

THE DATA OF JURISPRUDENCE

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“Since jurisprudence is a science of human activities, and touches humanity both on its social and its individual side, it has relations to all human sciences.”¹

In contemporary jurisprudential writing, there is no lack of attention to method. Although I have participated in this activity,² I have reservations about it, partly because it tends to be narcissistic, but more because it can encourage an unwelcome form of intellectual-boundary policing. Despite these reservations, I will offer in this essay some reflections on method in jurisprudence, reflections stirred by Professor Tamanaha’s impressive new book, *A Realistic Theory of Law*.³ Although my remarks will be critical at points, they are meant to build on and elaborate proposals Tamanaha makes in his book, and are offered in the hope of expanding jurisprudential efforts and effacing intellectual boundaries, rather than defining new ones or policing old ones.

William Galbraith Miller, in a remarkable, albeit puzzling, book written at the turn of the twentieth century, anticipated a central methodological theme of Tamanaha’s work. He wrote, “Our primary object in Jurisprudence . . . may be to enumerate, classify, and account for the various shapes which the matter under investigation has assumed.”⁴ He further noted, “Common sense rebels against the restriction of jurisprudence to the anatomy of the skeleton of law in forms, and strives continually to deal with the physiology of society.”⁵

Tamanaha argues vigorously and persuasively for the revival of a genuinely historical and sociological dimension of jurisprudence. He develops and defends such a theory that locates law in the living, constantly changing environment of human societies. In the first part of this essay, I will argue for an understanding of the enterprise of jurisprudence that is even more ambitious than Tamanaha’s, but one that finds a secure place for his historical and social theory. In the second section of this essay, I will

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1. WILLIAM GALBRAITH MILLER, *THE DATA OF JURISPRUDENCE* 16 (1903).
2. See, e.g., Gerald J. Postema, *Jurisprudence as Practical Philosophy*, 4 *LEGAL THEORY* 329 (1998); Gerald J. Postema, *Jurisprudence, the Sociable Science*, 101 *VA. L. REV.* 869 (2015) [hereinafter Postema, *Sociable Science*].
3. BRIAN Z. TAMANAHA, *A REALISTIC THEORY OF LAW* (2017).
4. MILLER, *supra* note 1, at 3.
5. *Id.* at 466.

examine the methodology of Tamanaha's social-legal theory, offering suggestions aimed at further elaborating and enriching it.

I. THE JURISPRUDENTIAL ENTERPRISE

I begin with some unscientific observations. Law, the focal subject of the enterprise of jurisprudence, is a complex social phenomenon linked with other social phenomena that structure the lives of human beings who are equipped with certain distinctive capacities, limited by certain weaknesses, and driven by certain needs, among them the need to live together. This is not a theoretically partisan thought, but a common starting point for philosophical reflection on law for more than two millennia. It is as central to the thinking of Aristotle and Aquinas as to that of Grotius and Hobbes, to Marsilius of Padua as to Matthew Hale and Jeremy Bentham. We might likewise observe that the specific shape law might take in any community of human beings can vary with differences in the social, political, and natural circumstances in which they live, and that these variations themselves vary over time. This observation was available to ancient as well as modern writers.

Thus, the notion that to understand law we need to observe its forms and behavior in its natural social and historical habitat is not a piece of hard-won theoretical wisdom; it is just common sense. It is not a little surprising, then, that in the twenty-first century a theorist of law of Tamanaha's sophistication should find it necessary to argue these observations shape the jurisprudential enterprise. Yet, contemporary jurisprudence has found it easy to ignore them. Tamanaha's work in *A Realistic Theory of Law* demonstrates the value of keeping them clearly in view.

Tamanaha seeks to revitalize the historical-sociological tradition of jurisprudential thinking that flourished at the turn of the twentieth century—a tradition that has been systematically dismissed (when it is not simply ignored) by contemporary legal theory. He argues that it has a rightful and vital place alongside “natural law” (i.e., systematic normative moral-political philosophy) and “analytic jurisprudence” (dominated these days by latter-day Hartian positivism). These three branches represent different perspectives or “angles” on law, each with its distinctive theoretical focus. The social-historical “angle” must be added to the other two, he argues, because they are blind to it, and a “new balance” among the three must be struck. I agree that robust social and historical inquiry is an integral part of the jurisprudential enterprise. I also agree that its role has not been sufficiently appreciated by contemporary Anglo-American legal philosophy. But, the three-branch frame does not accurately represent the

task of contemporary jurisprudence, and it undersells the potential contribution of his social-historical inquiry to it. At the risk of offering Tamanaha an unwanted gift, I propose to sketch briefly a larger vision of the jurisprudential enterprise, in which his social-historical inquiry has a secure place.

