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## General Jurisprudence

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## GENERAL JURISPRUDENCE<sup>1</sup>

WILLIAM TWINING\*

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<sup>1</sup> This paper is a sequel to WILLIAM TWINING, *GLOBALISATION AND LEGAL THEORY* (2000) [hereinafter GLT] and WILLIAM TWINING, *Reviving General Jurisprudence*, in *THE GREAT JURISTIC BAZAAR* 335-363 (2002) [hereinafter GJB]; see also WILLIAM TWINING, *Reviving General Jurisprudence*, in *TRANSNATIONAL LEGAL PROCESSES: GLOBALIZATION AND POWER DISPARITIES* 3-22 (Michael Likosky ed., 2002); WILLIAM TWINING, *The Province of Jurisprudence Re-examined*, in *JURISPRUDENCE FOR AN INTERCONNECTED GLOBE* 13-42 (Catherine Dauvergne ed., 2003); William Twining, *A Post-Westphalian Conception of Law*, 37 *LAW & SOC’Y REV.* 199 (2003) [hereinafter *PWCL*]; William Twining, *Have Concepts, Will Travel: Analytical Jurisprudence in a Global Context*, 1 *INT’L J. L. IN CONTEXT* 5 (2005) [hereinafter *HCWT*]; William Twining, *Diffusion of Law: A Global Perspective*, 49 *J. LEGAL PLURALISM & UNOFFICIAL L.* 1 (2004); WILLIAM TWINING, *Social Science and Diffusion of Law*, 32 *J. LAW & SOC’Y* 203 (2005); William Twining, *Human Rights: Southern Voices*, 11 *REV. CONST. STUD.* 203 (Nov. 2 2006); William Twining, *Glenn on Tradition: An Overview*, in *A Fresh Start for Comparative Legal Studies? A Collective Review of Patrick Glenn Legal Traditions of the World, 2<sup>nd</sup> Edition*, 1 *J. COMP. L.* 101, 107-15 (Nicholas H.D. Foster ed., 2005) [hereinafter *A Fresh Start*]; William Twining, *Diffusion and Globalization Discourse*, 47 *HARV. INT’L L. J.* 507 (2006); and William Twining, *Schauer on Hart*, 119 *HARV. L. REV. F.* 122 (2006).

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This paper sets out a view of a General Jurisprudence that is needed to underpin the institutionalized discipline of law as it becomes more cosmopolitan in the context of "globalization" and considers its implications.<sup>2</sup>

Part I restates a position on the mission and nature of the discipline of law and of the role of jurisprudence, as its theoretical part, in contributing to the health of the discipline. Part II clarifies some questions that have been raised about this conception of General Jurisprudence: (a) the implications of "globalization;" (b) the meaning of "General Jurisprudence" in this context; (c) the relationship

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<sup>2</sup> The term "cosmopolitan" is sometimes used to refer to a universalist ethos proclaiming loyalty to humankind, *see, e.g.*, DAVID HELD, *DEMOCRACY AND THE GLOBAL ORDER* (1995); and MARTHA NUSSBAUM, *FOR LOVE OF COUNTRY: DEBATING THE LIMITS OF PATRIOTISM* (Joshua Cohen ed., 1996). However, it is sometimes used more ambivalently to express the tensions between universalism and particularism, as in the term "cosmopolite," which suggests "[a] citizen of the world who has no national attachments and prejudices . . . often contrasted with *patriot* and so is either reproachful or complimentary." 3 THE OXFORD ENGLISH DICTIONARY 986 (2d ed. 1989). In the present context, I prefer the second usage, which expresses caution about "globalization" better than "international," "transnational," or "global." *See, e.g.*, David Harvey's witty paper, *Cosmopolitanism and the Banality of Geographical Evils*, 12 PUB. CULTURE 529 (2000).

between Jurisprudence, Legal Philosophy, and social scientific approaches to law; and (d) the significance of the idea of “non-state law.” Part III illustrates through concrete examples some implications for possible agendas and issues suggested by this model within the areas roughly characterized as analytical, normative, empirical, and critical jurisprudence; including a critical analysis of the assumptions and presuppositions typically underpinning mainstream work in fields such as comparative law, public international law, religious law, and socio-legal studies.

## I. INTRODUCTION

The purpose of this paper is to set out a view of a revived General Jurisprudence as part of an increasingly cosmopolitan discipline of law, to clarify some issues that have been raised about this view, and to illustrate some of its potential implications and applications.

I have written this paper from the standpoint of an English jurist who is concerned about the health of the institutionalized discipline of law, especially in common law countries, during the next fifteen to twenty years in the face of “globalization.” I am based in London and Florida, but I have traveled widely and have worked in several countries, mainly in Eastern Africa, the United States, the Commonwealth, and the Netherlands. My background, experience, and outlook are quite cosmopolitan, but my biases and culture are British, my training is in the common law, and my main language is English. My aim is to develop a vision for General Jurisprudence for Western jurists in the early years of this Millennium. A jurist from a different tradition approaching the same issues from another vantage point would probably present a significantly different picture as few of us can break away very far from our intellectual roots.

This paper could be interpreted as a plea for a less parochial jurisprudence. It might even be read as a polemic suggesting that Anglo-American jurisprudence in recent years has been narrow in its concerns, abysmally ignorant of other legal traditions, and ethnocentric in its biases. This is partly correct. However, in talking of “parochialism,” it is useful to distinguish between provenance, sources, audience, focus, perspectives, and significance.<sup>3</sup> My

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<sup>3</sup> TWINING, GLT, *supra* note 1, at 128-29.

argument does indeed suggest that we should pay more attention to other legal traditions, that the agenda of issues for jurisprudence needs to be reviewed and broadened, that the juristic canon should be extended, and that there is much to be learned from adopting a global perspective. However, in some respects the perspective is also self-consciously quite parochial, reflecting my own biases and limited knowledge and the fact that I address here a very largely Western audience.

In my view, jurisprudence is the theoretical part of law as a discipline. The mission of an institutionalized discipline is the advancement and dissemination of knowledge and critical understanding about the subject matters of the discipline. Legal scholarship is concerned with the advancement of knowledge and the critical understanding of law. Legal education is one part of the discipline of law that is concerned with dissemination of knowledge and critical understanding, including know-what, know-how, and know-why, of its subject matters and operations. This paper is concerned in the first instance with legal scholarship and legal theory - with what is involved in advancing the understanding of law from a global or transnational perspective and only indirectly with the implications of this for the teaching of law.<sup>4</sup>

How any discipline is institutionalized varies according to time, place, and tradition. Law is no different. Because of this historical contingency, there is no settled core or essence of the subject matters of our discipline or of legal knowledge.<sup>5</sup> I shall argue for a broad (and pluralistic) interpretation of these subject matters, but

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<sup>4</sup> At this stage in history, most forms of international and transnational legal practice are quite specialized. On the one hand, few law students and legal scholars can focus exclusively on a single jurisdiction. On the other hand, we are some way from a situation in which primary legal education can sensibly be geared toward the production of global lawyers or Euro-lawyers, or even specialists in international law. A cosmopolitan discipline does not mandate neglect of local knowledge, but law students can generally benefit from being presented with broad perspectives and from being made aware of different levels of legal ordering and their interactions. See William Twining, *A Cosmopolitan Discipline? Some Implications of "Globalisation" for Legal Education*, 8 INT'L J. LEGAL PROF. 23 (2001); and William Twining, *Cosmopolitan Legal Studies*, 9 INT'L J. LEGAL PROF. 99 (2001).

<sup>5</sup> See generally WILLIAM TWINING, *BLACKSTONE'S TOWER: THE ENGLISH LAW SCHOOL* 153-189 (1994) (discussing the idea of the "core" of a discipline).

I am well aware that not all of my audience will agree with me. The purposes, methods, and scope of the discipline are frequently contested.

At the risk of over-simplification, if one adopts a global perspective and a long time scale, one can discern some general tendencies and biases in Western academic legal culture that are in the process of coming under sustained challenge in the context of “globalization.” In crude form, these can be expressed as a series of simplistic assumptions that are constituent propositions of an ideal type:

- (a) That law consists of two principal kinds of ordering: municipal state law and public international law (classically conceived as ordering the relations between states: “the Westphalian duo”);
- (b) that nation-states, societies, and legal systems are very largely closed, self-contained entities that can be studied in isolation;
- (c) that modern law and modern jurisprudence are secular and now largely independent of their historical-cultural roots in the Judeo-Christian traditions;
- (d) that modern state law is primarily rational-bureaucratic and instrumental, performing certain functions and serving as a means for achieving particular social ends;
- (e) that law is best understood through the “top-down” perspectives of rulers, policy makers, officials, legislators, and elites with the points of view of users, consumers, victims, and other subjects being at best marginal;<sup>6</sup>

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<sup>6</sup> See TWINING, GLT, *supra* note 1, at 108-35; *see also* BRIAN TAMANAHA, A GENERAL JURISPRUDENCE OF LAW AND SOCIETY 239-40 (2001) [hereinafter “A GENERAL JURISPRUDENCE”].

- (f) that the main subject matters of the discipline of law are ideas and norms rather than the empirical study of social facts;
- (g) that modern state law is almost exclusively a Northern European/ Anglo-American creation, diffused through most of the world via colonialism, imperialism, trade, and latter-day post-colonial influences;
- (h) that the study of non-Western legal traditions is a marginal and unimportant part of Western academic law;
- (i) that the fundamental values underlying modern law are universal, although the philosophical foundations are diverse.<sup>7</sup>

In short, during the twentieth century and before, Western academic legal culture has tended to be state-oriented, secular, positivist, "top-down," Northo-centric, unempirical, and universalist in respect to morals. Of course, all of these generalizations are crude and subject to exceptions - indeed, none has gone unchallenged within the Western legal tradition - and issues surrounding nearly all of them constitute a high proportion of the contested agenda of modern Western jurisprudence. However, at a general level, this bald ideal type highlights some crucial points at which such ideas and assumptions are being increasingly challenged.

Jurisprudence, as the theoretical part of law as a discipline, has a number of functions to perform in order to contribute to its health.<sup>8</sup> To clarify, "Jurisprudence," "Legal Theory," and "Legal Philosophy" do not have settled meanings in either the Anglo-American or the Continental European traditions. In order to be brief, I shall stipulate how I use them here rather than enter into controversies that are partly semantic, but also partly ideological. As we shall see in Part IIc, I treat jurisprudence and legal theory as

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<sup>7</sup> For example, natural law, utilitarianism, and neo-kantianism are all universalist. See discussion of different meanings of universalism *infra* Part IIB.

<sup>8</sup> For more detailed discussions, see WILLIAM TWINING, LAW IN CONTEXT: ENLARGING A DISCIPLINE 110-30, 131-48 (1997) [hereinafter LIC].

synonyms and legal philosophy as the most abstract part of jurisprudence.

In this view, jurisprudence can be viewed as a heritage, as an ideology, and as the *activity* of theorizing that is posing, reposing, answering, and arguing about general questions relating to the subject matters of law as a discipline. The idea of heritage emphasizes continuity. The idea of ideology (in a non-pejorative sense) links one's beliefs about law to one's more general beliefs about the world whether or not they are systematic. In the Marxian pejorative interpretation of the term, the notion of ideology serves as a healthy reminder of the close connections between belief, self-interest, prejudice, and delusion.

As an activity within our discipline, theorizing has several functions: constructing whole views or total pictures (the synthesizing or mapping function); elucidating, constructing, and refining concepts; developing normative theories, middle-order hypotheses, and general working theories for participants; building bridges with other disciplines (the conduit function); intellectual history; and, most important, critically examining the underlying assumptions of different kinds of discourses of and about law.<sup>9</sup> This pragmatic conception of legal theorizing emphasizes the crucial role of jurisprudence in the development of law as a discipline, even though in a participant-oriented discipline it is natural, and often healthy, that practice should outrun theory.

Students coming to jurisprudence for the first time often find themselves bewildered and daunted by the disorderly profusion of our heritage of legal thought. One leading British student work discusses the ideas of over one hundred thinkers, yet the author "regrets" not finding room for many other significant figures.<sup>10</sup> On examination it

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<sup>9</sup> *Id.* at 110-14.

<sup>10</sup> M.D.A. FREEMAN, *LLOYD'S INTRODUCTION TO JURISPRUDENCE* vi (7th ed. 2001). Another recent student reader on jurisprudence, *JURISPRUDENCE AND LEGAL THEORY* (James Penner, Nicola Lacey, David Schiff & Richard Nobles, eds., 2002), heroically tries to give a broad conspectus by adopting a historical perspective by regularly crossing disciplinary boundaries, by moving beyond Anglo-American authors and transnational classics, such as Aquinas, Kant, Kelsen and Weber, to include modern Continental Europeans, such as Derrida, Foucault, Lacan, Habermas, and Luhmann. Although it extends over 1,000



becomes obvious that the student focused almost entirely on modern Western, mainly Anglo-American, theories about law. The index does not mention Hindu, Islamic, or Jewish jurisprudence and there are only passing references to Chinese, Japanese, Latin American, and African traditions. The work, therefore, presents only part of the total picture of the heritage of legal theory.

Even if the spotlight focuses solely on Anglo-American jurists, the picture remains daunting. For example, the few students who study any of Jeremy Bentham's writings usually focus on a few chapters of one early work: *An Introduction to the Principles of Morals and Legislation*. This represents less than one percent of his entire body of work, which will in time extend to 68-70 substantial volumes. Yet Bentham is only one of almost a hundred English and American thinkers represented in Lloyd and Freeman's *Introduction to Jurisprudence*. No history of Anglo-American jurisprudence can be sensibly restricted to thinkers who were English-speaking lawyers. Even quite narrow conceptions of the agenda of jurisprudence recognize that at least some of the central issues are shared with other disciplines. For example, concerns about justice and rights are shared with ethics, political theory, literary theory, theology, psychology, economics, and sociology among others.

The extent and diversity of the heritage of Anglo-American jurisprudence poses problems of selection even within that tradition when used for particular purposes, such as legal education and, more generally, for communities of scholars as well as for individuals. Texts and authors get "canonized" partly on perceived merit, but as often as not quite arbitrarily. No agreed upon criteria of selection exists. Inertia, fashion, ideology, power, self-promotion, and serendipity often influence the choices that are made. However, surveys of jurisprudence courses and statistics of citation tend to converge in identifying a fairly consistent short list of individual authors who are widely read and studied at a given time.<sup>11</sup> A

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pages, like Freeman, the editors lament that they have been forced to make significant omissions for reasons of space. *Id.* at vii.

<sup>11</sup> See e.g., the series of surveys on how jurisprudence is being taught in the United Kingdom: R. Cotterrell & J.C. Woodliffe, *The Teaching of Jurisprudence in British Universities*, 1974 J. SOC'Y PUB. TEACHERS L. 74 (1974); Hilaire Barnett & Dianna Yach, *The Teaching of Jurisprudence in British Universities and Polytechnics*, 5 LEGAL STUD. 151 (1985); and Hilaire

mainstream and something approaching a canonical core exists, but the core changes constantly and a rather healthy pluralism surrounds it.

Fairly orthodox accounts depict the Anglo-American tradition as extending over several centuries, as multi-disciplinary, and by no means confined to Anglophone authors. Plato and Aristotle, Kant and Kelsen, Marx and Weber, Foucault, Habermas, and post-modernists have been at least partly assimilated into the Anglo-American tradition. Yet if one adopts a global perspective, this heritage is vulnerable to criticism as being quite narrow and “parochial” on three main grounds.

