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Brian Z. Tamanaha
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Introduction: A Realistic Perspective

Contemporary jurisprudence suffers from a profound gap. Law is rooted in the history of a society, continuously remade in relation to social factors. Law is an integral aspect of society and society infuses law, their interaction mutually constitutive and bidirectional in cause and effect. Law assumes different forms and functions in connection with levels of social complexity and surrounding economic, political, cultural, technological, ecological, and social factors. Interconnected with society in these and other ways, law must be apprehended holistically. Theories that center on law within social and historical contexts, however, have been all but banished from jurisprudence.

Legal philosophers abstract law from history and from society to present theories of law as timeless and universally true.[1] "Principles of natural law . . . have no history," says John Finnis.[2] Joseph Raz declares, "It is easy to explain in what sense legal philosophy is universal. Its theses, if true, apply universally, that is, they speak of all law, of all legal systems; of those that exist, or that will exist, and even of those that can exist though they never will."[3] Natural law theorists concentrate on objective principles of morality and their implications for law. Legal positivist analytical jurisprudents focus on "those few features which all legal systems necessarily possess."[4] Beyond these two main branches of legal theory lies a jumble of schools of thought: legal realism, law and economics, critical legal studies, critical feminism, critical race theory, legal pragmatism, and so on.[5] These various theoretical approaches have particular angles and concerns – none considers law in its social totality.

[1] See Joseph Raz, *Between Authority and Interpretation* (Oxford: Oxford University Press 2009) 91.

[2] John Finnis, *Natural Law and Natural Rights* (Oxford: Clarendon Law Series 1980) 24.

[3] Raz, *Between Authority and Interpretation*, supra 91–92.

[4] Joseph Raz, *The Authority of Law*, 2nd ed. (Oxford: Oxford University Press 2009) 105.

[5] For an exhaustive survey, see Brian Bix, *Jurisprudence: Theory and Context*, 6th ed. (Durham, NC: Carolina Academic Press 2012); see also Jeffrie G. Murphy and Jules L. Coleman, *Philosophy of Law: An Introduction to Jurisprudence*, rev. ed. (Boulder, CO: Westview 1990); Robert L. Hayman, Nancy Levitt, and Richard Delgado, *Jurisprudence Classical and Contemporary: From Natural Law to Postmodernism*, 2nd ed. (St. Paul, MN: West 2002).

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To observe that holistic theories of law within society are excluded from contemporary jurisprudence is not to say they are nonexistent. An illuminating account conveyed later in this Introduction was constructed by Adam Smith. Montesquieu, Henry Maine, Rudolf von Jhering, Eugen Ehrlich, and Max Weber produced enlightening theories of law in society, discussed in the course of this book. These major intellectual figures and contemporary theorists working along similar lines, however, are ignored in jurisprudence texts. Jurisprudence in recent decades has become increasingly abstract, specialized, and narrow. Analytical jurisprudence, dominated by legal positivists, has traveled the furthest in this direction.

The dual objectives of this book are to articulate a realistic theory of law, and more generally to demonstrate the significance to jurisprudence of theories that center on law in society (what I call social legal theories). Realism has various meanings, three of which I invoke. In jurisprudence, legal realism is commonly portrayed as a skeptical view of judging attributed to Karl Llewellyn and Jerome Frank, among others. The realistic theory I construct focuses on law more broadly, including but not limited to judging, and draws on views within historical and sociological jurisprudence that informed the legal realists, particularly the insight that law is subject to historical and social influences and must be seen in terms of its functions and consequences.[6] Social scientific realism – or naturalism – sees humans with natural traits and requirements who manage collective tasks through culturally informed intentional actions, collectively giving rise to social practices, institutions, and structures that are continuously produced and evolve over time.[7] Last, commonsense realism holds that law can best be understood by paying close attention to what people say about law, what people think about law, and what people do with law. All three senses of realism require that law be understood empirically. A realistic theory of law is built on observations about the past and present reality of law rather than on intuitions, thought experiments, musings about all possible worlds, claims about self-evident truisms, and other non-empirical modes of analysis frequently utilized by analytical jurisprudents.