To begin, I believe we must revise Tamanaha's tripartite characterization of the enterprise of jurisprudence. Tamanaha's orienting assumption is that the enterprise is theoretical, aimed at understanding and explanation, rather than practical, aimed immediately at intending, judging, and acting. Nevertheless, its *object* is fundamentally practical. Law is a body of knowledge, to be sure, but one focused on and arising from praxis. Unfortunately, Tamanaha identifies two of the three "angles" on this object of theoretical reflection with particular theories—natural law and post-Hartian positivism. A better characterization, I suggest, would identify complementary domains and disciplines of inquiry. Among them would be the *ideal domain*, centered around inquiries into the values and principles by which we seek to determine what law (and laws) *should be*. Theorists working in this domain explore our aspirations for law and seek to articulate standards with which to evaluate current law and principles to guide construction of better law. From another perspective, we might focus on the world in which we currently live, a world of imperfect practices and institutions that demands our understanding. Our *praxis* is situated in ongoing practices that shape our practical deliberations. Responsible action requires that participants understand the practices and institutions, the norms, values, and concepts that give them their distinctive shape, and the larger social and historical contexts in which they operate. There are not, then, just three "angles" on legal experience, but many of them, differing with respect to the aspects or domains of legal experience on which they focus and the disciplines they deploy in seeking their contributions to understanding their common object. We need a wider methodological vision in which to locate these different disciplines.

To capture this methodological vision,⁶ I suggest we look to historical examples of a wider jurisprudential enterprise. Sir Edward Coke boasted that common-law jurisprudence was a "sociable science" (*scientia socialis*), drawing on the rules and principles of all the other excellent sciences, human and divine.⁷ Some may wish to challenge the accuracy of Coke's description of the jurisprudential ambitions of seventeenth-century common

6. I set out more fully and defend this vision in Postema, *Sociable Science*, *supra* note 2.

7. SIR EDWARD COKE, CALVIN'S CASE 28a (1608), reprinted in 1 THE SELECTED WRITINGS OF SIR EDWARD COKE 231–32 (Steve Sheppard, ed., 2003).

law, although his successor, Sir Matthew Hale, did as much as any scholar and jurist of his day to bring divine, human, and natural learning to bear on the project of understanding the law that he professionally practiced.⁸ As Tamanaha rightly notes, in the next century a robust practice of sociable jurisprudence took root in Scotland.⁹ From within this tradition Miller wrote, “[t]he phenomena of jurisprudence are continuous” with the sciences of history, politics, ethics, and economics.¹⁰ “We cannot, for scientific purposes, draw an arbitrary line between law and these sciences and confine the province of jurisprudence to legislation, as Austin virtually did”¹¹

General jurisprudence, modeled after Scottish jurisprudence, would seek to bring all forms of rational inquiry together to deepen human understanding of the law and its place in the social and political lives of human beings. The common object of this enterprise is law in all its forms. Understanding this complex object is the work of many, including those engaged in philosophy (moral and political philosophy as well as epistemology, metaphysics, and logic), theology, history, economics, social inquiry, and psychology. The understanding that can be achieved thereby is not merely the consequence of aggregating the results of each separate mode of inquiry. A more substantial interaction and interdependence—a partnership—is possible. To illustrate what I have in mind, permit me to sketch what a truly philosophical jurisprudence might look like and the place it might hold in general jurisprudence.