First, nearly all Anglo-American legal theorists, including those who claim to be doing general jurisprudence, work exclusively within the Western legal tradition. Their perspective is generally secular and they pay little if any attention to religions other than Christianity and to non-Western cultures and traditions.

Second, and related to this, almost all Western jurisprudence has focused on state law, especially that of sovereign, industrialized nation-states. However, as I argue in Part IID, in many countries and transnationally, various forms of law, religious, customary, traditional, or normative orderings emerging from self-regulation or commercial practice, may be as important, if not more important, than municipal law in some contexts.

Third, and most important for a global perspective, the *agenda* of mainstream Anglo-American jurisprudence seems quite limited. It has concentrated, sometimes obsessively, on a narrow range of issues, most of which seem generally remote from the concerns of world leaders and Southern peoples. From a global perspective, questions need to be asked about the actual and potential contribution of law and legal theory to pressing problems of the age, such as the North-South Divide, war, genocide, and the environment,

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Barnett, *The Province of Jurisprudence Determined - Again!*, 15 LEGAL STUD. 88 (1995) (also covering Australia and Canada). Ronald Dworkin remarks that “[c]ontemporary jurisprudence courses differ wildly in content . . . There is no single subject, technique or canon.” Ronald Dworkin, *Hart and the Concepts of Law*, 119 HARV. L. REV. F. 95, 96 (2006). This may be true of jurisprudence courses, especially in the United States, but there is a mainstream and there is far less variety in books for such courses as is illustrated by the three surveys referred to above.

or those identified at the Millennium Summit, including hunger, poverty, basic education, health, international and national security, colonialism, fundamentalism, displaced persons, fair trade, and corruption.<sup>12</sup> From this point of view, our heritage can look rather narrow and sterile, narrow in its concerns, ignorant of other traditions, and ethnocentric in its biases. In short, despite the richness and complexity of our heritage, from a global perspective we are collectively open to charges of myopia, ignorance, ethnocentrism, and irrelevance. The central argument of this paper contends that both the practices and discipline of law are in fact becoming more cosmopolitan, and that jurisprudence as the theoretical part of law as a discipline needs to face these challenges.

In *Globalisation and Legal Theory* I argued that “globalization” presents three specific challenges to traditional legal theory:

- a. it challenges ‘black box theories’ that treat nation states, societies, legal systems, and legal orders as closed, impervious entities that can be studied in isolation;
- b. it challenges the idea that the study of law and legal theory can be restricted to two types of legal ordering: municipal state law and public international law, conceived as dealing with relations between sovereign states; and
- c. it challenges the adequacy of much of the present conceptual framework and vocabulary of legal discourse (both law talk and talk about law) for discussing legal phenomena across jurisdictions, traditions, and cultures.<sup>13</sup>

Part II of this paper seeks to clarify, and in part modify, this general thesis with reference to four issues that are regularly raised in discussion when presented. And then in Part III, I shall try to concretize the idea of a revived general jurisprudence with a few specific examples.

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<sup>12</sup> On possible agendas, *see infra* Part III.

<sup>13</sup> Quoted from TWINING, GLT, *supra* note 1, at 252.

## IIA. THE SIGNIFICANCE OF “GLOBALIZATION”

I teach a course called “Globalization and Law.” At our first meeting I usually ban all “g-words” from the classroom - “global,” “globalizing,” “globalization,” etc. There are two exceptions to this rule: first, for most of the course we adopt a global perspective; second, a student may use a “g-word” provided she can justify its use in that particular context and show that she can use it with clarity and precision.

I have two reasons for this rule. The first is obvious: “g-words” are ambiguous and tend to be used very loosely. They are abused and over-used in many ways, often as part of generalizations that are false, exaggerated, misleading, meaningless, superficial, ethnocentric, or a combination thereof.<sup>14</sup> I hear these problems in much of the loose talk about global law, global governance, global law firms and so on.<sup>15</sup>

The second reason is especially important for lawyers: the literature on globalization tends to move from the very local (or the national) straight to the global, leaving out all intermediate levels.<sup>16</sup> It is also tempting to assume that different levels of relations and of

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<sup>14</sup> Twining, *A Cosmopolitan Discipline?*, *supra* note 4, at 24-26.

<sup>15</sup> Not all such talk is inflated. For example, Harold Berman makes a sustained case for developing “world law” underpinning global civil society along the lines of Wilfred Jenks’ vision of a common law of mankind or a new *ius gentium*. See Harold Berman, *World Law*, 18 FORDHAM INT’L L.J. 1617 (1995); see also generally C. WILFRED JENKS, *THE COMMON LAW OF MANKIND* (1958). While I would place much greater stress on sub-global processes and institutions, the argument deserves to be taken seriously. Similarly, the New York University Law School’s program and concerns are sufficiently extensive that it may be pedantic to mock its claim to be “a” or “the” “Global Law School.” However, a law firm with offices in less than ten metropolitan centers and many books, journals, and articles with “global” in the title illustrate the general point.

<sup>16</sup> This is very common. See, e.g., David Westbrook, *Theorizing the Diffusion of Law: Conceptual Difficulties, Unstable Imaginations, and the Effort to Think Gracefully Nonetheless*, 47 HARV. INT’L L.J. 489 (2006). Even Santos, who emphasizes the complexities of “globalization,” only tends to use only four levels: global, regional, national, and local. See, e.g., BOAVENTURA DE SOUSA SANTOS, *TOWARD A NEW LEGAL COMMON SENSE: LAW, GLOBALISATION AND EMANCIPATION* 162-182 (2d ed. 2002) (placing the local and the global in counterpoint) [hereinafter *TOWARD A NEW LEGAL COMMON SENSE*]; cf. at 371 (showing a bit more flexible chart).

ordering are neatly nested in a hierarchy of concentric circles ranging from the very local, through sub-state, regional, continental, North/South, global, and beyond to outer space. The picture, however, is much more complicated than that: it includes empires, alliances, coalitions, diasporas, networks, trade routes, and movements; "sub-worlds" such as the common law world, the Arab world, the Islamic world, and Christendom; special groupings of power such as the G7, the G8, NATO, the European Union, the Commonwealth, multi-national corporations, crime syndicates, and other non-governmental organizations and networks. Talking in terms of vertical hierarchies obscures such complexities.

Even with these crude geographical categorizations, and even without reference to history, a ban on g-words sends a simple message of complexity. It also emphasizes the point that in regard to the complex processes that are making individuals, groups and peoples more interdependent, much of the transnationalization of law and legal relations is taking place at sub-global levels. Furthermore, there are also local and transnational relations and processes that to a greater or lesser extent by-pass the state, such as the Internet, networks of NGOs, many of the internal and external relations of large corporations, and so on.

The purpose of this ban on "g-words" does not suggest that the processes that are loosely subsumed under "globalization" are unimportant; rather it suggests that if we adopt a global perspective in studying and theorizing about law, our attention needs to be focused on all levels of relations and ordering, not just the obvious trilogy of global, regional, and nation-state, important as these may be.

I have written at length about some of the implications of broadly conceived "globalization" for legal theory.<sup>17</sup> I shall not attempt to go over that ground again here, except to make two points that are directly relevant to this paper. Both relate to law as an academic discipline as it has been institutionalized in what is loosely called "the West."

In the past 150 years or so, the primary focus of academic law, legal scholarship, legal education, and legal theory has been on the municipal law of nation-states. This is true not only of substantive and procedural law, but also of satellite subjects.

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<sup>17</sup> See TWINING, GLT, *supra* note 1; see also Twining, HCWT, *supra* note 1.

Comparative law, at least until recently, has been almost entirely dominated by “the Country and Western Tradition,” a tradition largely concerned with comparisons of private municipal law in “parent” common law and civil law systems.<sup>18</sup> The more expansive “Grandes Systèmes” tradition has often been dismissed as unscholarly or simplistic.<sup>19</sup> In legal theory, only exceptionally have Western jurists looked beyond municipal law: in the Anglo-American tradition nearly all canonical jurists, positivists, and non-positivists alike, from Bentham and Austin through to Dworkin, Raz, and Duncan Kennedy, have been concerned with domestic state law. The few exceptions, such as Ehrlich, Maine, and Llewellyn,<sup>20</sup> are generally treated as marginal. In recent times, leading normative theorists, notably Rawls and Dworkin, have explicitly retreated into a peculiar kind of particularism. Dworkin states that “interpretive theories are by their nature addressed to a particular legal culture, generally the culture to which their authors belong.”<sup>21</sup> Rawls makes a similar restriction to liberal, or at least decent, societies;<sup>22</sup> even socio-legal studies and sociology of law for most of their history have focused almost entirely on the municipal law of their own “societies.”<sup>23</sup>

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<sup>18</sup> See William Twining, *Comparative Law and Legal Theory: The Country and Western Tradition in Comparative Law*, in *COMPARATIVE LAW IN GLOBAL PERSPECTIVE* 21-76 (Ian Edge ed., 2000).

<sup>19</sup> See, e.g., ALAN WATSON, *LEGAL TRANSPLANTS: AN APPROACH TO COMPARATIVE LAW* 1-9 (2d ed. 1993).

<sup>20</sup> American commentators tend to focus on Llewellyn as a legal realist and commercial lawyer, but downplay the significance of “the law jobs theory,” which is treated as perhaps his most significant contribution by European jurists. See, e.g., *RECHTREALISMUS, MULTIKULTURELLE GESELLSCHAFT UND HANDELSRECHT: KARL N. LLEWELLYN UND SEINE BEDEUTUNG HEUTE* (Ulrich Drobnig & Manfred Rehbinder eds., 1994).

<sup>21</sup> RONALD DWORKIN, *LAW’S EMPIRE* 102 (1986).

<sup>22</sup> “The aims of political philosophy depend on the society it addresses.” John Rawls, *The Idea of an Overlapping Consensus* (1987), reprinted in *COLLECTED PAPERS* 421-448, 421 (Samuel Freeman ed., 1999).

<sup>23</sup> On the declining value of the idea of a “society” as an analytical concept, see ANTHONY GIDDENS, *THE CONSEQUENCES OF MODERNITY* 64 (1990); see also TAMANAHA, *A GENERAL JURISPRUDENCE*, *supra* note 6, at 206-8 (going so far as to say that “society” is no longer a useful concept for the sociology of law and substitutes the more flexible “social arena”).

Similar patterns are discernible in Continental Europe. The phenomenon is familiar, well documented, unsurprising, and for the most part, quite easily explained. One general reason is that, especially in the common law tradition, the culture of academic law is “participant-oriented” and, at least until recently, professional legal training and practice (by judges, government lawyers, as well as private practitioners) have been almost entirely oriented to local municipal law. In the present context, an important implication of this is that nearly all of our stock of concepts and theories remain relatively local or at least geared to a single legal tradition. Indeed, nearly all legal concepts, including many “fundamental legal conceptions” that have been the focus of analytic jurists’ attention, are “folk concepts.”<sup>24</sup> Hence, one of the main challenges to general analytic jurisprudence involves the elucidation and construction of analytical concepts that “travel well” across legal traditions and cultures.<sup>25</sup>

Secondly, the adoption of a global perspective may encourage reductionist tendencies such as the search for universals, the construction of grand overarching theories, and the tendency to emphasize similarity rather than difference. Such tendencies are particularly visible in the movement to harmonize, standardize, and unify laws.<sup>26</sup> In 1977, the World Congress on Philosophy of Law and Social Philosophy was launched under the grand rubric of “A General Theory of Law for the Modern Age.” No such theory resulted. My contribution, entitled “The Great Juristic Bazaar,” was taken as satirizing this title and emphasized the richness, pluralism, and

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<sup>24</sup> On the shortness of the list of concepts dealt with by nineteenth century analytical jurists, see TWINING, GLT, *supra* note 1, at 17-18, 22-23. On the distinction between “folk” and “analytic” concepts, see Twining, *PWCL*, *supra* note 1, at 229-31.

<sup>25</sup> This is the central theme of Twining, *HCWT*, *supra* note 1. See generally H. PATRICK GLENN, *LEGAL TRADITIONS OF THE WORLD* 44-51 (2d ed. 2004) (discussing some of the methodological difficulties).

<sup>26</sup> A powerful eloquent critique of the tendency to privilege the similar over the different is made by Pierre Legrand in PIERRE LEGRAND & RODERICK MUNDAY, *COMPARATIVE LEGAL STUDIES: TRADITIONS AND TRANSITIONS* 240-311 (2003).

complexity of the global heritage of theorizing about law.<sup>27</sup> Although I am not an extreme particularist, a central theme of theorizing envisaged in this paper is that problems of generalizing about legal phenomena - conceptually, normatively, empirically, and legally - are central problems of a new general jurisprudence.

I have one major exception to the ban on “g-words.” I encourage students to adopt a global perspective as a starting point for considering particular topics in the course.<sup>28</sup> Thinking in terms of total pictures assists in setting a context for more particular studies.<sup>29</sup> Glenn’s work on legal traditions and Tamanaha’s attempt to construct a broad and inclusive general concept of law are good examples of the synthesizing function of legal theory.<sup>30</sup> There may even be some modest value in trying to construct a historical atlas of law in the world as a whole. Earlier attempts to construct such maps, however, did little more than illustrate the difficulties: the variety of “levels” of human relations and ordering, the problems of individuating normative and legal orders, the complexity and elusiveness of the subject matters of our discipline, and the relatively undeveloped state of the stock of concepts and data that would be needed to produce such overviews.<sup>31</sup> Adopting a global perspective also reminds us

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<sup>27</sup> William Twining, *Academic Law and Legal Philosophy: The Significance of Herbert Hart*, 95 LAW Q. REV. 557 (1979), reprinted in TWINING, GJB, *supra* note 1, at 69.

<sup>28</sup> Adopting a global perspective is not “a view from nowhere.” For example, this article explicitly adopts the standpoint of an English jurist based in London and Florida, considering some of the implications of adopting a global perspective for his conception of legal theory and for law as an institutionalized discipline.

<sup>29</sup> This is the development of the second part of Llewellyn’s realist precept: “See it fresh, see it whole, see it as it works.” William Twining, *Talk About Realism*, 60 N.Y.U. L. REV. 329, 376 (1985), reprinted in TWINING, GJB, *supra* note 1, at 140-42 (paraphrasing Llewellyn in KARL LLEWELLYN, *THE COMMON LAW TRADITION: DECIDING APPEALS* 510 (1960)).

<sup>30</sup> TAMANAHA, *A GENERAL JURISPRUDENCE*, *supra* note 6, at 206-08; *see also* GLENN, *supra* note 25.

<sup>31</sup> *See* TWINING, GLT, *supra* note 1, at 136-73; (presenting the idea of “mapping law”); *cf.* Gordon Woodman, *Why There Can Be No Map of Law*, in *LEGAL PLURALISM AND UNOFFICIAL LAW IN SOCIAL, ECONOMIC, AND POLITICAL DEVELOPMENT* (Rajendra Pradham ed., 2003) (discussing the “impossibility” of mapping law).



about our collective ignorance of other legal traditions. Despite advancements toward a more cosmopolitan discipline, attention will remain primarily focused on particular inquiries<sup>32</sup> and local details. Jurists and legal scholars cannot live by abstractions alone.

In summation, we may not be able to entirely expunge g-words from our vocabulary because some genuinely global issues and phenomena exist. Since g-discourse tends to be both narrow in range and quite rigid, a global perspective may be useful for setting a broad context and presenting overviews and maps. Therefore, whenever we hear a g-word, we should pause to ask: is it being used precisely, or in this context is it exaggerated, superficial, misleading, simplistic, ethnocentric, false, or just plain meaningless?

