

Washington University Law Review

Volume 95 | Issue 5

2018

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Recommended Citation

Edward L. Rubin, *Phenomenology, Colonialism, and the Administrative State*, 95 WASH. U. L. REV. 1097 (2018).

Available at: https://openscholarship.wustl.edu/law_lawreview/vol95/iss5/9

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PHENOMENOLOGY, COLONIALISM, AND THE ADMINISTRATIVE STATE

EDWARD L. RUBIN

In *A Realistic Theory of Law*,¹ Brian Tamanaha rejects the claim that universal legal principles exist, and its variant that essential features of law applicable to all societies can be identified. He argues that we should define law in accordance with our society's ordinary usage of the term and analyze law in other societies on the basis of the practices they follow on subjects that fall within the boundaries of that usage. Tamanaha then observes that the effort to identify universal principles or essential features of law has interfered with our understanding of the way that law, as we define it, has evolved over the course of human history. Even more importantly, this effort has occluded our understanding of our own legal system, which is largely organization-based and managerial, and carries out a wide variety of functions beyond the traditional one of regulating relations between private persons.

There are at least two major arguments against the positions that Tamanaha advances. The argument against rejecting any universal legal standards is that this rejection is a form of cultural relativism and thus precludes our ability to make moral judgments about other nations or other societies.² Are we truly willing to say that slavery or human sacrifice is not wrong, but merely reflect a different cultural perspective; are we willing to say that there are no universal principles by which we can condemn someone like Hitler? The argument against allowing all the organizational and managerial practices of our society to count as law is that it validates governmental action that violates important legal or moral principles.³ Are we truly willing to say that discretionary, opaque, and result-oriented

1. BRIAN Z. TAMANAHA, *A REALISTIC THEORY OF LAW* 9–11 (2017).

2. *See generally* MARC D. HAUSER, *MORAL MINDS: HOW NATURE DESIGNED OUR UNIVERSAL SENSE OF RIGHT AND WRONG* (2006); STEVEN LUKES, *MORAL RELATIVISM* (2008); MARTHA NUSSBAUM, *FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP* (2006); ALISON DUNDES RENTELN, *INTERNATIONAL HUMAN RIGHTS: UNIVERSALITY VERSUS RELATIVISM* (1990).

3. MILTON FRIEDMAN, *CAPITALISM AND FREEDOM* (1962); F.A. HAYEK, *THE ROAD TO SERFDOM* (1944); THEODORE LOWI, *THE END OF LIBERALISM: THE SECOND REPUBLIC OF THE UNITED STATES* (2d ed. 1979). These sources all identify the danger created by administrative government as a threat to liberty, or sometimes property, but do not provide any systematic definition of liberty or justification for the sort of property rights that are seen as being threatened. For more philosophically sophisticated arguments about the dangers of administrative government, see 2 JURGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION: LIFE WORLD AND SYSTEM: A CRITIQUE OF FUNCTIONALIST REASON* 301–403 (Thomas McCarthy trans., 1987); MAX WEBER, *THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM* 155–83 (Talcott Parsons trans., 1930).

behavior of modern administrative agencies does not raise concerns about their lawfulness?

These may seem like separate objections, stated at different levels of generality, but I will maintain that they suffer from a common defect and thus are best answered with a single argument. That argument is that the principles by which we formulate our moral judgments are the product of our own society, the very same society that has generated our modern form of government. The idea that we can articulate and apply universal moral principles is simply a rhetorical device, characteristic of our own society, and one that cannot withstand sustained examination. This does not preclude us from advancing moral arguments; rather, it means that the best moral arguments we can advance—the ones that will be most meaningful to us—are derived from our own conceptual framework, that is, the framework generated by our own society. It also means that the concepts of law and government that will be most meaningful to us are our own concepts of those institutions. We can criticize those institutions, but global condemnations of them based on different concepts, concepts that are not our own, are also little more than rhetorical devices designed to grant an illusory validity to particular criticisms being voiced within the context of our own society's debates.

The underlying theory of this argument goes beyond the boundaries of the discussion in Tamanaha's book. The book is designed to refute certain widespread positions in Anglo-American analytic jurisprudence⁴ and does so within the framework of that jurisprudence. The basic approach of analytic jurisprudence, like analytic philosophy in general, is to interrogate our own beliefs, to demand that we reflect on the values that we hold and the consequences they imply. Tamanaha's reliance on this approach is not a defect, because the positions against which the book is directed are probably critiqued most effectively on their own terms.

In my view, there is a more philosophically and psychologically convincing way to address general questions about law and legal systems. This is Husserl's phenomenology, an approach less common in Anglo-American jurisprudence but dominant on the European continent. I argue that phenomenology leads to a different and more effective answer to the two objections that might be raised against Tamanaha's position, and thereby offers a different perspective on that position. Thus, it is not a

4. Tamanaha's primary targets include LON L. FULLER, *THE MORALITY OF LAW* (1964); JOHN GARDNER, *LAW AS A LEAP OF FAITH* (2012); H.L.A. HART, *THE CONCEPT OF LAW* (1961); JOSEPH RAZ, *BETWEEN AUTHORITY AND INTERPRETATION* (2009); JOSEPH RAZ, *THE AUTHORITY OF LAW* (1979); SCOTT SHAPIRO, *LEGALITY* (2011).

critique of Tamanaha's argument, but rather an alternative route to the same conclusions that he reaches.

This article applies a phenomenological approach to the subject matter of Tamanaha's book, and the potential criticisms against it, in four sections. Section A shows why there are no universal principles of law and why any claim to such principles is incoherent. Section B then argues that the effort to find universal principles that apply to all legal systems is an inadequate and indeed defective way to understand legal systems other than our own. Section C argues that this effort is also an inadequate and defective way to understand our own legal system. The final section then applies these arguments to the modern administrative state and shows that global critiques of it, even at the most sophisticated level, tend to be based upon such asserted universal principles. The administrative state is our society's mode of governance; its specific features can of course be criticized, but its basic existence is the product of the same conceptual processes that generate the basis for any criticisms that we might advance.

I. WHY THERE ARE NO UNIVERSAL PRINCIPLES OF LAW

Phenomenology's basic insight leads to the recognition that the search for universal principles of law is based on unsupportable assumptions. This reinforces Tamanaha's argument against such principles, but does so on somewhat different grounds. Tamanaha states that his approach is grounded on pragmatism, an epistemological approach asserting that theoretical statements are to be judged on the basis of their usefulness.⁵ Pragmatism is not a demand that theory should have practical value—that it should be rejected unless it allows us to solve the mystery of gravitation or design a better government. The point, rather, is that a theory that fails to advance any sort of inquiry, including a theoretical one such as the basis of knowledge or the meaning of ethics, is an empty use of language, perhaps enjoyable as imaginative writing but of no philosophic value. Pragmatism is the only starting point that Tamanaha needs because analytic jurisprudence does not go beyond it. A theoretical argument that has no use, in pragmatism's sense of that term, will not be relevant to such an inquiry; it cannot be deployed within analytic philosophy's process of interrogation and argument.

5. TAMANAHA, *supra* note 1, at 2–3. He cites the work of William James, John Dewey, Charles Sanders Pierce and George Herbert Mead as the basis of this approach. On pragmatism generally, see Morris Dickstein, *Introduction* to *THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW, AND CULTURE* 1 (Morris Dickstein ed., 1998); SUSAN HAACK, *THE BLACKWELL COMPANION TO PHILOSOPHY* 774 (2003).

Pragmatism becomes problematic, however, if we are not satisfied to base philosophic inquiry on arguments that appeal to us, as members of our own society, as reasonable or coherent, but rather seek to ground it on more basic considerations, namely, those that place the source and nature of our beliefs in question. This is the point at which Continental and Anglo-American philosophy diverge. An analytic philosopher can assert: “I think, therefore I am.”⁶ When we reflect on this statement, we recognize that it effectively establishes the limits of doubt for an individual, since existence cannot be doubted by a process that implies existence. Continental philosophy, however asks: “Who are you?” What assumptions are built into the concept of a rational, conscious entity that can pursue the Cartesian analysis? What is the philosophic grounding of selfhood and thought, and what does it imply for the way that the self is constructed and thought pursued?⁷

Husserl’s phenomenology offers an answer that has proved decisive in the development of Continental philosophy. All thought, he argues, is based upon experience.⁸ Our starting point is the world that surrounds us, the “lifeworld” in his terminology, and we are immersed—Heidegger says “thrown”⁹—into that world before we have any notion of ourselves as selves.¹⁰ We cannot stand apart from the lifeworld and speculate about its reality or its significance, because we are inevitably part of it, and all our thoughts and ideas derive from it. Because our lifeworld consists of our own experience, Husserl’s position is one of radical subjectivity; all the individual can know is what he or she has actually been in contact with and perceived or undergone. Part of that experience, however—an important and essential part—is contact with other human beings. Knowledge, culture, and the very ability to speak and think results from such contact. To describe this, Husserl uses the term “intersubjective,” indicating that each individual is formed and shaped by his or her own experience, but much of that

6. That is the central question in RENE DESCARTES, DISCOURSE ON METHOD (1637), *reprinted in* RENE DESCARTES, DISCOURSE ON METHOD AND MEDITATIONS ON FIRST PHILOSOPHY 1 (Donald A. Cress trans., 1988), and is often regarded as the beginning of modern philosophy.

7. EDMUND HUSSERL, CARTESIAN MEDITATIONS: AN INTRODUCTION TO PHENOMENOLOGY 1–26 (Dorion Cairns trans., 1993).

8. EDMUND HUSSERL, IDEAS: GENERAL INTRODUCTION TO PURE PHENOMENOLOGY 45–47 (W.R. Boyce Gibson trans., 1962).

9. MARTIN HEIDEGGER, BEING AND TIME 174 (John Macquarrie & Edward Robinson trans., 1962).

10. EDMUND HUSSERL, THE CRISIS OF THE EUROPEAN SCIENCES AND TRANSCENDENTAL PHENOMENOLOGY: AN INTRODUCTION TO PHENOMENOLOGICAL PHILOSOPHY 103–89 (David Carr trans., 1970); HUSSERL, *supra* note 8, at 91–96 (using the term world-about-me). For the development of Husserl’s thought on this subject, *see* RUDOLF BERNET, ISO KERN & EDUARD MARBACH, AN INTRODUCTION TO HUSSERLIAN PHENOMENOLOGY 217–28 (1993); DERMOT MORAN, INTRODUCTION TO PHENOMENOLOGY 181–86 (1993).

experience consists of contact with other individuals who are similarly formed and shaped. This is, in effect, the answer to the “who are you” question that Husserl poses to Descartes in response to his claim that he will doubt everything and reach the conceptual starting point for all speculative thought.¹¹ An enormously complex process of individual and intersubjective experience precedes the ability to ask that question, Husserl argues, and the reality of that process cannot be challenged or put into doubt because it is anterior to the ability to doubt and creates the entity that asks the question.

The dominant approach to the human sciences and social theory, in Europe and increasingly in the Anglo-American world as well, can be attributed to the insights of Husserl and his followers. This approach is familiarly described as the “social construction of reality.”¹² In essence, it means that the way people think, in any given society, will be determined intersubjectively, that is, by the lifeworld formed by their intersubjective experiences.¹³ Of course, individuals will also be shaped by their personal experiences, but the meaning of those experiences—the way that the individual perceives and processes them—will be the result of intersubjective understandings that prevail in the individual’s society. Those understandings can be described as interpretive, in the sense that the intersubjective process determines the way individuals process their experience and the significance that they attach to various aspects of it.¹⁴ For example, George Lakoff points out in *Women, Fire and Dangerous Things* that much of the meaning we attach to objects we perceive depends on how we categorize them.¹⁵ We see lions and tigers as belonging within the narrow category of big cats, then within the only slightly larger category

11. See HUSSERL, *supra* note 8.

12. PETER BERGER & THOMAS LUCKMANN, *THE SOCIAL CONSTRUCTION OF REALITY: A TREATISE IN THE SOCIOLOGY OF KNOWLEDGE* (1966); ALFRED SCHUTZ, *THE PHENOMENOLOGY OF THE SOCIAL WORLD* (George Walsh & Frederick Lehnert trans., 1967). See NELSON GOODMAN, *WAYS OF WORLDMAKING* (1978); WILLARD V.O. QUINE, *WORD AND OBJECT* (1960).