My realistic perspective is informed by the classical pragmatism of William James, John Dewey, Charles Saunders Peirce, and George Herbert Mead. It builds on the notion that truths are established through the collective pursuit of projects in the world. Pragmatism is a method or orientation modeled on scientific inquiry,

[6] The basis for realism and pragmatism applied in this book is laid out in Brian Z. Tamanaha, *Realistic Socio-legal Theory: Pragmatism and a Social Theory of Law* (Oxford: Clarendon Press 1997). For a study of the legal realists in particular, see Brian Z. Tamanaha, *Beyond the Formalist–Realist Divide: The Role of Politics in Judging* (Princeton, NJ: Princeton University Press 2010).

[7] An account of social scientific realism is elaborated in Peter T. Manicas, *A History & Philosophy of the Social Sciences* (Oxford: Blackwell 1987) chapter 13. See Roy Bhaskar, *The Possibility of Naturalism* (Atlantic Highlands, NJ: Humanities Press 1979). My epistemological views are grounded in pragmatism, which diverges at certain points from versions of scientific realism. See Cleo H. Cherryholmes, "Notes on Pragmatism and Scientific Realism," 21 *Educational Researcher* 13 (1992).

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which is continuous with all human inquiry. The pragmatist, James explains, "turns away from abstraction and insufficiency, from verbal solutions, from bad a priori reasons, from fixed principles, closed systems, and pretended absolutes and origins. He turns towards concreteness and adequacy, towards facts, towards action and towards power."[8] Beliefs, theories, and concepts are given meaning by and evaluated in terms of the consequences that follow from actions based thereon. In Dewey's words, "a thing is – is defined as – what it does, 'what-it-does' being stated in terms of specific effects extrinsically wrought in other things."[9] This perspective requires close attention to the empirical reality of law. Another key pragmatic notion reflected in this book is that existence is continuously evolving. Natural and social circumstances are always in the process of being made and remade through the intentional and unintentional consequences of our purposeful actions. "And this taking into consideration of the future takes us to the conception of a universe whose evolution is not finished, of a universe which is still, in James' term, 'in the making,' 'in the process of becoming, of a universe up to a certain point still plastic."[10]

An empirically oriented theoretical approach that portrays law in terms of developing social institutions accounts for important aspects of law that jurisprudents presently overlook. For instance, legal philosophers say little about how law has evolved over time in connection with society. They focus almost exclusively on state law, largely ignoring other forms of law like customary law, religious law, and international law, and overlooking the pervasiveness of legal pluralism. Legal theorists routinely conceptualize law in terms of rule systems engaged in social ordering, although state law has become a multifunctional instrument used for all sorts of tasks, from creating entities like corporations and government agencies to structuring internal operations of government. Legal theorists make no mention of the modern creation of a legal fabric within society, constituting a new stage of law. These and other pivotal aspects of law neglected in jurisprudence are brought to the surface through my realistic theory.

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 whither or are absorbed or supplanted. Law has roots planted 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.

[8] William James, *Pragmatism and The Meaning of Truth* (Cambridge, MA: Harvard University Press [1907] 1975) 31.
[9] John Dewey, "The Historic Background of Corporate Legal Personality," 35 *Yale Law Journal* 655, 660 (1926).
[10] John Dewey, *Philosophy and Civilization* (New York: Capricorn Books [1931] 1963) 25.