## **IIB. "GENERAL JURISPRUDENCE"**

Similar considerations apply to the term "general jurisprudence" as to the overuse of the term "global." "General" in this context has at least four different meanings: (a) abstract, as in "*théorie générale du droit*;" (b) universal, at all times in all places; (c)

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<sup>32</sup> The connection between secularism and human rights provides a striking example of the implications of adopting a global perspective. Many Western scholars treat human rights discourse as a product of Enlightenment secular rationalism. See, e.g., FRANCESCA KLUG, *VALUES FOR A GODLESS AGE: THE STORY OF THE UNITED KINGDOM'S NEW BILL OF RIGHTS* (2000); CONOR GEARTY, *2005 HAMLYN LECTURES: CAN HUMAN RIGHTS SURVIVE?* (2006); cf. UPENDRA BAXI, *HUMAN RIGHTS EDUCATION* 18 (2002) ("[H]uman rights education symbolizes a secular, or multi-religious equivalent of 'liberation theology.'"). Such interpretations of human rights theory and discourse may be generally correct from a European perspective, but are more problematic in the United States. From a global perspective, however, it is at least as plausible to characterize our age as one of religious revival, not only in respect of Islam. These revivals are not confined to non-Western countries, not least because of patterns of immigration. See, e.g., PHILIP JENKINS, *THE NEXT CHRISTENDOM: THE COMING OF GLOBAL CHRISTIANITY* (2002) (discussing the power of demographic trends and religion); cf. *RELIGION AND POLITICS IN COMPARATIVE PERSPECTIVE: REVIVAL OF RELIGIOUS FUNDAMENTALISM IN EAST AND WEST* (Bronislaw Misztal & Anson Skupe eds., 1992) (comparing Christian religious movements in Eastern and Western Europe and the United States). Examples of the revival and reform in Islam are presented in *THE OXFORD HISTORY OF ISLAM* (John L. Esposito ed., 1999) *passim*. The growing Yoruba diaspora is discussed in *ORISA: YORUBA RELIGION AND CULTURE IN AFRICA AND THE DIASPORA* (Wande Abimbola & Kola Abimbola eds., forthcoming 2006).

widespread, geographically or over time; (d) more than one, up to infinity.

The English distinction between general and particular jurisprudence is not quite the same as the one common usage found in Continental Europe. In his useful book, *What is Legal Theory?*, Mark van Hoecke traces the history of civilian conceptions of “general jurisprudence” (*théorie générale du droit, allgemeine rechtlehre*) in terms of the ups and downs of a sub-discipline that tried to establish itself between abstract legal philosophy and legal dogmatics.<sup>33</sup> This kind of legal theory reached its heyday before World War II in the *Revue Internationale de la théorie du droit* edited by Kelsen, Duguit and Weyr. In this interpretation, “legal philosophy” was abstract and metaphysically removed from the details of actual legal systems. “General jurisprudence” was empirical, concerned with analyzing actual legal systems at a relatively high level of generality. “General” in this context therefore refers to a level of abstraction rather than to geographical reach, and “general jurisprudence” is interpreted as a kind of middle order theory.

In the English analytical tradition, “general” referred to an extension in a point of space: Bentham, for example, distinguished between universal and local jurisprudence; Austin between the general theory of law common to more mature systems and the theory of law underlying a particular legal system. Accordingly, we need to distinguish between “generality” in respect of levels of abstraction, in respect of geographical reach, and in respect of extent. Mobile phones and the Internet have wide geographical reach without being very abstract; mobile phones are numerous; the Dutch concept of “beleid,” as I dimly understand it, is quite abstract but rather local.<sup>34</sup> Often, however, generalization involves abstraction.

During the nineteenth century, English jurists normally assumed that jurisprudence was general. The Natural Law Tradition

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<sup>33</sup> See generally M. VAN HOECKE, *WHAT IS LEGAL THEORY?* (1986).

<sup>34</sup> See ERHARD BLANKENBURG & FREEK BRUINSMA, *DUTCH LEGAL CULTURE* 63-73 (2d. ed. 1994). Beleid is “a very Dutch legal term,” which has no English equivalent. *Id.* at 63. It is considered a key to understanding Dutch legal culture. “It is generally used to describe the policies of a public body” in terms of intentions, guidelines, ethos, or standards by which its actions may be judged. *Id.* It is used in the text as an example of an abstract term which has a limited geographical reach.

was universalistic. Bentham developed a universal science of legislation. Austin, more cautiously, developed a general analytical jurisprudence for more mature nations. Holland claimed that jurisprudence was a science and therefore must be general. Leaders of the Historical School, such as Maine, advanced sweeping Darwinian generalizations about law and social change.<sup>35</sup> However, during the early days of academic law in both England and the United States, the focus became more particular. One reason for this was that the study of the fundamental legal conceptions of one's own legal system was viewed as more practical and relevant to the rest of the curriculum. Austin, Pollock, Gray, and others explicitly emphasized this practicality.<sup>36</sup> There were also signs of a tacit legal relativism as exemplified by W.W. Buckland.<sup>37</sup>

Nineteenth century proponents of general jurisprudence, influenced by scientific models of enquiry (e.g., Darwinism) and by universalism in ethics (e.g., both utilitarianism and natural law), tended to *assume* the universality of their theories. Today, however, claims to universality and generality need to be treated as problematic. A central issue of a revived general jurisprudence should be: how far is it meaningful, feasible, and desirable to generalize (conceptually, normatively, empirically, and legally) across legal traditions and cultures? To what extent are legal phenomena contextually and culturally specific? In treating generalization as problematic, usage may be the most useful because of its flexibility.

While Bentham and some nineteenth century jurists equated "general" with "universal,"<sup>38</sup> Austin and others explicitly limited their

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<sup>35</sup> For details, see TWINING, GLT, *supra* note 1, at 15-49.

<sup>36</sup> See J. AUSTIN, THE USES OF THE STUDY OF JURISPRUDENCE (1863) *reprinted in* JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED, ETC. (H.L.A Hart ed. 1954); FREDERICK POLLOCK, ESSAYS IN JURISPRUDENCE AND ETHICS 1-41 (1882); JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 128-144 (1909).

<sup>37</sup> See GRAY, *supra* note 36, at 132.

<sup>38</sup> Tamanaha's conception of "general jurisprudence" is universalistic in tendency: "The ability to gather information on *all* kinds of social arenas, on *all* state legal systems as well as on other kinds of law, is precisely what qualifies this proposal as a *general* jurisprudence." TAMANAHA, A GENERAL JURISPRUDENCE, *supra* note 6, at 232-33 (emphasis in original).

theories to "mature" or "advanced" societies. The same can be seen by Hart and his followers who by implication treat modern state law as the paradigm case of law. The geographical reach of much contemporary juristic discourse is strikingly indeterminate.<sup>39</sup> "General," in a sense, is a flexible, relative category in a way that "global" and "universal" are not.<sup>40</sup>

In the nineteenth century the term "particular jurisprudence" referred to the study of the concepts and presuppositions of a single legal system. General jurisprudence referred to the study of two or more legal systems and was quite often confined to advanced or "civilized" systems. Universal jurisprudence was more like global jurisprudence, although often restricted to the law of sovereign nation states. Generality and particularity are relative matters. Globalization has implications for law and its study. It does not follow that what is needed is a global jurisprudence if that means looking at law solely or mainly from a global perspective. That is too narrow. The old term "general jurisprudence" is broader and more flexible than "global." Here, I shall use "general jurisprudence" to refer to the theoretical study of two or more legal traditions, cultures, or orders (including ones within the same legal tradition or family)<sup>41</sup> from the micro-comparative to the universal.<sup>42</sup>

Why do I talk of "reviving" general jurisprudence when some prominent contemporary jurists, such as Hart and Raz, claim to be doing "general jurisprudence"?<sup>43</sup> A brief answer is that while much of their work can be treated as examples of general jurisprudence,

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<sup>39</sup> TWINING, GLT, *supra* note 1, at 38-47. For example, it is sometimes difficult to be sure whether Dworkin's theory of adjudication is about American Federal law, U.S. law, Anglo-American law, "the common law" generally, or beyond that.

<sup>40</sup> TWINING, GJB, *supra* note 1, at 338-41.

<sup>41</sup> This paper is mainly concerned with theorizing across legal traditions and cultures. However, comparison and generalization *within* a given legal tradition or culture can also be problematic and has tended to be neglected by comparative lawyers. On comparative common law, *see id.* at 145-48.

<sup>42</sup> This conception has some affinity with nineteenth century usage, but differs from it in three important respects: (i) it treats generalizing about legal phenomena as problematic; (ii) it deals with all levels of legal ordering, not just municipal and public international law; and (iii) it treats the phenomena of normative and legal pluralism as central to jurisprudence.

<sup>43</sup> This paragraph is adapted from TWINING, GJB, *supra* note 1, at 340 n.11.

their conception of "general jurisprudence" is quite narrow and largely confined to state law viewed from an essentially Western perspective. My conception is much broader than theirs and harks back to a time when jurists as different as Bentham, Austin, Maine, Holland, and followers of Natural Law were all conceived of as pursuing different aspects of "jurisprudence." The label itself is unimportant, although it has sometimes been misused. Furthermore, contemporary jurists who consistently study general jurisprudence are exceptional, for the great bulk of legal theorizing in the Anglo-American tradition is confined to modern Western state legal systems, especially the United States and the United Kingdom. Finally, my conception of general jurisprudence is intended to challenge tendencies (often latent) and to project parochial or ethnocentric preconceptions onto non-Western legal orders, cultures, and traditions.

## **IIc. JURISPRUDENCE, LEGAL PHILOSOPHY, AND SOCIO-LEGAL STUDIES**

"Jurisprudence," "legal theory," and "legal philosophy" do not have settled meanings in either the Anglo-American or the Continental European traditions.<sup>44</sup> Here, I shall treat jurisprudence and legal theory as synonyms and legal philosophy as one part - the most abstract part - of jurisprudence. In this view, jurisprudence acts as the theoretical part of law as a discipline with a number of functions to perform in order to contribute to its health. A theoretical question is no more and no less than a question posed at a relatively high level of abstraction. Some topics, such as theories of justice, questions of metaphysics, epistemology, or meta-ethics, belong to legal philosophy in this restricted sense. Some questions, such as "what constitutes a valid and cogent argument on a question of law in the context of adjudication?" are in part philosophical, as they concern themselves with the nature of reasoning, but they also involve elements about which philosophers have no special expertise - such as the distinction between questions of law and questions of

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<sup>44</sup> For fuller treatment, see Twining, *The Province of Jurisprudence Re-examined*, *supra* note 1.

fact, and the nature of adjudication.<sup>45</sup> One cannot just take for granted that courts and judges are institutionalized in the same ways in London and New York, or Chicago and Amsterdam, let alone in the world as a whole.<sup>46</sup> One does not expect philosophers to contribute very much to clarifying such matters, yet theories of adjudication and legislation are an important part of the agenda of jurisprudence.

Herbert Hart wrote that “no very firm boundaries divide the problems confronting [different branches of legal science] from the problems of the philosophy of law.”<sup>47</sup> He continued: “Little, however, is to be gained from elaborating the traditional distinctions between the philosophy of law, jurisprudence (general and particular), and legal theory.”<sup>48</sup> I agree with the first statement, but dissent from the second for several reasons. First, there has been a tendency in recent times to treat legal philosophy and jurisprudence as co-extensive, but this is associated with a tendency to focus only on the most abstract questions and to neglect other important, but less abstract issues. Similarly, there has been a tendency to criticize all jurists at the level of philosophy.<sup>49</sup> However, by no means are all questions in legal theory solely or mainly philosophical questions and not all jurists are philosophers.

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<sup>45</sup> As we descend a ladder of abstraction, the need for local knowledge increases. For example: “What constitutes a valid, cogent, and appropriate argument in common law/US/Florida adjudication?” requires more detailed knowledge of the institutional and cultural contexts, even more so if the question refers to a specific court (e.g., Federal Court of Appeals for the Ninth Circuit) or an individual judge or a particular case.

<sup>46</sup> Courts, adjudication, and judges are all problematic as analytic concepts. TWINING, GLT, *supra* note 1, at 64; *see also*, MARTIN SHAPIRO, COURTS: A COMPARATIVE AND POLITICAL ANALYSIS (1981) (in which Shapiro bravely attempts to develop a general account of adjudication).

<sup>47</sup> H.L.A. Hart, *Problems of Philosophy of Law*, in 6 ENCYCLOPEDIA OF PHILOSOPHY 271 (Paul Edwards ed., 1967).

<sup>48</sup> *Id.* In the postscript to Herbert Hart’s THE CONCEPT OF LAW (1994), Hart revived the distinction between particular and general jurisprudence in order to differentiate his expertise from Dworkin. In my view, he did not succeed. *See* TWINING, GLT, *supra* note 1, at 33-47.

<sup>49</sup> *See, e.g.*, Brian Leiter, *Is there an ‘American’ Jurisprudence?*, 17 OXFORD J. LEGAL STUD. 367 (1997) (reviewing NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE (1995)).

The idea of “philosophically interesting” questions and concepts can build bridges between law and philosophy by pointing to shared concerns; but it can also divert attention from concepts and issues that are jurisprudentially significant.<sup>50</sup> Justice, rights, rules, causation, and reasons are familiar examples of concepts that are both jurisprudentially important and philosophically interesting. Tradition, culture, institution, corruption, and torture may be potentially philosophically interesting, but have not received the attention they deserve within jurisprudence. There are, however, other concepts that could benefit from the methods of conceptual elucidation developed by analytical philosophers even if they do not raise issues of philosophical significance, such as lawyer, dispute, court, jurisdiction, and unmet legal needs.<sup>51</sup> In the enterprise of understanding law, it is neither necessary nor sufficient for an issue to be philosophically interesting for it to be jurisprudentially interesting.<sup>52</sup>

The revival of close contacts between jurisprudence and analytical philosophy in the 1950s, for which Herbert Hart has been given much of the credit, has led to a range of work that has contributed much to the enterprise of understanding law. In addition to Hart’s own work in both general and particular (or special) jurisprudence, his immediate successors included several substantial figures, of whom Dworkin, Finnis, MacCormick, and Raz are the best known. Although some of the debates about positivism seem to have verged on obsession and have recently descended to unseemly wrangling, Brian Leiter has reminded us of the contributions of the next generation of analytical philosophers to a wide range of topics.<sup>53</sup>

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<sup>50</sup> TWINING, GJB, *supra* note 1, at 81-83.

<sup>51</sup> For example, problems of constructing suitable analytic categories for comparing legal professions and legal education have bedeviled discussions of these subjects. At an even more mundane level it seems likely that the underdevelopment of global and international statistics on legal phenomena is in part due to lack of stable concepts suitable for this purpose. See TWINING, GLT, *supra* note 1, at 153-57.

<sup>52</sup> For a recent example of the use of the idea of “philosophically interesting” that is criticized here, see Dworkin, *supra* note 11.

