

LEGAL FORMALISM AND LEGAL REALISM: WHAT IS THE ISSUE?

Brian Leiter*

Center for Law, Philosophy & Human Values, University of Chicago

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

It is true enough that deductive reasoning on the model of syllogism is a characteristic feature of most well-done judicial opinions—that is, the conclusion can be reconstructed as following deductively from a statement of the applicable rule of law and the statement of the facts. But most legal reasoning in common-law jurisdictions³ is given over to explaining why the *applicable rule of law* is, in fact, the applicable rule of law and what the legally significant facts are. And such reasoning is rarely “mechanical” in the sense of “obvious” or machinelike, as the pejorative label implies. Such reasoning is often contestable and contested, which is why “mechanical” does not illuminate much about the nature of legal reasoning. But there are plenty of jurists and scholars committed to (1) and (2) above—we might call

*I am grateful to Mark Tushnet for helpful feedback and to Frederick Schauer and Scott Shapiro for detailed comments.

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

2. CESARE BECCARIA, *Interpretation of the Law, in OF CRIMES AND PUNISHMENTS* §4 (1764).

3. In some civil-law jurisdictions, the opinions are often written precisely in the form of vulgar formalism!

them “Sophisticated Formalists.” They are “sophisticated” precisely because they recognize that legal reasoning is not mechanical, that it demands the identification of valid sources of law, the interpretation of those sources, the distinguishing of sources that are relevant and irrelevant, and so on, and they offer a theoretical account of how these various bits of reasoning are done “rightly.” Their leading theoretical spokesman is Ronald Dworkin,⁴ but in different ways, Robert Bork and Justice Scalia are committed to such a picture of adjudication (at least as a normative ideal),⁵ as is the popular culture more generally, as any observer of a Supreme Court confirmation hearing can attest (indeed, one might think the popular culture is the last preserve of vulgar formalism!). Judges, of course, continue to write their opinions in sophisticated-formalist manner, presenting the binding rules of law as given by the materials correctly interpreted and as then requiring, as a matter of logic, a particular decision.

Against the Sophisticated Formalist theory stands the views of the “realists,” theorists who purport to give us an unsentimental and honest account of what judges *really* do—the theorists who, most famously, came to be known as American Legal Realists, scholars and lawyers and jurists like Karl Llewellyn, Jerome Frank, Underhill Moore, Herman Oliphant, Leon Green, Max Radin, and others.⁶ As I argue elsewhere at some length, the majority of Realists advance a descriptive theory of adjudication according to which (1) legal reasoning is indeterminate (i.e., fails to justify a unique outcome) in those cases that reach the stage of appellate review; (2) appellate judges, in deciding cases, are responsive to the “situation types”—recurring factual patterns (e.g., “seller of a business promises not to compete with the buyer, and then tries to break the promise”)⁷—that elicit predictable normative responses (“this is unfair” or “this is economically foolish”) from most jurists, responses that are not, however, predictable based on existing “paper” rules and doctrine; and (3) in the commercial-law context (a primary focus of the Realists), judges look to the “normal” practices in the existing business culture in deciding what the right outcome is (that is, the judges treat normal economic practice as the normative benchmark for decision).⁸

4. See, e.g., RONALD DWORKIN, *Hard Cases, in* TAKING RIGHTS SERIOUSLY (1977); and DWORKIN, LAW’S EMPIRE ch. 6 (1986).

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

6. I henceforth capitalize *Realists* to name this group of thinkers. Richard Posner is a contemporary representative; see POSNER, HOW JUDGES THINK (2008).

7. The example is from Herman Oliphant, *A Return to Stare Decisis*, 14 A.B.A.J. 75 (1928). In this situation type, courts found a way to enforce the promise. By contrast, in cases involving the situation type “employee promises not to compete with an employer after leaving his or her employ,” courts have found a way to invalidate the promise.

8. For detailed discussion and evidence, see BRIAN LEITER, NATURALIZING JURISPRUDENCE: ESSAYS ON AMERICAN LEGAL REALISM AND NATURALISM IN LEGAL PHILOSOPHY (2007), esp. chs. 1–3. For a more concise account, see LEITER, *American Legal Realism, in* THE BLACKWELL GUIDE TO PHILOSOPHY OF LAW AND LEGAL THEORY (M. Golding & W. Edmundson eds., 2005). The

My former colleague, the late Charles Alan Wright, senior author of the preeminent treatise on *Federal Practice and Procedure*, told me that he thought of himself as a Realist in this sense; my first “boss” in practice, Milton Handler, late professor of law at Columbia for forty-five years and name partner of the New York law firm now known as “Kaye Scholer,” understood his scholarly work as Realist in the same way.⁹ In their scholarly work, Wright and Handler tried to recast the norms of legal decision in ways that reflected the specific situation types to which they found the judges to be sensitive—that is, they tried to articulate explicitly the norms of decision (some of them previously inchoate or unstated in the decisions) at a greater level of factual specificity than might be found as boilerplate doctrine in a treatise or court decision.

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

description in the text pertains to what I call the “Sociological Wing” of realism, which was the dominant strand. The views of Jerome Frank were a bit different on the second and third points.

9. See, e.g., Milton Handler & Charles Pickett, *Trade Marks and Trade Names: An Analysis and Synthesis* (pts. 1–2), 30 COLUM. L. REV. 160, 759 (1930).

10. BRIAN TAMANAHA, *BEYOND THE FORMALIST-REALIST DIVIDE: THE ROLE OF POLITICS IN JUDGING* (2010).

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

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

I. FORMALISM AND REALISM: THE HISTORICAL NARRATIVE

Let us begin with the historical thesis, which is a coin with two sides, one about formalism and one about realism. Regarding legal formalism, Tamanaha’s target is legal historians and theorists such as Gilmore, Horwitz, and Kennedy,¹³ who claim that the 1870s to the 1920s in the United States were “the heyday of legal formalism,” according to which “lawyers and judges saw law as autonomous comprehensive, logically ordered, and determinate and believed that judges engaged in pure mechanical deduction from this body of law to produce single correct outcomes.”¹⁴ On this account, legal formalism was brought to an end by the Realists, who, “building upon the insights of Oliver Wendell Holmes, Roscoe Pound, and Benjamin Cardozo,” showed “that the law is filled with gaps and contradictions, that the law is indeterminate, that there are exceptions for almost every legal rule or principle, and that legal principles and precedents can support

12. TAMANAHA, *supra* note 10, at 3. This non sequitur is not simply an artifact of the introduction to the book; Tamanaha repeats it again much later: “Any approach that defines ‘formalism’ in these terms has doubtful validity, as earlier chapters demonstrated. These ideas were *not* widely held in the U.S. legal tradition, if they were held by any jurists at all” (*id.* at 160).