13. HUSSERL, *supra* note 8, at 94–95; HUSSERL, *supra* note 10, at 161–86. Because this concept involves the relation of consciousness to society, it is explored at length in Schutz’s application of phenomenology to social science. SCHUTZ, *supra* note 12, at 113–16, 139–214. The book holds a special status among the many works inspired by Husserl because Husserl read it and declared it to be fully consistent with his own ideas.

14. See HUSSERL, *supra* note 8, at 235–67. Husserl used the term “intentionality,” rather than interpretation. In a posthumously published work, he used “predicative judgment.” EDMUND HUSSERL, *EXPERIENCE AND JUDGMENT* (James S. Churchill & Karl Ameriks trans., 1973). Husserl’s followers, however, have used the term interpretation extensively and focused great attention on the concept. See HANS-GEORG GADAMER, *TRUTH AND METHOD* (Garrett Barden & John Cumming trans. 1988); HEIDEGGER, *supra* note 9, at 188–210; MARTIN HEIDEGGER, *THE BASIC PROBLEMS OF PHENOMENOLOGY* (Albert Hofstadter trans., 1988); SCHUTZ, *supra* note 12, at 71–96, 126–36.

15. See generally GEORGE LAKOFF, *WOMEN, FIRE AND DANGEROUS THINGS: WHAT CATEGORIES REVEAL ABOUT THE MIND* (1987).

of felines that includes ocelots and house cats, then within the relatively large category of mammals that includes rats and cattle, and then within the broad category of animals. Other societies create radically different categories, particularly those with totemic systems that distribute animals (that is, what we call animals) among different groupings that also include geographic features, astronomical features, and social clans.¹⁶ The idea that the individual's perception of reality is essentially interpretive brought epistemology into contact with literary theory, and particularly the hermeneutic theory that had developed on the European Continent during the century that preceded Husserl.¹⁷ Joined to the insight that the intersubjective process is based heavily on language, and that language is obviously specific to a given society and varies substantially from one society to another, it produced the well-known "linguistic turn" in modern philosophy.¹⁸

It follows from the phenomenological approach that individuals have no unmediated access to reality. What they think of as reality is the product of their own experience and the intersubjective understandings that enable them to interpret that experience. These experiences and understandings are anterior to any conclusions about reality that they might draw, and in fact anterior to any questions that they might choose to ask. Because the sense of reality is socially constructed, it will vary from one society to another; in other words, it will be culturally dependent. This does not deny that people have sensory experiences—on the contrary, Husserl insists that those experiences are the basis of thought, and anterior to any questions that might be raised about them—but rather that anything that we might say, or think, about sensory experiences will depend on the intersubjective understandings that prevail in our own society. No amount of introspection or speculation can enable one to escape from this socially constructed process and perceive some transcendental or trans-cultural essence of

16. See, e.g., MARY DOUGLAS, *PURITY AND DANGER: AN ANALYSIS OF THE CONCEPTS OF POLLUTION AND TABOO* (1966); EMILE DURKHEIM, *THE ELEMENTARY FORMS OF THE RELIGIOUS LIFE* 121–271 (Joseph Ward Swain trans., 1915).

17. WILHELM DILTHEY, *PLAN FOR THE CONTINUATION OF THE FORMATION OF THE HISTORICAL WORLD IN THE HUMAN SCIENCES*, reprinted in 3 WILHELM DILTHEY, *SELECTED WORKS: THE FORMATION OF THE HISTORICAL WORLD IN THE HUMAN SCIENCES* 213 (Rudolph A. Makkreel & William H. Oman trans., 2002); FRIEDRICH SCHLEIERMACHER, *HERMENEUTICS AND CRITICISM AND OTHER WRITINGS* (Andrew Bowie ed., 1998). See HANS W. FREI, *THE ECLIPSE OF BIBLICAL NARRATIVE: A STUDY IN EIGHTEENTH AND NINETEENTH CENTURY HERMENEUTICS* (1974).

18. See generally ELIZABETH A. CLARK, *HISTORY, THEORY, TEXT: HISTORIANS AND THE LINGUISTIC TURN* (2004); CRISTINA LAFONT, *THE LINGUISTIC TURN IN HERMENEUTIC PHILOSOPHY* (Jose Medina trans., 1999); *THE LINGUISTIC TURN: RECENT ESSAYS IN PHILOSOPHICAL METHOD* (Richard Rorty ed., 1967); LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* (G.E.M. Anscombe trans., 1958).

things, because the thought processes being deployed in this effort are produced by a particular society, and will be determined by that society's intersubjective process. The more assiduously we search the thoughts and practices of other societies to discern transcendental truths, the more we demonstrate the force of cultural dependence because the search for transcendental truths can be easily shown to be a distinctive feature of Western thought. There is a well-known joke among anthropologists about the researcher who spends an entire day asking an informant from a small, remote society about the customs of the society, its matrilineal or patrilineal relations, its rituals, its means of distributing goods, and so forth until finally the weary informant exclaims, "Enough about you – I want to talk about me."

Husserlian epistemology provides full support for Tamanaha's position about law and legal rules, while freeing it from any dependence on pragmatism and thus extending it beyond the bounds of Anglo-American analytic jurisprudence. While it does not deny that human beings, as a result of biological conditions they all experience, must all breathe, eat, sleep, and die, it strongly suggests that any feature of human society, such as law, will vary substantially from one place to another. More importantly, it indicates that this variation is not merely an empirical observation but a theoretical necessity. Different societies will necessarily produce different systems of law and different legal principles, just as surely as different individuals, asked to draw a picture of "a rural scene" will necessarily produce different drawings. Furthermore, and this is the greatest point of divergence between Continental and Anglo-American theory, even if one wants to maintain, as a matter of faith or as a working hypothesis, that there are universal principles of law, no individual could possibly have access to such principles. Individuals necessarily begin with the conceptual framework of their own society and can only approach other societies through that conceptual framework. This is, in fact, quite similar to William James' version of pragmatism, although not to Charles Sanders Peirce's version. James refused to acknowledge any difference between ideas and facts; like Husserl, he argued that all thought is derived from experience.¹⁹

II. WHY THE SEARCH FOR UNIVERSAL PRINCIPLES IS A BAD WAY TO

19. WILLIAM JAMES, *PRAGMATISM: A NEW NAME FOR SOME OLD WAYS OF THINKING* (1907); WILLIAM JAMES, *THE MEANING OF TRUTH: A SEQUEL TO "PRAGMATISM"* (1909). For Peirce's view, see CHARLES SANDERS PEIRCE, *PHILOSOPHICAL WRITINGS OF PEIRCE* (1955).

UNDERSTAND THE LEGAL SYSTEMS OF OTHER SOCIETIES

Phenomenology provides the tools by which we can achieve at least a partial understanding of a different society's legal system at the same time that it demonstrates that we will never achieve complete understanding due to the socially constructed character of human thought. This may seem unsatisfactory; in fact, it supports Tamanaha's argument that any valid understanding of a different society must begin by recognizing its difference from our own. Two particular requirements suggested by Husserl's epistemology for such understanding are erudition and introspection. One cannot approach a different society directly, assuming that its members think essentially the same way we do because they are instantiating universal principles of law. Rather, it is necessary to learn as much as we can about their own mode of thought, their own lifeworld. It is also necessary to engage in introspection—not introspection about the real nature of morality, or religion, and law, or about the universal principles that underlie those social systems—but rather introspection about the one thing we can reliably introspect about, which is our own conceptions and preconceptions. The further away the society is from our own, the more introspection will be needed. Husserl introduces the concept of bracketing for this technique; we cannot escape from our lifeworld, but we can make the effort to become aware of and then set aside or bracket its concepts as an aid to understanding different societies.²⁰

Gadamer offers the useful metaphor of a horizon to explicate the way society constructs our understanding through our lifeworld.²¹ The horizon determines the limits of our vision, and what we can see depends on what lies within our horizon. We can move (more on that later) but we will still be bound by a horizon, one of roughly the same size. It is also possible to see beyond the horizon by building a tower, but that requires a good deal of material and effort. Erudition and introspection can be analogized to those requirements, and the level of erudition and amount of effort that one must expend, in our current society, to be truly recognized as an expert about a

20. Husserl proposed bracketing, or phenomenological reduction, as a way to free ourselves from the lifeworld generally and achieve a sort of mystical transcendence. HUSSERL, *supra* note 8 at 139–67; HUSSERL *supra* note 10, at 135–54. Few of his many followers are persuaded by this aspect of his thought, and it is of course unnecessary to pursue in the context of this essay. Usage of the term here can be regarded as derived from Merleau-Ponty, who saw bracketing as a more limited device that reduced the effect on one's culturally-determined preconceptions while simultaneously revealing that those preconceptions could never be fully escaped. M. MERLEAU-PONTY, *THE PHENOMENOLOGY OF PERCEPTION* (Colin Smith trans., 1972).

21. GADAMER, *supra* note 14, at 216–18, 269–74.

different society is a measure of the task's complexity, just as the difficulty of building the tower indicates how hard it is to see past the horizon.

Tamanaha's proposal that we use our own society's definition of law to understand the legal system of other societies is presented, in his book, primarily as a means of avoiding the tendency to exclude fields of inquiry by fiat because other societies use a different definition. But he carefully refuses to attach any significance to this technique beyond its usefulness in defining the topic of our inquiry. In particular, he challenges the claim, advanced by Joseph Raz and others, that if other societies "lack institutions with the essential features of law, they do not have law according to our current concept of law."²² This is unobjectionable, Tamanaha argues, "so long as Raz restricts his assertion to the claim that our parochial concept of law can be *applied* to examine and evaluate other contexts," and that Raz does not claim that "his account of the nature of law is not just universally applicable but also universally *true* for all times and places."²³

Phenomenology adds a further level of significance to Tamanaha's argument. The claim that societies that lack certain essential institutions do not have law may sound theoretical, but it is in fact naïve because it fails to analyze the basis on which the claim of essentiality is being advanced. No argument about the legal norms of our society can articulate an adequate analysis because such an argument can only be framed by juxtaposing our conceptions of law to different ones, from different societies. Tamanaha's formulation is purposively naïve—he bases his definition on ordinary language—but it is in fact epistemologically sophisticated because it invites the process of introspection that phenomenology recommends. It requires us to identify our conception of law, to acknowledge it as merely our conception, and then contrast that conception with a different society's view of the same subject that embodies a different conception of law, or perhaps is not identified as law at all. This contrast tends to trigger the centerpiece of modern interpretive theory, namely the hermeneutic circle. The differing approach of the other society not only illuminates the way this society conceives of law, but then challenges us to reconsider our own conception because no claim has been made for that conception's validity. In doing so, we not only rethink our conception but also come to a better understanding of the other society because we have achieved a better grasp of its distinctive features.

A familiar criticism of the effort to identify universal principles of law, forcefully and extensively presented by Tamanaha, is that it does nothing

22. TAMANAHA, *supra* note 1, at 66.

23. *Id.* (emphasis in original).

more than seek to dress up a contested assertion about law within our own society in the raiment of universality.²⁴ From the pragmatic perspective, this criticism can be phrased in terms of insincerity. With the exception of Ancient Greece and Rome, and possibly ancient Israel, why would we, in this society, care about the legal views of a society that is different and remote from our own?²⁵ Suppose there are principles that are so universal that they can be found among the Aztecs, the Mongol nomads, and the Zulus. What difference could that possibly make to us? It is arguable that slavery, social hierarchy, and the subordination of women are among the most widespread features of legal systems other than our own that can be found, certainly more common than non-contradictory laws or an independent judiciary. Does that have any truly persuasive force for us? Claims that certain features of our legal system are universal, or necessary for the concept of law, seem designed to provide a rhetorical advantage to proponents of those features, an advantage derived from our distinctive, socially-constructed desire for universal principles.