Philosophical jurisprudence seeks a thoroughly philosophical understanding of law. Its subject matter is quotidian law, wherever it is to be found; its discipline is philosophy. As a mode of philosophy, it seeks a deeper, truth-approximating understanding of human experience. It works with our partial, disjointed, and confused self-understandings, including, but never limited to, the intuitions embedded within them. Philosophical jurisprudence begins with current, concrete, common experience of law, locating it in its natural habitat of human social and political life. For this purpose, it casts a wide net. Of course, the experience of *jurispiriti*—attorneys, judges, lawmakers, and officials—is included in this gathering of data. But no less important are the experiences of those whose lives are focused elsewhere, but who must live in the practical, daily milieu created and sustained by law—those who embrace it, those who are alienated from

8. For a discussion of Hale’s unique combination of natural law and common law themes, see Gerald J. Postema, *Introduction to MATTHEW HALE, ON THE LAW OF NATURE, REASON, AND COMMON LAW*, at xxxi–lviii (Gerald J. Postema ed., Oxford Univ. Press 2017).

9. TAMANAHA, *supra* note 3, at 4–8.

10. MILLER, *supra* note 1, at 465.

11. *Id.* at 465–66.

it, and those who wish to pay as little attention to it as possible: the decent man who values the rule of law, the bad man who doesn't give a fig for it, the victim oppressed by it, and the man on the Clapham omnibus. It also casts a wide net across time, recognizing that human beings have organized their social lives in law-like ways for a very long time.

Philosophical jurisprudence approaches this data of jurisprudence with the tools and dispositions of philosophy, of which I will mention four. First, philosophy is an essentially *discursive* enterprise. It is discursive in that it recognizes that the concepts and understandings that it seeks to order get their meaning only in and through networks of related concepts and understandings, neighbors nearby and more distant. It explores them with techniques of analysis and argument, but it is not narrowly "analytical." It tests its articulations of concepts against the complex phenomena of human experience and demands not only clarity but also illumination, not only precision but depth of understanding.

Second, on the ideal I have in mind, philosophical jurisprudence is slow to file experience into hermetically sealed boxes. As Michael Oakeshott reminded us, philosophy done properly is "suspicious of every attempt to limit the enquiry."¹² Although they are inveterate distinction-makers, philosophers nevertheless are willing to efface boundaries, explore connections, and demand deeper understanding of superficially disparate phenomena. Taking a cue from C. S. Peirce, I have called this disposition "*synechism*."¹³ Philosophical jurisprudence, when it gathers data for its exploration, and as it pursues this exploration, looks for continuities and illuminating similarities. It asks: *what is law like?* rather than declaring, *this is not like law and hence not law properly so-called*. Understanding, it holds, is found as much in relating and integrating as in separating and distinguishing. Always seeking precision, it nevertheless is willing to accept ambiguity when ambiguity better represents the phenomena under study.

Third, philosophy is resolutely, constitutionally *critical*—especially *self-critical*. It is Socratic, not in the law-school, pedagogical sense, but in the original sense dramatically presented in Plato's dialogues. In that respect, philosophy is potentially destabilizing. It may seek to reconcile disparate intuitions, but not to reconcile us to them; and the reconciliation always carries the potential of demoting or even dismissing our favored intuitions

12. MICHAEL OAKESHOTT, *The Concept of a Philosophical Jurisprudence*, in *THE CONCEPT OF A PHILOSOPHICAL JURISPRUDENCE* 142, 167 (Luke O'Sullivan ed., 2007).

13. 6 C.S. PEIRCE, *COLLECTED PAPERS OF CHARLES SANDERS PEIRCE* 86–112 (Charles Hartshorne & Paul Weiss eds., Harvard Univ. Press 1935). I learned of Peirce's concept from the insightful discussion in Susan Haack, *Not Cynicism, but Synechism: Lessons from Classical Pragmatism*, 41 *TRANSACTIONS CHARLES S. PEIRCE SOC'Y* 239 (2005).

if, from a wider perspective, they mislead or disorient our better understanding. Because of these characteristics, philosophical jurisprudence is inclined to pursue depth rather than closure, comprehensive insight rather than consensus.¹⁴ At the same time, it is a common enterprise (albeit often pursued by solitary scholars), a common endeavor, the work of many hands extended over time.

Finally, philosophy is constitutionally *historical*. I have said elsewhere, echoing Fernand Braudel's quip about historians, that for philosophers, the history of philosophy—the problems, projects, theories, and arguments that have unfolded over time—“sticks to [their] thinking like soil to the gardener's spade.”¹⁵ It sticks to their spades because it is the very soil they continually turn over, in which they plant, and from which they draw vital nutrients for their latest thoughts. The long tradition of philosophy is the tradition of engaging continually with its tradition, and this engagement of philosophy in its history is always philosophical, and hence resolutely critical. This tradition grows and becomes richer through this critical engagement and shrinks and becomes parched when it fails resolutely to do so.