13. *See id.* at 60–61.

14. *Id.* at 1.

different results.”¹⁵ Judges, according to these realists, “decide according to their personal preferences” and come up with post hoc legal rationales for the decisions so reached.¹⁶

Tamanaha distinguishes between two aspects of the “formalism” assigned by legal historians to thinkers of the nineteenth century.¹⁷ First, there was a “formalist” “theory of the nature of law (the common law, in particular),” according to which “in new situations judges *did not make law* (even when declaring new rules) but merely discovered and applied preexisting law.”¹⁸ Second, there was a “formalist” theory about judicial decision-making, about “how judge mechanically apply law (precedents and statutes) to the facts in particular cases.”¹⁹ Tamanaha claims that the connection between the two stories “is tight,”²⁰ though I do not see that he makes the case, and as a conceptual matter, the two theses are obviously distinct. The first “formalist” view—call it “Natural Law Formalism”—is an instance of a standard “natural-law” canard according to which there is always a preexisting answer to every legal question, usually one that requires moral reflection (or, in earlier forms, insight into the divine will) to discover. One could, quite obviously, reject natural-law formalism and still think that *where there are binding legal sources*, judicial decision-making is a matter of mechanical application of the rules derived from those sources to the facts of the case.²¹

Tamanaha spends an entire chapter showing that lots of jurists and scholars in the nineteenth century thought that judges do make law in new circumstances,²² but that is perhaps not surprising, since one would expect this to be common wisdom among common lawyers in the modern era in the wake of Bentham’s attack on the natural-law canard in the early nineteenth-century (an attack Tamanaha notes in passing).²³ Every beginning law student is taught, for example, that one of the key differences between common-law and (at least a caricature of) civil-law systems is that in the former, *judges make law*.²⁴ An attack on Natural Law Formalism

15. *Id.*

16. It is not clear that the Realists held the views so described, as I discussed many years ago in Brian Leiter, *Rethinking Legal Realism: Toward a Naturalized Jurisprudence*, 76 TEX. L. REV. 267 (1997), reprinted in LEITER, NATURALIZING, *supra* note 8, ch. 1. But we can bracket that issue for the moment.

17. TAMANAHA, *supra* note 10, ch. 2.

18. *Id.* at 13.

19. *Id.*

20. *Id.* Later remarks suggest that Tamanaha may mean only that those he is criticizing think the connection is tight; see *id.* at 54.

21. This appears to be very roughly what H.L.A. Hart thinks, e.g., about “easy” cases. See H.L.A. HART, THE CONCEPT OF LAW 126–130 (2d ed. 1994); see also the discussion *infra*.

22. TAMANAHA, *supra* note 10, ch. 2.

23. *Id.* at 15.

24. I was surprised to see Tamanaha acknowledge the point toward the end of the book: “All lawyers know that judges make the common law. This has been acknowledged for at least two centuries, as earlier chapters document” (*id.* at 175). The surprise is that this recognition did not lead Tamanaha to suspect the triviality of the issue and the fact that it is orthogonal to any interesting formalist theory of adjudication. To be sure, this contrast, though indeed drawn in

formalism was no significant part of the attack on “formalism” by the American Legal Realists, and in any case is of little jurisprudential interest given how few proponents the alternative view has.²⁵

Against the second formalist thesis about “mechanical” adjudication, Tamanaha argues contra Roscoe Pound that “judges at the time [the purported “formalist” age] did not widely believe that judging was an exercise in mechanical deduction.”²⁶ Of course, “mechanical deduction,” while central to Vulgar Formalism, also has little to do with any philosophically interesting jurisprudential thesis about formalism, and it is not wholly surprising that skeptics about mechanical deduction are to be found in the nineteenth century too. Still, Tamanaha’s approach to Pound is representative of the general argumentative strategy of the book and so warrants notice. Tamanaha adduces quotations from nineteenth-century jurists and scholars—whom Tamanaha generally describes as important or leading figures (some of them are, whereas some, one worries, have been rescued from obscurity by the needs of Tamanaha’s argument) or who published their views in prominent journals—that are inconsistent with the historical thesis in question.²⁷ Is this method adequate to establish the claims at issue in this chapter and elsewhere in the book?

Tamanaha gives insufficient attention to two key evidential questions. First, are the antiformalist quotations he adduces representative of views in the putatively “formalist” age? Second, even if the quotations are representative, are they as common as such sentiments became in the 1920s and 1930s? We are trying to assess, remember, whether there was something that deserves to be called a “formalist” age. Presumably no one committed to the existence of such a period believes that everyone thought monolithically at that time. It is often said, for example, that “free-market” thinking triumphed in the West in the 1980s, giving rise to a so-called “neoliberal” era. That obviously does not mean that Marxists, socialists, and free-market skeptics stopped writing or thinking. Indeed, it would be easy to adduce examples of market skeptics publishing their views in prominent journals

common-law classrooms, is a caricature of what really goes on in civil-law courtrooms, as the legions of Legal Realists in civil-law countries—from François Génay in France a century ago to Riccardo Guastini in Italy today—have demonstrated.

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

26. *Id.* at 28.

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

during the last thirty years. But this would hardly show that the past thirty years were not properly characterized as a “neoliberal era” in the West.

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

The evidential issue, however, is even more complicated than this.²⁸ Even if we suppose, in the best-case scenario for Tamanaha, that a significant minority or even a bare majority of scholars and jurists in the late nineteenth century were saying “realist-sounding” or “antiformalist” things, we would still need to know how this compares to the received professional wisdom of the 1920s and 1930s. After all, it would still make perfectly good sense to call the late nineteenth century the “formalist age” if it turns out that a larger proportion of leading scholars and jurists said “realist-sounding” things in the 1920s and 1930s than in the 1870s and 1880s. Tamanaha, alas, sheds no light on this issue.

These worries are compounded by the fact that Tamanaha’s historical evidence is probative only to the extent that his account of the competing positions is illuminating.²⁹ We already note above that showing that nineteenth-century jurists and scholars recognized that common-law judges “make law” in new circumstances and that they do not decide cases “mechanically” does not illuminate much about formalism as a philosophically interesting theory of adjudication. But let us turn to the flip side of Tamanaha’s historical thesis about formalism: “Realism about judging was commonplace decades before the legal realists came on the scene.”³⁰ This historical claim turns out to trade on a sloppy and loose characterization of realism that does no justice to the distinctive theses of Realists such as Karl Llewellyn, Herman Oliphant, Max Radin, Underhill Moore, and others.

