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Realism and Jurisprudence: A Contemporary Assessment (book review)

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BOOK REVIEW

REALISM AND JURISPRUDENCE: A CONTEMPORARY ASSESSMENT

BRIAN Z. TAMANAHA, *A REALISTIC THEORY OF
LAW*, Cambridge, UK: Cambridge University
Press, 2017, p. 202, \$34.99

REVIEWED BY KEVIN P. LEE*

INTRODUCTION

In *A Realistic Theory of Law (RTL)*, Brian Z. Tamanaha develops a narrative of historical jurisprudence that is deeply textured and rich in probative insight. But despite the title, readers looking for a philosophical account of realism in legal theory should look elsewhere. The realism of *RTL* is a commonsense realism that is related to commonsense pragmatism. It is “built on observations about the past and present reality of law rather than on . . . non-empirical modes of analysis frequently utilized by analytic jurists.”¹ The book does not engage with current debates on philosophy or concerns about the possibility of objective historiography.²

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¹ BRIAN Z. TAMANAHA, *A REALISTIC THEORY OF LAW* 2 (2017).

² “Realism” means the philosophical concepts of “real” in the fields of ontology (the study of being) and epistemology (the study of knowledge). The concept is given some clarity by the famous question attributed to George Berkeley: “If a tree falls in the forest and there is no one there to hear it fall, did it really happen?” Ontological realists answer this question in the affirmative—there is a tree, and it did fall; and epistemological realists add that there is some way (at least potentially) to discover the tree and determine if it did or did not fall. There are then two claims of philosophical realism: (1) that there is a real world external to the mind; and (2) that knowledge of it is possible. When the falling tree example is applied by analogy to law, the question becomes one about the nature and the status of legal rules. It might be formulated this way: “If legal rules exist, can they be known apart from the society that made them?” The philosophical realist view is that law exists in

Nonetheless, Tamanaha takes a philosophical position. He believes that “[c]ontemporary jurisprudence suffers from a profound gap. Law is rooted in the history of a society, continuously remade in relation to social factors.”³ But, he observes, despite this connection between law and history, the once-influential historical jurisprudence has been “banished.” He argues that neither contemporary natural law (by which he means the natural law jurisprudence of John Finnis)⁴ nor analytic jurisprudence is concerned with history. “Natural law theorists concentrate on objective principles of morality and their implications for law,”⁵ he writes. And “[l]egal positivist analytical jurists focus on ‘those few features which all legal systems necessarily possess.’”⁶ Neither of the two “schools”⁷ is concerned with how historians have interpreted law’s past.

To address this situation, he proposes the restoration of a historical jurisprudence as a third way. There are two types of claims made here: (1) a claim about the history of law; and (2) a claim about philosophical realism. With respect to the first claim, there is a rich tradition of historical jurisprudence that includes Henry Maine (1822-1888), Friedrich Karl von Savigny (1779-1861), Rudolf von Jherling (1818-1892), and Oliver Wendell Holmes Jr. (1841-1935),⁸ which lost influence early in the 20th century. The restored historical jurisprudence that he proposes is concerned with understanding social relations underlying the law by examining the historical and sociological evidence for them.⁹ The underlying basic social relations are held to exist apart from mental and cultural instantiation and to be knowable. The theory rests on the claim that it is an instance of (or at least substantially similar to) classical American pragmatism, the philosophy initiated by C.S. Pierce and William James in the late 19th century and developed by John Dewey.¹⁰ In *RTL*, Tamanaha introduces a historical method that he calls “genealogical”¹¹ that he hopes will result in a “portrayal of law developing over time in connection with natural human tendencies and surrounding social cir-

some way apart from the minds of those who create it, and that knowledge of at least some aspect of the law is possible apart from its cultural expression in authoritative texts.

³ TAMANAHA, *supra* note 1, at 1.

⁴ Following Anthony Lisska, the natural law theory of John Finnis is referred to herein as the “Finnis Reconstruction.” See ANTHONY J. LISSKA, *AQUINAS’S THEORY OF NATURAL LAW: AN ANALYTIC RECONSTRUCTION* 82-115 (1998).

⁵ TAMANAHA, *supra* note 1, at 1.