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ADAM SMITH'S REALISTIC ACCOUNT OF LAW

A holistic historical theory of law in society is best introduced by way of example. What follows is a brief discursive of Adam Smith's account of law, not a systematic theory, which he announced, though never completed.[11] Smith worked out his ideas in the company of the Scottish Enlightenment philosophers, famously including David Hume, who shared naturalistic assumptions about human social development and were deeply impressed by Montesquieu's perspective.[12] "They discard all speculations regarding man before the beginning of society; man is for them an animal living in certain types of groups."[13] Producing their theories prior to the division of knowledge into separate disciplines, they aspired to achieve a scientifically grounded philosophy of society that ranged across psychology, sociology, history, economics, politics, and law, exhibiting a holistic perspective on law interconnected within society seldom seen today. Central to their perspective was human nature and people living in social groups that develop over time.[14]

Smith builds his accounts of morality and law on natural human traits: anger, hatred, resentment, and jealousy; generosity, kindness, compassion, and friendship; selfish passions, including the desire for wealth, fame, prestige, and the esteem of others; and pursuit of comfort, pleasure, and well-being.[15] His theory of morality combines the human capacity for empathy with desire for the sympathy and admiration of others, filtered through what he calls the "impartial spectator."[16] When evaluating others, people imagine themselves in the position of the actors, sympathizing with or disagreeing with the actors' feelings and motives, rendering judgments on their conduct. Moral sentiments prevailing within society color the

[11] This discussion is based on two detailed sets of student notes from separate classes in the early 1760s, supplemented by discussions of law in his other published works. See Adam Smith, *Lectures on Jurisprudence*, edited by R. L. Meek, D. D. Raphael, and P. G. Stein (Indianapolis, IN: Liberty Fund 1982); Adam Smith, *The Essential Adam Smith*, edited by Robert L. Heilbronner (New York: W.W. Norton & Co. 1986).

[12] A rich introduction to the views of the Scottish philosophers is Christopher J. Berry, *Social Theory of the Scottish Enlightenment* (Edinburgh: Edinburgh University Press 1997). On the connection to Montesquieu, see Peter Stein, "Law and Society in Eighteenth Century Scottish Thought," in *Scotland in the Age of Improvement: Essays in Scottish History in the Eighteenth Century*, edited by N. T. Phillipson and Rosalind Motchison (Edinburgh: Edinburgh University Press 1970) 157.

[13] Roy Pascal, "Property and Society: The Scottish Historical School of the Eighteenth Century," 1 *Modern Quarterly* 167, 170 (1938).

[14] See Arthur Herman, *How the Scots Invented the Modern World* (New York: Broadway Books 2001) 62–107.

[15] Henry J. Bittermann, "Adam Smith's Empiricism and the Law of Nature," 48 *Journal of Political Economy* 487, 509–10 (1940). An informative brief summary of Smith's thought is James R. Otteson, "Unintended Order Explanations in Adam Smith and the Scottish Enlightenment," in *Liberalism, Conservatism, and Hayek's Idea of Spontaneous Order*, edited by Louis Hunt and Peter McNamara (New York: Palgrave Macmillan 2007).

[16] See D. D. Raphael, *The Impartial Spectator: Adam Smith's Moral Philosophy* (Oxford: Clarendon Press 2007). Glenn R. Morrow, "The Significance of the Doctrine of Sympathy in Hume and Adam Smith," 32 *Philosophical Review* 60 (1923).

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judgments of an impartial spectator. "The individual moral consciousness is the result of social intercourse; the individual moral judgments are the expression of the general sentiments of the society to which the individual belongs."[17]

Fundamental natural sentiments become embodied in obligatory general rules of justice enforced by positive law.[18] "Fraud, falsehood, brutality, and violence" excite reactions of "scorn and abhorrence," Smith observed, and murder, theft, and robbery "call loudest for vengeance and punishment."[19] Protections for personal injury, property rights, and contract enforcement, in Smith's account, obtain legal backing when people sympathize (via the impartial spectator) with a victim against a wrongdoer.[20] These sentiments are informed by conventional moral views and involve consideration of perceived benefits and harms to parties, as well as natural responses like resentment at perceived injustice. He identified an innate sense of justice as the "main pillar that upholds" society, without which it would "crumble into atoms."[21] "Nature has implanted in the human breast that consciousness of ill desert, those terrors of merited punishment which attend upon its violation, as the great safeguards of the association of mankind, to protect the weak, to curb the violent, and to chastise the guilty."[22] "Smith does recognize a general framework of legal notions which are found universally in any society: property, contract, punishment for injury, marriage, succession, and so on. These ideas are a part of the nature of man, whatever the state of society he is living in."[23] Although legal rules on these matters exist everywhere, the substance of these notions varies across societies and over time in connection with attendant economic, political, material, and cultural factors. Diverse rules of justice across societies reflect different moral sentiments. Legal regimes also vary because elites in control of legal institutions and powerful groups within society are able to produce laws that serve their interests.[24]