Tamanaha offers a motley assortment of “evidence” that there was realism about judging before the Realists.³¹ It runs the gamut from Teddy

28. Here I am indebted to Stefan Vogenauer.

29. There is also the question of whether Tamanaha represents his quoted sources fairly. I discuss *infra* some cases where he does not. I leave it to intellectual historians to carry out a more systematic examination of the sources on which Tamanaha’s argument depends.

30. TAMANAHA, *supra* note 10, at 68.

31. Some of the “evidence” from scholars and jurists in the early 1900s is hardly apposite: no one thinks realism arose *ex nihilo*; it had, of course, a prehistory in the work of earlier thinkers such as Oliver Wendell Holmes and Benjamin Cardozo. And Jerome Frank famously cites Chancellor Kent, writing a century earlier, in support of the thesis that judges *first* get a “hunch” about the fair outcome and then search for legal reasons to support that conclusion.

Roosevelt's claim in 1908 that "The decisions of the courts on economic and social questions depend upon their economic and social philosophy,"³² to an 1893 law review article observing that "To say that no political prejudices have swayed the court . . . is to maintain that its members have been exempt from the known weaknesses of human nature"³³ and an unsigned essay in the *Albany Law Review* in 1870 claiming that "the excision of politics from the judicial mind is impossible."³⁴ From all of this Tamanaha concludes that "By the time the legal realists arrived on the scene [in the 1920s], realism about judging had circulated inside and outside of legal circles loudly and often for at least two generations."³⁵

But does Tamanaha's evidence show anything of the kind? Critical Legal Studies writers may have believed that "law is politics," but this is barely a footnote in realism, which is largely silent on the political influences on decisions.³⁶ Yet Tamanaha's mistaken reduction of realism to the view that judges are influenced by politics runs throughout his discussion and is even reflected in the title of the book and the extensive attention he accords the recent political-science literature on courts. Hence it is unsurprising that at the conclusion of his purported exposition of realism in Chapter 6, Tamanaha announces:

Rantoul in 1836, Hammond in 1881, the legal realists in the 1920s and 1930s, and Critical Legal Studies in the 1970s and 1980s (and others along the way) all argued in interchangeable terms that judges have the freedom to decide cases in accordance with their political views.³⁷

See JEROME FRANK, *LAW AND THE MODERN MIND* ch. 12 n.3 (1930). Even Tamanaha notices that Frank cites jurists from the nineteenth century (see TAMANAHA, *supra* note 10, at 93). I concentrate on Tamanaha's evidence that further predates the 1920s.

32. TAMANAHA, *supra* note 10, at 71–72.

33. *Id.* at 75.

34. *Id.* at 77.

35. *Id.* at 78.

36. The closest one comes in a central realist text is the comment in Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457 (1897) about the three possible explanations for why a judge might make a particular legal argument (e.g., implying a condition in a contract in a particular case): "It is because of some belief as to the practice of the community or a class, or because of some opinion as to policy, or, in short, because of some attitude of yours [the judge's] upon a matter not capable of exact quantitative measurement, and therefore not capable of founding exact logical conclusions." *Id.* at 466. The Realists of the 1920s and 1930s focused almost wholly on the first and third possibilities, not the second.

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

37. TAMANAHA, *supra* note 10, at 107.

But it was not the thesis of the Realists that judges decided in accordance “with their political views”!³⁸ Tamanaha himself adduces no textual evidence otherwise. If one looks at classic realist studies such as Llewellyn on sales law³⁹ or Moore on check-cashing practices,⁴⁰ there is no interest at all in the political party of the judge, the judge’s political ideology, or the political objectives of the appointing president. Rather, in each case the Realists tried to show that nonlegal norms of fairness or efficiency, often derived from normal practice in the relevant business context, explained the decisions. Rather than judges imposing an “economic and social philosophy” (as Teddy Roosevelt put it in the quotation above), the emphasis in most realist writings is on the sensitivity of judges to nonlegal norms prevalent, for example, in the regular practices of merchants or banks.

Even when Tamanaha tries to produce evidence that *more precise and distinctive* realist theses about adjudication were common well before the Realists came on the scene, he either produces inapposite evidence or, more seriously, mischaracterizes his sources. Noting, for example, that Realists believed that to predict judicial decisions, one needed to attend to “the reactions of the judges to the facts and to the life around them” (quoting Llewellyn),⁴¹ Tamanaha claims that “this too was said much earlier” and then cites Frederick Pollock noting that “legal science” aims to predict “the decisions of courts of justice.”⁴² But Pollock endorses nothing like Llewellyn’s claim about the need to attend to the factual “situation types” to which the judges were sensitive in order to predict the decision! So the Pollock quotation is irrelevant; what was distinctive of realism was its view of the factors relevant to predicting a decision, not some vague and general interest in prediction, which was of course a common concern of all lawyers faced with the prospect of going to court.

Tamanaha also quotes Judge Thomas Cooley observing in 1886 that “when a case is such that just and well-instructed minds differ as to its coming within the intent of the statute, the rule laid down by the [presiding judge] or the prevailing majority of its members becomes a rule of law.”⁴³ But this banal observation—that if there is a dispute about the intent or purpose of the statute, the court’s decision will settle the matter and create a binding precedent—has nothing to do with the distinctive realist theses about statutory interpretation,⁴⁴ which suggest that across a wide range of statutory interpretation cases, the judge has available equally proper but utterly

38. I discuss this and the evidence in LEITER, NATURALIZING, *supra* note 8, chs. 1 & 3.

39. See, e.g., KARL LLEWELLYN, THE COMMON LAW TRADITION 122 (1960).

40. See, e.g., Underhill Moore & Theodore S. Hope, Jr., *An Institutional Approach to the Law of Commercial Banking*, 38 YALE L.J. 703 (1929).

41. TAMANAHA, *supra* note 10, at 80.

42. *Id.*

43. *Id.* at 81.

44. See Max Radin, *Statutory Interpretation*, 43 HARV. L. REV. 863 (1930); Karl Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules and Canons about How Statutes Are to Be Construed*, 3 VAND. L. REV. 395 (1950).

conflicting principles of statutory interpretation, so that the actual “rule” of the statute is “up for grabs.”