<sup>53</sup> Brian Leiter, *Naturalism in Legal Philosophy*, Stan. Encyclopedia of Phil. (Fall 2002), at <http://plato.stanford.edu/archives/fall2002/entries/lawphil-naturalism/>. Leiter lists criminal law theory, the conceptual and moral foundations of private law, the elucidation of central concepts of abstract legal theory (such as authority, reasons, rules and conventions); the revival of natural

In the fifty years since Hart's seminal inaugural lecture, there is much to celebrate, not only in terms of an extensive and sophisticated literature, but also because there is now a lively, loosely-knit interdisciplinary community that includes philosophers interested in law, jurists interested in one or more areas of philosophy, scholars trained in both disciplines, and philosophers who have worked to acquire sufficient local legal knowledge to be accepted as honorary jurists. Thus a large, well-equipped, and varied pool of talent exists to tackle a fresh range of issues.

Despite its many achievements, a sense of dissatisfaction has grown in recent years in regard to the dominant mode of analytical legal philosophy both within and outside its somewhat closed circles. This is a complex matter because the criticisms come from different quarters, the reasons for them are varied, and some of the more heated polemics have taken the form of personal attacks. Here, I shall confine myself to two common complaints: (i) that legal philosophy has become too detached from ordinary legal scholarship and legal practice; and (ii) that mainstream analytical philosophers address their agenda of issues too narrowly.<sup>54</sup> I shall argue that while these criticisms have some force, there are encouraging signs that we are entering a new era.

**i. *Legal philosophy out of touch with legal scholarship and legal practice***

This charge relates mainly to the continuing debates about positivism - especially the Hart-Dworkin debate and the discussions provoked by Hart's postscript to *The Concept of Law*. Many law students have complained that there seems to be little or no connection between legal philosophy and other subjects in the

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law theory; and the exploration of the implications of philosophy of language, metaphysics, and epistemology for both traditional issues of legal philosophy and for fresh explorations of the foundations of various fields of substantive and adjective law. *Id.* One might add a wealth of literature on the borderland of legal and political theory, especially in theorizing liberal democracy and justice, and some outstanding contributions to intellectual history, not least in relation to Bentham.

<sup>54</sup> These complaints are illustrated in the series of outbursts by Dworkin, *infra* note 56, at 1656; Leiter, *infra* note 61, at 165; and Halprin, *infra* note 62, at 67-68.



curriculum. Similarly, many legal scholars complain that they find little illumination for their particular studies from such theorizing. In this view, much legal philosophy has become too abstract, too esoteric, and perhaps too sophisticated to contribute much to the health of the discipline. In short, analytical legal philosophy has become a subject apart.<sup>55</sup>

Some of these concerns found expression in a stinging attack by Ronald Dworkin on recent positivist writings, exemplified by Jules Coleman and Joseph Raz.<sup>56</sup> His central charge is that “positivists are drawn to their conception of law not for its inherent appeal, but because it allows them to treat legal philosophy as an autonomous, analytic, and self-contained discipline.”<sup>57</sup> He also charges that “[t]hey make little attempt to connect their philosophy of law either to political philosophy generally or to substantive legal practice, scholarship, or theory.”<sup>58</sup> To Dworkin, this kind of work is insular, ascetic, Ptolemaic, and analogous to Scholastic philosophy.<sup>59</sup> He contrasts this unworldly and sterile activity with “the decidedly plodding and terrestrial character of what I actually said.”<sup>60</sup>

In an equally sharp riposte, no less personal because the author disclaims having met him, Brian Leiter writes Dworkin off as wrong-headed, deeply implausible, and largely irrelevant to some lively areas of legal philosophy that Dworkin has ignored.<sup>61</sup>

Dworkin, in turn, accuses positivist legal philosophers, such as Coleman and Raz, of having lost touch with legal scholarship and legal practice. In a thoughtful essay entitled “Thirty Years Off the Point,” Andrew Halpin agrees with the thrust of Dworkin’s critique and extends it to Leiter in respect of divorce from practice, but then

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<sup>55</sup> See Neil MacCormick & William Twining, *Theory in the Law Curriculum* (1986), reprinted in TWINING, LIC, *supra* note 8, at 131-148.

<sup>56</sup> Ronald Dworkin, *Thirty Years On*, 115 HARV. L. REV. 1655, 1656 (2002) (reviewing JULES COLEMAN, *THE PRACTICE OF PRINCIPLE: IN DEFENSE OF A PRAGMATIST APPROACH TO LEGAL THEORY* (2001), where Coleman attacked Dworkin).

<sup>57</sup> *Id.* at 1656.

<sup>58</sup> *Id.* at 1678.

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* at 1687.

<sup>61</sup> Brian Leiter, *The End of Empire: Dworkin and Jurisprudence in the 21<sup>st</sup> Century*, 36 RUTGERS L.J. 165, 165-66, 180 (2004).

goes on to argue that Dworkin is no more in touch with legal practice than his rivals.<sup>62</sup> The central point is that Dworkin and Raz have each elected to emphasize only one characteristic of legal practice in a way which does not give an account of actual practice, but “is rather a theoretical perspective on what law might be if one were to share the theorist’s preoccupations.”<sup>63</sup>

The effect of these sharp exchanges reveals more than their intellectual content. They can be interpreted as symptomatic of a growing feeling that some enclaves of legal philosophy have fallen into a rut and therefore need to branch out in new directions. Part of my argument is that the challenges of globalization present plenty of opportunities to do just that.

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<sup>62</sup> See Andrew Halpin, *The Methodology of Jurisprudence: Thirty Years Off the Point*, 19 CANADIAN J. L. & JURISPRUDENCE 67 (2006).

<sup>63</sup> *Id.* at 85.

Dworkin’s choice of the characteristic of deploying normative argument clearly avoids Raz’s particular error but in a more subtle way he makes the same mistake of grounding the methodology for his theory on an artificially isolated characteristic of the practice of law. Whereas Raz precluded the controversies of practice from his theoretical enterprise by insisting on a methodology that avoided engaging in moral argument, Dworkin is open to normative or moral argument. However, Dworkin too precludes the controversies of practice. He does this by diverting his methodology to construct a theory of normative argument that will provide authoritative and conclusive reasons for recognizing particular determinations of social relations: producing a coherent theory to account for the ‘right answer’ in every established and future case. Dworkin’s enterprise is equally speculative in working towards a theory of law that would provide an authoritative determination of every instance of every social relation, which is as far removed in another direction from the actual practice of law as Raz’s enterprise. Raz departs from the controversies of practice for a theoretical exposition of law without moral controversy; Dworkin departs for a theoretical destination where all moral controversy is resolved.

*Id.* at 86. I am in sympathy with the thrust of Halpin’s criticism, but I have some puzzlements about his conception of “legal practice.”

ii. *Narrowness*

Charges of narrowness against analytical jurisprudence are of long standing. They can refer to focus, conception of law, or geographical reach. All three are relevant in the present context.

The central thesis of this paper is that as the discipline of law becomes more cosmopolitan, the theoretical part of jurisprudence needs to broaden its reach to take more account of non-Western legal traditions, a wider range of legal phenomena, and different levels of normative and legal relations and ordering.

For many years I have argued that Herbert Hart and his followers revolutionized the methods of analytical jurisprudence, but they also tended to accept uncritically the agenda of the questions they inherited, which in turn was based on a narrow conception of law that centered on legal doctrine and its presuppositions.<sup>64</sup> Although they treated law as a social phenomenon, their work proceeded “in almost complete isolation from contemporary social theory and from work in socio-legal studies, with little overt concern with the law in action.”<sup>65</sup> As an example of this, Hart himself continued to focus almost entirely on concepts of legal doctrine or its presuppositions (“law talk”) but paid almost no attention to concepts of “talk about law,” such as dispute, function, institution, order, and so on, which were as susceptible to and in need of the same kind of conceptual elucidation.<sup>66</sup>

I have sometimes suggested that the famous claim that *The Concept of Law* was an essay in descriptive sociology can be interpreted as an olive branch offered by Hart to socio-legal studies.<sup>67</sup> Recently, Nicola Lacey and David Sugarman have persuaded me that this interpretation is historically incorrect because Hart shared the Oxford prejudice against sociology for most of his career.<sup>68</sup> The

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<sup>64</sup> See TWINING, GJB, *supra* note 1, at 69-92; cf. William Twining, *Schauer on Hart*, 119 HARV. L. REV. F. 122, 128-30 (2006).

<sup>65</sup> TWINING, GJB, *supra* note 1, at 73.

<sup>66</sup> *Id.* at 90-91.

<sup>67</sup> See TWINING, LIC, *supra* note 8, at 168-69; Twining, *HCWT*, *supra* note 1, at n. 27.

<sup>68</sup> NICOLA LACEY, A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM 230-31, 260-61, 322 (2004); David Sugarman, *Hart Interviewed: H.L.A. Hart in Conversation with David Sugarman*, 32 J.L. & SOC'Y 267, 291-93 (2005); In some contexts, terms like “Sociology of Law,” “Sociological

argument is nevertheless analytically correct, for conceptual elucidation is as important for social scientific investigation as it is for legal exposition, and the methods of conceptual analysis developed by analytical philosophy are applicable to important concepts in socio-legal studies and the social sciences generally.

Recently, Nicola Lacey has advanced a more fundamental explanation of the narrow focus of most contemporary analytical legal philosophy.<sup>69</sup> Hart's conception of his enterprise came from working "within a philosophical community . . . that conceived its own boundaries narrowly."<sup>70</sup> Hart treated philosophical questions as quite distinct from historical and sociological ones and rejected any idea of continuity between them. He remained relatively unmoved by historical and sociological criticisms of *The Concept of Law* because he thought that these raised different questions from those that he had set out to answer. As a result, "the social fact" dimensions of *The Concept of Law* were imperfectly realized. Joseph Raz and others followed Hart in trying to maintain a sharp distinction between

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Jurisprudence," "Law and Society," and "Socio-legal Studies" may suggest that the main, or even the only, important relationship between law and social science is with sociology. That is quite wrong. For example, in the United Kingdom the term "socio-legal studies" was originally coined for bureaucratic purposes to designate those kinds of cross-disciplinary enquiries about law that qualified for support from public funds in respect of research that involved perspectives, methods, or concepts from *any* of the social sciences. Each of these disciplines has its own complex history, culture, feuds, traditions, external relations, and fashions. Their relations to law are correspondingly complex. On the whole, such points have been well understood by those involved in socio-legal research, but this diversity has sometimes been obscured at the level of theory. In circles in which sociology is held in low esteem, this conflation of sociology and the social sciences can be used as a not too subtle kind of put down. See LACEY at 149-50, 185, 260-1; see also Thomas Nagel, *The Central Questions*, LONDON REV. OF BOOKS, Feb. 3, 2005, at 27.

<sup>69</sup> See Nicola Lacey, *Analytical Jurisprudence Versus Descriptive Sociology Revisited*, 84 TEX. L. REV. 945 (2006) [hereinafter *Analytical Jurisprudence*]. This is a development of arguments introduced in Nicola Lacey, *Philosophical Foundations of the Common Law: Social not Metaphysical*, in OXFORD ESSAYS IN JURISPRUDENCE 17-39 (Jeremy Horder ed., 2000) [hereinafter *Philosophical Foundations of the Common Law*] and her biography of Hart, LACEY, *supra* note 68.

<sup>70</sup> Lacey, *Analytical Jurisprudence*, *supra* note 69, at 953.

philosophical and empirical questions.<sup>71</sup> As a result, they failed to resolve the tension between emphasizing that law is a social phenomenon and refusing to consider it empirically.<sup>72</sup>

Lacey suggests that the dilemma of trying to theorize law as genuinely normative yet grounded in social fact is even more acute in the context of particular (or special) jurisprudence. In a perceptive discussion of *Causation in the Law*,<sup>73</sup> Lacey acknowledges that this thorough application of linguistic analysis to hundreds of cases greatly clarified the legal concept of causation and grounded a convincing critique of "causal minimalism" of American jurists such as Wechsler.<sup>74</sup> Hart and Honoré gave a very rich account of the discourse of causation in the law, but they gave "no systematic analysis of the institutional, practical, professional context in which

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<sup>71</sup> Lacey attributes this to Raz's distinction between "momentary" and "non-momentary legal systems." See JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM* 187-202 (1970). The identity of the latter is determined primarily by their content and of the former by the criteria of identification of valid legal standards. "Raz may be taken to imply that the social-theoretic analysis of law can be neatly bracketed off from the analytic." Lacey, *Analytical Jurisprudence*, *supra* note 69, at 981.

<sup>72</sup> [T]he richer the characterization of law's social basis – its institutional forms, its various types of rules, its role and its functions – the less plausible any theoretical claim to universality. Hart wanted to maintain the claim to universality as well as descriptiveness. In doing so, he ended up with the worst of both worlds. On the one hand, he produced a theory whose commitment to a social fact dimension meant that it did indeed reflect certain features of institutionalization – a fact which already compromised its universality. His theory, after all, fits most comfortably with a centralized state legal order. On the other hand, in the grip of the ambition for universality, he failed to deliver any rich paradigm of law's institutional form.

Lacey, *Analytical Jurisprudence*, *supra* note 69, at 957-58.

<sup>73</sup> H.L.A. HART & TONY HONORÉ, *CAUSATION IN THE LAW* (1959).

<sup>74</sup> "Causal minimalism claims that there is no *sui generis* concept of causation deployed in law beyond the 'factual' idea of causation as a *sine qua non* . . . Beyond this . . . decisions about how to attribute causal liability are based on policy considerations such as efficiency or moral considerations such as fault." LACEY, *supra* note 68, at 212.

the legal language was used.”<sup>75</sup> Consequently, they gave a very thin account of the very different social roles of contract, crime, and torts; law was analyzed as a body of doctrine rather than as a social practice, and as a result, “law is implicitly misrepresented as founded, actually or ideally, on a metaphysics – that is, on a moral or conceptual structure whose validity transcends space and time.”<sup>76</sup> Lacey further illustrates her thesis with reference to Hart’s theory of responsibility and the social and institutional basis of corporate criminal responsibility.<sup>77</sup>

Two points about Lacey’s argument deserve emphasis. First, her thesis is about “a general commitment to theorizing law as a *social* phenomenon,”<sup>78</sup> which is separate from a more general argument about the need to theorize law sociologically.<sup>79</sup> Second, her thesis is not merely that linguistic analysis of legal discourse divorced from its institutional and social context is incomplete, but rather that it is misleading. If *Causation in the Law* had included a richer account of the context in which legal language is used, it would have been a quite different book:

We could expect it to have explored questions such as the institutional factors which restrict the extent to which judges will appeal to pragmatic or policy arguments - their sensitivity to the need to legitimate their decisions, their (system-specific) understanding of their constitutional role and so on. As an empirical matter, these institutional factors shape not only the appeal to policy in causation cases but also the development of causal concepts themselves.<sup>80</sup>

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<sup>75</sup> *Id.* at 217.

<sup>76</sup> Lacey, *Analytical Jurisprudence*, *supra* note 69, at 981.

<sup>77</sup> Lacey, *Philosophical Foundations of the Common Law*, *supra* note 69, at 21-35.

<sup>78</sup> *Id.* at 19.

<sup>79</sup> See Roger Cotterrell, *Why Must Legal Ideas be Interpreted Sociologically?*, 25 J.L. & SOC’Y 171 (1998) *passim*.

<sup>80</sup> LACEY, *supra* note 68, at 218.