⁶ *Id.*

⁷ Tamanaha terms these styles of jurisprudential reasoning as “schools.” He suggests that the other “theoretical approaches” such as law and economics and critical studies, “considers law in its social totality.” *Id.*

⁸ *Id.* at 17-21.

⁹ *Id.* at 24.

¹⁰ *Id.* at 2-3.

¹¹ *Id.* at 10.

cumstances.”¹² In the realistic theory presented in *RTL*, law mediates (in particular historically manifested cultural moments) between social forces and emergent social norms.

For all of *RTL*'s many strong points, a historical theory needs to be strongly self-aware of its own location in the history. With *RTL*, that means having a sense of the location of both types of claims in Tamanaha's theory (i.e., legal history and philosophical realism). Where *RTL* is weakest is in locating itself in relation to historical debates on philosophical realism. Concepts of reality (and relatedly, the concepts of Being and existence) have storied pasts. The claims about the real that Tamanaha makes in *RTL* are not entirely new, and the anti-realist jurists have sophisticated and intellectually respectable theories. They cannot be simply ignored and dismissed. Moreover, in the 20th century, new realist concepts of information, computation, and complexity are giving rise to radically new understandings of the world and of human nature. These new concepts are so radical that they are leading to a new informational worldview that has been likened to a Copernican revolution.¹³ Although the information revolution is having practical and philosophical consequences, it has so far had little influence on American legal theory. Nonetheless, it holds insights for questions about ontological and epistemological realism in law and could perhaps support the type of realistic theory of law that Tamanaha seeks.

I. SUMMARY OF THE BOOK

RTL contains six chapters. Chapter 1 is the Introduction. It describes the historical-sociological theory he calls “social legal theory” as an alternative to both legal positivism and natural law jurisprudence. Tamanaha argues that social legal theories are in some ways similar and complementary to natural law and legal positivism. He views this approach as similar to (or derived from) Montesquieu, Adam Smith, and others who viewed law as interacting with other social systems. He explains that historical jurisprudence seeks to understand law through universal principles, but it is also distinct in that it seeks to derive the principles from empirical observations. The belief that law is related to relations among various functional social structures is central to Tamanaha's theory.

Chapter 2 considers theories that have sought to define law in terms of a stable essential nature. Tamanaha argues that all such attempts have

¹² *Id.* at 9.

¹³ See LUCIANO FLORIDI, *THE FOURTH REVOLUTION: HOW THE INFOSPHERE IS RESHAPING HUMAN REALITY* (2014).

been either over- or underinclusive. He is particularly concerned to point out the error of conflating a legal system with a system of rules. Citing to John Searle's theory of social ontology,¹⁴ he argues that law is a distinct type of rule-based system backed by the authority and power of the state. There is a multitude of kinds of rule systems, but law is unique in having this formal aspect. Theories that are overly abstract do not recognize the "conventionalism" that he develops.¹⁵

Chapter 3 begins by distinguishing between natural kinds and social artifacts. It makes note of a common analogy used by both Joseph Raz and Scott Shapiro: "If being made of H₂O is of the nature of water,"¹⁶ Raz writes, "[t]hen this is so whether or not people believe that it is so, and whether or not they believe water has essential properties."¹⁷ These ontological claims are distinguished by drawing attention to the physicalism of these understandings of the ontology of water and asserting that law is social, not physical.¹⁸ Tamanaha does not develop a philosophical concept of realism here, and perhaps that is because the real for him is not a singular concept. While this may appear to allow for a subjective interpretation of what is significant in history, Tamanaha nonetheless asserts what he calls a "genealogical" approach that he apparently believes avoids this conclusion.

Chapter 4 presents the genealogical method of historical jurisprudence in more detail. The chapter develops a narrative of increasing complexity in society, moving from basic social relations to clans and tribes. Although analytic jurists do not typically view tribal people as having law because they do not have legal systems, he argues that they go wrong when they unthinkingly conflate "law" and "legal sys-

¹⁴ TAMANAHA, *supra* note 1, at 50-53.

¹⁵ *Id.* at 51-53.

¹⁶ *Id.* at 58-59.

¹⁷ Tamanaha notes that Shapiro makes a similar claim: "Being H₂O is what makes water, water. With respect to law, accordingly, to answer the question 'What is law?' on this interpretation is to discover what makes all and only instances of law instances of law and not something else." *Id.* at 58 (quoting JOSEPH RAZ, BETWEEN AUTHORITY AND INTERPRETATION: ON THE THEORY OF LAW AND PRACTICAL REASON 23 n.7 (2009)).