On the key issue of the influence of situation types on judicial decision-making (which Tamanaha says “has been identified by a theorist [citing me] as *the* distinctive innovation the legal realists brought to American jurisprudence”),⁴⁵ he cites *only one* earlier author, James C. Carter, who in fact says *nothing of the kind*. Here is what Tamanaha quotes from Carter:

It is in *new* cases that nearly all the difficulty in ascertaining and applying the law arises. The great mass of transactions of life are indeed repetitions of what has before happened—not exact repetitions, for such never occur—but repetitions of all substantial features. They have once or oftener been subjected to judicial scrutiny and the rules which govern them are known. They arise and pass away without engaging the attention of lawyers or the courts. The great bulk of controversy and litigations springs out of transactions which present material features never before exhibited, or new combinations and groupings of facts. It is here that doubt and difficulty make their appearance. . . . Several different rules—all just in their proper sphere—are competing with each other for supremacy.⁴⁶

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

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

Our power to subject objects to a scientific classification being necessarily limited to those which are submitted to observation, the jurist, or the codifier, can no more classify future human transactions, and, consequently can no more frame the law concerning them, than the naturalist can classify the *fauna* and *flora* of an unknown world.⁴⁷

45. TAMANAHA, *supra* note 10, at 83.

46. James C. Carter, *The Provinces of the Written and the Unwritten Law*, 24 AM. L. REV. 1, 15 (1890), *quoted in* TAMANAHA, *supra* note 10, at 83.

47. Carter, *supra* note 46, at 10.

To be sure “unwritten” common law:

takes the transactions of the past, and, by classifying them, makes its rules; but it makes them *provisionally* only. It declares that they are binding upon courts only so far as respects transactions substantially like those from the examination of which the rules have been framed. In respect to future cases which may wear different aspects, it suspends judgment.⁴⁸

So the “future cases” at issue for Carter are those that are sufficiently different from the past cases on the basis of which common-law doctrines were crafted that the unwritten rules of the common law should not be binding. Codification, for a radical reformer like Bentham, was meant to do away with the “unwritten” judge-made rules, but at the cost, says Carter, of laying down rules for unknown situations. What leads to the passage that Tamanaha quotes is Carter’s consideration of the rejoinder of the “Benthamite” that even if codification might produce unjust and arbitrary results for genuinely new cases, such cases are “so small in number” that the “miscarriages” of justice resulting from them would be trivial.⁴⁹

The quoted passage is, then, Carter’s response to this rejoinder and thus is part of his continued defense of the need for “unwritten” rules crafted by judges in response to new circumstances. We can now see that what Carter *really* says in this passage has nothing at all to do with the realist theory of appellate decision based on responsiveness to situation types. Rather, Carter makes the sensible point that where the problems are familiar ones, settled common-law doctrines are so clear that the matters do not end up in court at all, which means it is precisely the *new* or “future” cases—ones for which no legal rule governs—that will most often command the attention of judges. The genuine Realist, by contrast, would be skeptical that even the settled common-law doctrines, at least at the level of abstraction at which they are typically articulated, will really explain the decisions of the courts in later cases. On this distinctive realist thesis, Carter is completely silent.

Tamanaha’s overreaching of the evidence in this and other instances leads me to think that legal historians would do well to consider his other examples with care and some skepticism. Even when Tamanaha seems to do better—for example, finding examples of earlier writers (in particular William Hammond, whom he cites quite a bit) making something like Llewellyn’s point about the “strict” and “loose” view of precedent⁵⁰ and Frank’s point about the latitude judges have in characterizing the facts of a case in terms of their legal significance⁵¹—one has the sense that he is too quick to be satisfied with quotes and snippets considered in isolation. Tamanaha does not mention, for example, that Hammond concedes that

48. *Id.*

49. *Id.* at 15.

50. TAMANAHA, *supra* note 10, at 81.

51. *Id.* at 82.

his realist-sounding claims constitute “a bold and harsh statement” but one that can be backed up “on much higher authority than my own”⁵²—that is, Hammond appears to recognize that his claims go against the common wisdom (perhaps because his was a “formalist” age) and thus demand some support.

Also unnoted by Tamanaha is that Hammond’s article is quite clearly a brief for *university education of lawyers by full-time academics* in the place of “schools . . . in the hands of busy lawyers and judges” who devote “their scanty leisure to this (commonly ill-paid and too often underrated) work.”⁵³ This is hardly surprising, given that Hammond was dean of the law schools at the University of Iowa and then Washington University, St. Louis. Hammond’s realist-sounding description of the state of the law⁵⁴—his “bold and harsh statement”—is quite clearly, in context, something he *deploras* but that he offers as a reason for entrusting legal education to full-time academics, who might, it is implied, set things right (making the law more formalistic, perhaps). Given his rhetorical objectives, one might at least wonder how representative Hammond’s realist-sounding claims are of the prevailing understanding. Tamanaha does not.

Let me conclude by recapping the main lines of argument regarding Tamanaha’s historical thesis. Tamanaha adduces enough evidence, in my view, to state at least a *prima facie* case against any historian who wants to claim that in the nineteenth century jurists and scholars generally believed that common-law judges did not make law in new circumstances and that judging was simply a mechanical exercise in deductive reasoning. We still need to know how representative Tamanaha’s evidence is and its relation to the received wisdom of the time. It would certainly not be at all surprising to find that most common-law jurists and scholars did not accept natural-law formalism, and it would also not be wholly surprising if most jurists and scholars then were not really vulgar formalists. Whether nineteenth-century jurists and scholars held or rejected more sophisticated forms of formalism is simply not addressed at all by Tamanaha’s evidence.

With regard to realism, Tamanaha’s evidence is much less probative. He shows that many people recognized the influence of politics on the courts in the nineteenth century, but it was no significant part of Realism to establish this thesis. With respect to more distinctive realist theses, Tamanaha’s evidence fares worse; in several important cases, either it is inapposite, or its content is misunderstood. In the end, Tamanaha does not make even a *prima facie* case that the distinctive theses of the Realists had widespread traction in the nineteenth century.

52. William G. Hammond, *American Law Schools, Past and Future*, 7 S. L. REV. 400, 413 (1881).

53. *Id.* at 417.

54. *Id.* at 412.