Smith articulated a four-stage theory of law-society revolving around property rights. Hunter-gatherers (first stage) had few property rights because people had few possessions, so theft was not significant. In shepherd or pastoral societies (second stage), when people tended flocks and herds, property rights were treated seriously and theft was harshly sanctioned because herders invested substantial efforts and

[17] Morrow, "The Significance of the Doctrine of Sympathy in Hume and Adam Smith," supra 70. See Bittermann, "Smith's Empiricism and the Law of Nature," supra 510–11.

[18] See Lisa Herzog, "Adam Smith's Account of Justice between Naturalness and Historicity," 52 *Journal of the History of Philosophy* 703, 705–07 (2014).

[19] Smith, *Essential Adam Smith*, supra 116, 94.

[20] See Adam Smith, *Lectures on Jurisprudence*, edited by R. L. Meek, D. D. Raphael, and P. G. Stein (Indianapolis, IN: Liberty Fund 1982) 16–17, 183, 104. Raphael informatively conveys and supplements Smith's account of property rights, contract, and crimes, and the impartial spectator at Raphael, *Impartial Spectator*, supra 105–14. See also Peter G. Stein, *Legal Evolution: The Story of an Idea* (Cambridge: Cambridge University Press 1980) 42.

[21] Smith, *Essential Adam Smith*, supra 97. [22] Id.

[23] Peter G. Stein, "Adam Smith's Theory of Law and Society," in *Classical Influences on Western Legal Thought A.D. 1650–1870*, edited by R. R. Bolgar (Cambridge: Cambridge University Press 1979) 265.

[24] See Herzog, "Adam Smith's Account of Justice between Naturalness and Historicity," supra 708.

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resources in raising animals and wealthy people with large herds sought protection of their holdings. In agricultural societies (third stage), property law expanded to account for more forms of moveable and fixed property. In the age of commerce (fourth stage), laws and regulations multiplied to cover new kinds of property and economic exchanges. "It is easy to see that in these severall ages of society, the laws and regulations with regard to property must be very different."[25]

During each stage, laws are commensurate with and suited to the extent of social differentiation and means of subsistence. "The more improved any society is and the greater length the severall means of supporting the inhabitants are carried," Smith observed, "the greater will be the number of their laws and regulations necessary to maintain justice, and prevent infringements of the right of property."[26] In early societies, only the most heinous crimes like murder and robbery were punished; trials "were carried on by the whole people assembled together; and this was not so much to inflict a punishment as to bring about a reconciliation and some recompense for the damage the injured party may have sustained."[27] Laws at this stage are conventions and settled practices.[28] Contracts were not considered binding early on because the value at issue was insufficient to gather the entire community, and ambiguities made it difficult to determine agreements.[29] When trade grew to sizable amounts and spanned greater distances, communities began to enforce contracts to provide security for transactions.[30]

Rejecting the social contract theories of Hobbes and Locke, Smith believed government formed in the age of shepherds "from the natural progress which men make in society."[31] From previously egalitarian circumstances, chieftains emerge as leading figures and use their authority to marshal wealth, which over time is parlayed into hereditary leadership. Government came about with the accumulation of property and resultant disparity between rich and poor. "Laws and government," he said in terms redolent of Marxism, "may be considered in this and indeed in every case as a combination of the rich to oppress the poor, and preserve to themselves the inequality of the goods which would otherwise soon be destroyed by the attacks of the poor, who if not hindered by the government would soon reduce the others to an equality with themselves by open violence."[32] This arrangement is supported by ideological justifications (religious, aristocratic, and caste traditions) and secured by legal force.