A further argument against this tendency, more closely related to phenomenology, is that the effort to identify universal principles of law is a simply dreadful way to understand the legal system of different societies, and thus denies us the opportunity to understand our distinctive, socially constructed views by contrasting them with these different systems. Arguments that another legal system provides evidence of universal principles are often notable for their cavalier, tone-deaf treatment of that legal system. Consider F.A. Hayek's argument, described by Tamanaha in an earlier book,²⁶ that the rule of law means "rules fixed and announced beforehand—rules which make it possible to foresee with fair certainty how the authority will use its coercive power."²⁷ Hayek's motivation for this assertion is quite evidently his desire to demonstrate that societies engaged in economic planning violate the rule of law, while those that abjure this approach and rely on a market regulated only by the common law, follow the rule of law and are thus more just or free. At some subsequent time, it occurred to Hayek, or was pointed out to him, that prior notice of the rules

24. *Id.* at 57–81.

25. We care about these two remote societies because we regard them as our forebears, and thus an important source of our own views. In the case of ancient Greece and Rome, this attitude arises from physical, linguistic and ethnic continuity, from our view of classical philosophy and literature as authoritative sources, and from our ability to contextualize those sources through historical knowledge. The case of ancient Israel is not as clear, because we recognize only one authoritative text, but lack the other continuities or the contextualizing historical knowledge. Consequently, it seems likely that we do not know, or truly care, what the ancient Hebrews really thought, but simply take the text that they produced and interpret it in accordance with the norms and concepts of our own society.

26. BRIAN Z. TAMANAHA, *ON THE RULE OF LAW: HISTORY, POLITICS, THEORY* 65–72 (2004).

27. FRIEDRICH A. HAYEK, *THE ROAD TO SERFDOM* 80 (15th ed. 1944).

is in fact a standard feature of social planning, and it is the common law system that fails to provide people with notice because it evolves by incremental revision of prior doctrine in litigated cases, and thus has an intrinsically retroactive character.²⁸ Justice Cardozo's famous decision in *MacPherson v. Buick Motor Co.*,²⁹ rejected the rule of privity in mass marketing contexts and held a car manufacturer liable to a remote purchaser. The decision is considered a landmark of common law, and an indication of its flexibility,³⁰ but it changed the law without notice; Buick had every reason to assume, based on the prevailing common law doctrine, that it would only be liable to direct purchasers of its product, such as automobile dealers.

Once Hayek became aware of this first-year law school observation about common law, he attempted to shore up his position with a historical argument about the development of common law in the society that preceded our own. Common law, he said, was customary law, emerging from the dispersed, spontaneous actions of private individuals engaged in self-motivated interactions, and then transcribed and organized, or legalized, by judges in the process of deciding individual cases.³¹ Echoing St. Thomas Aquinas,³² he argued that this law achieved a kind of rationality, that is, an effective means of ordering a market economy, by a process that resembled Adam Smith's invisible hand and that aligned with what we now identify as "the wisdom of crowds."³³ But as Tamanaha explains in his present book,³⁴ the association of common law with customary law was an argument advanced by English judges, most notably Sir Edward Coke, as a mode of opposition to the Stuart monarchy. The idea was that the common law dated back before the Norman Conquest, to England's Anglo-Saxon past, and thus, by the prevailing principle that age conferred authority, was

28. See BEN JURATOWITCH, *RETROACTIVITY AND THE COMMON LAW* 119–98 (2008). For an insightful analysis of common law in general, see MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* (1988).

29. 145 N.Y.S. 1132 (N.Y. App. Div. 1914).

30. On the flexibility of common law, see BRADIN CORMACK, *A POWER TO DO JUSTICE: JURISDICTION, ENGLISH LITERATURE, AND THE RISE OF COMMON LAW* (2007).

31. I F. A. HAYEK, *LAW, LEGISLATION AND LIBERTY* 78–86 (1973).

32. ST. THOMAS AQUINAS, *SUMMA THEOLOGICA* PT. II-II, Qs. 97 (Fathers of the English Dominican Province trans., 1948). St. Thomas argues that customary law is likely to be more rational than statutory law because statutes are subject to the idiosyncrasies or errors (sins) of the individual lawmaker, while customary law, because it emerges from the actions of large numbers of people over extended periods of time, tends to eliminate or average out these individual variations and reflect the God-given rationality of people in general.

33. JAMES SUROWIECKI, *THE WISDOM OF CROWDS* (2004).

34. TAMANAHA, *supra* note 1, at 134–38.

superior to, and thus independent of the king.³⁵ This contention served as a conceptual basis for American legal education, but by the time Hayek wrote, it had been disproved by Pollock and Maitland.³⁶

In fact, the association of common law with customary law is erroneous in ways that relate directly to other arguments in Tamanaha's current book, and to the discussion of the modern administrative state in the following section. To begin with, common law cannot be contrasted with statutory law because it was the product of statute. Although based on preceding legal thought and practices, the decisive step in its establishment was legislation enacted by Henry II in the latter part of the twelfth century, primarily for the purpose of creating royal judges (that is, judges appointed by and loyal to Henry) who could resolve the land disputes that resulting from the civil war that preceded Henry's accession to the throne.³⁷ It is true that Henry's statutes did not prescribe the content of the law to be applied, but rather left that to his appointed judges. However, the idea that these royal officials, all members of the social elite, would somehow transcribe the customary law of ordinary people in reaching their decisions seems implausible, however. In fact, the very name of the body of law that they created, namely "common" law, suggests that this law was intended to displace rather than reflect the customary law. At the time of Henry's enactments, each English country, and often each baronial estate, had its own set of legal rules, and these at least arguably embodied customary law.³⁸ The common law imposed by royal judges established a regime-wide set of legal rules, and was thus a precocious tool of nation-state formation that Continental regimes would subsequently adopt through more systematically established legal codes. Predictably, the barons resisted it and a few decades after its establishment, they sought to protect their individual, and presumably customary systems of law from the common law's control in one chapter of the Magna Carta.³⁹

35. See J.G.A. Pocock, *THE ANCIENT CONSTITUTION AND THE FEUDAL LAW: A STUDY OF ENGLISH HISTORICAL THOUGHT IN THE SEVENTEENTH CENTURY* 30–55 (1987).

36. See 1 Frederick Pollock & Frederic Maitland, *THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I*, 145–56 (2d ed. 1898).

37. J. H. Baker, *AN INTRODUCTION TO ENGLISH LEGAL HISTORY* 11–32 (2d ed. 1979); R.C. Van Caenegem, *THE BIRTH OF ENGLISH COMMON LAW* 1–28 (1973); W.L. Warren, *HENRY II* 317–61 (1973).

38. See Barbara A. Hanawalt, *THE TIES THAT BOUND: PEASANT FAMILIES IN MEDIEVAL ENGLAND* 124–55 (1986); Richard Mortimer, *ANGEVIN ENGLAND, 1154–1258*, 53, 56–57 (1994); Edwin DeWindt, *LAND AND PEOPLE IN HOLYWELL-CUM-NEEDINGWORTH: STRUCTURES OF TENURE AND PATTERNS OF SOCIAL ORGANIZATION IN AN EAST MIDLANDS VILLAGE 1252–1457* (1972); Warren, *supra* note 37, at 248–52, 317–20.

39. *MAGNA CARTA* cl. 34, reprinted in J.C. Holt, *MAGNA CARTA* 448, 461 (1992) (Latin text and literal translation) (“The writ called praecipe shall not, in future, be issued to anyone in respect of any holding whereby a free man may lose his court.”).

The subsequent development of common law continued to be carried out by royal officials, all of whom were members of England's social elite, members who as time went on, received increasingly formalized and elaborate training.⁴⁰ They had only limited contact with the common people, and thus with the customary law that must be ascribed to these people in order to have any meaning at all. Over time, in fact, English common law became notorious for its complex doctrines and elaborate procedures, not for its reflection of ordinary people's practices. A clear indication of this separation is Lord Mansfield's effort to incorporate the customary law of London merchants into common law by creating a merchant jury of "City men" that he could consult in commercial cases.⁴¹ These men were hardly ordinary English people, but rather a different subset of the English elite. Even this modest effort to reach out beyond the self-contained limits of judicial doctrine was abandoned and its apparent oddity attests to the separation between common and customary law. To be sure, ordinary people appear in the common law judicial process as jurors, but they are carefully instructed about the legal rules that they are obligated to apply; a judge who told the jurors to use their own intuitive sense of law would be reversed as having committed legal error.

Another example of the way in which the search for universal principles occludes our understanding of different legal systems can be found in Richard Epstein's work. Like Hayek, Epstein is intent on demonstrating that modern economic regulation is not simply bad policy, but violates enduring legal principles. In *Supreme Neglect*, Epstein argues that a universal principle of property rights is that they permit the property owner to exclude "all the world" from intruding on her property, a principle that would place significant constraints on economic regulation. In our own legal tradition, he traces this principle back to Magna Carta.⁴² But the principal signatories of that document, and the leaders of the rebellion that the document was intended to resolve, were the great barons of the realm, who were tenants-in-chief of King John.⁴³ Their concern in Magna Carta, the principle source of both their income and their status, was the land that they controlled. Far from being able to exclude "all the world" from this land, they held their property subject to an extensive range of feudal privileges that King John

40. See generally THEODORE F. T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* (1929); POLLOCK & MAITLAND, *supra* note 36.

41. 2 JOHN CAMPBELL, *THE LIVES OF THE CHIEF JUSTICES OF ENGLAND: FROM THE NORMAN CONQUEST TILL THE DEATH OF LORD MANSFIELD* 407 (1849); 1 JAMES OLDHAM, *THE MANSFIELD MANUSCRIPTS AND THE GROWTH OF ENGLISH LAW IN THE EIGHTEENTH CENTURY* 99 (1992).

42. RICHARD A. EPSTEIN, *SUPREME NEGLECT: HOW TO REVIVE CONSTITUTIONAL PROTECTION FOR PRIVATE PROPERTY* 6 (2008).

43. HOLT, *supra* note 39, at 76–86.

could assert.⁴⁴ They sought, as an innovative legal reform, the right to bequeath their land to their heirs, or allow their widows in possession of the land to marry anyone of their choice, without the king's permission.⁴⁵ This hardly seems consistent with a right to exclude the world. In fact, it was standard practice in Angevin England for the king to travel through the realm, staying at the most convenient baronial manor and being lavishly entertained while doing so.⁴⁶ Was this obvious and massive intrusion, something we would regard as an offensive interference with our property, a matter of law or custom? Could the baron refuse and what would be the consequences if he did? These are interesting questions for anyone who wants to understand medieval England, but they are hardly advanced by declaring that exclusion of "all the world" is a universal feature of property rights. In fact, it is not clear that the idea of exclusion has any real meaning in the Medieval context. Typically, a baron's landed holdings did not consist of a house on 2.7 acres surrounded by a picket fence, as it does for us, but rather a series of villages and their surrounding fields, often widely separated from each other. They were insistent on their ability to derive income from this property, and knight's service from their vassals (or by this late date, monetary payments in place of service), but it seems unlikely that the right to exclude would even be comprehensible to them.

In his book *Design for Liberty*, Epstein notes a "sharp contrast" between classical liberal attitudes (which he endorses) and "progressive attitudes toward economic liberties" (which he condemns).⁴⁷ Not content with offering policy-based arguments for his preferences, he writes: "The older model of labor contracts allowed parties to construct their own deals, so that the public force was concentrated on the interpretation and enforcement of their agreements, not on imposing new terms and conditions on all private deals within a given class."⁴⁸ The theme that modern economic regulation represents a departure from established principles of law appears throughout the book, and in Epstein's other works as well. It is true provided that one

44. See 1 MARC BLOCH, *FEUDAL SOCIETY: THE GROWTH OF TIES OF DEPENDENCE* 167 (L.A. Manyon trans., 1962) ("[A] fief involved not only an obligation of service but also a very definite element of professional specialization and of individual action."); R.H.C. DAVIS, *A HISTORY OF MEDIEVAL EUROPE: FROM CONSTANTINE TO SAINT LOUIS* 325 (R.I. Moore ed., 3d ed. 2006) ("Thus, in Norman England, the word *allodium* was unknown; on the continent of Europe it denoted land which was a man's absolute and inalienable property, but in England there was no such thing. All land was the king's . . ."). In fact, it was King John's over-aggressive assertion of these privileges that led the barons to revolt. See HOLT, *supra* note 39, at 50–122.