Philosophical *jurisprudence* is philosophical in this wide, and admittedly ideal, sense. It must be *sociable*: it pursues its project of deeper and wider understanding of the corner of human experience represented by the practice and experience of law in partnership with other modes of inquiry focused on the same range of human experience. It joins and learns from psychology, sociology, art, and literature about the dimensions and depth of human nature; it joins and learns from economics, political science, and sociology about the institutions that structure human life in communities; it joins and learns from history about the variety of such institutions, the patterns of their interaction and influence, and the impact of political and social arrangements on them. From its own history and the history of theological reflection on such matters, it learns of the variety of ways in which implicit understandings of human nature and of social, political, and legal institutions have been articulated and defended. History of this kind is especially important for the critical engagement of philosophical jurisprudence in its theoretical history. Bentham fantasized about participating in a dialogue among the great philosophers, all gathered together at the same time in the same room—we might imagine, for

14. This is not to say that there is no place for what Fred Schauer calls, “analytic isolation,” but analytic isolation is a jurisprudential tactic, one tool in the toolbox of philosophical jurisprudence, and not the only or always the most important. Frederick Schauer, *Preferences for Law?*, 42 LAW & SOC. INQUIRY 87, 94 (2017).

15. FERNAND BRAUDEL, ON HISTORY 47 (Sarah Matthews, trans., Univ. of Chicago, 1980).

jurisprudential purposes, bringing together Plato, Aristotle, Cicero, Al Farabi, Maimonides, Aquinas, Marsilius of Padua, Althusius, Hooker, Grotius, and Hobbes. This is a typical Benthamite fantasy, but not a genuinely philosophical one, in my view, for it fails to appreciate that each of these theorists of the law set out to understand the self-understandings of law of their day, which were embedded in and reflective of the lives of *jurispiriti* and ordinary folk alike. Social, political, and often ecclesiastical history is essential ballast and context for critical engagement with their theories. We cannot pursue philosophical jurisprudence responsibly without entering a partnership with these other component disciplines of general jurisprudence. There is an important place for Tamanaha's project in this enterprise. Let us now consider his project.

II. GATHERING THE DATA OF JURISPRUDENCE

In chapters 4-6 of his book, Professor Tamanaha offers a sophisticated "genealogical account" of law from which I learned a great deal, especially from his discussion of international and transnational law.¹⁶ Tamanaha orients his discussion with the very general question: "What is Law?"¹⁷ This formulation suggests at least two quite different questions, based on two ways to understand the "is" at the center of the question. The first question uses the *is* of *identification*. On this reading, the question is, "Where and how can I find law?" An adequate answer to this question would offer a criterion that would enable us to gather good examples of law. Socratic inquirers would not be satisfied with this criterion, however, because they ask a different question, focusing on the *is* of *explanation*. They ask, "What sort of thing is it that we have found when we have gathered all the exemplars of law answering to the question of identification?" Those who ask this question seek a deeper understanding of the phenomena gathered for this purpose.

Tamanaha is mindful of the difference between these two questions. Indeed, his sketch of the stages of jurisprudential theory construction presupposes such an awareness.¹⁸ At the first stage, he maintains, theorists begin to collect data about the phenomena of law for their exploration. At the second stage, they articulate the way those whose experience is shaped by these phenomena understand them. At the third stage, they pursue empirical and historical investigations of these phenomena. These stages provide increasingly sophisticated and refined data for jurisprudential

16. TAMANAHA, *supra* note 3, at 82.

17. *Id.* at 38.