At the outset, the state cared little about the private affairs of people beyond keeping disputes from erupting. "Those which immediately affect the state are those which will first be the objects of punishment";[33] threats to state power, including treason and desertions by soldiers, were treated severely.[34] "A government is often maintained, not for the nation's preservation, but its own."[35] The government's primary orientations are to maintain the elite (rulers, aristocracy, high caste, priests,

[25] Smith, *Lectures on Jurisprudence*, supra 16. [26] Id. [27] Id. 88.
[28] Stein, *Legal Evolution*, supra 35. [29] See Smith, *Lectures on Jurisprudence*, supra 88–94.
[30] Id. [31] Id. 207. [32] Id. 208. [33] Id. 130. [34] Id. 209. [35] Id. 547.

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wealthy) and the government itself, though the entire community benefits from the security law provides in protecting property, enforcing contracts, punishing murder and personal injuries, and resolving disputes.[36] Smith thus extolled the essential social benefits supplied by law while also matter-of-factly depicting law as coercive power used by political, economic and cultural elites to their advantage as well as by the government itself to dominate others.[37]

A prime example of law's enforcement of domination is slavery. Slavery would not soon disappear, he opined, because "the love of domination and authority over others . . . is naturall to mankind."[38] Presaging the American Civil War, he doubted that a democracy would voluntarily relinquish slavery. "In a democraticall government it is hardly possible that it ever should [abolish slavery], as the legislators are here persons who are each masters of slaves; they therefore will never incline to part with so valuable a part of their property . . . this love of domination and tyrannizing, I say, will make it impossible for the slaves in a free country ever to recover their liberty."[39]

Smith's views of family law are bluntly realistic. He compares humans to all animals in that "the inclination of the sexes towards each other is precisely proportional to the exigencies of the young and the difficulty of their maintenance."[40] Husbands everywhere have great authority over wives, he explains, because "The laws of most countries being made by men generally are very severe on the women, who can have no remedy for this oppression."[41] In many societies, only the husband had the right of divorce; adultery by a wife was a great offense, sometimes punishable by death, whereas infidelity by husbands was not considered adultery or was treated more leniently. "The real reason is that it is men who make the laws with respect to this; they generally will be inclined to curb the women as much as possible and give themselves the more indulgence."[42] Modern critical feminist theorists would heartily concur.

In Smith's account, as summarized earlier, natural human traits of jealousy, self-interest, and desire for esteem and wealth, as well as sympathy, kindness, and generosity, are filtered through cultural views and ideologies that inform moral sentiments about justice and fairness and become entrenched within law. The legal disabilities of wives are not justified by naked admissions that men benefit from controlling women's property and sexuality; rather, within a paternalistic world view, these legal doctrines are for the protection and benefit of women. Slavery laws

[36] Id. 338.

[37] As Jennifer Pitts comments, "Smith makes clear in the Wealth of Nations that the economically and socially powerful will always act politically, using their power to shape law and policy to enhance their wealth and standing, not always successfully but often to the prejudice of public interests." Jennifer Pitts, "Irony in Adam Smith's Critical Global History," *Political Theory* 1, 9–10(2015): 0090591715588352.

[38] Smith, *Lectures on Jurisprudence*, supra 192. [39] Id. 186. [40] Id. 141. [41] Id. 146.

[42] Id. 147.

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are not justified in terms of the selfish interests of owners; instead, slaves are painted as naturally inferior, deserving their subjugation, which is for their own good.