¹⁸ To some extent, this claim appears at least superficially, to call into question the realism of the theory presented in *RTL*, since the passage continues,

Philosophers generally agree the essential properties of water are mind-independent internal properties: "we are accustomed to thinking of essentialness as fixed by the laws of nature." Law is neither mind independent nor fixed by the laws of nature, but rather is a folk concept with multiple versions and variations. As psychologists who study concepts have found, "it may indeed be the case that for any one type of artifact, there exist an almost infinite number of variations in ontogeny, form, and function."

TAMANAHA, *supra* note 1, at 59.

tem.”¹⁹ What he means by law is a commonplace understanding among modern Anglophones: “Law is our concept, not theirs,” he writes.²⁰ His point is that, among tribal people, there was present what we now call “law” even in the absence of a legal system, and even if the tribal persons do not use the concept.

The chapter describes an evolution of law from early states to empires to contemporary legal systems. The argument is eclectic, moving from topic to topic. Beginning from what is essentially Hart’s concept of the minimum content of the natural law²¹ to medieval law (which did not fit well with Hart’s concept),²² the chapter suggests a secularized progressive view of law, separating from “religion and superstition” along essentially Weberian lines.²³ It defines empires as “inoperative states that exercise control over other societies through military force.”²⁴ After describing British colonial practices, he concludes that colonial laws are indifferent to the societies in which they are imposed.²⁵ And “[a] realistic clear-eyed view tells us that law can be constructed to advance all sorts of aims, from moral, to immoral, to having nothing to do with morality.”²⁶ The chapter is generally progressive, viewing law as growing in volume and complexity over time, with the 20th century witnessing explosive growth. This growth in sheer volume and complication of the law mirrors similar growth in society in general.²⁷

¹⁹ Tamanaha explains:

This is an artificial puzzle created by a poorly posed question that presupposes current circumstances. We have little trouble making these distinctions in our own societies using commonsense conventional criteria. Sharp distinctions cannot be drawn between law, custom, morality, etiquette, and religion in early social groups because low levels of social differentiation did not have the normative variations present at higher levels of social complexity. It was a primordial normative soup. If one points at the lack of differentiation to conclude that law did not exist, then it would also follow that customs and morality did not exist because they too cannot be clearly distinguished—which reinforces the point that these distinctions are inappropriate. A genealogical approach need not make these distinctions clear, for it can identify law in early social groups by locating recognizably familiar legal proscriptions.

Id. at 91-92.

²⁰ *Id.* at 92.

²¹ *Id.* at 99.

²² *Id.*

²³ *Id.* at 100.

²⁴ *Id.* at 101.

²⁵ Tamanaha writes: “Legal systems, as colonial law shows, are complexes of coercive power that do things in the name of law with no necessary or inherent connections to the society they purport to rule and no inherent moral purpose.” Legal systems, as colonial law shows, are complexes of coercive power that do things in the name of law with no necessary or inherent connections to the society they purport to rule and no inherent moral purpose. *Id.* at 103-04.

²⁶ *Id.* at 105.

²⁷ *Id.* at 116-17.

Chapter 5 adds some clarity by focusing on law as it exists today (which is described as the Age of Organizations) and suggesting some aspects influencing its continued development. Critically, Tamanaha argues that “[n]o existing theory of law adequately accounts for government entities that utilize legal mechanisms in myriad ways in their activities.”²⁸ Legal theories tend to view law only from the perspective of the government as law-giver, not law-user. But this is inadequate today. He then describes law in terms of social use and three forms of government use. Social use refers to the ways in which law coordinates social activities, whether consciously and intentionally or not.²⁹ Governmental use takes several forms: (a) self-protecting of its own institutions;³⁰ (b) structuring the internal operations of the government;³¹ and (c) achieving governmental objectives.³² This schema of private and governmental use, he believes, is more complete than the abstract analytic theories that reduce these dimensions to one account. He argues against Hayek that the common law is a spontaneous order reflecting society because societies will inevitably have diverse views of fundamental values, such as justice, and these differences create diverse background rules that are not purposefully part of the common law.³³ The chapter lists several features of law in the Age of the Organization that he believes are overlooked by analytic philosophy. He argues that due to over abstraction, it misses these features of law.