II. FORMALISM AND REALISM: THE JURISPRUDENTIAL ISSUES

Tamanaha says he wants to rebut a “common misapprehension about the realists . . . [namely] that they were radical skeptics about judging.”⁵⁵ Rather, the Realists embraced what Tamanaha calls “balanced realism,” an awareness that:

judges sometimes make choices, that they can manipulate legal rules and precedents, and that they sometimes are influenced by their political and moral views and their personal biases (the skeptical aspect [of balanced realism]. Yet [balanced realism] conditions this skeptical awareness with the understanding that legal rules nonetheless work; that judges abide by and apply the law; that there are practice-related, social, and institutional factor that constrain judges; and that judges render generally predictable decisions consistent with the law (the rule-bound aspect).⁵⁶

Since Frederick Schauer and I developed more refined versions of these same points about American Legal Realism in widely cited scholarship going back twenty years now,⁵⁷ it is puzzling indeed to see Tamanaha announce this as though it were a discovery. Of course, the bulk of our work was devoted to rendering precise issues such as (1) the actual influences on judicial decision-making; (2) how often judge “make choices”; (3) when legal rules *really* constrain decisions and when they do not; and (4) the difference between *legal* factors constraining decisions (and rendering it predictable) versus nonlegal factors that have the same effects (Tamanaha

55. TAMANAHA, *supra* note 10, at 68. He also denies that “the legal realists formed a group or movement.” *Id.* at 68. His evidence is that “the main characterizations of legal realism put forth by theorists and historians”—he cites only Laura Kalman, Robert Summers, John Henry Schlegel, and Morton Horwitz—are “the promotion of an instrumental view of law as a means to serve social ends, the pursuit of social scientific approaches to law, the efforts of reformers to transform legal education in order to improve legal practice and judging, and attempts by reformers to advance a progressive political agenda in and through the law—or some amalgamation of all four.” *Id.* at 70. He then fairly notes that those often listed as Realists “did not agree among themselves on these positions.” *Id.* Since he inexplicably omits attempts by jurisprudential writers explicitly to state distinctive jurisprudential theses characteristic of realism—namely, mine and Fred Schauer’s (though he otherwise cites our work)—this is hardly surprising. But we return to this issue *infra*.

56. *Id.* at 6; *cf. id.* at 95–96. Note that balanced realism is not simply an empirical observation about judicial behavior; it is predicated on a jurisprudential view about the indeterminacy of legal reasoning such that judges do have choices to make and can *quite properly* construe rules and precedents in different ways, etc.

57. See, e.g., Brian Leiter, *Legal Realism*, in A COMPANION TO THE PHILOSOPHY OF LAW AND LEGAL THEORY (D. Patterson ed., 1995); and my 1997 paper Leiter, *Rethinking Legal Realism*, *supra* note 16, which Tamanaha does cite *but not for its precise characterization of realism*. And for Schauer’s work on realism, see, e.g., Frederick Schauer, *Judging in a Corner of the Law*, 61 S. CAL. L. REV. 1717 (1988); and FREDERICK SCHAUER, PLAYING BY THE RULES (1991), at 191–196. Schauer gives a concise summary of his views on realism in FREDERICK SCHAUER, THINKING LIKE A LAWYER ch. 7 (2009).

runs them together under the heading of “rule-bound aspect”).⁵⁸ In this respect, Tamanaha’s treatment of realism in Chapter 6 marks a somewhat unhappy step backward in the jurisprudential discussion of realism.⁵⁹

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

The Realists believed that decision-makers, especially judges deciding hard cases, initially make an “all things considered” judgment about who ought to win. That preliminary judgment, taking into account moral, political, economic, and psychological factors, is not arbitrary, but is particularistic in focusing on the optimal results for this case. . . . To the Legal Realist, rules serve not as sources of ex ante guidance, but as vehicles of ex post legitimation of decisions reached without regard for the rules.⁶⁰

According to Tamanaha, Schauer “misconstrues their position.”⁶¹ His argument against Schauer bears quoting:

The Realists believed in the law and fervently labored to improve it. Llewellyn unabashedly proclaimed his “faith about the Good in this institution of our law”; and he waxed poetically on “the aesthetics of certain legal arts I deeply love.” In defense of the realists, Eugene Rostow, the dean of Yale Law School who knew many of the key players, remarked that “the legal realists were among our most devoted and effective reformers, both of law and of society.” Jerome Frank confessed, “I am—I make no secret of it—a reformer.”

The various goals of the realists were to increase the certainty and predictability of law, to train better lawyers, to advance legal justice, and to reform the law to better serve social needs.⁶²

It is unclear, however, how these points are relevant to the adequacy of Schauer’s gloss on the realist position, unless one assumes that his use of “especially” means that Schauer is claiming that Realists believe judges *always* decide in the way described, as opposed to so deciding in that small

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

59. A contrast can be usefully drawn here with the work by Michael Steven Green on realism; see, e.g., Michael Steven Green, *Legal Realism as Theory of Law*, 46 WM. & MARY L. REV. 1915 (2005). While I think Green wrong, partly on textual and partly on philosophical grounds, Green’s work is jurisprudentially interesting because it articulates precise and distinctive realist theses about law and adjudication.

60. SCHAUER, PLAYING, *supra* note 57, at 192, quoted in TAMANAHA, *supra* note 10, at 93–94.

61. TAMANAHA, *supra* note 10, at 94.

62. *Id.*

number of “selected”-for cases that reach the stage of appellate review, which has always been Schauer’s expressed view.⁶³ Believing that judges in those kinds of cases make result-oriented decisions based either on particularistic grounds or by reference to nonlegal norms prevalent in the context where the dispute arose, and then cite legal doctrines as a post hoc rationalization for the decision, is compatible with, *inter alia*, loving the law, thinking the law delimits the range of permissible outcomes, thinking most legal cases (e.g., those that do not reach the stage of appellate review) are determinate as a matter of law, thinking that decisions can be made more predictable by attending to the situation types to which the judges are actually responsive, restating the law to capture the pertinent level of fact-specificity to which judges are sensitive, and so on.⁶⁴

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

The Banality of Balanced Realism is a recurring theme in Tamanaha’s argument. “Judges . . . have consistently and candidly expressed a balanced

63. See Frederick Schauer, *Judging in a Corner*, *supra* note 57; and even earlier, Schauer, *Easy Cases*, 58 S. CAL. L. REV. 399 (1985).

64. I confine my comments on Tamanaha’s mistaken criticisms of me to a footnote. I have already commented *supra* on Tamanaha’s misrepresentation of James Carter’s views in the context of his criticism of my claim that the distinctive realist thesis is about responsiveness to situation types as the best explanation of appellate decisions. Tamanaha also purports at one point to be disputing my claim that “American Legal Realism was, quite justifiably, the major intellectual event in 20th century American legal practice and scholarship” (LEITER, NATURALIZING, *supra* note 8, at 1), but since he does not, as we see above, actually discuss the distinctive views of the Realists, on which my claim was predicated, there is no dispute. Everyone can agree with Tamanaha that before realism, there were at least some jurists and scholars who recognized the influence of politics on judicial decision-making and were skeptical that mechanical deduction did any justice to the nature of legal reasoning, but this would do nothing to show that “Realism about judging was commonplace decades before the legal realists came on the scene.” TAMANAHA, *supra* note 10, at 68. A more egregious case—because I point out the error to Tamanaha in an earlier version of this material—is the purported criticism (*id.* at 2) of my account of formalism in Brian Leiter, *Positivism, Formalism, Realism*, 99 COLUM. L. REV. 1138 (1999), without noting that I was articulating competing substantive views of adjudication, not making an historical claim of the kind he is criticizing. Even if most late-nineteenth-century writers were “realists” instead of “formalists,” this would have no bearing on the jurisprudential question about how we ought to understand adjudication.