Lacey's critique of attempts to draw a sharp line between philosophical and social perspectives on law elicited a sharp response from a philosopher, Thomas Nagel:

Lacey seems to have a weak grasp of what philosophy is. Hart's work consists not merely in analysis of doctrinal language, but in the philosophical elucidation of institutions, practices, concepts, and forms of reasoning and justification that are the most basic and general elements of law and politics. He is acutely aware of the importance of institutions and power relations, but the questions he addresses cannot be answered by social and historical study. . . . [F]or all philosophers, the understanding they seek has to be pursued primarily by reasoning rather than empirical observation, because it is concerned with concepts and methods that enable us to describe and think about what we can observe. These are not mutually exclusive approaches or forms of understanding: they address different questions, and they operate at different levels of abstraction and generality.<sup>81</sup>

Nagel takes Lacey to task for associating Hart's neglect of institutional and practical context with differences between J. L. Austin and Wittgenstein.<sup>82</sup> He completely misses the point of her criticism, however, which is that legal concepts and legal doctrine can only be understood in the institutional and practical context of their use, and that an account of causation or corporate responsibility in English law is likely not merely to be incomplete but misleading if these contextual factors are ignored. For the same reason, abstracted accounts of "legal reasoning" or "adjudication" are likely to be over-generalized or inaccurate in other ways if differences in institutional and other contexts are overlooked. The extent to which such contextual factors are similar or uniform - both across and within

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<sup>81</sup> Nagel, *supra* note 68.

<sup>82</sup> If Lacey had implied that Wittgenstein would have actually undertaken empirical work this would be misleading, but she denies this. Lacey, *Analytical Jurisprudence*, *supra* note 69, at 969.

jurisdictions - is an empirical one. Philosophers who wish to understand legal phenomena need to equip themselves with local knowledge.

Many of us have argued for years that law, including legal doctrine and concepts, needs to be understood in context. Recently, there have been encouraging signs of a convergence between socio-legal and analytical approaches. For some time analytical jurisprudence was treated with hostility by many who favored contextual or socio-legal perspectives.<sup>83</sup> The disdain was mutual.<sup>84</sup> Recently, however, the mood has changed. Leading socio-legal scholars, including Cotterrell, Griffiths, and Roberts, have acknowledged that Hart's *The Concept of Law* has made a significant contribution to social science.<sup>85</sup> Leiter has reinterpreted legal realism in terms of naturalist philosophy, one version of which treats conceptual analysis as continuous with empirical inquiry in the social sciences.<sup>86</sup> Lewis Kornhauser has recently elaborated a social scientific concept of governance structures - of which legal systems

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<sup>83</sup> Early critics of Hart from a social science perspective included Edgar Bodenheimer, *Modern Analytical Jurisprudence and the Limits of its Usefulness*, 104 U. PA. L. REV. 1080 (1956) and B.E. King, *The Basic Concept of Professor Hart's Jurisprudence: The Norm Out of the Bottle*, 1963 CAMBRIDGE L.J. 270 (1963). For more recent examples of hostility to analytical positivism, see PETER FITZPATRICK, *THE MYTHOLOGY OF MODERN LAW* (1992) and Morton Horwitz, *Why is Anglo-American Jurisprudence Unhistorical?*, 17 OXFORD J. LEGAL STUD. 551 (1997).

<sup>84</sup> The patronizing attitudes of Oxford philosophers towards lawyers at the time of Hart's election to the Chair of Jurisprudence in Oxford are vividly illustrated in LACEY, *supra* note 68, at 149-50. It seemed that Hart was expected to colonize, educate, and upgrade academic law.

<sup>85</sup> See Cotterrell, *supra* note 79; Simon Roberts, *Against Legal Pluralism: Some Reflections on the Contemporary Enlargement of the Legal Domain*, 42 J. LEGAL PLURALISM 95 (1998) [hereinafter *Against Legal Pluralism*]; Simon Roberts, *After Government? On Representing Law Without the State*, 68 MOD. L. REV. 1 (2005) [hereinafter *After Government?*]; and John Griffiths, *The Social Working of Legal Rules*, 48 J. LEGAL PLURALISM 1 (2003).

<sup>86</sup> See Leiter, *supra* note 49; Leiter, *supra* note 61; and Brian Leiter, *Legal Realism, Hard Positivism, and the Limits of Conceptual Analysis*, in HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW 355-370 (Jules Coleman ed., 2001).



are a class - that explicitly takes its inspiration from Hart.<sup>87</sup> Especially significant are Brian Tamanaha's use of Hart's positivist premises as the starting-point for his socio-legal positivist general jurisprudence<sup>88</sup> and the fact that some analytical jurists have sympathetically reviewed Tamanaha's work.<sup>89</sup>

### **II.D. THE SIGNIFICANCE OF NON-STATE LAW**

The great bulk of mainstream Western legal theory and legal scholarship in the twentieth century focused on the domestic law of municipal legal systems, sometimes extending to public international law in the narrow sense of law governing relations between states ("The Westphalian Duo"). Hart, Rawls, Kelsen, and Raz are examples of this perspective. The main exceptions have been legal anthropologists and other scholars who have emphasized the importance of legal pluralism. Recently, some jurists interested in the implications of "globalization," including Glenn, Santos, Tamanaha, and myself, have advanced arguments in favor of broader conceptions of law that include at least some examples of "non-state law." Not surprisingly, this has been met with some resistance.

In the immediate context of viewing our discipline and its subject matters from a global perspective (both geographically and historically) my argument for a broad conception of law is that focusing solely on the municipal law of nation states (or 'the Westphalian Duo') leaves out too much that should be the proper concern of legal scholarship. A reasonably inclusive cosmopolitan discipline of law needs to encompass all levels of relations and of

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<sup>87</sup> See Lewis A. Kornhauser, *Governance Structures, Legal Systems, and the Concept of Law*, 79 CHI.-KENT L. REV. 355 (2004).

<sup>88</sup> See BRIAN TAMANAHA, *REALISTIC SOCIO-LEGAL THEORY: PRAGMATISM AND A SOCIAL THEORY OF LAW* (1997); TAMANAHA, *A GENERAL JURISPRUDENCE*, *supra* note 6.

<sup>89</sup> See, e.g., Brian Bix, *Conceptual Questions and Jurisprudence*, 1 LEGAL THEORY 464 (1995); and Brian Bix, *Conceptual Jurisprudence and Socio-Legal Studies*, 32 RUTGERS L.J. 227 (2000). Himma recommends Tamanaha's book, *A GENERAL JURISPRUDENCE OF LAW AND SOCIETY*, *supra* note 6, "without reservations, to both legal philosophers and sociologists." Kenneth Einar Himma, *Do Philosophy and Sociology Mix? A Non-Essentialist Socio-Legal Positivist Analysis of the Concept of Law*, 24 OXFORD J. LEGAL STUD. 717, 718 (2004); see also Twining, *The Province of Jurisprudence Re-examined*, *supra* note 1.

ordering, relations between these levels, and all important forms of law including supra-state (e.g., international, regional) and non-state law (e.g., religious law, transnational law, chthonic law, i.e., tradition/custom) and various forms of “soft law.” A picture of law in the world that focuses only on the municipal law of nation states and public international law would for many purposes be much too narrow. For example, it is difficult to justify omitting Islamic law or other major traditions of religious law from such a picture. Yet, to include only those examples of religious law or custom officially recognized by sovereign states (state legal pluralism) would be seriously misleading.<sup>90</sup> To try to subsume European Union Law or *lex mercatoria* or international commercial arbitration or all examples of “human rights law” under public international law similarly stretches that concept to breaking point, without any corresponding gains.<sup>91</sup>

A move to extend the conception of law to encompass the main phenomena that are appropriately treated as subject-matters of our discipline<sup>92</sup> undoubtedly raises a number of conceptual

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<sup>90</sup> It is hardly controversial to say that to recognize Islamic or other religious law only insofar as it is recognized by sovereign states involves crude distortion. It would be odd to accept the idea of a Jewish, Islamic or Gypsy legal tradition, but to refuse to talk about Jewish and Islamic or Gypsy law – but that is a corollary of thinking in terms of law as a system of rules. See generally RELIGION, LAW AND TRADITION (Andrew Huxley ed. 2002). On the differences between looking at Jewish legal tradition from the perspective of a theologian and a jurist, see Bernard Jackson, *Internal and External Comparisons on Religious Law: Reflections from Jewish Law*, 2 DAIMON. ANNUARIO DI DIRITTO COMPARATO DELLA RELIGIONE 257 (2002).

<sup>91</sup> A theory of state law such as Hart’s provides an inadequate theoretical framework for grounding our discipline as it becomes more cosmopolitan and more concerned with multiple levels of legal relations and legal ordering. Hart’s concept of law cannot easily fit European Union Law, contemporary public international law, religious law, canon law, and medieval and modern *lex mercatoria*, let alone other forms of traditional and customary law that are candidates for our attention as legal scholars and jurists. In short, none of our stock of theories of municipal law can provide an adequate theoretical basis for a cosmopolitan and reasonably inclusive discipline of law.

<sup>92</sup> Of course “understanding law” involves understanding much else besides. Studying law in context does not involve defining law as context. Our concern here is with what constitute legal phenomena as the main subject matters of our discipline. That implies some means of differentiating between legal and other

difficulties, but that is not a good reason for retreating back to the familiar orbit of a state law plus a few "law-like" analogies. In the present context, the key step is to cease to treat modern municipal law as a paradigm case by reference to which one can decide on the closeness of the analogy of other candidates for inclusion.<sup>93</sup> Glenn, Tamanaha, and Griffiths, for example, in different ways de-center the state from their pictures of law in the world without denying that it is for most purposes the most, powerful, complex and sophisticated form of law around.<sup>94</sup>

The issue is not mainly a semantic one nor is it one of status, a plea that specialists in religious legal traditions, African law or Gypsy law, should be recognized as jurists and legal scholars. Instead, it concerns the health of our discipline and especially our collective ignorance and marginalization of the ideas, norms, institutions and practices of non-Western legal traditions. My thesis in this context is that we can no longer afford to maintain such a narrow focus, that this involves significant redeployment of attention and resources, and that this re-orientation of our discipline raises fundamental problems of comparison and generalization across legal traditions, cultures and other boundaries<sup>95</sup> in which we are not yet well equipped to tackle.

Some colleagues may readily concede that more attention needs to be paid to other legal traditions and cultures and that this has implications for legal theory. They may also concede that if one adopts a global perspective at the start of the twenty-first century there are good reasons for arguing that an *exclusive* focus on municipal law is too narrow for many practical and theoretical purposes as well as, generally, for a balanced view of the subject matters of a genuinely cosmopolitan discipline of law. But they may

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phenomena, between legal and "non-legal" rules, institutions, practices, and processes. Skepticism about a general definition of law does not involve denial of the need to be able to make appropriate differentiations and clarifications in given contexts.

<sup>93</sup> See TAMANAHA, A GENERAL JURISPRUDENCE, *supra* note 6.

<sup>94</sup> GLENN, *supra* note 25; TAMANAHA, A GENERAL JURISPRUDENCE, *supra* note 6; John Griffiths, *What is Legal Pluralism?*, 24 J. LEGAL PLURALISM 1 (1986); John Griffiths, *The Social Working of Legal Rules*, 48 J. LEGAL PLURALISM 1-83 (2003).

<sup>95</sup> On the analytic value of the concepts of culture, tradition, civilization, and religion, see Twining, *A Fresh Start*, *supra* note 1, at 107-08 *passim*.

still be concerned about a sharp break with state-centered conceptions of law or what Simon Roberts has called “attempts to loosen the conceptual bonds between law and government.”<sup>96</sup> These concerns need to be addressed not only in relation to my specific argument but also to broader claims about the importance of non-state law in a variety of other contexts.

The literature on globalization is replete with discussion of the decline of sovereignty, the changing significance of national boundaries, religious revivals, the increase in migration and displacement, the extension of multi-culturalism, the decline of private international law and the rise of private transnational justice, the importance of informal horizontal transnational networks of officials and judges, the increasing roles of non-state actors, and so on. The more ebullient forms of “g-talk” contain such catch-phrases as “the end of sovereignty,” “the decline of the nation state,” “global governance,” and “the borderless world.”<sup>97</sup> Clearly these developments deserve the attention of jurists, but their significance is contested and difficult to interpret. However, to argue that non-state law deserves more attention from legal scholars and jurists involves no specific commitment to a firm position on any of these developments. Whether the nation-state is in fact declining in relative importance is an extremely complex and elusive question, which is usually better tackled at lower levels of generality. For present purposes, it is sufficient to restate briefly why non-state law needs our attention.

Patrick Glenn, among others, has made the general case for taking non-state law seriously at some length.<sup>98</sup> For the sake of brevity, I shall adopt his argument. The nation state as the primary form of governance emerged slowly in Europe, roughly between the thirteenth and sixteenth centuries. The modern conception of a sovereign nation state with a monopoly of legitimate authority over

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<sup>96</sup> Roberts, *After Government?*, *supra* note 85.

<sup>97</sup> See, e.g., KENICHE OHMAE, *THE BORDERLESS WORLD* (1990); ANNE-MARIE SLAUGHTER, *A NEW WORLD ORDER* (2004); GLOBAL LAW WITHOUT A STATE (Gunther Teubner ed., 1997).

<sup>98</sup> H. Patrick Glenn, *A Transnational Concept of Law*, in *THE OXFORD HANDBOOK OF LEGAL STUDIES* 839 (Peter Cane and Mark Tushnet eds. 2003); H. Patrick Glenn, *The Nationalist Heritage*, in *COMPARATIVE LEGAL STUDIES*, *supra* note 26, at 76-99.

defined territory has been the predominant form in the West for barely two centuries. Even during the period, the predominant notion was not universal:

There has been considerable correspondence between statist legal theory and actual legal practice in Europe and the United States, but elsewhere it has been taken *cum grano salis*. States in the colonized world (the rest of the world) lived through the eighteenth, nineteenth, and twentieth centuries in a delicate equilibrium between local law (in its non-state form) and the metropolitan law of the colonial power. Identities here were complex and shared, law was conceived in a pluralistic manner, state law was necessarily limited, and conquered peoples played an active role in the law applicable to them . . . . Law here has been conceived for centuries in a transnational manner.<sup>99</sup>

Apart from variations in the power and reach of state law, Glenn emphasizes the variety of forms in which states exist and the lack of analytical purchase of the concept of a national legal system. There may be nearly two hundred members of the United Nations, but these include failed states, small states,<sup>100</sup> fragmented states, states caught up in lengthy civil wars, and states with corrupt, despotic, or anarchic regimes. In most parts of the world, the modern form of the state, with its great variety and fluidity, is a quite recent phenomenon with shallow roots. In the post-colonial period, and as the result of colonialism and imperialism, the modern state's stability and hegemony have often been challenged, through for example, boundary disputes, civil wars, revolution and conquest.

The abstract and formalistic nature of the conception of a nation state as the basis for membership of the United Nations

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<sup>99</sup> Glenn, *A Transnational Concept of Law*, *supra* note 98; see also H. Patrick Glenn, *Persuasive Authority*, 32 MCGILL L.J. 261, 266-68 (1987).