Chapter 6 considers international law as a distinct socio-historical legal tradition that emerged from European customs and practices between states, and evolved with the changing nature of state sovereignty. Focusing on the global financial and trade regime that was developed after the Second World War, Tamanaha suggests that an equivalent to the legal fabric of society had developed in the international community, which has allowed for more stability and concern for lawful behavior among state actors.

In sum, it appears that Tamanaha’s claim is that law, which is admittedly a Western concept with a modern meaning, has nonetheless a general applicability. It refers to a phenomenon that must be studied in the particular details of its actual manifestation. Therefore, rigid a priori concepts should be eschewed in favor of flexible commonsense understandings developed through historical and cross-cultural observation and analysis. This sort of analysis, which Tamanaha calls “genealogy,” sug-

²⁸ *Id.* at 126.

²⁹ *Id.* at 127.

³⁰ *Id.* at 129.

³¹ *Id.*

³² *Id.*

³³ *Id.* at 134-35.

gests that law has referred to something that exists formally from simple tribal societies to complex modern states but is always culturally contingent in the details of its existence. Law has a formal structure and an organic vitality. It is independent of moral norms and other social influences, but also coupled to them, shaping and being shaped by them. It has grown in volume and complexity as society has grown more complex.³⁴

II. ANALYSIS: “REALISM” IN A HISTORICAL CONTEXT

A significant weakness of *RTL* is that it develops a “genealogy” without reference to the substantial history of philosophical usage of the concept of genealogy—a history that is marked by complex issues in epistemology. Two moments in the development of the philosophical meaning of the term are particularly relevant in the contemporary literature. Genealogy was first used with philosophical meaning by Friedrich Nietzsche and developed substantially by Michel Foucault.³⁵ By choosing this term, Tamanaha has associated his work with these historiographies, but since he does not engage with them, it is not precisely clear how he views the relation to them. To get a better understanding of the method of *RTL*, it is useful to make a close examination of the genealogy described in *RTL* compared to both of the main methodological perspectives on genealogy.³⁶ A brief review of some of the history of the genealogical methods might clarify the nature and role of the historiography he calls “genealogy” in his “realistic theory” of law.

To begin, Nietzsche claimed the term genealogy for philosophers in his 1887 book, *On the Genealogy of Morals*.³⁷ In that book, he uses genealogy to refer only to a line of causal relations of descent. The biological concept of “gene” at the time referred to the presumed agent or unit of heredity, but that DNA is the mechanism of the gene was not discovered until 1953. Nonetheless, the Darwinian conception of evolution was well known in social science mainly through the work of Herbert Spencer in the United States and the United Kingdom, and Ernst Haeckel in Germany. Nietzsche used the term “genealogy” with preci-

³⁴ *Id.* at 148.

³⁵ FRIEDRICH NIETZSCHE, *ON THE GENEALOGY OF MORALS* 2 (Horace B. Samuel trans., Barnes & Noble 2006) (1887); *see also* BRIAN LEITER, *NIETZSCHE ON MORALITY* 133-54 (2015) (discussing the meaning of genealogy).

³⁶ That is to say at least this: by calling his method “genealogical,” Tamanaha signals that he is engaging in the discourse of legal theory from within an existing genealogical method, but his conclusions are not precisely located in relation to those of the genealogists who form the tradition in philosophy and political theory.

³⁷ NIETZSCHE, *supra* note 35.

sion. *On the Genealogy of Morals* is a study and critical analysis of the development of morality. This was a landmark in moral philosophy in part because Nietzsche suggested that moral norms have a history at all since the then dominant Christian moral philosophy viewed moral principles to be “absolutes,” in the sense that they are timeless truths willed by God or reflecting God’s moral nature.³⁸ Where Christians viewed moral norms as timeless, transcendent principles or universal essences, Nietzsche’s *Genealogy* showed that moral norms change over time through the interaction of concealed natural social forces. This was itself a revolutionary claim. Moreover, this conclusion suggested that the organizing principles of society might be revisable. In an age where hereditary monarchy was still widely recognized, the suggestion that the entire structure might be arbitrary and revisable was transformative. Nietzsche sought to expose the hidden history in order to challenge the power distributions within society.

