of history in *A Realistic Theory of Law* by way of direct and indirect support of his views about law and legal theory, particularly in his extended discussion of “a genealogical view of law.”⁶⁶ The main lessons we are to learn from these selections from history include that the structures and functions of law have changed significantly over the centuries, and that these changes reflect changes in social complexity and (in turn) political institutions and structures. We also are to learn that law sometimes reflects social norms and national character, but it is also sometimes better explained as reflecting the interests of dominant groups or colonizing powers.

Tamanaha’s descriptions of the stages through which law has developed (and how societies and political systems have developed) over the centuries has some surface similarities to the theories of historical development that one might find in Vico, Maine, or Marx. However, Tamanaha is careful not to propose “iron laws” of historical change, and, in fact, emphasizes how “[r]esiduals, variations, and legacies of earlier forms of law can be found around the world today, interacting with other forms of law present in the same social space. . . . There is no reason to think . . . that every society is on a uniform and inevitable trajectory of legal development.”⁶⁷

So, one can agree with the conclusion Tamanaha seems to offer, if only implicitly: that a modern version of historical jurisprudence would not have that much to do with history—in the sense of grand narratives or universal theories of how societies do and must progress—but would instead have much more to do with sociological understanding, social context, and empirical investigation.

CONCLUSION

Brian Tamanaha’s book, *A Realistic Theory of Law*, does what a good jurisprudential text should do: question our assumptions, remind us of the wisdom of theorists who have been unjustly forgotten, and offer a provocative new proposal for us to debate. I certainly agree with Tamanaha that the great writers of historical jurisprudence deserve more attention than they are now receiving (a claim I would extend to a number of other “unfashionable” approaches to law, including Scandinavian legal realism, critical legal studies, and the European free law movement). As Tamanaha points out, some of the insights of historical jurisprudence were adapted by (or emerged independently in) the works of American legal realists, sociological jurisprudence, and other schools of thought. And certainly,

66. TAMANAHA, *supra* note 1, at 82–117.

67. *Id.* at 117.

there is value to focusing on the questions that historical jurisprudence (intentionally or indirectly) brought to our attention: Why do different communities have different legal institutions, legal practices, and legal rules? Why do institutions, practices, and rules that work well in one community work significantly less well in another? Must law always correspond to existing social norms, or is there a way in which law can and should attempt to alter existing social norms? And what portion of the answers to the above questions depend on the different “character,” “culture,” or “*Volksgeist*” of different communities?