18. *Id.* at 74.

theorizing. At the fourth stage, theorists construct their explanatory theory; they do what Tamanaha calls their “conceptual work.”¹⁹

Tamanaha offers the following “conventionalist” answer to the question, “What is Law?”: “[L]aw is whatever people identify and treat through their social practices as ‘law.’”²⁰ Tamanaha formulates this master thesis several times in somewhat different terms. He invites us to consider what people “collectively” or “conventionally” say and do in their respective social groups and communities. He uses different terms or phrases to characterize what they do: they “collectively [or conventionally] recognize,”²¹ they “conventionally identify,”²² they “identify and treat through their social practices,”²³ and they conventionally accept.²⁴ Sometimes they are said to recognize (or identify) something *as law*, but at other times *as “law”*—that is, he seems to focus on what they *call* law. Taken as a conventionalist *criterion of identification*, it could be expressed as follows: *Law in society S comprises whatever people in S collectively recognize as law (or “law”).* For the remainder of my discussion, I will focus on this formulation of his master thesis. Tamanaha may also intend for this thesis to articulate the core of a conventionalist explanatory *theory of law*, but I will not comment on that proposal.

Viewed as a criterion for the identification of the data of jurisprudence, this formulation still needs refinement if it is accurately to represent Tamanaha’s project, as I understand it. As I have noted, Tamanaha sometimes seems to focus the theorists’ attention on the linguistic practice of people in target communities, on what they call or regard as “law” or “legal.”²⁵ Of course, people who are willing to *call* something law do not necessarily accept or practice its norms or regard them as binding on them *as law*. To determine what people in another culture call law, he acknowledges, requires skillful and sensitive translation of indigenous languages, but it is linguistic rather than legal practice that ultimately determines the adequacy of the translation.

Despite his language, I do not think Tamanaha has linguistic practice in mind. What appears to be the canonical formulation of his master thesis urges the theorist to seek out what people regard—“identify and treat through their social practices”—*as law*.²⁶ And it is clear from his treatment

19. *Id.*
20. *Id.* at 73 (emphasis in original).
21. *Id.* at 52, 72.
22. *Id.* at 72, 73.
23. *Id.* at 73.
24. *Id.* at 77.
25. *Id.* at 52, 53, 73, 75.
26. *Id.* at 77.

of data regarding law in primitive (“hunter-gatherer”) societies that he does not focus on linguistic practice.²⁷ He acknowledges that people in primitive societies may not have a term in their language that could properly be translated “law,” and even if they did, we do not have access to their language to fix a translation. What we must do, when we consider such societies, is look to their practice, to the extent we can reconstruct it, and identify features of it that bear some significant analogy in substance and function to features of our law-involving practices.²⁸ Indeed, this is the strategy he follows in gathering relevant jurisprudential data from international and transnational experience.²⁹ Hence, I believe Tamanaha’s master thesis directs theorists gathering data for their work to look to what people in their various societies *treat through their social practices* as elements bearing sufficient, illuminating similarities to what the ordinary people (as well as *jurispiriti*) in theorists’ home societies take to be law. They look to what people in those societies *think* and *do* when they think about and use what theorists can regard as roughly analogous to what they and people in their society think and do.

Starting at this point may seem to bias the theoretical project from the outset, but this need not worry us greatly, if the similarities noted at this point need only be rough, and if further evidence and analysis will go into gathering and refining this data. There is no point “from nowhere” from which our theoretical exploration can begin, whether that exploration be empirical or conceptual, a project of natural science, of logic, or of jurisprudence. Path dependence is an inescapable feature of every human intellectual endeavor.

But our theorists should heed two warnings, which might constrain somewhat Tamanaha’s otherwise latitudinarian attitude regarding what indigenous people “do with” their law.³⁰ First, when seeking to understand the products of human invention, we must keep in mind that not every use to which a social object may be put will illuminate the nature of that social object. Laptops can be used to hold windows open and candlesticks can be used for weapons, as Professor Plum did in the library. But we learn little about these cultural objects by observing and seeking to integrate these uses into our understanding. Listening to what people say (inferring therefrom what they think) and watching what they do, and especially *do with*, cultural objects is an important task for the cultural theorist, but it takes sensitivity

27. *Id.* at 82–93.

28. *Id.* at 84–89

29. *Id.* at 182.

30. *Id.* at 46–47.

and judgment to determine when the objects are used “in the right way,”³¹ where the right way is determined not by the observer-theorist, but rather by those engaged in the practice of their use. To complicate matters, the observer-theorist must also acknowledge that cultural objects, like customs and conventions, can be misused, or used in novel ways, with the result that the “right way” of their use may be altered or expanded. Sometimes, *ex iniuria ius oritur*.