45. MAGNA CARTA, cl. 2, 6, 7, 8, reprinted in HOLT *supra* note 39, at 451–52.

46. MORTIMER, *supra* note 38, at 15–22; WARREN, *supra* note 37, at 301–04.

47. RICHARD A. EPSTEIN, *DESIGN FOR LIBERTY: PRIVATE PROPERTY, PUBLIC ADMINISTRATION, AND THE RULE OF LAW* 120 (2011).

48. *Id.*

identifies older or established principles of law as those that prevailed during the seven or eight decades between the onset of industrialization and the rise of social welfare legislation. Prior to the industrialization of Europe, and the concomitant enclosure movement in England, the model of contracts that prevailed was one of intensive regulation. Quality of artisanal products and quantity of output was set by craft guilds,⁴⁹ sale of land was constrained by restrictions remaining from the feudal system,⁵⁰ interest on loans was either forbidden or strictly limited by usury laws, and price was controlled, at least in theory, by the just price doctrine which prescribed, and sometimes actually imposed, prison sentences on those who violated its strictures.⁵¹ Many magnificent works of European art were commissioned by bankers and merchants who were expiating for the sin of contracting “their own deals” on the terms of their choice.⁵²

These examples, which could be compounded ad infinitum, indicate that the search for universal principles, and even the more modest efforts to identify enduring themes over extended periods of history, leads to distortion and misunderstanding of societies that are different from our own, that is, beyond our lifeworld. This is hardly surprising because these searches and efforts are transparently designed to recruit those different societies as allies for contemporary arguments. Phenomenology explains this; because we are immersed in our lifeworld, the arguments in which we are engaged within that lifeworld will be of primary importance to us, and present themselves to us with an intensity that makes other enterprises seem lackluster by comparison. If we nonetheless want to pursue this academic

49. See STEVEN A. EPSTEIN, *WAGE LABOR AND GUILDS IN MEDIEVAL EUROPE* (1991); FRANCIS GIES & JOSEPH GIES, *LIFE IN A MEDIEVAL CITY* 78–93 (1969); RUTH MAZZO KARRAS, *BOYS TO MEN: FORMATIONS OF MASCULINITY IN LATE MEDIEVAL EUROPE* 109–150 (2003); GEORGE UNWIN, *THE GUILDS AND COMPANIES OF LONDON* (4th ed. 1963).

50. See BLOCH, *supra* note 44, at 163–75; F.L. GANSHOF, *FEUDALISM* 106–49 (Philip Grierson trans., 1964). In some places, although not in post-Conquest England, lords had full (allodial) rights over their land, but most actual landholders were vassals. Prohibitions on bequeathing the land they controlled to their heirs were abandoned early in the Medieval era, but prohibitions on alienation lasted longer, and required payments for permission to sell lasted longer still. Village land was often held in common, with severe restrictions on its alienation or division, see FRANCES GIES & JOSEPH GIES, *supra* note 49, at 6–18, and its transformation into private property in England by the enclosure movement aroused great opposition. See DOROTHY GEORGE, *ENGLAND IN TRANSITION* 77–99 (1951); R.H. TAWNEY, *RELIGION AND THE RISE OF CAPITALISM* 118–28 (1926).

51. See WILLIAM ASHLEY, *AN INTRODUCTION TO ENGLISH ECONOMIC HISTORY AND THEORY* 126–62 (4th ed. 1920); JOHN M. CLARK, *SOCIAL CONTROL OF BUSINESS* 23–24 (2d ed. 1939); DAVID HAWKES, *THE CULTURE OF USURY IN RENAISSANCE ENGLAND* (2010); ERIC KERRIDGE, *USURY, INTEREST AND THE REFORMATION* (2002); TAWNEY, *supra* note 50, at 11–60. The prohibition on usury as violating principles of Christianity led, of course, to the emergence of the Jews as moneylenders.

52. This includes Giotto’s frescoes in the Arena or Scrovegni Chapel, certainly one of the greatest works of art ever produced. See Benjamin G. Kohl, *GIOTTO AND HIS LAY PATRONS*, in *THE CAMBRIDGE COMPANION TO GIOTTO* 176 (Anne Derbes & Mark Sandona eds., 2004).

effort to understand a different society, we must make a conscientious effort to bracket our own views, rather than wallowing in those views as we seek to advance them. In particular, we must employ erudition and introspection, learning as much as we can about the other society and conscientiously attempting to bracket the views that the lifeworld of our society imposes.

This does not require us to abandon the desirable effort to learn useful lessons from other societies; what it does mean is that those lessons are not to be obtained by searching through those societies for validation of our present views. It is the differentness of those societies, their ability to help us problematize or bracket our own views that provide the lessons.⁵³ Instead of seeing common law as customary, and thus as a sort of free market legal alternative to legislation, we might try to understand the actual purposes that it served in pre-modern England. That could aid us in determining where we want common law to be continued, and how we might obtain the advantages it possessed in different settings, such as commercial arbitration or administrative regulation. Instead of touting the right to exclude as a universal principle of property, and our present system of regulation as legal apostasy, we might use its absence from prior law as a way to question our current legal rules. At present, for example, many people's property consists largely of stocks, bonds, retirement benefits or government entitlements. Are these usefully conceived as a pot of money from which others can be excluded, or rather as an ongoing allocation that is secured in some ways and contingent in others? Different societies, whether past or present, can help us problematize and bracket the lifeworld concepts that are otherwise so totally engulfing for us, but only if we make a conscientious effort to understand the very different lifeworlds that these other societies possessed.

III. WHY THE SEARCH FOR UNIVERSAL PRINCIPLES WITHIN OUR OWN SOCIETY IS A BAD WAY TO UNDERSTAND OURSELVES

Phenomenology further demonstrates that the search for universal principles of law is not only a defective way to understand the legal system of another society but also a defective way of understanding our own society. The point can be explicated by generalizing from one of Tamanaha's principal arguments against the claim that universal principles

53. For my own use of this technique, see EDWARD L. RUBIN, *BEYOND CAMELOT: RETHINKING POLITICS AND LAW FOR THE MODERN STATE* (2005). Having identified the pre-modern origins of many basic terms that we use to describe our modern political and legal system, including the branches of government, power, discretion, legitimacy, law, rights and property, I propose that we bracket these terms and attempt to develop alternative descriptions that will provide us with a better understanding of the government we actually possess. The point is not to stop using these terms, which would be culturally impossible, but to rethink them in contrast to the distinctly different culture from which they emerged.

of law exist, namely the nature of law in colonial regimes. This is an argument that he has advanced in prior works as well.⁵⁴ It is often asserted that law is a necessary means by which a society maintains social order, but in a colonial regime the prevailing law has often been imposed by the colonizing power as a means of exploitation.

Another conclusion from phenomenology is that the experience of people in a given society can readily diverge from the legal system to which they are subject. It is often asserted that law always provides the framework for social relations, but in a colonial regime the imposed law tends to disrupts those relations. This objection can be answered by claiming that the legal regime imposed by a colonial power is not really law, but the costs of such exclusion are immense. To begin with, a great many nations—almost the entire Global South—was subject to colonization, and much of it continues to rely on laws that colonizing powers imposed on them. A universal theory that excludes nearly half the world is not particularly universal.

The argument that colonialism was an exploitive process is certainly not difficult to make, but it is in fact not necessary to the claim that the imposition of law by colonial powers disproves the existence of universal principles. Perhaps some aspects of colonialism were beneficial, or perhaps the process was too widespread and complex to be judged in its entirety. The criminal code that was drafted by Thomas Macaulay and imposed on British India reflected British, and to some extent European, thinking about the optimal form of law and can thus be seen as a conscientious effort to improve the lives of people in the colony.⁵⁵ Those people are themselves divided about whether this is true; while praise for colonialism is not fashionable at present,⁵⁶ the fact remains that most of the independent nations that were formed out of British India, including the Republic of India, Pakistan, Bangladesh, and Sri Lanka, continue to use variations of the Macaulay code.⁵⁷ What is unarguable is that they perceive this code as

54. TAMANAHA, *supra* note 1, at 101–05.

55. Barry Wright, *Macaulay's Indian Penal Code: Historical Context and Originating Principles*, in CODIFICATION, MACAULAY AND THE INDIAN PENAL CODE: THE LEGACIES AND MODERN CHALLENGES OF CRIMINAL LAW REFORM 29 (Wing Cheong Chan, Barry Wright & Stanley Yeo eds., 2011).

56. ELIZABETH KOLSKY, COLONIAL JUSTICE IN BRITISH INDIA: WHITE VIOLENCE AND THE RULE OF LAW 68–78 (2010). Macaulay himself said that “India cannot have a free Government. But she may have the next best thing, a firm and impartial despotism.” LAUREN BENTON & LISA FORD, RAGE FOR ORDER: THE BRITISH EMPIRE AND THE ORIGINS OF INTERNATIONAL LAW, 1800–1850 82 (2016). At present, we would be unlikely to describe any form of despotism as the next best thing to freedom.

57. See NICK CHEESMAN, OPPOSING THE RULE OF LAW: HOW MYANMAR'S COURTS MAKE LAW AND ORDER 37–96 (2015); MARC GALANTER, LAW AND SOCIETY IN MODERN INDIA 15–36 (1989); OSAMA SIDDIQUE, PAKISTAN'S EXPERIENCE WITH FORMAL LAW: AN ALIEN JUSTICE 8–12 (2013).

different from their indigenous law, so much so that Indians who are seen as overly devoted to Western European values are sometimes called “Macaulay’s children.”⁵⁸

The process of borrowing another nation’s law, moreover, is much more widespread than colonialism. Many nations have voluntarily adopted large portions of the Napoleonic Code.⁵⁹ Japan, in its process of modernization, adopted British law, then German law, precisely because it differed from the law of the traditional culture that they wanted to displace.⁶⁰ In China, Western law and concepts were extensively introduced over the course of the nineteenth century, and at the beginning of the twentieth century, the Qing government’s Commission of Legal Reform revised many existing laws on Anglo-American and other models.⁶¹ Mao Zedong can be viewed as rejecting Western law, but the ideology on which he based this rejection was Marxism, itself an import from the West. Since 1980 or so, the People’s Republic of China has been assiduously drafting laws based on European and American models, which they see as an antidote to the discretionary, hortatory, and disruptive system that prevailed under Mao.⁶² Thus, for the vast majority of people in the world, large portions of the legal regime under which they live have been borrowed from the West and are perceived as containing provisions, and based on principles, that are distinctly different from their indigenous law. It would be difficult to argue that they are wrong in his perception, and that the law they have borrowed and their indigenous law embody the same basic principles. To do so, one would need to adopt a strongly dismissive attitude to the people who live with, and are thus familiar, with both legal systems. The claim, in fact, could be described as a form of intellectual colonialism.

58. Gautan Adhikari, *Macaulay’s Children & the Rest*, THE TIMES OF INDIA (Feb. 23, 2013), <https://perma.cc/PT9M-NCZJ>; THE ECONOMIST, *Macaulay’s Children: Quarreling Over India’s Past* (Oct. 28, 2004).

59. ALEXANDER GRAB, *NAPOLEON AND THE TRANSFORMATION OF EUROPE* (2003). *See id.*, 93–97 (German states), 161–75 (Italian peninsula), 69–70, 100–07 (Netherlands); ROBERT B. HOLTMAN, *THE NAPOLEONIC REVOLUTION* (1981).

60. CHONKGO CHOI, *HISTORY OF EAST ASIAN JURISPRUDENCE* 143–45, 148–72 (2002); MARIUS B. JANSSEN, *THE MAKING OF MODERN JAPAN* 389–95, 542–48, 666–90 (2000); JAMES L. McCLAIN, *JAPAN: A MODERN HISTORY* 169–205 (2002); EDWIN O. REISCHAUER, *THE JAPANESE* 78–109 (1977); *WESTERN WORLD AND JAPAN: A STUDY IN THE INTERACTION OF EUROPEAN AND ASIATIC CULTURES* 444–50 (1950); PETER TASKER, *THE JAPANESE: A MAJOR EXPLORATION OF MODERN JAPAN* 20–23 (1987).