Tamanaha’s concept of “genealogy” has *prima facie* similarly to Nietzsche’s in as much as it appears to endorse a naturalized historical account. Early in *RTL*, for example, Tamanaha invokes Adam Smith as exemplifying the method of genealogy. For him, Smith illustrates how social forces can be operative in history, even if they are not obvious. This is a form of naturalized genealogy. Leiter explains naturalism in this context:

The genealogy is not only a *history* of morality that rejects the evidential value of morality’s present meaning for discovery of its origin, but it is also a distinctively *naturalistic* history, an account of the origins of morality without appeal to supernatural causes. Nietzsche reiterates this methodological point in both the Preface of the *Genealogy* and his summary of the *Genealogy*’s argument two years later in *Ecce Homo*.³⁹

³⁸ Leiter explains:

So a genealogy of morality shows “morality” (qua AEP [Anthropocentric Evaluative Practice]) to have several different origins and multiple meanings. In particular the genealogist resists the mistaken inference from the present purpose of morality to any conclusions about its history or origin. But, this, so far is only part of what is distinctive of genealogy qua method. For equally central to genealogical practice, in Nietzsche’s view, is a commitment to *naturalism*. The genealogy is not only a *history* of morality that reject the evidentiary value of morality’s present meaning for discovering its origin, but it is also a distinctively naturalistic history, an account of the origins of morality without appeal to supernatural causes. Nietzsche reiterates this methodological point in both the Preface of the *Genealogy*, and his summary of the *Genealogy*’s points two years later in *Ecce Homo*.

LEITER, *supra* note 35, at 138 (footnote omitted) (emphasis in original).

³⁹ *Id.* at 138 (emphasis in original).

Naturalism here refers to a claim that is influential in many areas of philosophy, that the epistemological foundations can be explained through the interactions of material forces and entities, and are thus open to scientific investigation.⁴⁰ (Leiter views naturalized jurisprudence as a philosophically informed version of the central claims of Legal Realism.)⁴¹

Tamanaha expresses similar ambitions for *RTL*. He equates “social scientific realism” with “naturalism,”⁴² and sets this as a goal for his theory.⁴³ This commitment appears to be confirmed by his reliance on early sociology; which appears to rest on the work of sociologists like Eugene Ehrlich and Bronislaw Malinowski who draw from traditional intellectual history and the assumptions of functional-structuralism,⁴⁴ (a theoretical perspective that presumes that the natural social forces that guide the development of law work through causal relations that are rationally predictable).

A second issue has to do with the epistemological value of history. Leiter observes that for Nietzsche, genealogy is a critique of moral values:

In the genealogy of morality, his aim is critical not positive. And he is concerned *precisely* to break the chain of value transmission by showing that the value or meaning of the genealogical object is discontinuous over time: first because there is no unitary value or meaning transferred from point of origin to contemporary object; and, second, because there is more than one point of origin.⁴⁵

⁴⁰ Owing to Leiter’s influence, the form of naturalized epistemology that has been most important for legal philosophy is the replacement naturalism associated with Willard Van Orman Quine. Alvin Goldman has also developed a normative epistemological naturalism that some legal theorists have associated with Ronald Dworkin’s legal theory. And, there is a form of substance naturalism (which seeks harmony by looking to avoid conflicts of legal theory with the conclusions of the natural sciences), which is associated with Scandinavian Legal Realism. See Brian Leiter, *Naturalism in Legal Philosophy*, STAN. ENCYCLOPEDIA OF PHIL. (July 31, 2012), <https://plato.stanford.edu/archives/fall2014/entries/lawphil-naturalism/>.

⁴¹ Leiter has developed his understanding beyond the naïve realism of Nietzsche. He makes his case in two ways that mirror Quine’s two ways to naturalize epistemology: first by asserting epistemic holism, and second, by rejecting foundationalism. Leiter argues that Legal Realists made arguments similar to both of Willard Quine’s approaches. He illustrates the impact of Quine’s holism argument, which undercuts the distinction between *apriori* and *a posteriori*, by turning to a central claim of 20th century Anglophone jurisprudence: legal positivism. See Kevin Lee, *Jurisprudence and Structural Realism*, 5 LEGAL ISSUES J. 2, 81-82 (2017).

⁴² TAMANAHA, *supra* note 1, at 2.