<sup>100</sup> See Glenn, *A Transnational Concept of Law*, *supra* note 98, at 846 citing JOHN BRAITHWAITE & PETER DRAHOS, *GLOBAL BUSINESS REGULATION* 492 (2000) (reporting that more than 50% of the largest economies in the world were corporations rather than states in the 1990s).

obscures both the diversity of kinds of states, the variation in the extent of each state's actual effective control over its territory, and the fragility and susceptibility to change of this political form.<sup>101</sup>

Glenn treats nation state law as one tradition among many. In addition to various forms of non-state law at sub-national levels, he examines the contributions of the *ius commune*, the *lex mercatoria*, natural law, personal laws, 'binding' custom, self-regulation, and best practices to the development of transnational law. He links this examination to his general thesis about tradition and persuasive authority:

Ancient justifications for law beyond the state are once again of relevance since transnational law is not (generally) considered to be binding law [subject to exceptions] . . . . Pre-state and post-state law, however, share the general characteristic of being suppletive law, law which is at the disposition of the parties as opposed to binding them. The notion of binding people together was necessary for purposes of construction of collective identities, as in the case of organized religion and the state.<sup>102</sup>

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<sup>101</sup> "The definition of a state suggests uniformity, since all states are composed of uniform elements, a government and a defined territory. International law supports this impression of uniformity, since all states are treated as equal, at least in principle. Yet, national legal traditions crystallize in many different forms, some close to the European model, or models, others far removed from them. Diversity emerges in the choice which the members of each state make as to its constituent elements. The tradition of a national legal system creates no obstacle to this, since systems are defined only in terms of ensembles with interacting elements. That is why the notion of state is not *féconde*; it is a formal descriptor and almost anything can be conceived in terms of system. Hence, the ubiquity of the expression 'legal system' in describing wildly disparate legal phenomena in the world." LEGRAND AND MUNDAY, *supra* note 26, at 90-91; TWINING, GLT, *supra* note 1, at 178-84. Glenn's emphasis on the diversity of states and the formal nature of the category contrasts sharply with Simon Roberts' emphasis on the distinctiveness of state law as a form of ordering. See *infra* at 42-48.

<sup>102</sup> Glenn, *A Transnational Concept of Law*, *supra* note 98, at 849.

While Patrick Glenn's account of legal traditions of the world may be controversial,<sup>103</sup> it is the most comprehensive and persuasive general argument for taking non-state law seriously if one adopts a global perspective. Given that this appears to involve a quite radical break from the dominant Western traditions of academic law, it is hardly surprising if it gives rise to some anxieties among scholars and jurists. Such concerns deserve to be taken seriously. Here, I shall address four different concerns that have been expressed and will argue that while a global perspective opens up some exciting possibilities for our discipline, the break with tradition need not be quite as sharp as might at first sight appear. The concerns can be categorized into four heads: (i) A threat to liberal democracy?; (ii) Diluting the discipline of law?; (iii) Conceptual difficulties I: the problem of the definitional stop; (iv) Conceptual difficulties II: the distinctiveness of state law.

i. *A threat to liberal democracy?*

A great deal of modern Anglo-American jurisprudence has in recent years been focused on the development of liberal democratic theory, as exemplified by the work of Rawls, Dworkin, Raz, and MacCormick. This kind of political philosophy has been almost as state-centric as legal theory.<sup>104</sup> For much of the twentieth century, Anglo-American jurisprudence has been concerned with a tug of war between the minimalist/reactive state, the welfare state, and the administrative state.

Some political scientists have noted a strong change of mood during the 20<sup>th</sup> century. There was a period in which the state was looked upon with suspicion by the libertarian Right. Conversely, the state was considered by the Left to provide the best hope for popular sovereignty, social justice and the rights of the citizen. But in recent years the predominating mood has changed to one of suspicion of

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<sup>103</sup> See Twining, *A Fresh Start*, *supra* note 1, at 100-199. "Because of its intimate connections with the world of affairs – with legal practice and the law in action in a broad sense – nearly all legal discourse is strongly participant-oriented . . . . Its main audiences are actual or intending participants with concerns related directly or indirectly to their own activities. These participants are varied and so are their concerns." TWINING, *LIC*, *supra* note 8, at 111-12.

<sup>104</sup> For some social scientists, however, the concept of governance extends beyond the state to include, for example, economy, family, and community.

both the state and nationalism.<sup>105</sup> These tendencies have in turn bred a fear that this suspicion will lead to anarchy, repression, and injustice. These concerns stem from the rationale that political ideals such as democracy, the Rule of Law, citizenship, human rights, due process, social welfare, and social justice depend for their realization on relatively strong and stable forms of centralized governance.

While such concerns may be well-founded, within jurisprudence, they may not be good grounds for refusing to acknowledge the importance of the phenomenon that a broad conception of law would subsume under “non-state law.” Nonetheless, these concerns provide an important warning: legal scholars should no more romanticize non-state law than they should view state law through rose-tinted spectacles.

It is worth noting that several of those arguing for a broad conception of law, have made a similar warning: for example, Santos explicitly argues that “there is nothing inherently good, progressive, or emancipatory about legal pluralism.”<sup>106</sup> Teubner criticizes the vagueness and confusion of post-modern treatments of legal pluralism.<sup>107</sup>

Interestingly, Brian Tamanaha, having devoted a whole book to arguing strenuously for a broad conception of law, focused almost exclusively on state law in writing about the Rule of Law as an

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<sup>105</sup> “Associated, above all, with the impact of Foucault and his brethren, the new prevailing sentiment on the left is anti-state, libertarian, fearful of authoritarianism, and suspicious of collectivism . . . . Here I shall argue that only a strong polity can hold out the prospect of democratic self-governance with individual liberty and social justice; only a strong state can protect against the disintegrative forces of global capitalism and the divisive forces of particularism and identity.” David Abraham, *The Boundaries and Bonds of Citizenship: Recognition and Redistribution in the United States, Germany, and Israel*, in 7 *MIGRATION IN HISTORY* 210 (Davis Center Studies in Comparative History) (Marc Rodriguez and Anthony Grafton eds., 2007).

<sup>106</sup> BOAVENTURA DE SOUSA SANTOS, TOWARD A NEW COMMON SENSE: LAW, SCIENCE AND POLITICS IN THE PARADIGMATIC TRANSITION 114-115 (1995) [hereinafter TOWARD A NEW COMMON SENSE]; SANTOS, TOWARD A NEW LEGAL COMMON SENSE, *supra* note 16, at 90-92.

<sup>107</sup> Gunther Teubner, *Global Bukowina: Legal Pluralism in World Society*, in *GLOBAL LAW WITHOUT A STATE*, *supra* note 97, at 6-7.



ideal.<sup>108</sup> Thus, the lesson provided by the arguments of many scholars is clear: a positivist conception of law that includes examples of non-state law involves no commitment to approving of non-state law whether general nor specific examples thereof. Nor does it imply that the nation-state and democratic government are in terminal decline.

ii. *Diluting the discipline of law?*

A major concern of some legal scholars and educators is that an enthusiastic response to “globalization” will result in the discipline of law becoming detached from its roots in a particular legal tradition and local legal practice. This concern might be expressed as follows: Our tradition of academic law has been state-centered and rightly so for three main reasons. First, municipal state law is by far the most important form of normative ordering (or of law in a broad sense). Professional lawyers, judges, government lawyers, private practitioners, and even law-makers deal almost entirely with state law, mainly local municipal law. They do not practice non-state law. Second, Twining himself has argued that law is a participant-oriented discipline closely connected in fact with legal practice in a broad sense.<sup>109</sup> Third, academic law is intimately linked with preparation for legal practice because, to a large extent, legal scholarship services legal education. Basic competence involves mastery of practical details and socialization into the local legal culture, especially the intellectual skills and “mentality” of lawyers practicing within a particular system or tradition. Even when legal education is presented as a good vehicle for a general liberal education, the core of the discipline is concerned with intellectual skills that involve analysis, interpretation, application, and argumentation about detailed particulars. Study of other traditions in perspectives courses may have value as a secondary activity, but it usually involves study *about* generalities rather than studying *how* to participate in a particular legal system.<sup>110</sup> Furthermore, experience has shown that the sources

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<sup>108</sup> BRIAN TAMANAHA, ON THE RULE OF LAW: HISTORY, POLITICS, THEORY 26-35 (2004).

<sup>109</sup> See, e.g., TWINING, LIC, *supra* note 8, at 111-12, 126-128.

<sup>110</sup> See TWINING, LIC, *supra* note 8, at 181-83 (on the distinction between studying about and studying how). Part of Ronald Dworkin’s approach is that his theory focuses on detailed argumentation about specific issues (especially in hard cases) within a given system, whereas descriptive theories such as those of

of non-state law, even when they are available, are less suitable as vehicles for developing intellectual and practical skills than codes, statutes, cases and other traditional materials of law study.<sup>111</sup> Heightened awareness of other legal traditions may be admirable, but it is no substitute for the disciplined study of local particulars. For the discipline of law to be internally coherent, manageable, and disciplined it needs to continue to focus on domestic state law.

This is not the place to dwell on the complex issues about the implications of globalization for legal education, vocational training, and legal practice. In this context, the best I can do is confess and avoid. I have argued elsewhere that different considerations arise in relation to legal scholarship and legal education, for much the same reasons that are stated in the objection.<sup>112</sup>

However, the case for maintaining the traditional focus can easily be overstated. Non-state law is more directly relevant to many kinds of legal practice than is generally acknowledged. While our

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Hart and Tamanaha operate at a more abstract level largely from external points of view. A Hartian description of the form and structure of a state legal system is likely to be rather thin and provides little or no guidance to judges and other participants.

<sup>111</sup> This observation is derived from my experience of trying to teach “customary law” in the Sudan and East Africa. See TWINING, LIC, *supra* note 8, at Ch. 2.

<sup>112</sup> TWINING, GLT, *supra* note 1, at 128-129. This paper is concerned in first instance with legal scholarship and legal theory as well as with what is involved in advancing understanding of law from a global or transnational perspective. This paper only indirectly deals with the implications of this for the teaching of law. At this stage in history, most forms of international and transnational legal practice are quite specialized. On the one hand, few law students and legal scholars can focus exclusively on a single jurisdiction; on the other hand, we are some way from a situation in which primary legal education can sensibly be geared to the production of global lawyers or Euro-lawyers, or even specialists in international law. Law students can generally benefit from being presented with broad perspectives and from being made aware of different levels of legal ordering and their interactions. But I am personally somewhat skeptical about the rapid development of global or radically transnational legal education, at least at first degree level. In the United States, bar examinations are likely to be better indicators of the impact of “globalization” on perceptions of legal practice than issues about citing foreign precedents. For the foreseeable future, bar examinations seem likely to focus almost exclusively on domestic law. A cosmopolitan discipline does not mandate neglect of local knowledge. For the time being, the rule of thumb should be “Think global, focus local.”

discipline has never been entirely local, it is becoming more cosmopolitan. Legal scholarship and legal education have in fact been quite responsive to changes associated with "globalization." For example, in my own country, every law student is exposed to European Community Law by studying the Human Rights Act to the European Convention on Human Rights (1998). More and more options are offered with an explicitly transnational focus: for example, international trade, human rights, immigration law, and internet law. Perhaps equally as important, is the fact that many subjects are recognized as having important transnational dimensions, for example, regulation, commercial law, environmental law, intellectual property, and labor law. Family law and feminist legal theory are becoming more sensitive to multiculturalism; challenges to rigid views of sovereignty are explored in constitutional law as well as international law and jurisprudence; a leading textbook on the English legal system gives a prominent place to "alternative dispute resolution"<sup>113</sup> and courses of that name are placing an increasing emphasis on cross-cultural and trans-national negotiation, and mediation. In a 1994 survey of LLB students at the University of London, it was estimated that over two thirds of the courses dealt mainly with international, transnational, foreign, or comparative subjects.<sup>114</sup>

To sum up: concern that our discipline should not lose touch with the local and the particular is well founded and nothing in this paper is intended to suggest otherwise.

iii. *Conceptual difficulties I: the problem of the definitional stop*

A more traditional concern has been with a version of the floodgates argument. If the door is opened and some examples of non-state law are added, then we are left with no clear basis for differentiating legal norms from other social norms, legal institutions and practices from other social institutions and practices, legal traditions from religious or other general intellectual traditions and so on. This can be characterized as the problem of the definitional stop.

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<sup>113</sup> ANTHONY BRADNEY AND FIONA COWNIE, ENGLISH LEGAL SYSTEM IN CONTEXT (2003).

<sup>114</sup> TWINING, GLT, *supra* note 1, at 55-56.

Within the literature of legal pluralism there have been three main reactions to this problem.

First, some have tried to produce a general definition that differentiates the legal from the non-legal. For example, Santos in the first edition of *Toward a New Common Sense* produced a general definition of law that was very close to that of the anthropologist E. Adamson Hoebel.<sup>115</sup> Similarly, Teubner feels the need to do so.<sup>116</sup> This is one of Tamanaha's central concerns in his *A General Jurisprudence of Law and Society*.<sup>117</sup> He explicitly seeks to establish criteria of identification that differentiate legal institutions from institutions such as hospitals, schools, and sports leagues.<sup>118</sup> This concern leads him to set up a "labeling test,"<sup>119</sup> which several critics, including myself, have rejected on the grounds that it conflates analytic and folk concepts and that it is unworkable.<sup>120</sup> This deserves to be seen as a valiant failure.

Second, there are those who take the position that the search for a general definition of "law" is a futile pursuit. Many writers just beg the question. "*It just doesn't matter*" writes Glenn, whether or not "Cthonic law" is actually classified as law.<sup>121</sup> While I am personally sympathetic with such impatience, I prefer to use different conceptions of law in different contexts. In some contexts, whether a

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<sup>115</sup> SANTOS, *TOWARD A NEW COMMON SENSE*, *supra* note 106, at 112; E. ADAMSON HOEBEL, *THE LAW OF PRIMITIVE MAN: A STUDY IN COMPARATIVE LEGAL DYNAMICS* 28 (1954). This was the general definition that Llewellyn refused to include in K.N. LLEWELLYN & E. ADAMSON HOEBEL, *THE CHEYENNE WAY: CONFLICT AND CASE LAW IN PRIMITIVE JURISPRUDENCE* 41-47 (1992).

<sup>116</sup> Gunther Teubner, *The Two Faces of Janus: Rethinking Legal Pluralism*, 13 *CARDOZO L. REV.* 1443, 1451 (1992).

<sup>117</sup> TAMANAHA, *A GENERAL JURISPRUDENCE*, *supra* note 6, at xii-xiii.

<sup>118</sup> *Id.* at 238-239.

<sup>119</sup> Twining, *PWCL*, *supra* note 1, at 223.

<sup>120</sup> *Id.* at 223, 229; Kenneth Einar Himma, *supra* note 89, at 718, 738; Roberts, *After Government?*, *supra* note 85, at 20-22.

<sup>121</sup> GLENN, *supra* note 25, at 69. For criticisms on Glenn's failure to distinguish clearly between legal and religious aspects of a tradition in the context of his general theory of legal tradition, see Twining, *A Fresh Start*, *supra* note 1. However, Glenn may be defended on the ground that he is comparing phenomena which are *conventionally* viewed as major legal traditions by outside observers, but each of which conceptualizes religion and law and their relations differently.

particular set of phenomena is classified as legal or not may be insignificant. For example, very little turns on whether the phenomena under consideration are designated as "law" or not in Weyrauch's account of "Gypsy law,"<sup>122</sup> or Bradney and Cownie's of "Quaker law,"<sup>123</sup> or Santos' account of "Pasagarda law,"<sup>124</sup> or The Common Law Movement,<sup>125</sup> or many of the classic accounts of dispute processes in pre-literate societies, such as those of Gulliver on the Arusha.<sup>126</sup> Similarly Pistor and Wellons, in their excellent study of law and economic development in Asia, conclude that nearly all receptions of state law involve complex interactions between imported official law and local "unofficial law."<sup>127</sup> It would not make much difference to their study if they had not used the term "law" in relation to local normative orders.