61. CHOI, *supra* note 60, at 143, 173–212. *See generally* JONATHAN D. SPENCE, *THE SEARCH FOR MODERN CHINA* 245–49 (1990).

62. *See generally* STANLEY B. LUBMAN, *BIRD IN A CAGE: LEGAL REFORM IN CHINA AFTER MAO* (2002); YUHUA WANG, *TYING THE AUTOCRAT’S HANDS: THE RISE OF THE RULE OF LAW IN CHINA* (2015); YONGNIAN ZHENG, *CONTEMPORARY CHINA: A HISTORY SINCE 1978*, 161–94 (2014).

This consideration leads to a still more general one about the nature of legal systems. Most nations, even those that have never been colonized, have legal systems composed of different elements, derived from different sources. The usual account of Western history, for example, is that its legal system represents an uneven and only partially homogenized blend of three different traditions, namely Greco-Roman, Germanic, and Jewish.⁶³ Each of these, particularly the Greco-Roman one that represented a blend of at least two different cultures that evolved over the course of a millennium, is itself complex. But even if one simplifies them into a few basic principles, it appears that those principles were different ones, reflecting different conceptions of law, at the time of the Early Middle Ages (fifth to seventh centuries) when Western society can be said to begin. Greco-Roman law was seen as originating in the state, established by command of the Emperor, and legitimated on that basis. As received by Early Medieval society, it consisted of a systematic code that contained elaborate rules regarding interpersonal behavior and property ownership.⁶⁴ Legal sanctions were imposed for violation of those rules, generally by means of jury trials that were supposed to weigh the evidence and reach conclusions on its basis. German law was regarded as emerging from the customs of the people, and promulgated by a king who was required to respect those customs. Legal penalties were prescribed for causing harm, not for violating rules, and the legal sanction was compensation for the harm by means of wergild. Factual disputes about whether a particular person was responsible for the harm were determined by ordeal or combat.⁶⁵ Jewish law, as received in the West through Christianity, was seen as the command of God, who not only prescribed basic principles such as those found in the Decalogue but also the detailed matters of ritual and social behavior that appear in Leviticus and Deuteronomy.⁶⁶ It allowed for direct appeals to God, and contained the principle that a holy man could condemn the ruler for violating divinely ordained law, as Nathan does when he charges King David with murder for sending Uriah the Hittite to the front.⁶⁷

63. See generally DONALD R. KELLEY, *THE HUMAN MEASURE: SOCIAL THOUGHT IN THE WESTERN LEGAL TRADITION* 35–108 (1990); R.A. Markus, *Introduction* to J.H. BURNS, *THE CAMBRIDGE HISTORY OF MEDIEVAL POLITICAL THOUGHT C. 350–C.1450* 83 (1988).

64. KELLEY, *supra* note 63, at 35–52; P.G. Stein, *Roman Law*, in BURNS, *supra* note 63, at 37; J.M. KELLY, *A SHORT HISTORY OF WESTERN LEGAL THEORY* 59–78 (1992).

65. HAROLD J. BERMAN, *LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION* 49–68 (1983); KELLEY, *supra* note 63, at 89–108; KELLY, *supra* note 64, at 79–113.

66. BERMAN, *supra* note 65, at 68–83; KELLEY, *supra* note 63, at 67–88.

67. *II Samuel 11–12* (King James). David, having fallen in love with Uriah's wife, Bathsheba, orders Uriah's commanding officer: "Set ye Uriah in the forefront of the hottest battle, and retire ye from him, that he may be smitten, and die." *II Samuel 11:15* (King James). David then marries Bathsheba. But, we are told that "the thing that David had done displeased the Lord." *II Samuel 11:27* (King James).

These are, of course, gross generalizations, but they are sufficient to indicate that Western law originated from a *mélange* of different legal principles that seem clearly inconsistent with each other. Over time, of course, these principles were blended, and since Western Europe was free from foreign invasion by the year 1000, it had the opportunity to develop a coherent legal system without further disruption. But the blending process did not proceed smoothly; conflicts between the different legal principles pervade Western history. One of the most notable is between the Catholic Church, with its scripture-based insistence on divine law as interpreted by holy men, and the Roman principle that law is a promulgation of civil authorities, who exercise supreme command.⁶⁸ A millennium after the beginning of Western society, this remained a source of legal conflict; one of the central motivations for the Reformation in Northern Europe was to establish the Roman principle, and subordinate religious authority to national rulers.⁶⁹ Several centuries later, *Marbury v. Madison* modified this

He sends the prophet Nathan, who tells David a story about a rich man with many sheep who, when required to entertain a visitor, takes the one sheep belonging to his impecunious neighbor rather than any of his own. David says, "As the Lord liveth, the man that hath done this thing shall surely die." *II Samuel 12:5* (King James). Nathan memorably responds: "Thou are the man." *II Samuel 12:7* (King James). David, also a prophet of course, recognizes the justice of this accusation and repents.

68. This conflict is one of the dominant themes in Western history, a continuing struggle between secular and religious rulers punctuated by spectacular confrontations. Charlemagne's son divided the great Carolingian Empire among his three sons, giving one the west (now France), one the east (now Germany) and the third the center, whose remnant is the Low Countries, Alsace-Lorraine, Switzerland, Piedmont and North Italy. Its king, Lothar II, wanted to divorce his wife, who had given him no children, and marry his concubine, who had given him several, thereby securing the succession to his crown. Pope Nicholas I refused, and after a titanic, decade-long struggle, Lothar died in 869 without heirs, and his kingdom broke apart, decisively shaping the map of Europe to this day. See FRANCES GIES & JOSEPH GIES, *MARRIAGE AND FAMILY IN THE MIDDLE AGES 88-94* (1987); CHRIS WICKHAM, *THE INHERITANCE OF ROME: ILLUMINATING THE DARK AGES 420-22* (2009). In 1077, the Holy Roman Emperor, Henry IV, came into conflict with Pope Gregory VII, over the right to name bishops in the Empire, long the prerogative of the Emperor but now claimed by the Pope as part of a comprehensive Church reform program. Henry found it necessary to beg the Pope's forgiveness, kneeling in the snow for three days as a penitent at the gates of Canossa Castle until Gregory felt compelled to absolve him. Within a few years, Henry returned to Italy with an army and besieged Gregory in Rome. Gregory responded by allying himself with the ferocious Norman ruler of Naples, Robert Guiscard, who raised the siege, sacked the city, and made a prisoner of Gregory, who promptly died. See GEOFFREY BARRACLOUGH, *THE ORIGINS OF MODERN GERMANY 120-25* (1984); TOM HOLLAND, *THE FORGE OF CHRISTENDOM: THE END OF DAYS AND THE EPIC OF THE WEST xiii-xx*, 359-90 (2008). These were struggles for power between rival institutions, but they were actuated by distinctly different conceptions of law, in particular, who exercised ultimate authority and from what source that authority derived.

69. Protestantism enabled the German princes to assert their control over the religious practices and institutions within their realms, freeing themselves from the joint control of the Catholic Church and the Catholic Holy Roman Emperor (Charles V). See BARRACLOUGH, *supra* note 68, at 355-73; DIARMAID MACCULLOCH, *THE REFORMATION: A HISTORY 158-205* (2003). Henry VIII's demand to annul a marriage that produced no heir led to conflict with the Pope (Clement VII), much as Lothar's similar demand more than 600 years earlier, but in this case the King prevailed and took control of the

principle,⁷⁰ in effect reviving the Jewish principle that the ruler must conform to higher law, as interpreted by those with special understanding of this higher doctrine, or perhaps the Germanic principle that the ruler must conform to custom. Lord Coke, often regarded as the progenitor of judicial review on the basis of his decisions and proclamations,⁷¹ knew well that it could not be reconciled with either Roman law; denied the authority of the Church by the Reformation, he attributed the power of courts to resist or countermand royal authority to the Celts.⁷²

The jagged combination of different legal principles in our own society is also reflected in our means of resolving factual disputes. Jury trials, where the decision is controlled by law and determined by evidence, might appear to be a classic embodiment of Western legal principles, and like Epstein's property rules, are often traced back to Magna Carta's command that no one should be held legally guilty or liable "except by lawful judgment of his peers."⁷³ In fact, the idea that jury trials should be used as a means of determining legal liability can be dated to 1215, the year Magna Carta was promulgated; unfortunately, it was initiated, at the earliest, about six months later in that year. At the time of Magna Carta, factual disputes were still being determined by ordeal or combat.⁷⁴ This practice was evidently based on Germanic customary law, but it had been overlaid by the Judeo-Christian doctrine that God would determine the result of these seemingly arbitrary

English church. See WINSTON S. CHURCHILL, *THE NEW WORLD* 53–85 (1956); DIARMAID MACCULLOCH, *THE REFORMATION: A HISTORY* 198–204 (2003).

70. 5 U.S. 137 (1803). In requiring the ruler to submit to legal rules as interpreted by an institution that is independent of the ruler, *Marbury* domesticates the right of revolution. Medieval thinkers, aware that a ruler might violate God's law, argued that people had a right to rebel against a ruler of that sort. They were equally aware, however, that this remedy is highly disruptive, and so risky for those asserting it that it is unlikely to be used. *Marbury* is based on the same idea that the ruler should be subject to the law, but provides a means by which individual actions by the ruler that violate the law can be reversed without overthrowing the ruler itself. For further explication of this interpretation of *Marbury*, see Edward Rubin, *Judicial Review and the Right to Resist*, 97 GEO. L.J. 61 (2008).

71. E.g., *Jentleman's Case*, (1583) 6 Reports 11a (K.B.), reprinted in 1 *THE SELECTED WRITINGS OF SIR EDWARD COKE* 157–60 (Steve Sheppard ed., 2003) (stating that the king appoints judges but cannot determine their decisions after appointment); *Prohibitions del Roy*, 12 Reports 63, reprinted in 1 *THE SELECTED WRITINGS OF SIR EDWARD COKE* 478–81 (Steve Sheppard ed., 2003) (arguing that the king may not decide a case at law).

72. EDWARD COKE, PREFACE TO PART II OF THE REPORTS (1602), reprinted in *THE SELECTED WRITINGS OF SIR EDWARD COKE*, supra note 71, at 39, 40 ("If the ancient Lawes of this noble Island had not excelled all others, it would not be but some of the severall Conquerors, and Governors thereof; That is to say, the Romanes, Saxons, Danes or Normans, and specially the Romanes, who (as they justly may) doe boast of their Civill Lawes, would (as every of them might) have altered or changed the same.").

73. MAGNA CARTA, cl. 39, reprinted in HOLT supra note 39, at 452.

74. See ROBERT BARTLETT, *TRIAL BY FIRE AND WATER: THE MEDIEVAL JUDICIAL ORDEAL* 13–33 (1986); DAN JONES, *MAGNA CARTA: THE BIRTH OF LIBERTY* 164–65 (2015); MORTIMER, supra note 38, at 55–56; GEORGE NEILSON, *TRIAL BY COMBAT* 31–74 (1890).

events; reflecting this reinterpretation, the person who officiated at the event was a priest, not a government appointee. The reference in Magna Carta to the judgment of one's peers probably refers to the special council of twenty-five barons established in Chapter 61 of the document and applicable only to its signatories, a further warning against imposing our own legal concepts on a different society.⁷⁵ The practice of using jury trials to determine factual disputes began to develop after 1215 because Lateran IV prohibited priests from officiating in the ordeal.⁷⁶ The Lateran IV decrees applied to all of Western Europe, of course, but England complied much more quickly than other realms because King John, for political reasons, had declared himself a vassal of the Pope.⁷⁷ This relatively rapid shift in legal practice probably caused the newly-instituted jury trials to reflect some of the adversarial features that characterized trial by combat, still the prevailing means of resolving land disputes between members of the nobility in 1215.⁷⁸ Continental regimes were able to shift to civil trials more gradually, and combat had become outmoded by that time, with the result that their trial procedures are less adversarial and more investigative or inquisitorial.