⁴³ *Id.*

⁴⁴ For a discussion of the development of socio-legal theories, see John M. Conley & William M. O’Barr, *Legal Anthropology Comes Home: A Brief History of the Ethnographic Study of Law*, 27 LOY. L.A. L. REV. 41 (1993).

⁴⁵ LEITER, *supra* note 35, at 135.

For Nietzsche, then, the value of tracing the threads of relation through historical texts lies in drawing causal inferences that suggest the adaptive value of moral sentiments and their cultural expressions as rules and valued habits for the survival of individuals. The genealogy is naturalistic in this respect, in as much as it seeks no transcendent source or purpose for morals.

Tamanaha is silent on this aspect of his genealogy. The precise epistemic value the historical moments that he identifies are unclear, but he appears to have a similar agenda as Nietzsche. In describing the perspective on law that *RTL* develops, he writes:

Law is a social historical growth—or, more precisely, a complex variety of growths—tied to social intercourse and complexity. Certain of these legal manifestations develop and evolve, while others wither or are absorbed or supplanted. Law has roots in the history of a society, develops in social soil alongside other social and legal growths, tied to and interacting with surrounding conditions. The realistic theory of law I elaborate conveys law in these terms.⁴⁶

And later he adds:

[A] realistic theory of law can consider social influences on and consequences of natural law and analytical theories of law in ways the theories themselves are not capable of addressing. A realistic theory folds all theories of law, including itself, into the broader environment of beliefs and actions about law within society.⁴⁷

Taken together, these passages suggest that Tamanaha may view his project as similar to Nietzsche's genealogy. His genealogy seeks to illustrate the hidden socio-legal forces that evolve, the culturally specific belief and actions (rituals) that instantiate these natural forces.

All of this is well enough, but Nietzsche was writing before the critiques of modern social science that were put forward by the likes of Heidegger, Derrida, and Rorty. A critical objective for his genealogy to be self-reflexive in the way he suggests it is would be to engage with Michel Foucault, who wrote the *Order of Things*.⁴⁸ At that time, the gene recently had been identified, and this brought a new meaning to the historiographic method of genealogy. Foucault intended the term genealogy to refer to Nietzsche's study of morals, but he substantially departs

⁴⁶ TAMANAHA, *supra* note 1, at 3.

⁴⁷ *Id.* at 35.

⁴⁸ MICHEL FOUCAULT, *THE ORDER OF THINGS: AN ARCHAEOLOGY OF THE HUMAN SCIENCES* (Vintage 1994) (1966).

from it.⁴⁹ The shift in meaning is indicated by the distinction he makes between an *archeological* and a *genealogical* method. Archeology is the term he uses to refer to his early works on the history of psychology, which culminate with *Folie et Déraison: Histoire de la Folie à L'Âge Classique (Madness and Insanity: History of Madness in the Classical Age)*.⁵⁰ Beginning in *The Order of Things*,⁵¹ Foucault alters Nietzsche's conception of genealogy by rejecting what he takes to be Nietzsche's naïve commitment to naturalism. This allows an anti-realism to develop in Foucault's concept of genealogy.⁵²

Before adopting the term genealogy, Foucault used the metaphor of archeology to describe his method. His premise was that to understand an idea such as evolution, one needs to "understand the underlying structures of thought that formed the context" for Darwin to develop it.⁵³ The term "archaeology" was already in use in France after World War II as a metaphor for a historiography that emphasized discontinuity, the rejection of narrative histories, and "the critical awareness that historical research is always partly creating its subject matter."⁵⁴ Social Darwinism, associated with Herbert Spencer, which had been influential in the early twentieth century, was held deeply suspect by many following the war.⁵⁵ The metaphor of archeology refers to a historiographical approach that looks through the procrustean layers of intellectual deposit over generations for the grand themes that form the context for the creative insights of individuals. "It distinguishes between different levels of analysis in the history of science and penetrates the strata beneath individual observations, experiments and theories."⁵⁶

Foucault developed this concept of archeology, which he used in earlier works, to a derivative expression of Nietzsche's genealogy. In an essay, "*Nietzsche, Genealogy, History*," he argues for an opposition between naïve metaphysical systems of philosophy (such as characterized medieval Scholasticism) and genealogy, "which is self-effacing and unpretentious, but effective, precise, and cutting."⁵⁷ It too makes philosoph-

⁴⁹ Leiter suggests that Foucault did not adopt Nietzsche's naturalism. See LEITER, *supra* note 35, at 133-34. See also JOHANNA OKSALA, *HOW TO READ FOUCAULT* 45-46 (2008).