Smith presents a slow evolution of judicial institutions in connection with social needs as well as attitudes and incentives of the actors involved. "The judicial power gradually arises from being at first merely an interposition as a friend without any legal authority, which however will be of considerable effect if this third person have a great influence with both parties, to be, 2ndly, a power resembling that of an arbiter to decide the causes referred to them and inflict some gentle penalty."[43] "At the first establishment of judges there are no laws; every one trusts the naturall feeling of justice he has in his own breast and expects to find in others."[44] The strict writ system came about in England, Smith says, because judges were suspected of irregularity, injustice, and corruption. "They were therefore ordered to judge by the strict law, and were to be tried [for bribery] in their proceedings by their own records, which were kept all along with great exactness, and no alteration, explanations, or amendments of any sort would be admitted, and any attempt of this sort would be punishable."[45] Competition between courts for claimants motivated improvements in how judges functioned. "As the whole profits of the courts thus depended on the numbers of civil causes which came before them, they would all naturally endeavor to invite every one to lay his cause before the court, by the precision, accuracy, and expedition (where agreeable) of their proceedings, which emulation made a still greater care and exactness of the judges."[46] The explosive growth of commerce also had an impact on the judicial system because many cases arose that did not fit within existing statutes and writs, "which proved very detrimental, and could not go long without a remedy."[47] The equitable Court of Chancery initially took up these cases, providing remedies that previously were unavailable in law.

Longevity is essential to the functionality of legal institutions. Smith observed that extended duration results in normalization and social fixity. New courts and laws are inevitably uncertain. "It takes time and repeated practice to ascertain the precise meaning of a law or to have precedents enough to determine the practice of a court."[48] After a system is established, its stability is enhanced because people become accustomed to and build arrangements on top of legal regimes despite their known defects.[49] "Everyone would be shocked at any attempt to alter this system," Smith said of the English polity, "and such a change would be attended with the greatest difficulties."[50] The existing system becomes an implicit aspect of the daily lives of citizens. "And indeed," Smith notes, "it will but seldom happen that one will be very sensible of the constitution he has been born and bred under; everything by custom appears to be right or at least one is but very little shocked at it. In this case and in any others the principle of authority is the foundation of that of utility or common interest."[51]

43 Smith, *Lectures on Jurisprudence*, supra 213. 44 Id. 314. 45 Id. 279. 46 Id. 281.
47 Id. 281. 48 Id. 287. 49 Id. 322. 50 Id. 271. 51 Id. 322.

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My purpose in reciting Smith's views is not to endorse the details, though much of what he says is edifying. Oliver Wendell Holmes likewise grounded the origins of law in primitive opinions of "vengeance," "a feeling of blame," "an opinion ... that a wrong has been done."[52] His impartial spectator resembles George Herbert Mead's "taking the role of the other."[53] His claims about the orientation of early proto-states find some support in the work of anthropologists and political scientists. Aspects of his account of the development of English courts have been echoed by later legal historians Frederic Maitland, Frederick Pollock, and A. W. B. Simpson.[54] And his association between law and domination is confirmed at various points in this study. That said, I make no effort to defend Smith's ideas and do not heavily rely on them. The main value of his account, along with Montesquieu's views conveyed in the next chapter, is its portrayal of law developing over time in connection with natural human tendencies and surrounding social circumstances. Smith's perspective on law is consistent with legal realism, social scientific realism, and commonsense realism.

Chapter 1, "The Third Branch of Jurisprudence," redraws current jurisprudential understandings. Legal philosophers today present natural law and legal positivism as the two main rival theories of the nature of law. A century ago, however, three prominent theoretical perspectives on law were widely recognized: natural law, analytical jurisprudence (mainly legal positivism), and historical-sociological jurisprudence. The latter branch, which I label *social legal theory*, has since been excluded. This chapter fills in the missing branch and explains why it merits an essential place within jurisprudence. At the heart of social legal theory lies Montesquieu's account of law influenced by and interacting with surrounding social, economic, cultural, political, ecological, and technological circumstances. This core insight was central to historical jurisprudence, sociological jurisprudence,

[52] Oliver Wendell Holmes, *The Common Law* (Chicago; ABA Publishing: Transaction Publishers [1881] 2009) 2.