Second, in gathering the relevant jurisprudential data, we must look to more than just what people in our target communities *do*, and especially what they *do with* various potentially law-relevant cultural objects. Rather, we need to attend to what people *do in* practices that appear roughly similar to practices we tend to regard as legal. Doing so we must recognize that what they do when engaged in their practices may differ in significant ways from what we do, and, more importantly, that what they think about what they are doing, if they were able to articulate it, might be quite different from what we think we are doing. Tamanaha’s work in this respect builds on an important insight that I wish to elaborate briefly.

The insight is that, when we go abroad geographically or temporally, we find *law* when we find people individually and collectively engaged in meaningful law-like practices. Such practices involve behaviors that constitute *performances*, that is, actions that are meant to conform to, and are judged by their conformity to, certain standards of competency. Participating in these practices requires a degree of mastery as measured by these standards. So, to understand these actions or activities one must understand the meaning they have as judged relative to these standards. The practice calls for judgment by those engaged in it and those observing it. Thus, competent participation in the practices involves some degree of reflective grasp of the standards and an ability to guide practice-relevant behavior by this grasp. Moreover, the practices that the jurisprudential theorists have in view are themselves shaped in part by the understandings of competent participants. What the participants *are doing* and how what they are doing relates to other social practices and institutions in the vicinity are determined by their understanding of what they are doing and why. This is not to say that indigenous understandings are necessarily correct, for participants need not be clairvoyant about their practices and some may be uncertain or confused about what they are doing. The reflective character of the activity does not guarantee accuracy of the reflections. The meanings of

31. On this notion, see Gerald J. Postema, *Conformity, Custom, and Congruence: Rethinking the Efficacy of Law*, in THE LEGACY OF H.L.A. HART: LEGAL, POLITICAL, AND MORAL PHILOSOPHY 45, 49 (Matthew H. Kramer et al. eds., Oxford Univ. Press 2008).

the practices, and the standards by which performances constituting them are evaluated, are not a simple function of the beliefs of practitioners. Nevertheless, when theorists gather the data of jurisprudence, when they gather what people *think* about what they are doing, what they gather is not epiphenomenal; it is intrinsic to the phenomena. What they believe does not *constitute* their practice, but it is, as old common lawyers liked to say, the best evidence we have regarding that practice. Theorists must do the best they can to uncover, identify, understand, and articulate this reflective grasp of the practice by those engaging in it.

What is also true of legal practices is that, as societies grow more complex and are capable of releasing at least some of their members from grinding subsistence labor, those with some leisure reflect more widely on their practices, offering more general and articulate accounts of common understandings of their practices in stories, myths and theories. These implicit “folk concepts,” as Tamanaha calls them, are given theoretical articulation and defense.³² And these theories and conceptions can achieve a degree of autonomy from the practices themselves, influencing the directions in which the practices develop and change. These philosophical or theological theories themselves have a history, interlaced with the history of the increasingly sophisticated development of social, economic, political, and ecclesiastical institutions of the societies in which they are produced. “The idea of right [i.e., *ius*] has a history,” Miller wrote, “so have laws themselves, and so has the philosophy that consciously discusses those laws [and the idea of right].”³³

Theorists seeking a comprehensive understanding of law must gather their data from the behavior, implicit understandings, and theoretical articulations of those understandings of those who engage in law-like practices. It is at this point that the partnership between social-historical inquiry and philosophical jurisprudence can bear fruit. The two modes of inquiry bring different but complementary skills, tools, and intellectual dispositions to the partnership. Let me propose here a friendly amendment to Tamanaha’s project. His project would be greatly enriched, I believe, if it were to include exploration of the attempts by theoretically inclined observers of the various “forms of law” to give articulate expression to the inherited and practiced understandings implicit in them. Such theorists might include card-carrying philosophers like Aristotle, Kant, and Bentham, philosopher-theologians like Al Farabi, Aquinas, Ockham, and Hooker, and theoretically inclined practitioners and jurists like Marsilius of Padua and

32. TAMANAHA, *supra* note 3, at 42–43.

33. MILLER, *supra* note 1, at 16.

Matthew Hale. Doing so may bring into focus dimensions or aspects of law—or at least of law in certain historical contexts—that we otherwise might overlook. It may also enable us to understand better how social forces can work on law to effect changes in the law and in other social and political institutions, for it can give us insight into how law in its rational, deliberative dimension responds to, incorporates, and redirects these forces.