⁵⁰ MICHEL FOUCAULT, *HISTORY OF MADNESS IN THE CLASSICAL AGE* (Routledge 2006) (1961).

⁵¹ FOUCAULT, *supra* note 48.

⁵² LEITER, *supra* note 35, at 138 n.5.

⁵³ OKSALA, *supra* note 49, at 27.

⁵⁴ *Id.* at 28.

⁵⁵ For a general account of Spencer's philosophy and the eugenics movement in the United States, see ADAM COHEN, *IMBECILES: THE SUPREME COURT, AMERICAN EUGENICS, AND THE STERILIZATION OF CARRIE BUCK* (2016).

⁵⁶ OKSALA, *supra* note 49, at 29.

⁵⁷ *Id.* at 47.

ical claims, but ones that “historicize in order to radically question the timelessness and inevitable character of practices and forms of thinking.”⁵⁸ For Foucault, the genealogical method places emphasis on showing that what is presumed to be knowledge might be otherwise—that knowledge is contingent on historical accident. Archeology placed emphasis on discontinuity and disruption against the notion of steady linear progress, which Foucault took to be an overly simplified conceptualization of historical change that is commonly found in intellectual history. Foucault’s genealogy sought to show the connections between power relations and the claim to scientific knowledge. He argues that power and scientific knowledge co-evolve, and that genealogy’s task is to show that intertwining.⁵⁹

Tamanaha’s relation to Foucault’s conception of genealogy is complex. He does not specifically fail to mention Foucault, but the argument of *RTL* implicates questions that Foucault’s genealogy presupposes. The project of *RTL* questions the norms of the academic study of legal theory more than the law itself: it has as a primary goal to advocate for historical jurisprudence over the more dominant forms of analytic and natural law jurisprudence.⁶⁰ The social power conferred by the dominance of the analytic conceptualization of legal theory itself appears to be a concern for Tamanaha, but it is not clear from the text. Surely, it is an elitist field, but Tamanaha does not focus on this as Foucault might. But, to call into question the power structures that have made analytic philosophy and natural law jurisprudence the dominant forms (and to question why historical jurisprudence has been forgotten), is to question also the judgment that Nietzsche’s genealogy has not escaped naïve realism. That is to say, Foucault’s conception of genealogy challenges Nietzsche’s genealogy to be self-referential—to question what evolutionary forces support the recognition of the “will to power,” and by whom. To be self-referential in this way is necessary if genealogical approaches are to exemplify those virtues that they advocate. For Tamanaha’s theory to be self-referential, it must make a genealogy of legal theory that includes the idea of genealogy itself; that calls into question the historical constructed-ness of historical deconstruction. None of this is on the agenda of *RTL*, however. And so, the reader is left to wonder how Tamanaha views the genealogy of legal theory: is it driven by evolutionary forces that are disclosed by the genealogy of genealogy, based on the survival of the fittest jurispudent, like Nietzsche? Or is it a historically constructed power play carried out through the intertwining of power structures and claims to scientific

⁵⁸ *Id.* at 48.

⁵⁹ *Id.* at 49-50.

⁶⁰ TAMANAHA, *supra* note 1, at 12-13.

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knowledge as with Foucault's genealogy? Lack of clarity on this issue goes to the core claims of the book since the methods of analytic jurisprudence⁶¹ and the anti-realisms that it rejects are responses to the epistemological claims that are illustrated by the contrasting methods of Nietzsche and Foucault.

⁶¹ The methodology of the Finnis reconstruction of natural law is bifurcated. Finnis intends to separate theoretical and practical reason as Aquinas did. Whether he succeeds in this has been a matter of debate, *see* LISSKA, *supra* note 4. In many respects, he does adopt a form of conceptual analysis, particularly with theoretical reason. He accepts the positivists dichotomy between fact and norm, but seeks to ground practical reason separately from theoretical reason. Perhaps the historical method that Tamanaha seeks does not lie between analytic jurisprudence and Finnis, but is an alternative that is at odds with both.