The somewhat awkward pastiche of practices resulting from England's rapidly-initiated jury trials is reflected to this day in our legal system. On the one hand, trials are regarded as a means of weighing evidence to determine actual facts about the external world, and many of their specific procedures are based on the accuracy or reliability of the evidence

75. HOLT, *supra* note 39, at 10, 56, 78–80. This was the Court of Twenty-Five. According to Holt, and again indicative of the gap between the medieval society that generated Magna Carta and our own, the precedent for this arrangement may have been “the London council of twenty-five mentioned by the city chronicler, fitz Thedmar, under 1200-1.” *Id.* at 56 (footnote omitted). Holt also notes that the general idea of setting up a mechanism such as the Court of Twenty-Five to exercise control over a monarch had roughly contemporaneous parallels in practices established in the Crusader Kingdom of Jerusalem allowing vassals to renounce their fealty if the king imprisoned a vassal without judgment, and in the Kingdom of Aragon's *Privilegio de la Union*, which allowed vassals to replace a king who violated their privileges. *Id.* at 78–79. In other words, the “judgment of their peers” clause in Chapter 39 is better viewed as a predecessor (although not in any direct or lineal sense) to judicial review, not jury trials.

76. “No subdeacon, deacon, or priest shall practice that part of surgery involving burning and cutting. Neither shall anyone in judicial tests or ordeals by hot or cold water or hot iron bestow any blessing; the earlier prohibitions in regard to dueling remain in force.” TWELFTH ECUMENICAL COUNCIL: LATERAN IV, CANON 18, <https://perma.cc/T6FU-CUV5>. See BAKER, *supra* note 37, at 63–66; BARTLETT, *supra* note 74, at 34–102; JONES, *supra* note 74, at 164; PLUCKNETT, *supra* note 40, at 114–25; WARREN, *supra* note 37, at 321–22. There were, of course, broader social changes that supported implementation of the Lateran decree, just as there were social changes that had generated the decree. See John W. Baldwin, *The Intellectual Preparation for the Canon of 1215 Against Ordeals*, 36 SPECULUM 613 (1961). The crucial point is that Magna Carta cannot be read as establishing a right to jury trials.

77. MORTIMER, *supra* note 46, at 121–22; HOLT, *supra* note 39, at 216–18; JONES, *supra* note 74, at 80–164.

78. Edward L. Rubin, *Trial by Battle. Trial by Argument.*, 56 ARK. L. REV. 261, 277–79 (2003).

presented. On the other hand, trials are regarded as a procedure that establishes facts through an adversary process, which means that untrue statements about the world will be accepted if the parties agree to them, and that judges cannot carry out their own investigation of the facts, no matter how reliable that effort may be. In other words, bundled together in this familiar mode of legal decision making, often regarded as embodying universal principles of law, are two different concepts of legality and legal dispute resolution. If the idea of legal principles has any content, rather than being an empty and formulaic recitation, it must be acknowledged that these principles are inconsistent with each other. Thus, we need not venture as far afield as the Ancient Maya or the Golden Horde to find evidence that legal systems can embody conflicting concepts; such conflicts exist in our own backyard.

The same point can be made about many other societies as well. Macaulay's code was clearly a disruption and displacement of prevailing Indian law, but that law was itself a complex mixture of Hindu law and Islamic law of the previous Moghul conquerors of India.⁷⁹ Japan, perhaps the most homogenous and culturally unified nation in the modern world, derives its legal concepts from its native Shinto culture, overlaid by massive, albeit voluntary borrowing of Chinese law, influenced by the subsequent adoption of Buddhism, transformed by another voluntary borrowing of British and German law, and then modified by the law imposed during the American occupation, much of which has been kept in place.⁸⁰ In other words, it is not only difficult to find evidence of legal principles that are universal among the legal systems of different societies, but it is also difficult to find such principles that are universal within a single society. Conquest, trade, immigration, voluntary borrowing, and innumerable other contacts tend to render any society's legal system a complex mixture of different and often inconsistent principles. The idea of law as springing from the essence of a society's primordial and continuous experience is a romantic fantasy of nineteenth century historical jurisprudence, and one reason for the decline of this approach that Tamanaha documents as the beginning of his book.⁸¹

79. On the interaction between Hindu and Islamic culture after the Moghul conquest, see JOHN KEAY, *INDIA: A HISTORY* 289–382 (2000); THOMAS R. TRAUTMANN, *INDIA: BRIEF HISTORY OF A CIVILIZATION* 148–68 (2010). In fact, the interaction began several centuries earlier, with the incursion of earlier Islamic groups from Central Asia into the Delhi area. JOHN KEAY, *INDIA: A HISTORY* 231–61 (2000).

80. See R. H.P. MASON & J.G. CAIGER, *A HISTORY OF JAPAN* (rev. ed. 1997); W. SCOTT MORTON & J. KENNETH OLENIK, *JAPAN: ITS HISTORY AND CULTURE* (4th ed. 2005); REISCHAUER, *supra* note 60.

81. TAMANAHA, *supra* note 1, at 16–24.

But we are not yet done. Quite apart from the differences and inconsistencies that result from divergent cultural influences, other differences and inconsistencies are likely to arise due to wealth and educational divisions within the society. What we define as the legal system of a given society generally reflects the concepts and beliefs of its literate elite. The common law of England, highly touted as an embodiment of autochthonous and enduring legal principles, was created by royal judges who were universally drawn from the tiny upper stratum of English society.⁸² The attorneys representing litigants in those courts came from the same stratum, or perhaps a marginally broader one as time went on.⁸³ The litigants themselves represented a larger portion of society, being merchants, artisans, and small landowners, but even so they probably represented only a minority of the populace.⁸⁴ There remained a large number of farmhands, tenant farmers, cottagers, manual laborers, peddlers, ordinary servants, impoverished widows, and vagrants who rarely appeared in common law courts as plaintiffs because they could not understand the proceedings or afford a lawyer.⁸⁵ They did appear as defendants in criminal cases, generally dazed, bewildered and inarticulate, and often on their way to the gallows.⁸⁶ We know that they were not even subject to the common law for the first several centuries after its establishment because of the continued existence of manorial courts, as described above. What we do not know, because written records are lacking, is the nature of the law that they themselves used, understood, and were governed by in their ordinary relations. The question here does not involve specialized bodies of law for different purposes. The church's canon law was a specialized body of law in this sense, but a well-educated cleric fully understood the common law, its boundaries, and the differences between that law and the law governing the Church, and would have been a fully competent participant in any common law case in which he might be involved. In contrast, it seems possible that the large number of uneducated, low-status, and impoverished people in English society found the prevailing legal system

82. BAKER, *supra* note 37, at 143–47; POLLOCK & MAITLAND, *supra* note 36, at 160–61.

83. BAKER, *supra* note 37, at 147–49; *see generally* MICHAEL BIRKS, GENTLEMEN OF THE LAW (1960).

84. *See* BERMAN, *supra* note 65, at 390–403.

85. *See* POLLOCK & MAITLAND, *supra* note 36, at 160 (“Walter Map has told us how in the exchequer a poor man obtained an expeditious judgment against a rich antagonist. Of this as of a marvelous thing he spoke to Ranulf Glanvill.”).

86. *See* PETER LINEBAUGH, THE LONDON HANGED: CRIME AND CIVIL SOCIETY IN THE EIGHTEENTH CENTURY (2d ed. 2003); DOUGLAS HAY ET AL., ALBION'S FATAL TREE: CRIME AND SOCIETY IN EIGHTEENTH CENTURY ENGLAND (1975).

incomprehensible and substituted their own rather different concepts in its place.

Proponents of universal law, or even of prevailing legal principles within a given society, tend to assert the contrary, but these assertions are typically mere declarations of faith. Often, they result from simply ignoring the issue. In *Design for Liberty*, Epstein treats John Locke's *Second Treatise* as a statement of the universal principles of the English law of property and perhaps of law in general.⁸⁷ This does not require much research, since the *Second Treatise* is readily available, but it is not clear that Locke, who was a genius, even reflects the typical views of the elite class to which he belonged. Assuming he does, a question arises whether the views about property that he advances can be taken as embodying or articulating some general, universal rules of property. Locke describes these views, after all, as being directly and self-evidently derived from God.⁸⁸ No problem, according to Epstein: Locke's "insistent and fervid repetition of the 'natural and divine law' theme surely did no harm, and in some close cases an appeal to the rule of law may have tipped the scales against abuses of state power."⁸⁹ Perhaps that is true if one is only concerned about the propertied classes who may have shared Locke's ideas, and who certainly would have benefitted from their application. But what about the great mass of people who were consigned to subordinate status by that natural and divine law, who were defined as inferior because of prevailing beliefs that social hierarchy and vast inequalities of wealth, privilege, and opportunity were required by God's Great Chain of Being?⁹⁰ Did they share Locke's view about the sacrosanct nature of property, and can it fairly be said that his view did them no harm?

The few accounts we have of actual lower-class life in pre-modern Europe suggest that these people inhabited a different world from that of the middle classes and the elite.⁹¹ They spoke a different dialect, followed

87. Epstein, *supra* note 48, at 13. See JOHN LOCKE, *SECOND TREATISE OF CIVIL GOVERNMENT* (1689), reprinted in JOHN LOCKE, *TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION* 100 (Ian Shapiro ed., 2003).

88. LOCKE, *TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION*, *supra* note 87, at 111–21.

89. EPSTEIN, *supra* note 48, at 14.

90. See ARTHUR O. LOVEJOY, *THE GREAT CHAIN OF BEING: A STUDY OF THE HISTORY OF AN IDEA* (1956). On the inequality of wealth in pre-modern England, see, e.g., MAURICE ASHLEY, *ENGLAND IN THE SEVENTEENTH CENTURY* 12–25 (2d ed. 1954). See also GEORGE, *supra* note 50, at 9–28; MORTIMER, *supra* note 46, at 77–104. As Ashley says, "though the rich were often extremely rich . . . the poor were always very poor." MAURICE ASHLEY, *ENGLAND IN THE SEVENTEENTH CENTURY* 23 (2d ed., 1954).

91. For a remarkable study, although relatively recent, see HENRY MAYHEW, ET AL., *LONDON LABOR AND LONDON POOR* (1861), reprinted as HENRY MAYHEW, ET AL., *THE LONDON UNDERGROUND IN THE VICTORIAN PERIOD* (2005).

different customs, ate different food, wore different clothes,⁹² and faced different concerns. They had a different type of education (generally none at all), a different experience of the Christian religion, and a different relationship to government. It seems implausible that they shared the same legal concepts as the elite; in any case, such a counterintuitive claim would need to be demonstrated with evidence before it could be accepted. Many of these differences have been effaced in modern society, not only by our democratic system of governance and theory of rights but also by the mass media and public education. Nonetheless, studies of people in impoverished communities, concededly a smaller proportion of our population than the Medieval or Early Modern lower classes, but still a significant number, suggest that they have distinctly different ideas about the law and the legal order of society. Henry Peder Lundsgaarde reports that they regard lethal violence as a legitimate response to verbal insults,⁹³ Sudhir Venkatesh that they treat group loyalty and mutual protection as their primary norms,⁹⁴ and Matthew Desmond that they have virtually no sense that landlord-tenant relations are governed by contract law.⁹⁵ Their attitudes more closely resemble the legal systems of the Early Middle Ages, where central government authority was weak and people needed to protect themselves through mutual support groups.⁹⁶ Janet Landa reports a similar phenomenon among overseas Chinese communities in Southeast Asia, who avoid the official courts as prejudiced and corrupt, and maintain their own (often more demanding) rules regarding contractual performance.⁹⁷

These further variations and discontinuities in legal systems go beyond Tamanaha's example of colonial exploitation, but his theory of law readily accommodates them. As he says in defense of his "conventionalist" approach to the subject: "There are multiple manifestations of law, each

92. The sartorial difference was enforced by sumptuary laws, themselves sufficiently weird by present standards to raise doubts about the universality of legal principles. See JASPER RIDLEY, *THE TUDOR AGE 112–15* (1990). In fact, such laws were generally unnecessary because no peasant could possibly afford to dress like a noble. The purpose of these laws was probably to prevent nobles from giving their worn-out clothes to their servants.