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<sup>122</sup> See GYPSY LAW: ROMANI LEGAL TRADITIONS AND CULTURE (Walter O. Weyrauch ed., 2001) [hereinafter GYPSY LAW]; and Walter O. Weyrauch, *The Romani People: A Long Surviving and Distinguished Culture at Risk*, 51 AM. J. COMP. L. 679-89 (2003) [hereinafter *The Romani People*].

<sup>123</sup> See ANTHONY BRADNEY & FIONA COWNIE, *LIVING WITHOUT LAW: AN ETHNOGRAPHY OF QUAKER DECISION-MAKING, DISPUTE AVOIDANCE AND DISPUTE RESOLUTION* (2000) [hereinafter *LIVING WITHOUT LAW*].

<sup>124</sup> SANTOS, *TOWARD A NEW COMMON SENSE*, *supra* note 106, at 99-160.

<sup>125</sup> The Common Law Movement is an offshoot of the militias in the United States. See Susan P. Koniak, *When Law Risks Madness*, 8 CARDOZO STUD. L. & LIT. 65 (1996); and Susan P. Koniak, *The Chosen People in our Wilderness*, 95 MICH. L. REV. 1761, 1784-1785 (1997) (reviewing MORRIS DEES & JAMES CORCORAN, *GATHERING STORM* (1996) and CATHERINE MCNICOL STOCK, *RURAL RADICALS: FROM BACON'S REBELLION TO THE OKLAHOMA CITY BOMBING* (1996)). To date I have yet to meet an American law student who had heard about this bizarre phenomenon before taking a course on "Globalization and Law." It deserves to be better known for several reasons: it is politically and socially significant; it is a good example of a marginal candidate for being called "non-state law;" in some respects it arguably fits the categories of illegal, unnoticed, or mad legal orders, all of which raise issues in respect of legal pluralism; and, like "Pasagarda law," its discourses echo or caricature those of "official law."

<sup>126</sup> P. H. GULLIVER, *SOCIAL CONTROL IN AN AFRICAN SOCIETY* 173-302 (1963).

<sup>127</sup> KATHARINA PISTOR & P.A. WELLONS, *RULE OF LAW AND LEGAL INSTITUTIONS IN ASIAN ECONOMIC DEVELOPMENT 1960-95* (1999); see also Daniel Berkowitz, Katharina Pistor & Jean-Francois Richard, *The Transplant Effect*, 51 AM. J. COMP. L. 163-201 (2003).

However, sometimes the categorization may have some significance. For example, it could be argued that Glenn needs a distinction in the context of his proposition, for he treats legal traditions as the main unit of comparison, without clearly distinguishing between law and religion in respect of several intellectual traditions.<sup>128</sup>

Third, there are some, like Marc Galanter, who see the indicia of “the legal” as a complex mix of attributes along one or more continua so that it is artificial and misleading to prescribe precise general boundaries at least outside a particular context.<sup>129</sup> In practice, Galanter ends up with a conception of “the legal” which is broader and vaguer than Tamanaha’s. Karl Llewellyn refused to include a general definition of law in the *Cheyenne Way* for similar reasons,<sup>130</sup> but as I have argued elsewhere, one can construct some general indicia for differentiating legal from non-legal phenomena from Llewellyn’s law jobs theory on the basis of a kind of “thin functionalism” while leaving borderline cases to be settled in a specific context.<sup>131</sup> In the specific context of mapping law from a global perspective, I have been willing to indicate some broad criteria of identification not very different from Llewellyn’s, but subject to three caveats: first, that this is intended for no more than clarification in a quite specific context; second, that it is not intended that this characterization should bear much theoretical weight; and, third, that this conception represents only one way among several for categorizing the phenomena for this particular purpose.<sup>132</sup>

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<sup>128</sup> GLENN, *supra* note 25. Note the criticism by several contributors to *Symposium on Glenn in Twining, A Fresh Start*, *supra* note 1.

<sup>129</sup> Mark Galanter, *Justice in Many Rooms: Courts, Private Ordering, and Indigenous Law*, 19 J. LEGAL PLURALISM 1 (1981).

<sup>130</sup> WILLIAM TWINING, KARL LLEWELLYN AND THE REALIST MOVEMENT 177-79 (1973).

<sup>131</sup> Twining, *PWCL*, *supra* note 1, at 237-43. The provisional formulation for the specific purpose of constructing a broad overview of law from a global perspective is: Law is a species of institutionalized social practice concerned with the ordering of relations between subjects at various levels of relations and of ordering. The elements in this formulation are elucidated, and its uses and limitations will be explored in a forthcoming paper.

<sup>132</sup> Twining, *The Province of Jurisprudence Re-examined*, *supra* note 1.

If one is interested in the relations between municipal law and other normative orders there are conceptual problems however one defines or conceptualizes law. The definitional stop is only one of several problems in this area most of which are unlikely to be resolved by conceptual analysis or formal definitions alone.

iv. *Conceptual difficulties II: the distinctiveness of centralized governance*

A somewhat different concern has recently been expressed by Simon Roberts. In his elegant Chorley Lecture for 2004, Roberts criticizes attempts “to loosen the conceptual bonds between law and government” and to broaden representations of law to include negotiated orders, which have distinct rationalities and values.<sup>133</sup> Simon Roberts is a distinguished legal anthropologist who can hardly be accused of being narrowly focused or indifferent to social context. Indeed, his main concern seems to be that broadening our conceptions of law may de-stabilize “the comparative project,” obscure the differences between state law and other forms of normative orders, and in the process weaken our capacity to grasp the nature of negotiated orders.

Roberts’ lecture is an extension of an argument that he made in “*Against Legal Pluralism*” in which he suggested “that it is inevitably problematic to attempt to fix a conception of law going beyond the robust self-definitions of state law.”<sup>134</sup> In both papers, Roberts is concerned that when enthusiastic jurists turn their attention to non-state normative orders they are likely to try to interpret other cultures through what are essentially lawyers’ “folk concepts,” or else to indulge in an undisciplined and “eclectic resort to the theoretical resources of the social sciences.”<sup>135</sup> While acknowledging that a sharp distinction between folk and analytic concepts can be

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<sup>133</sup> Roberts, *After Government?*, *supra* note 85.

<sup>134</sup> Roberts, *Against Legal Pluralism*, *supra* note 85, at 105. Roberts is justified in warning of the dangers of juricentrism. Lawyers may tend to view the world through juricentric lenses, much as human beings tend to view the world through ethnocentric lenses. However, not all jurists are confined by narrow legalistic perspectives and it is one of the aims of a humanistic jurisprudence to counter such tendencies, not least by acknowledging the continuities between legal and other social phenomena.

<sup>135</sup> *Id.* at 95.

problematic, Roberts insists that only by working with this distinction and looking for meaning at an analytic level can “the comparative project” hope to achieve any stability.<sup>136</sup>

I personally find Roberts’ argument puzzling because I agree with nearly all of his main points, but I do not share his fears about the consequences of adopting a broad conception of law for certain purposes. Following his logic, I think that one of the main challenges to comparative law and legal anthropology is the development of usable analytic concepts.<sup>137</sup> For example, in the present context, I have no reason to dissent from the following propositions:

- (a) There are aspects of the form and structure of state law that are clearly linked to centralization, leadership, and governance. In some respects, state law represents a distinctive social form worthy of conceptualization in a rigorous and precise fashion.<sup>138</sup>
- (b) State/municipal law has been and is likely to continue to be the main focus of attention of legal scholars and legal practitioners. For the foreseeable future, state law is likely to become of great political and economic significance.
- (c) Broadening the concept of law to include some non-state normative orders poses a number of conceptual difficulties, including problems of differentiating legal from “non-legal” phenomena in different contexts and

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<sup>136</sup> *Id.* at 102-105; see also Roberts, *After Government?*, *supra* note 85, at 23-24.

<sup>137</sup> TWINING, *HCWT*, *supra* note 1. But see, GLENN, *supra* note 25, at 46-67, for a divergent approach, where Glenn writing about traditions argues against looking for a *tertium comparationis* in comparing traditions.

<sup>138</sup> Joseph Raz justifies confining his concept of law to municipal legal systems because they are sufficiently important and sufficiently different from most other normative systems to be made the object of a separate study. JOSEPH RAZ, *THE AUTHORITY OF LAW* 105 (1979). Yet, Roberts makes further claims.



individuating orders, systems, and semi-autonomous social fields.<sup>139</sup>

- (d) Confining one's conception of law to state law involves no commitment to the idea that other forms of normative ordering are unimportant or unworthy of the attention of legal scholars.<sup>140</sup>

I also agree with some of Roberts' criticisms of Pospisil, Sacco, Teubner, and Geertz<sup>141</sup> and with many, but not all, of his other specific points. Consequently, I am left puzzled as to what we might be disagreeing about. Surely, it cannot be just another return to obsession with "the definition of law"? There might be more than that, for the following two reasons.

First, Roberts' central concern is that "[a]s radically different modes of ordering and decision are represented together as "legal," law loses analytic purchase."<sup>142</sup> Here, it is useful to distinguish between law as an analytic concept, law as an organizing concept, and law as a rough way of designating a scholarly field or focus of attention. Many of us feel that the concept of law has so many varied associations that it is unwise to expect it to have much analytic purchase. Unless a particular conception is specified with precision in a particular context, the law is too abstract, too ambiguous, with too many contested associations to perform that function. Conversely, the concept of state or municipal law as one form of law (as, for example, elucidated by Hart) can perform that function. It is

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<sup>139</sup> See TWINING, *HCWT*, *supra* note 1.

<sup>140</sup> However, one implication of Roberts' argument appears to be that our colleagues in the Law Department of the School of Oriental and African Studies who specialize in Islamic law, Buddhist law, Hindu law etc., are only studying law insofar as the phenomena they study are closely connected with centralized governance. My objection to this is not primarily with semantics or status; rather it is that it reinforces their marginalization within our discipline and does not really allow for the possibility of scholars studying religious law from a juristic, as opposed to theological or historical or social scientific, perspective.

<sup>141</sup> I have made a similar critique of Tamanaha's labeling test for law. See Twining, *PWCL*, *supra* note 1, at 223-43. But I sense that Roberts has unfairly characterized Tamanaha's project.

<sup>142</sup> Roberts, *After Government?*, *supra* note 85, at 23.

difficult to see why substituting the term “state law” or “municipal law” or something similar will not satisfy Roberts’s concern. Hart’s own method helps to explain why law, apart from its various meanings in ordinary usage, is not susceptible to definition *per genus et differentiam*.<sup>143</sup> It is too abstract to be satisfactorily elucidated as a species of some even more abstract genus. Furthermore, the history of jurisprudence and comparative law suggests that law is itself unlikely to be satisfactory as a generic concept, with species and sub-species that can be elucidated by reference to clear differentiae and criteria of identification. Failed typologies of “legal families” illustrate clearly: families were not species of a single genus.<sup>144</sup> The familiar complexities surrounding the conceptualization of law are also not simply resolved by resort to Wittgenstein’s method of family resemblances, although it can be of some assistance.<sup>145</sup>

Brian Tamanaha tried to construct a conception of law that would serve as “an organizing concept,” i.e., it would pose as the basis for a theoretical framework within which a wide range of different forms of law can be accommodated and compared. By eliminating nearly all of Hart’s “essentialist” conditions for the existence of a legal system, Tamanaha sought to include a wider range of phenomena within a single framework while differentiating between legal and other social institutions and practices. His criteria of identification operate to exclude hospitals, schools, sports leagues and table manners, but his ultimate test of inclusion has been shown by critics to be inadequate.<sup>146</sup> In contrasting Tamanaha’s umbrella theory with Robert’s analytic concepts, the former makes clear that most analysis, comparison and explanation has to take place at lower levels of abstraction thereby resulting in less work than the latter. However, despite its limited purpose, Tamanaha’s criterion of identification flounders.

A third use of an abstract conception of law is to do no more than roughly indicate a broad area of study. As we have seen, terms

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<sup>143</sup> H.L.A. Hart, *Definition and Theory in Jurisprudence*, 70 L. Q. REV. 37, 57 (1954).

<sup>144</sup> Most commonly comparatists have referred to families of legal systems, but have used “legal system” ambiguously. TWINING, GLT, *supra* note 1, at 178-84.

<sup>145</sup> Twining, *PWCL*, *supra* note 1, at 238.

<sup>146</sup> *Id.* at 223-43; Himma, *supra* note 89, Roberts, *After Government?*, *supra* note 85, at 20-22.

like legal theory, legal philosophy, and jurisprudence tend to be used rather loosely. For special reasons, I have felt it important to stipulate a rough working distinction between legal theory and legal philosophy as its most abstract part. The terms are nevertheless vague and rightly so. Few think it worthwhile to make them more precise; indeed, false precision would be a fault. As we saw, Herbert Hart said that legal philosophy has no clear boundaries which are generally accepted. For the purpose of my argument about the focus of the discipline of law, I have argued for a broadened view of the discipline and a correspondingly inclusive conception of law. But what are, or should be, the subject matters of particular fields of study is historically contingent. In some contexts, adopting a broad conception of a field rather than a narrow one can have important intellectual consequences. However, in this context, the consequences need not be nearly so dire as Roberts suggests.<sup>147</sup>

A second point about Roberts' concern is that by subsuming centralized systems of governance and negotiated orders under the same conceptual roof, the distinctive nature of the latter will disappear. Echoing the classic distinction between chiefly and acephalous societies, he is keen to emphasize the differences between the two categories. Roberts has done important work on "alternative

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<sup>147</sup> Roberts alleges that I have left myself "free to hold forth about whatever aspect of the social world interests him from within the secure stockade of jurisprudence." Roberts, *After Government?*, *supra* note 85, at 22. (Stating that "[b]eyond its normative character, 'law' seems to have no specificity whatever.")). *Id.* This is unfair in several respects. First, he quotes a passage in a paper on diffusion, Twining, *Diffusion of Law*, *supra* note 1, where I say that I will not repeat what I have said about the conceptual issues elsewhere, but he does not give the cross-reference which to some extent meets his point. Twining, *PWCL*, *supra* note 1. Second, it is not the case that I am prepared to include "any old normative order" in my conception(s) of law in that specific context (or some others). For example, I have made it clear that I do not usually include the rules of ping pong, spelling, grammar, or many social conventions in my conception(s) of legal rules. Nor do I treat social institutions such as hospitals, schools or businesses as specifically legal institutions. Unlike Tamanaha, however, I believe that the internal governance of some such institutions can be usefully viewed as a form of legal order in some contexts. Often, in writing about legal education, I proceed on the assumption that we are mainly concerned with domestic municipal law in that context.

dispute resolution”<sup>148</sup> and he has interesting propositions about the appropriateness of trying to design institutions of third party adjudication (such as international criminal tribunals) in the absence of a strong centralized order.<sup>149</sup> But he seems to postulate centralized governance and negotiated orders as antiphonal ideal types in some kind of binary opposition rather than providing for other variations along a complex range of overlapping continua or some other more complex picture. Thus, what Roberts presents is a narrow conception of law and a typology of two main types of normative orders along a continuum of centralization/decentralization. This seems to me to be unnecessarily reductionist. The following examples do fit comfortably within either ideal: Pasagarda Law as described by Santos,<sup>150</sup> the Common Law Movement in the United States as described by Koniak,<sup>151</sup> Quaker law as described by Bradney and Cownie,<sup>152</sup> Gypsy law as described by Weyrauch,<sup>153</sup> and Hindu law as described by Menski<sup>154</sup> are examples that just do not fit either ideal type at all comfortably. Similarly, in setting up his ideal type of centralized authority, Roberts lumps together weak states, fragmented states, failed states, tyrannies, states bedeviled by civil war, and so on.<sup>155</sup> We need a much more complex framework of explication.