realism about judging,” he says.⁶⁵ “The formalist-realist antithesis obscures . . . balanced realism, a view that the legal realists shared with their entire generation as with their historical jurisprudence forebears.”⁶⁶ “[R]ealist insights about judging” are in fact “*plainly evident aspects of judging*.”⁶⁷ Is it really evident that in appellate cases, judges are primarily responding to factual situation types and then finding post hoc legal rationales for what they think would be “fair” or “sensible” given the situation type? (The critics of my interpretation of realism certainly do not think so!)⁶⁸ But as we see above, by “realism” Tamanaha often does not mean the views distinctive of the Realists. What is “plainly evident,” he says, is that “the law has inconsistencies, runs out, and routinely comes up against unanticipated situations and that judges possess a substantial degree of flexibility when working with legal materials. It was obvious to observers that the law can be interpreted differently by judges with different views.”⁶⁹

That view, stated at this level of generality, may be banal (except for Natural Law Formalists), but it is not clear that it is what is really at issue. The

65. TAMANAHA, *supra* note 10, at 7. Alas, most of Tamanaha’s examples are of Realist judges such as Cardozo or post-Realist judges such as Walter Schaefer.

66. *Id.* at 69.

67. *Id.* at 91.

68. See, e.g., Green, *supra* note 59; see also MICHAEL S. MOORE, EDUCATING ONESELF IN PUBLIC: CRITICAL ESSAYS IN JURISPRUDENCE 32–35 (2000). H.L.A. Hart, who seems to embrace what Tamanaha is calling “balanced realism” (again, it is hard to say for sure because the characterization is vague and shifting), thought he had a dispute with the Realists, and rightly so.

69. TAMANAHA, *supra* note 10, at 91. In ch. 10, esp. 186–196, Tamanaha expands on his earlier description of “balanced realism,” attributing to realism nine claims about adjudication (his rambling discussion is somewhat repetitive, so I have trimmed the list a bit here): (1) “When judges perceive facts, interpret the law, and render judgments, they are influenced by cognitive framing in the same ways that all cognition is influenced” (*id.* at 187), but the inevitability of cognitive framing is not the same as “willful judging,” which, unlike the former, “is not ubiquitous and is not inevitable” (*id.* at 188); (2) “when judges render legal decisions, except in the most routine cases, the purposes behind the applicable rules and the consequences of the decision will have a bearing” (*id.* at 189); (3) “uncertainties will inevitably arise in interpretation and application of legal rules and principles” (*id.* at 190); (4) “the region of legal uncertainty is where judges render decisions with the least legal guidance, and where judges’ mix of legal and social views has the most leeway and impact—though still in a context thick with legal norms” (*id.* at 190); (5) “judges are sometimes confronted with what they consider ‘bad rules’ or ‘bad results,’” although they “do not take a uniform position or follow the same course in such situations” (*id.* at 191), though sometimes, in cases of this kind, there “is an enhanced potential for the influence of the personal values of” the judge to affect the decision (*id.* at 192); (6) “the common law and statutes contain a variety of standards like fairness and reasonableness, or provisions that require balancing, or that require judges . . . to make judgments. The judgments called for cannot be made in a rule-like fashion and are not determined by legal factors alone,” although judges may often agree due to their sharing “similar training in the legal tradition and its values” as well as “social views” (*id.* at 192); (7) “judges are not machines or computers” (*id.* at 194); (8) “judicial decisions frequently are consistent with and determined by the law” (*id.* at 194); (9) “law is continuously being worked out by judges” (*id.* at 195). Some of these claims are, at this level of generality, quite banal or merely the flip side of the denial of Vulgar Formalism (e.g., 3, 7 & 9); some are of dubious realist pedigree (e.g., 1, 2 & 6); and some are contested by other accounts of adjudication, as discussed in the text.

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

But perhaps the dispute is about how *often* the preceding is true, that is, about what “routinely” in this context means. Tamanaha appeals to comments by Cardozo, Patricia Wald, and Harry Edwards to the effect that 5 percent to –15 percent of appellate cases are “very hard” or indeterminate as a matter of law, and so judges in those cases have great latitude in deciding.⁷⁰ So perhaps it is *this* claim that is the hallmark of balanced realism and is supposedly banal. Here is Judge Edwards, presumably a “Balanced Realist” in Tamanaha’s sense:

Appellate judges sometimes make law. Both participants in and observers of the judicial process have recognized this fact for many years [citing Frank, Dewey, and Roger Traynor]. One might expect that today, more than a half-century after the Legal Realist movement, the phenomenon of the exercise of “judicial discretion” would have been so exhaustively studied as to merit no more than a passing reference in preparation for the examination of more controversial matters. That turns out not to be true. Not only does the activity of judicial lawmaking remain mysterious, but a surprisingly large number of people, both within and without the legal community, question its legitimacy in any form.⁷¹

Judge Edwards recognizes that his “balanced realism” is a controversial position, contrary to Tamanaha’s supposition of banality. His evidence, in a footnote to the passage quoted here, includes the jurisprudential views of Ronald Dworkin and the representative comments of a U.S. senator during Judge Wald’s confirmation hearings. Both data points are surprisingly absent from Tamanaha’s book. At one point, in the course of a generally dismissive discussion of Judge Posner’s realism, Tamanaha quotes Posner’s comment that “most judges are cagey, even coy, in discussing what they do. They tend to parrot an official line about the judicial process (how

70. See, e.g., *id.* at 144.

71. Harry T. Edwards, *The Role of a Judge in Modern Society: Some Reflections on Current Practice in Federal Appellate Adjudication*, 32 CLEV. ST. L. REV. 385, 388 (1983). Notwithstanding the admission of “balanced realism” by Judge Edwards, it is perhaps worth noting that he himself may be understating the role of nonlegal influences on the decisions of his own court, as suggested in Richard L. Revesz, *Ideology, Collegiality, and the D.C. Circuit: A Reply to Chief Judge Harry T. Edwards*, 85 VA. L. REV. 805 (1999).

rule-bound it is), and often to believe it, though it does not describe their actual practices.”⁷² In reply, Tamanaha allows that:

Judges no doubt bear some responsibility for perpetuating the belief that they are deluded or deceptive. They *occasionally* say things that ring false, like Justice Roberts’s claim in his Senate confirmation hearing that judging on the Supreme Court is akin to calling balls and strikes.⁷³

“Occasionally” seems an understatement. Judge Sotomayor, then of the Second Circuit, spoke like a true “Balanced Realist” before her nomination to the U.S. Supreme Court⁷⁴ but toed the official formalist line at her confirmation hearings about the role of the judge being to apply the law, not to “make” law, leading Georgetown law professor Louis Michael Seidman to denounce her as a liar.⁷⁵ Formalism (both Natural Law and Vulgar versions!) is quite obviously the official story about adjudication in the public culture in the United States, as confirmation hearings, including the most recent one,⁷⁶ regularly confirm. Thus already there appears to be a useful role for the formalist-realist distinction, namely, as a way of framing political discourse about adjudication.