[53] Echoing Smith, Mead observed, "in responding to ourselves, we are in the nature of the case taking the attitude of another than the self that is directly acting, and into this reaction there naturally flows the memory images of the responses of those about us, the memory images of those responses of others which were in answer to like actions." George Herbert Mead, "The Social Self," 10 *Journal of Philosophy, Psychology, and Scientific Methods* 374, 377 (1913). On the resemblance, see Dennis H. Wrong, *The Problem of Order: What Unites and Divides Society* (Cambridge, MA: Harvard University Press 1994) 88, 109. On Adam Smith's influence on Mead, see T. V. Smith, "The Social Philosophy of George Herbert Mead," 37 *American Journal of Sociology* 368, 378 (1931).

[54] Competition among courts for cases as a means to obtain fees was identified by Maitland as seminal in the development of the English legal system. Frederic Maitland, *The Constitutional History of England* (Oxford: Oxford University Press, 1919) 135. Maitland and Pollock credited the writ system for imposing checks on incompetent or corrupt judges. Frederic W. Maitland and Frederick Pollock, *The History of English Law*, vol. 2, 2nd ed. (Cambridge: Cambridge University Press 1899) 563. A. W. B. Simpson describes the early development of English courts as a competition for cases between common law courts and the Chancery. A. W. B. Simpson, *The History of The Land Law*, 2nd ed. (Oxford: Oxford University Press 1986) 162, 186–87.

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and legal realism, as I show, producing a theoretical perspective that contrasts with as well as complements natural law and legal positivism. The social historical perspective of law articulated in this chapter informs my realistic theory of law.

Chapter 2 takes on the classic question "What is law?" Rather than immediately answer the question – which extends back two and a half millennia to the Platonic dialogue *Minos* – instead I first explain why no answer to this question has proven successful despite theorists' countless attempts. The commonplace assertion that law is an essentially contested concept does not uncover the sources of the theoretical impasse. Concepts or theories of law typically are grounded in intuitions and comprised of various combinations of form and function. For reasons I reveal, all form and function-based accounts inevitably are over- or under-inclusive. I also expose the common error of conflating rule system with legal system. Using Searle's ontology of social institutions, I explain how state law is distinct from other rule systems within society, and I account for multiple, coexisting forms of law.

Chapter 3, "Necessary and Universal Truths about Law?," critically examines often repeated assertions by analytical jurisprudents that they pursue necessary, universal truths about law. I show why these claims are problematic in relation to concepts and social institutions that vary and evolve over time, and I demonstrate that their claims about the nature of law have not been established in *a priori* or *a posteriori* terms. I distinguish universal application from universal truth, indicating why the former is sound but the latter is not. I also question how legal theorists select the central case of law, and I reveal two ways they immunize their theories of law from refutation. Finally, I explain why resort to conventionalism in the identification of law is unavoidable, and provides the starting point to answer "What is law?"

Chapter 4, "A Genealogical View of Law," offers snapshots of different forms and functions law has assumed in the course of history across different societies. Along the way, I juxtapose actual manifestations of law past and present against theories of law propounded by analytical jurisprudents, showing time and again that law is contrary to their accounts. Drawing from anthropology, archeology, sociology, political science, and history, I discuss law in hunter-gatherer societies, chiefdoms, early states, and empires; the consolidation of the law state in the late Middle Ages; the development of legality as a professional culture; and I close with an account of the modern thickening of state law. Across human history flows a recognizable continuity to law as well as fundamental changes in law linked to increases in social interaction and complexity. Old forms of law survive and evolve while new ones develop, resulting in a multiplicity of historically rooted legal forms that coexist today.

Chapter 5, "Law in the Age of Organizations," describes law in the modern age. Theories of law, including those influentially propounded by Lon Fuller and H. L. A. Hart, typically portray law as rule systems that maintain social order. This narrow focus renders them unable to account for a great deal of contemporary legislation and administrative regulation. Governments utilize law

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