93. HENRY PEDER LUNDSGAARDE, *MURDER IN SPACE CITY: A CULTURAL ANALYSIS OF HOUSTON HOMICIDE PATTERNS* (1977).

94. SUDHIR VENKATESH, *GANG LEADER FOR A DAY: A ROGUE SOCIOLOGIST TAKES TO THE STREETS* (2008).

95. MATTHEW DESMOND, *EVICTED: POVERTY AND PROFIT IN THE AMERICAN CITY* (2016).

96. For a further explication of this point, see EDWARD L. RUBIN, *SOUL, SELF, AND SOCIETY: THE NEW MORALITY AND THE MODERN STATE* (2015). See *id.* at 40–54 (Early Medieval morality), 66–68 (reappearance of this morality among the Mafia and impoverished Afro-American populations).

97. JANET T. LANDA, *ECONOMIC SUCCESS OF CHINESE MERCHANTS IN SOUTHEAST ASIA: IDENTITY, ETHNIC COOPERATION AND CONFLICT* (2016); JANET T. LANDA, *TRUST, ETHNICITY, AND IDENTITY: BEYOND THE NEW INSTITUTIONAL ECONOMICS OF ETHNIC TRADING NETWORKS, CONTRACT LAW, AND GIFT-EXCHANGE* (1995).

with a collection of characteristics, none essential or necessary, and much variation amongst them.”⁹⁸ The multiple layers of law in Western society, in India, or in Japan might pose a challenge to theories claiming that law is necessarily an integrated system or a reflection of universal principles, but it is simply a matter for discussion with Tamanaha’s “realistic” approach to the subject. Because he limits law to systems established by the government, he might want to exclude the alternatives to the dominant legal system that sometimes flourish in impoverished or oppressed communities.⁹⁹ That only means, however, that he might want to assign their exploration to someone with different training (the authors of the studies cited above,¹⁰⁰ significantly, are all sociologists and anthropologists, not lawyers), not that they pose a conceptual challenge to his approach. The reason is that they take the place of law; that is, they serve the same function as government-established rules for communities where the government rules are not applied, accessible, or comprehended. They are thus distinguishable from the systems that Tamanaha wants to exclude, such as the rules that govern a sports association or a university. Members of those organizations, like the educated members of the Medieval Church, understand the prevailing government-established law, and also understand that their own rules apply in a distinct arena separate from public jurisdiction. To include them within a theory of law robs that theory of its necessary contours, as Tamanaha argues. But the rules by which people in impoverished or oppressed communities live occupy the same role as governmental rules, and thus can be treated as relevant to his consideration of our legal system in a way that would not be true for the rules of the United States Golf Association.

Phenomenology provides further insight on the issue of inconsistent or conflicting laws within a given society. Husserl’s approach is radically subjective; the experience from which consciousness arises, and the consciousness that results, are separate for each individual according to this theory. That is why he uses the term “intersubjective” for interactions between individuals, rather than social or cultural. But he recognizes this intersubjectivity as essential for thought because it provides the individual with the terms and structures that allow for the interpretation of sense experience, and the extension of understanding beyond that immediate experience. Because this intersubjectivity remains an individual experience, however, rather than being generalized as society or culture, there is no necessity that it be uniform within a given society, or indeed have any other

98. TAMANAHA, *supra* note 1, at 76–77.

99. *Id.* at 51–54.

100. *E.g.*, DESMOND, *supra* note 95; LUNDGAARDE, *supra* note 93; VENKATESH, *supra* note 94.

necessary features that relate to the society in general. Thus, to begin where the preceding succession of considerations ended, the intersubjective experience of poor or oppressed people in a given society might be quite different from the experience of the elite. Perhaps all members of the society share a common worldview, unified by collective rituals or continuously maintained channels of communication; perhaps different groups within a society have radically different experiences and concepts. Both possibilities, and all their intermediate variations, can be accommodated by Husserl's approach because it is based on the individual's experience, not any claims about the society at large.

Going further, phenomenology also provides an account of the way that disparate concepts of law can coexist within a given society. The universalists whom Tamanaha criticizes often assume that a legal order must possess certain unifying features in order to function, or to count as law. But Gadamer's analysis of textual interpretation suggests a conceptual mechanism that can overcome this assumption. As previously mentioned, his metaphor for the lifeworld is a space that is centered on the individual and bound by a horizon. Reading a text, however, involves a fusion of horizons, an interaction between the lifeworld of the reader and the text's originator that is mediated by the hermeneutic circle.¹⁰¹ An individual in a society that has borrowed law from a different society, or had that different law imposed on it by colonization, can mediate between the two systems of law by a similar process. The foreign legal system, through its acquisition or imposition, has become an element in the person's lifeworld, and is thus available for interpretation and adaptation. Because the process is ultimately grounded in each individual's consciousness, it will vary from one person to another. In India, there were many uneducated peasants who undoubtedly viewed the British as we would view aliens from outer space, while others became Macaulay's children. The result is a complex intermixture, varying from person to person or group to group, with many different modes of mediating between the two conflicting legal systems. To trace these variations requires empirically-based microanalysis, not generalizations about the universality of legal concepts.

IV. WHY THE ADMINISTRATIVE STATE DOES NOT VIOLATE OUR LEGAL PRINCIPLES

101. GADAMER, *supra* note 14, at 269–74.

As stated at the outset, a second objection to Tamanaha's book is that his approach precludes global criticism of the modern administrative state. A phenomenological approach to our society's legal system explains why this objection is invalid; specifically, why global criticisms are generally based on the assertion that there are universal principles of law. Here again, phenomenology provides support for Tamanaha's realistic theory of law, in this case as applied to the administrative state. As Tamanaha points out, proponents of the position that there are universal features of law, including both H.L.A. Hart and Lon Fuller, often ignore many standard features of modern administrative governance because these features fail to conform to their supposedly universal principles. Hart, for example, defines law as an effort to instruct citizens how to behave. This leaves him unable to explain something as common as disability benefits, whose purpose is not to induce people to become disabled.¹⁰² Fuller insists that law must be stated in generally applicable terms, which places a statute creating a national park outside the boundaries of law.¹⁰³ Tamanaha deploys his conventionalist definition of law in opposition to these jurisprudential exclusions. People in modern society describe the government's grant of disability benefits or its creation of a national park as enactment of a law. The failure to accommodate these provisions within the category of law invalidates the category, not the provisions.¹⁰⁴

Beginning with modern society's understanding of law thus precludes global condemnations of the governmental system that prevails in the society. This is often regarded as a defect in that it precludes the claim that this state has ventured outside the proper boundaries of law. The claim is not, of course, that a realistic definition such as Tamanaha's forestalls criticisms of particular administrative actions. Disability benefits can be included in the category of law, but if coverage is denied to some people on the basis of their religion or sexual orientation, these benefits can be readily condemned as illegal. Creating a national park may be regarded as an act

102. H.L.A. HART, *THE CONCEPT OF LAW* 38–41 (1961). For further explication, see Rubin, *supra* note 53, at 199–201; Edward L. Rubin, *Law and Legislation in the Administrative State*, 89 *COLUM. L. REV.* 369, 375–77 (1989).

103. LON L. FULLER, *THE MORALITY OF LAW* 46–49 (rev. ed. 1969). For further explication, see Rubin, *supra* note 102, at 397–408. Fuller lists other requirements for law as well: promulgation, clarity, possibility of compliance, constancy through time, congruence with official action, non-retroactivity, and non-contradictoriness. LON L. FULLER, *THE MORALITY OF LAW* 49–91 (rev. ed. 1969). But, being oblivious of the administrative character of the modern state, he fails to realize that he is not stating some underlying truth about law, but simply the familiar constraints that due process imposes on rules that apply to private citizens. In an administrative state, many laws are directed to administrative agencies, not directly to citizens, and his supposed principles are simply not relevant. See Rubin, *supra* note 53, at 217–18; Rubin, *supra* note 102, at 397–408.

104. TAMANAHA, *supra* note 1, at 120–24.

of law, but it is illegal if the legislators were bribed by businesses located on the road leading to the park. Rather, the criticism of a realistic or inclusive definition of law is that it precludes the claim that the administrative state is illegal in its entirety, that it violates the rule of law or represents the abandonment of valid legal principles.

The immediately apparent problem with an argument of this sort is its implausibility. How could a mode of governance that has been adopted by a democratic nation, over the course of a century or more, and repeatedly reconfirmed and expanded, violate that nation's concept of law? Administrative governance was not imposed on the U.S., or on the other Western nations that have adopted it, by a colonizing power. Perhaps it could be claimed that the British violated India's conception of law, but how could they have been violating their own conception? This question reveals that the answer offered by critics of the administrative state is simply another version of the idea that there are necessary and universal principles of law. Just as these asserted principles can be a means of projecting our own value onto different societies, they can be a means of restating policy-based objections to administrative government in jurisprudential terms. For those who dislike the administrative state, the general principles of law that they discern are typically formulations designed to exclude administrative government from the charmed circle of legality.

Stated more generally, the phenomenological argument is that the only legal concepts that we have available to us are those generated by our own society. To formulate a global condemnation of the government created by one's own society, it would be necessary to show that the government has diverged, in its entirety, from the society's prevailing legal norms. That is possible, but it must be demonstrated—not by invoking different legal norms that are asserted as universal but by showing how a government that embodies norms that diverge from those of its citizens can come into power. In the U.S., opposition to the administrative state is often grounded on interpretation of the Constitution.¹⁰⁵ It is certainly conceivable that a government existing at some later time could violate the legal norms embodied in a founding document. But demonstrating that such a violation has occurred must again be based on some discontinuity, some explanation how a government that rejected the document's norms could develop. The claim that a gradual process of change, generated and accepted at every stage through democratic processes, violates the founding principles can

105. See, e.g., EPSTEIN, *supra* note 42; PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? (2014); JOSEPH POSTELL, BUREAUCRACY IN AMERICA: THE ADMINISTRATIVE STATE'S CHALLENGE TO CONSTITUTIONAL GOVERNMENT (2017).

only be based on the idea that those principles exist outside the social process – in other words, that they are universal principles to which the claimant has some sort of special access. As the preceding sections have shown, such claims are incoherent.

A much more formidable objection to administrative government, although not stated in the categorical terms of critics such as Hayek, is advanced by Jurgen Habermas, writing in the phenomenological tradition. This is his idea that modern government represents the colonization of the lifeworld, in effect that we have colonized ourselves in the process of developing our present, technological society.¹⁰⁶ Habermas's position is based on the identification of four distinct modes of action, which he defines as "those symbolic expressions with which the actor takes up a relation to at least one world."¹⁰⁷ These "worlds," which can be thought of as conceptual orientations, are teleological (instrumental action to produce pragmatic results), constative (theoretical), normative (moral) and dramaturgical (aesthetic).¹⁰⁸ Collectively, they constitute the essence of the individual's lifeworld. Following Max Weber, Habermas argues that, in pre-modern society, these modes of action were integrated with each other by an overarching system of meaning.¹⁰⁹ Modernity, however, has disrupted this unity through the increasing dominance of purposive rational action, that is, instrumental behavior that does not function as part of an overall action orientation, but rather as an independent principle detached from any identified purpose. Its institutional manifestation is bureaucracy, a hierarchical structure of full-time employees chosen on the basis of merit or credentials and devoted to achieving a specified purpose.¹¹⁰ Weber does not limit bureaucratic structure to government, but rather sees it as a modern form of organization that dominates private business firms as well, and Habermas agrees with and follows this interpretation.

Bureaucratic organization enables both political and economic institutions to develop highly effective and increasingly complex modes of operation. It is these institutions that colonize the lifeworld of the individual. That is, they create structures that exceed the individual's ability to understand them, thereby denying people conceptual access to the forces that control their lives. This is Habermas's image of colonization. In government, it occurs through the instrumentality of "juridification," which

106. HABERMAS, *supra* note 3, at 301–403.

107. 1 JURGEN HABERMAS, *THE THEORY OF COMMUNICATIVE ACTION: REASON AND THE RATIONALIZATION OF SOCIETY* 143–271 (Thomas McCarthy trans., 1984).