If such affirmations of formalism were merely an artifact of the pathologies of American political life, then perhaps we should simply concede that “all insiders” are Balanced Realists, even if the *hoi polloi* and the grand-standing politicians are not. Yet surely it also matters that Tamanaha’s “balanced realism” is not the norm in the other major common-law jurisdiction,

72. POSNER, *supra* note 6, at 2.

73. TAMANAHA, *supra* note 10, at 124 (my emphasis).

74. See the video of her remarks at the 2005 regarding policy-making by courts in *Judge Sonia Sotomayor: Court Is Where Policy Is Made*, YOUTUBE, <http://www.youtube.com/watch?v=OfC99LtrM2Q> (last visited July 19, 2010).

75. The Federalist Society Online Debate Series, *The Sotomayor Nomination, Part II* THE FEDERALIST SOCIETY (July 13, 2009), <http://www.fed-soc.org/debates/dbtid.30/default.asp>. Seidman says:

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

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

England. I recount elsewhere⁷⁷ the story of the quip by Peter Birks, late Regius Professor of Civil Law at Oxford University, that legal realism is “immoral”—not simply wrong but reprehensible precisely because it encourages what he took to be the false view that legal categories and concepts do not in fact and should not constrain and explain the decisions of the courts. Birks was no Vulgar Formalist, nor was he a Natural Law Formalist, but he was certainly a sophisticated formalist who thought the duty of the scholar was to take seriously the way courts reason with legal concepts and then help them do it even more successfully. In the land where the law is still standardly taught from black-letter treatises written by the leading scholars, it should hardly be surprising that balanced realism is manifestly not the received wisdom of scholars and jurists.

Perhaps, though, we should interpret Tamanaha’s thesis about the Banality of Balanced Realism as being confined to the United States—though such a restriction would require him to abandon his broad claims about the uselessness of the distinction between formalism and realism. (If the distinction helps make sense of major jurisdictions, it has some utility!) But here the failure even to discuss Dworkin’s jurisprudential views is especially surprising, since Dworkin is *manifestly* not a Balanced Realist, and his Sophisticated Formalism (in the terms I introduce at the beginning of this essay) is offered as a way of making theoretical sense of American judicial practice, among other jurisdictions.

Perhaps Tamanaha does not see the relevance of Dworkin because of his own excessive emphasis on “mechanical deduction” and his repeated tendency to run together the autonomy of legal reasoning with the claim about mechanism, for example: “No one thinks that law is autonomous and judging is mechanical deduction.”⁷⁸ Or perhaps, since not many other scholars accept the full package of Dworkin’s views,⁷⁹ and since most legal philosophers find Dworkin’s actual jurisprudential theory implausible,⁸⁰ Tamanaha deems it not worth noting. If so, he should at least say so clearly. If the slogan “we are all Balanced Realists now” means we should not take Dworkin seriously, I am happy to sign on,⁸¹ though I fear I am not typical. Still, if a distinction between realism and formalism is useful for thinking

77. Brian Leiter, *Rule and Reason*, TIMES LITERARY SUPPLEMENT, Feb. 26, 2010, at 24 (reviewing FREDERICK SCHAUER, *THINKING LIKE A LAWYER* (2009)).

78. TAMANAHA, *supra* note 10, at 197.

79. The “Dworkin lite” that is popular among constitutional theorists does not appear to commit them to Dworkin’s views about the rational determinacy of law and the autonomy of legal reasoning. Most constitutional theorists are simply attracted to the idea that moral considerations are relevant to adjudicating weighty constitutional issues—a view, of course, that does nothing to distinguish Dworkin’s jurisprudence from that of the legal positivists. See Brian Leiter, *The Radicalism of Legal Positivism*, GUILD PRACTITIONER (2010).

80. See, e.g., Brian Leiter, *The End of Empire: Dworkin and Jurisprudence in the 21st Century*, 36 RUTGERS L.J. 165 (2004), and the references therein.

81. See Brian Leiter, *In Praise of Realism (and Against “Nonsense” Jurisprudence)*, U. Tex. L. Public Law Research Paper No. 138 (Jan. 23, 2010), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1113461.

about the dispute between a well-known contemporary theoretical edifice and its critics, must we really just give it up? It is hard to see why.

If balanced realism is not, then, wholly banal, perhaps the problem is really with the emptiness of formalism. Tamanaha begins his explicit discussion of jurisprudential issues in Chapter 9—tellingly titled “The Emptiness of ‘Formalism’ in Legal Theory”—by invoking H.L.A. Hart, who devoted a whole chapter of *The Concept of Law* to “Formalism and Rule-Scepticism.”⁸² Tamanaha emphasizes Hart’s puzzlement about the meaning of formalism yet fails to mention that *the whole point of Hart’s Chapter 7* is to render the issue more precise. “Easy” cases, for Hart, are cases in which the facts of the case fall squarely within the core meaning of the words in the applicable legal rule; these cases can be decided largely “mechanically” by deducing the required result from the rule and the facts. “Hard” cases, by contrast, are ones for Hart in which the facts fall within the “penumbra” of the meaning of the words in the applicable rule; these cases require the judge to exercise discretion. Hart is, in Tamanaha’s terms, probably a “Balanced Realist,” but his discussion certainly does *not* show that we can move “beyond the formalist-realist divide.” Rather, it shows that there is an important question about where and how often the formalist model of decision in “easy” cases applies and where and how often the “realist” model of decision in “hard” cases applies—which is precisely Hart’s dispute with realism.⁸³ Again, that looks like a useful conceptual role for the formalism-realism divide in thinking about adjudication.