I conclude with one example from a part of this legal-theoretical history with which I am familiar: classical common law jurisprudence.³⁴ Briefly stated, classical common law jurists, Matthew Hale prominent among them,³⁵ believed that, while law may be regarded as a body of propositions of law, these propositions cannot properly be understood if they are abstracted from the practice of reasoning from which they emerged. For these jurists, law is a reasoned thing: not that its propositions are necessarily reasonable as measured by some external standard, but rather that they are products of a distinctive process of deliberative reasoning that takes place in a public, forensic context. Concrete rules of law emerge from adjudged instances of such deliberative reasoning engaging the extant body of law to resolve practical problems of ordinary life that were brought to the court. The emerging and constantly evolving law was not, on this view, the result of any judge's decision, but rather were the common work of many hands over time. Judges, “these great traders in [legal] learning,” bring their several acquisitions “into a common stock by mutual communication,” Hale writes; thereby each becomes “the participant and common possessor of the other's learning and knowledge.”³⁶

Law, on this view, is a practiced discipline of practical reasoning shaped by the need to bring to bear a secure grasp of broad principles with a refined understanding and appreciation of the details of human affairs and conversation to forge practical judgments regarding the regular interactions of daily civic life. It is fundamentally a discursive discipline—involving at its core the giving, taking, and assessing reasons and tracing out their practical implications—which takes place paradigmatically in the course of public disputation. As Coke put it: “One shall not know of what metal a bell is [made] until it [is] well beaten; nor can the law be well known without disputation.”³⁷ Legal propositions have their content, status, and force just

34. I draw here on work I have done over the years. *See, e.g.*, Gerald J. Postema, *Classical Common Law Jurisprudence (Part I)*, 2 OXFORD U. COMMONWEALTH L.J. 155 (2002); Gerald J. Postema, *Classical Common Law Jurisprudence (Part II)*, 3 OXFORD U. COMMONWEALTH L.J. 1 (2003).

35. Postema, *supra* note 8.

36. MATTHEW HALE, ON THE LAW OF NATURE, REASON, AND COMMON LAW 159–60 (Gerald J. Postema ed., Oxford Univ. Press 2017).

37. SIR EDWARD COKE, 2 THE SELECTED WRITINGS OF SIR EDWARD COKE 743 n.7 (Steve Sheppard, ed., 2003).

insofar as they are incorporated in the body of law, where incorporation is a substantive and functional rather than formal matter, not a matter of official “acceptance,” but of discursive argument.

Professor Tamanaha recognizes that “professional legal culture shapes and affects the operation of law” and his paper in this volume of the *Washington University Law Review* develops this theme in rich detail.³⁸ Yet he, too quickly in my view, relegates this effect to the forces of legal formalism and self-interested gatekeeping of the monopoly-loving legal elite. I think willingness to listen more intently to the theoretical views I mentioned above, rather than treating them as epiphenomenal rationalizations, may provide insights into just how forces internal to the law, and indigenous participant understandings of it, may team up with larger forces to move the law and important social and political institutions.

Time and again through the human history, theological, philosophical, jurisprudential and institutional elements were powerfully intertwined. An understanding of how the forces described in Tamanaha’s book and recent essay work involves, I should think, understanding how these theoretical articulations promoted, retarded, extended, and enhanced forces external to the practice of law. Careful exploration of these elements by practitioners of philosophical jurisprudence and of social-legal theory together could yield insights into the way law moves other social institutions and is moved by them. I suspect that the discursive dimension of law has played a very large role in its development and transformation. It is a matter for our systematic general jurisprudential theory to determine what role we should ultimately assign to it, but we cannot ignore it without losing sight of an important part of law’s history. Here there is room for a vital partnership among key modes of jurisprudential inquiry.

38. TAMANAHA, *supra* note 3, at 110; Brian Z. Tamanaha, *Law’s Evolving Emergent Phenomena: From Rules of Social Intercourse to Rule of Law Society*, 95 WASH. U. L. REV. __ (2018).