108. *Id.* at 328–37.

109. *Id.* at 143–271.

110. MAX WEBER, *ECONOMY AND SOCIETY* 956 (Guenther Roth & Claus Wittich eds., 1978).

Habermas defines as “the tendency toward an increase in formal (or positive, written) law that can be observed in modern society.”¹¹¹ In other words, we have imposed on ourselves a system of law that is as incomprehensible to us as the law of a colonial power is to the native people it has colonized.

This is a powerful critique of the administrative state. It does not depend on invoking any fanciful set of universal principles that have been concocted to reinforce the critic’s a priori distaste for modern government. Instead, it charges modern government, and modern society in general, with having generated forces that contradict its own most crucial values, namely democratic rule and human rights. In colonizing ourselves, Habermas suggests, we have betrayed ourselves, created internal contradictions that we ourselves condemn and from which we need to find a pathway for emancipation.

The short answer to this critique, in terms of Tamanaha’s book, is that his realistic approach to administrative government is doing the same thing as Habermas himself, although obviously in the different terms of Anglo-American jurisprudence and philosophy. If modern government is undermining our values and threatening our freedoms, we had better understand just how this process is occurring. Global condemnations of the administrative state as violating imagined principles of law serve little purpose; we need to understand the precise way in which that state creates the threatened dangers. There is a difference between the two books, however. Tamanaha’s realistic account of modern administrative law lacks the sense of condemnation that is implicit in Habermas’s account of modern law as a form of colonization. As he writes: “A holistic view highlights aspects of modern law ignored by analytical jurists, among which [are] versatile government uses of law.”¹¹² His account might therefore be subject to the criticism that he is validating a system of law that ought to be globally condemned.

Although Habermas is writing in the phenomenological tradition, his assertion is subject to a response from within that tradition that would support Tamanaha’s more neutral and accepting stance toward the modern administrative state. Habermas has certainly identified a central and disconcerting aspect of the modernization process, but he has not necessarily provided an accurate account of its origin. He offers two alternatives. The first, which is the obvious one, is a Marxist, or more precisely neo-Marxist, analysis that views the colonization of the lifeworld

111. HABERMAS, *supra* note 3, at 357.

112. TAMANAHA, *supra* note 1, at 150.

as a means by which capitalist elites retain the bulk of industrial production's surplus value after democracy has triumphed, and the welfare state has been established.¹¹³ If their lifeworld has been colonized, then ordinary people will be unable to perceive this process and use democratic processes to change it. The second account, to which Habermas gives more attention, is Weber's idea that society has been trapped into the colonization process by the conceptual forces that it generated in its rejection of the traditional society that preceded it.¹¹⁴ The instrumental rationality that began as a means of liberating society from the irrational and dysfunctional features of the Medieval era has become, in Weber's famous phrase, an iron cage.¹¹⁵

A different account, obviously metaphorical but readily translated into an interpretation of specific political and social events, is that the process Habermas describes is a trade-off that modern people have willingly embraced. To begin with knowledge, the unified or integrated society whose decline Weber and Habermas regret was one where analytic tools were relatively simple, although the level of knowledge might have been somewhat advanced. Every educated person knew Christian doctrine and the New Testament thoroughly (Habermas's constative or theoretical mode of action). Explanations of physical reality (the teleological mode of action) were based on this doctrine and employed only rudimentary mathematics. Moral theory was derived from the same doctrine by means of arguments that were well understood, and aesthetics (dramaturgical action) were either based immediately on Christian values, such as Bellini's paintings, or

113. HABERMAS, *supra* note 3, at 338–43. Habermas points out that Marx's analysis of modernity is simplistic, in that he associates the lifeworld with the realm of freedom and the economic system with the realm of necessity. Marx's idea of revolution is to free the lifeworld from the system. But, Habermas argues, the lifeworld has been colonized in a much deeper way, that is, it has changed the way people, and specifically wage laborers, view themselves. They understand themselves as instrumentalities of the system, as units of labor power. Being an intrinsic feature of modernity, the abolition of private capitalism would not alter it. Interestingly, Heidegger comes to a similar conclusion; he points out that technology transforms nature into a "standing reserve" (e.g., the hydroelectric dam turns a river into so many acre-feet of water). Then, in one of his many striking images, he points out that when foresters go into the forest, they not only transform the forest into so many board feet of lumber, the way the dam transforms the river, but they also transform themselves into so many units of the labor force. MARTIN HEIDEGGER, *THE QUESTION CONCERNING TECHNOLOGY*, reprinted in MARTIN HEIDEGGER, *BASIC WRITINGS* 283, 298–301 (1977).

114. HABERMAS, *supra* note 3, at 303–31. This section is titled "A Backward Glance" because Habermas devotes a good deal of the first volume of *The Theory of Communicative Action* to an extended explication and analysis of Weber's theory of rationalization and his "diagnosis of the times." HABERMAS, *supra* note 107, at 143–271.

115. WEBER, *supra* note 3, at 181. Weber attributes this transformation to the Puritan work ethic, which established an order that "is now bound to the technical and economic conditions of machine production which to-day determine the lives of all the individuals who are born into this mechanism, not only those directly concerned with economic acquisition, with irresistible force." See HABERMAS, *supra* note 3, at 323–26 (discussing Weber's Protestant ethic).

derived from its moral theory, such as Shakespeare's plays. While ordinary people might have grasped the various forms of knowledge only vaguely or partially, they could generally perceive their basic claims because Christian doctrine pervaded the entire society. But the Scientific Revolution offered possibilities for knowledge that lay beyond the grasp of even the average educated person. After about a century, people began to recognize and then implement its technological implications. The result was a vastly increased control of the natural world and the development of industrial products that proved enormously appealing to the average person. At present, almost everyone in Western society carries a cell phone with capacities that Renaissance people would not have dared attribute to a wizard. And it might just as well be magic for most people, who use the device five or ten hours a day and do not have the slightest idea how it works.

Technology makes such developments possible, but these developments could not have been instantiated without a process of social organization that can be generally described as cumulative specialization. While many people in the Middle Ages were agriculturalists with limited and generalized skills, artisans often displayed highly specialized skills that took a lifetime and great talent to acquire. The stone carvers who decorated Chartres Cathedral easily matched, and probably exceeded, the capabilities of any modern industrial worker.¹¹⁶ But their skills, although they could not be duplicated by most people in the society, were readily understood. The stone carvers may have known of a few specialized techniques, but these could have been readily explained to an average person. In modern industrial processes, the people who design the products and organize their production are not only highly specialized, but use knowledge that has been built up and passed down over decades or centuries. Cell phones rely on a long series of discoveries about electricity, electronics, semiconductor materials, electromagnetic signals, astronomy, and relativistic effects. An enormous amount of learning, and not just practice, is necessary to understand the device, and this places the cell phone's operation well beyond the understanding of the ordinary citizen. And that small number of people who have developed cell phones and fully understand the device will not be able to understand very different and equally complex products such as automobiles, airplanes or nuclear power plants.

Non-technological knowledge has followed the same pattern, perhaps because of the impact of technology, perhaps because it reflects the same underlying social attitudes. We have excavated hundreds of Ancient Mayan

116. For a memorable description of this structure, conveying the remarkable artistic quality of the architecture and decoration, see HENRY ADAMS, *MONT SAINT MICHEL AND CHARTRES* (1986).

cities, deciphered their complex writing system, reconstructed the political conflicts of their city states and discerned the principles of their religion and the contours of their social structure. This level of knowledge can only be achieved by a cumulative research process funded by society through universities or institutes. Educated people can benefit from it by reading a book written for a general audience, or visiting on the excavated and reconstructed cities, but no one can contribute to the field without the many years of study needed to reach its advancing edge. Similarly, decades of empirical research, carried out by people with extensive academic training, have documented the conditions under which children suffer serious psychological damage from abuse by parents, step-parents or other caretakers. The validity of this research may be more open to challenge than electrical engineering or archaeology, but it cannot be dismissed in its entirety without attacking the general approach to knowledge that defines those other fields as well.

In order to exercise political control of a society such as ours, it is necessary for government to employ an equivalent level of specialization. How could public officials possibly decide whether a nuclear power plant is properly designed and safely operated without an agency staffed by officials who have a level of knowledge essentially equivalent to the engineers who designed and operate the facility? How can we deploy the knowledge we have gained about the effects of child abuse unless we rely on people who are familiar with the techniques and results of that knowledge? In other words, what Habermas describes as the colonization of the lifeworld by political forces can be attributed to the basic structure of knowledge in modern society. The actions of the Nuclear Regulatory Commission are incomprehensible to ordinary people because the facilities it regulates are incomprehensible, and they are incomprehensible because they are the product of the cumulative specialization that characterizes modern society. The incomprehensibility of our political and economic systems for the average person is a necessary consequence of the distinctive benefits that these systems confer.

This incomprehensibility creates dangers for us, of course, but before assuming it produces deleterious effects on our lifeworld generally, it is necessary to interrogate our own beliefs, as Husserl recommends. Is what Habermas describes as the colonization of the lifeworld the misfortune or disaster he and Weber claim, or are they judging it in terms of traditional attitudes that no longer prevail in modern society? Perhaps the specialization of government agencies that makes their actions opaque to ordinary people, and the bureaucratization that both enables and reflects that specialization, is a product of our lifeworld, rather than an intrusion on it. It

may be true that the modes of action in our lifeworld—teleological, constative, normative and dramaturgical—have become separated from each other, and that this reflect the breakdown of the previous conceptual unity of society, but that may reflect our modern sensibility, rather than intrusion on our sensibility by outside forces. Modern people tend to divide their experience into different spheres and seek fulfillment in each one.¹¹⁷ They speak readily and familiarly about doing well in their career but having trouble in their person life; they think of going to church and to a theater or museum as satisfying distinctly different inclinations or desires; they describe other people as being nice, admirable individuals but not effective at their jobs. In short, the idea of making global assessments of one's life and of other people may have been the result of a religious mentality that saw the purpose of life as going to heaven rather than hell, as judging others as either good or evil. That is simply not the way we think today.

Thus, the bureaucratization of government that Tamanaha is willing to accept as a feature of our legal system is not necessarily in conflict with the lifeworld of individuals in our society. Its particular actions may be incomprehensible to ordinary people, but they may accept that as a trade-off for the advantages of modern society, and recognize it as the same feature that characterizes all knowledge-based enterprises. At the same time, people may fully understand the structure of specialization that leads to this incomprehensibility. They may accept the compartmentalized character of government because their own lifeworld is compartmentalized, because the separation between different action orientations is not a metaphysical disaster for them but the way they think and live. In other words, the negative interpretation of the process Habermas describes as colonization may be the very tendency that his methodology warns us to avoid, namely, the unexamined transfer of one society's mode of thought to a different society.¹¹⁸

None of this suggests that we should be complacent about our legal system. Because modern government exercises vast and potentially oppressive power, we need to be vigilant in monitoring its actions and to make use of democratic process, social protest and academic criticism to contain it. But global condemnations based on outmoded norms, of the sort that Hayek and even Habermas advance, are not likely to contribute to this

117. For my views on the modern morality of self-fulfillment in general, see Rubin, *supra* note 95.

118. Habermas seems to have modified his position in his later book, see generally *BETWEEN FACTS AND NORMS: CONTRIBUTIONS TO A DISCOURSE THEORY OF LAW AND DEMOCRACY* (William Rehg trans., 1996). His idea of colonization is largely absent from this work, and he provides a refined and modulated analysis of modern government rather than a general condemnation.

process. Tamanaha's realistic theory of law provides a more effective starting point. Using a conventionalist account, that is, an account that can be regarded as derived from and comprehensible to the lifeworld of the individuals in our society, he includes all the operations of the modern administrative state in his theory and law and leaves open the possibility that we will approve or condemn its particular features on the basis of thoughtful analysis, rather than a priori definitions.