The relevance of the formalist-realist divide is also suggested by Tamanaha’s subsequent discussion of formalism, though that was not his intent. Considering the views of Duncan Kennedy and Frederick Schauer on formalism, Tamanaha concludes that “formalism entails rule-bound judging that prohibits consideration of purposes or consequences.”⁸⁴ So here is a clear formalist thesis, if not about legal reasoning as a whole, then about one important piece of it, namely, rule application: judges should, on this view, apply the rule without regard for its ultimate purposes. Tamanaha, in response to this thesis on rule application, tries to argue that it is impossible to distinguish applying a rule as written from consideration of its purposes. To this end, he revisits one part of the old Hart-Fuller debate, arguing that Fuller was correct that there is an “artificial separation of purposes from rule interpretation.”⁸⁵ Tamanaha points, fairly enough, to Hart’s famous example of the rule: “No vehicles in the park.” Tamanaha asks why Hart is entitled to think that automobiles are “obviously” prohibited while “bicycles and roller skates” fall within the penumbra of the rule.⁸⁶ Tamanaha

82. TAMANAHA, *supra* note 10, at 159.

83. See Brian Leiter, *Legal Realism and Legal Positivism Reconsidered*, 111 ETHICS 278 (2001), reprinted in LEITER, *NATURALIZING*, *supra* note 8.

84. TAMANAHA, *supra* note 10, at 166.

85. *Id.* at 167.

86. *Id.* at 168.

thinks this is obvious only if one assumes something about the “purpose” of the statute. To show that the distinction is not obvious (and to establish that there is no “meaning of the rule”/“purpose of the rule” distinction), he quotes an Internet dictionary’s definition of “vehicle” as follows, but omitting the part in italics here:

- (1) any means in or by which someone travels or something is carried or conveyed; *a means of conveyance or transport: a motor vehicle; space vehicles;*
- (2) a conveyance moving on wheels, runners, tracks, or the like, as a cart, sled, automobile, or tractor.⁸⁷

Put to one side the fact that Hart’s method of ordinary-language philosophy was not meant to track lexicographic results, Tamanaha’s omission is telling: the fact that *even an Internet dictionary* uses as its core example “motor vehicle” does jibe nicely with Hart’s intuition that automobiles are indeed core instances of “vehicles” (without any regard for the “purpose” of the rule) while bicycles and roller skates are not. Remember, too, that Hart was not claiming that it was a clear mistake of language to deem a bicycle a “vehicle” but rather that competent speakers of English will have different intuitions about that usage (with some adopting it and some eschewing it), such that it is indeterminate whether a rule covering “vehicles” covers bicycles. By contrast, competent speakers will all agree that an automobile is a “vehicle,” as the very dictionary Tamanaha cites (but selectively quotes from) demonstrates. To be sure, there can be contexts of interpretation where the pragmatics, as distinct from the semantics, of meaning come to the fore and “meaning and considerations of purposes are intertwined,”⁸⁸ as Tamanaha puts it, but his discussion does not show that the distinction between meaning and purposive interpretation is not a real one.

Tamanaha is aware, of course, that there are self-described formalists in America today. Yet in discussing contemporary self-identified formalists, such as Justice Scalia and Harvard law professor John Manning, the best Tamanaha can do is to note that they are not, in my terms, Vulgar Formalists (i.e., they do not think judicial decision-making is just mechanical deduction).⁸⁹ Ironically, Tamanaha himself gives a perfectly apt characterization of their formalism:

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

87. *Vehicle*, DICTIONARY.COM, <http://dictionary.reference.com/browse/vehicle> (last viewed July 2, 2010).

88. TAMANAHA, *supra* note 10, at 170.

89. *Id.* at 178.

statutory terms; they advocated adherence to precedent; they argue that courts ought to defer to other institution bodies (legislatures, administrative agencies, etc.) when the applicable legal provisions are vague or uncertain, or not rule-like; most argue that courts should decide in accordance with clear rules even if the legally indicated outcome in a particular case would be unjust.⁹⁰

These views give expression to “formalism” as a kind of normative ideal of completeness for the legal system;⁹¹ there may well be indeterminacies and gaps in the law now, but the ambition of the formalist is to eliminate them, to produce a system of law and legal reasoning that is determinate throughout. Tamanaha admits that these views mark a distinction between “contemporary jurists” who self-identify as “formalists and their opponents,”⁹² and it certainly does; many theorists, Hart perhaps most famously, reject formalism as a normative ideal.⁹³ Given this concession, one wonders why Tamanaha thinks his argument moves one “beyond the formalist-realist divide.” Perhaps the title of Tamanaha’s book should have been *Refining the Formalist-Realist Dispute about Adjudication*. I suppose such an ambition, though intellectually legitimate, would have been less exciting, and would have overlapped too obviously with well-traversed terrain.

Let me conclude by recapping the main lines of argument regarding Tamanaha’s jurisprudential thesis that we can (or should) move “beyond” formalism and realism. Tamanaha attributes to the Realists a view he calls “balanced realism,” a somewhat looser version of the account of realism developed by Schauer and myself in the 1990s, though Tamanaha’s version tends to overemphasize the role of politics in judicial decision-making. He claims—falsely—that everyone is a “Balanced Realist” largely on the basis of remarks by post-Realist judges and at the same time accords little or no attention to the evidence that “balanced realism” is not accepted, such as public political debate about adjudication in the United States (which is quite formalistic in its assumptions), theoretical accounts of adjudication such as Ronald Dworkin’s, and the self-understanding of other common-law legal cultures such as England’s. Tamanaha also argues, unsuccessfully, that “formalism” is “empty” but in the process actually reveals its substantive meaning as a normative theory or ideal of adjudication and rule application.

III. CONCLUSION

Tamanaha’s book reflects some striking research into the views of largely forgotten or neglected nineteenth-century law professors and jurists, and the material he brings to our attention demands attention from legal

90. *Id.* at 179 (footnotes omitted).

91. I owe this way of putting the point to Scott Shapiro.

92. TAMANAHA, *supra* note 10, at 179.

93. HART, *supra* note 21, at 130–131.

historians. One often has the sense, though, that Tamanaha, having unearthed this material, is determined (no matter what!) to show that it really matters, that it really *must* change our views about realism and formalism and about the originality of the Realists. Tamanaha's lack of conceptual clarity about the different kinds of formalist and realist theses about adjudication, together with his penchant for sometimes poaching quotes out of context, warrants some skepticism about this ambition of the book.

At the same time, one must acknowledge that many of Tamanaha's targets are as conceptually confused as he is and that by disabusing those readers of the idea that most jurists have thought legal decision-making was mechanical (Vulgar Formalism) or that common-law judges never make law (Natural Law Formalism), the book will have a salutary effect. Notwithstanding the preceding criticisms, then, I think we should be grateful to Tamanaha for his provocative historical research, for laying down a vigorous challenge that should be met by historians of ideas and social scientists, and for imparting appropriate intellectual caution and modesty to future writers who might otherwise be prone to casual talk about a "formalist" age in American legal thought.