In sum, some of the concerns behind resisting to the idea of non-state law deserve serious consideration. The central point is that relations between municipal law and other forms of normative ordering (however they are labeled) and other interactions (interlegality) deserve the sustained attention of jurists because they are a crucial part of understanding legal phenomena. Definition, labeling or semantics are not the main concern.

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<sup>148</sup> See, e.g., SIMON ROBERTS, ORDER AND DISPUTE: AN INTRODUCTION TO LEGAL ANTHROPOLOGY (1979); MICHAEL PALMER & SIMON ROBERTS, DISPUTE PROCESSES: ADR AND THE PRIMARY FORMS OF DECISION-MAKING (1998).

<sup>149</sup> Roberts, *After Government?*, *supra* note 85, at 23.

<sup>150</sup> SANTOS, TOWARD A NEW COMMON SENSE, *supra* note 106.

<sup>151</sup> Koniak, *When Law Risks Madness*, *supra* note 125.

<sup>152</sup> GYPSY LAW, *supra* note 122; and Weyrauch, *The Romani People*, *supra* note 122.

<sup>153</sup> BRADNEY & COWNIE, LIVING WITHOUT LAW, *supra* note 123.

<sup>154</sup> WERNER F. MENSKI, COMPARATIVE LAW IN A GLOBAL CONTEXT: THE LEGAL SYSTEMS OF ASIA AND AFRICA (2000).

<sup>155</sup> See, GLENN, *A Nationalist Heritage*, *supra* note 98.

### III. GENERAL JURISPRUDENCE: AGENDAS AND ISSUES

I am sometimes asked to specify the kinds of issues and lines of inquiry that I would include within my view of General Jurisprudence. While this is a reasonable request,<sup>156</sup> attempting to set out a grand master plan or blueprint for what must be a collective enterprise involving multiple perspectives and conceptions of the subject-matters of our discipline that are as varied, fluid and multi-layered as the discipline itself would be contrary to the spirit of this paper. However, it is not difficult to illustrate some of the kinds of inquiry that are suggested by adopting a global perspective and asking what are the implications for theorizing about law.

As a preliminary matter, it is worth reiterating two points. First, one or more general theories about the nature of law could at best be a small part of the enterprise. Second, one of the strengths of law as an institutionalized discipline is that it is continuously stimulated by and responsive to events, problems, examples, and ideas from other disciplines and “the real world” outside itself. For the most part, it does not create its own agenda or feed off its own questions and examples. Practice and specialized scholarship will often come in advance of theory.

General jurisprudence as conceived in this paper is not an entirely new enterprise involving a sharp break from the past. Our discipline has long had its cosmopolitan aspects and in recent years it has responded to the processes of “globalization” in a rich variety of ways. These activities include many contributions that fit comfortably within my conception of general jurisprudence. Therefore, the point of this paper is as much to identify and interpret trends as to advocate new directions.<sup>157</sup>

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<sup>156</sup> Over the past five years I have undertaken a number of small case studies in order to concretize and illustrate the general perspective. These include analysis of discourses about rights, corruption, the treatment of prisoners, and the comparative study of legal professions and legal education (analysis of concepts); a study of the approaches of four “Southern” jurists to human rights (Deng, An-Na-im, Ghai, and Baxi) (normative jurisprudence); an overview and comparison of the legal and social science literatures on diffusion (socio-legal studies); and critical analyses of assumptions of mainstream writings about comparative law and transplants/ diffusion of law (critical jurisprudence).

<sup>157</sup> Papers presented at the World Congress at Granada in May, 2005 amply illustrate the variety of kinds of theoretical work that are responding to the

In dividing jurisprudence into categories, many other scholars, Julius Stone for example, set out a broad scheme into three or four rough distinctions: Analytical Jurisprudence, Sociological (or Functional) Jurisprudence, and Theories of Justice (or Critical or Censorial or Ethical) Jurisprudence.<sup>158</sup> I follow Stone in adopting a broad conception of legal theory that is closely linked to law-as-a-discipline and is skeptical of claims to autonomy of disciplines, but I prefer to talk of analytical, normative, empirical, and critical inquiries. Stone emphasized that his categorization was solely for convenience of exposition.<sup>159</sup> So long as they are recognized as a very rough indication of areas of interest and inquiry, which overlap and combine in myriad ways, either is a workable division. Most scholarly inquiries in law involve a combination of analytical, normative and empirical elements. In each of these areas, one can identify examples of the kinds of tasks that may be performed by the activity of theorizing, including synthesis, construction and elucidation of concepts, critical development of normative principles, hypothesis formation, middle order theorizing, participant working theories, intellectual history, and critique.<sup>160</sup>

Rather than attempt to be comprehensive in short compass, I shall briefly illustrate the general point with reference to three of many possible lines of development: exploiting the existing heritage of juristic texts; critical reappraisal of areas of legal scholarship that are significant transnationally; and linking legal theory more closely to important general issues.

**i. *Mining the heritage***

In considering the vast heritage of texts, ideas, and, theories that constitute the heritage of legal thought one might suggest:

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process of “globalization.” See, e.g., MANUEL ESCAMILLA & MODESTO SAAVEDRA, *LAW AND JUSTICE IN GLOBAL SOCIETY* (2005). As I said in my oral presentation: “Si momentum requiris, circumspecte.”

<sup>158</sup> See JULIUS STONE, *THE PROVINCE AND FUNCTION OF LAW* 16-19 (1956) (discussed in Twining, *The Province of Jurisprudence Re-examined*, *supra* note 1, at 20).

<sup>159</sup> *Id.* at 16.

<sup>160</sup> See *supra* Part I.

(a) *Extending the canon and  
reducing our ignorance of  
other traditions.*

Western jurists need to become better acquainted with the leading thinkers and salient ideas and controversies in other legal traditions. Some of the literature of non-Western legal traditions that have until now been considered the province of specialists need to be assimilated into the mainstream. This is a pre-condition for genuine cross-cultural dialogue and for serious aspirations to universalism. The task is daunting not least because of problems of selection, accessibility, translation, interpretation, and depth. While managing such a vast heritage is certainly cumbersome, fortunately, it includes much excellent writing by Western scholars (notwithstanding criticisms of “orientalism”) and, to a lesser extent, accessible writings by contemporary “Southern” jurists such as Abdullahi An-Na’im, Upendra Baxi and others.<sup>161</sup> The task is huge, but it will continue to be an essential part of developing a genuinely cosmopolitan jurisprudence.

(b) *Reviewing the canon.*

It is worth asking if there are relevant texts in our own tradition that have been marginalized or forgotten and that deserve to be reinstated as being of particular relevance to a more cosmopolitan legal theory. To the extent this inquiry is happening already, for example Kant’s “To Perpetual Peace” (1795)<sup>162</sup> is receiving newfound attention. Thinkers such as Grotius, Leibniz, and Vico may also warrant renewed attention. Of Anglo-American texts that deserve to be resurrected, I would include some of the works of Sir Henry Maine, Jeremy Bentham’s writings on colonialism, international law and his (to me disappointing) essay on *Time and Place in Matters Legislation*, and a refinement and development of

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<sup>161</sup> See ABDULLAHI AHMED AN-NAIM, TOWARD AN ISLAMIC REFORMATION: CIVIL LIBERTIES, HUMAN RIGHTS, AND INTERNATIONAL LAW (1990); UPENDRA BAXI, THE FUTURE OF HUMAN RIGHTS (2d ed. 2006); Twining, *Human Rights: Southern Voices*, *supra* note 1, at 203 (representing a modern step in the direction of making such work by “Southern” Anglophone jurists better known).

<sup>162</sup> See IMMANUEL KANT, KANT: POLITICAL WRITINGS 93 (Hans Reiss ed., H.B. Nisbet trans., 2d ed. 1991).

Karl Llewellyn's "law jobs" theory.<sup>163</sup> But this is just a list of personal preferences.

(c) *Reinterpreting the mainstream.*

Third, it is worth taking a critical look at ideas of our own current canonical jurists from a global perspective. A good example is Thomas Pogge's transfer of Rawls' theory of justice to the world stage. Pogge explores the application of Rawls' principles of justice to the design and operation of transnational and international institutions and practices, much more convincingly than Rawls' own *The Law of Peoples*.<sup>164</sup> The application of Rawls' principles of justice to the design and operation of transnational and international institutions and practices. The result is to transform a fairly comfortable theory of domestic justice into one that provides a potentially radical critique of existing arrangements in the world as a whole.<sup>165</sup> Tamanaha's interpretation of Hart is another example.<sup>166</sup> Some read Peter Singer's writings as the modern application of Benthamite utilitarianism to global and transnational issues.<sup>167</sup> Interesting questions arise about the applicability of Dworkin's Hercules to reasoning and interpretation in other juristic traditions.

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<sup>163</sup> TWINING, GLT, *supra* note 1, at 75-82.

<sup>164</sup> JOHN RAWLS, *THE LAW OF PEOPLES* (1999).

<sup>165</sup> THOMAS POGGE, *REALIZING RAWLS* 276-277 (1989) (discussed in TWINING, GLT, *supra* note 1, at 69-75). Pogge concludes: "[O]ur current global institutional scheme is unjust, and as advantaged participants in this order we share a collective responsibility for its injustice." *Id.* at 277. On a broader scale, international ethics has made considerable strides in recent years through the work of Amartya Sen, Brian Berry, Charles Beitz, Martha Nussbaum, Peter Singer and others.

<sup>166</sup> TAMANAHA, *A GENERAL JURISPRUDENCE*, *supra* note 6. Tamanaha's elimination of nearly all of Hart's criteria of identification for a broad conception of law narrows the application of Hart's theory. However, this does not seriously undermine the analytical value of concepts such as the rule of recognition, primary and secondary rules, the distinction between rules and habits, all of which may be useful in analyzing both municipal legal systems and some other normative orders.

<sup>167</sup> See, e.g., PETER SINGER, *ONE WORLD: THE ETHICS OF GLOBALIZATION* (2002); see also SINGER AND HIS CRITICS (Dale Jamieson ed. 1999) (demonstrating significant developments in the application of Bentham's utilitarian principles to Singer's "practical ethics" approach).



And one notes that there have been significant shifts in feminist theory occurred as its geographical horizons have broadened.<sup>168</sup> The reinterpretation of familiar texts from a global perspective is well under way.

ii. *Re-thinkings*

One of the tasks of theorizing is the articulation and critical appraisal of the presuppositions and working concepts of legal discourse generally and of more specialized areas. As the processes of globalization impact upon and give greater prominence to transnational fields such as comparative law, public international law, human rights law, international economic and financial law, regional regimes and so on, there is a corresponding need to subject their assumptions and discourses to critical scrutiny. This has already happened to a significant extent in some areas. In the 1980's, anthropologists, including legal anthropologists, recognized that they had often erred in treating small-scale societies as timeless, self-contained units and have since then been more sensitive to the broader contexts of history and geography.<sup>169</sup> The writings of Philip Allott, Richard Falk, Fernando Tesón, and other theorists in international law are clearly contributions to general jurisprudence. Similarly, in recent years, scholarly articles have mounted a sustained critique from a number of directions on mainstream comparative law.<sup>170</sup>

Perhaps some of the most important developments are taking place in relation to socio-legal studies, usually at the level of middle

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<sup>168</sup> See, e.g., WOMEN, CULTURE, AND DEVELOPMENT: A STUDY OF HUMAN CAPABILITIES (Martha Nussbaum & Jonathon Glover eds., 1995); HUMAN RIGHTS OF WOMEN: NATIONAL AND INTERNATIONAL PERSPECTIVES (Rebecca Cook ed., 1994); Annelise Riles, *The Virtual Sociality of Rights: The Case of Women's Rights are Human Rights*, in TRANSNATIONAL LEGAL PROCESSES 420-439 (Michael Likosky ed., 2002).

<sup>169</sup> HISTORY AND POWER IN THE STUDY OF LAW (Jane Collier & June Starr eds., 1989) marks the change of perspective in legal anthropology.

<sup>170</sup> See, e.g., Twining, *Comparative Law and Legal Theory*, *supra* note 18; LEGRAND, *supra* note 26, at 240-311; Mathias Reiman, *The End of Comparative Law as an Autonomous Discipline*, 11 TUL. EUR. & CIV. L. F. 49 (1996); Mathias Reiman, *The Progress and Failure of Comparative Law*, 50 AM. J. COMP. L. 671 (2004); and TWINING, GLT, *supra* note 1, at 174-93.

order theory. For example, some of the best theoretical work in recent years has been done in relation to transnational aspects of regulation, regional governance, and environmental protection.<sup>171</sup>

iii. **“Relevance”**

We have seen that there is a quite widespread feeling that some recent legal philosophizing has lost touch with mainstream legal scholarship and legal practice.<sup>172</sup> By contrast, legal scholars have been quite responsive to the stimuli of “globalization,” sometimes to the extent that some may feel that some transnational fields have become too fashionable. Without entering into debates about the “relevance” of theory, let me touch on two aspects of this responsiveness.

First, there are number of specialized fields of legal scholarship that have become more salient because of recent developments. For example, Boaventura de Sousa Santos, in a magisterial survey of areas of law that are likely to be affected by “globalization” at global, state, and local levels, lists the following in his “research agenda”: the globalization of nation-state regulation; regimes of regional integration; *lex mercatoria*; the law of people on the move (migration, displaced persons, refugees, citizenship); the law of indigenous peoples; human rights; *ius humanitatis* (the

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<sup>171</sup> See generally on regulation: REGULATING LAW (Christine Parker, Collin Scott, Nicola Lacey, & John Braithwaite eds., 2004); ABRAHAM CHAYES & ANTONIA HANDLER CHAYES, THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS (1995); BRAITHWAITE, GLOBAL BUSINESS REGULATION, *supra* note 100; see generally on the EU and legal theory: CONSTRUCTING LEGAL SYSTEMS: ‘EUROPEAN UNION’ IN LEGAL THEORY (Neil MacCormick ed., 1997); IAN WARD, A CRITICAL INTRODUCTION TO EUROPEAN LAW (2003); IAN WARD, JUSTICE, HUMANITY, AND THE NEW WORLD ORDER (2004); JOSEPH H.H. WEILER, THE CONSTITUTION OF EUROPE: “DO THE NEW CLOTHES HAVE AN EMPEROR?” AND OTHER ESSAYS OF EUROPEAN INTEGRATION (1999); see generally on environmental protection: MARIA LEE, EU ENVIRONMENTAL LAW: CHALLENGES, CHANGE AND DECISION-MAKING (2005); LAW AND GEOGRAPHY (Jane Holder and Carolyn Harrison eds., 2003); JONAS EBBESON, ACCESS TO JUSTICE IN ENVIRONMENTAL MATTERS (2002).

<sup>172</sup> See TWINING, GJB, *supra* note 1, at 73.

common heritage of mankind);<sup>173</sup> and “global reform of courts” (including the exportation of the “Rule of Law” and ideas of representative democracy, and the judicialization of politics).<sup>174</sup> Of course, this list is not comprehensive. Santos’s criteria of significance are directly related to his particular ideological standpoint. Others might add communications, regulation of financial markets, nuclear proliferation, transnational crime, responses to terrorism, the arms trade, crimes against humanity, among a huge variety of other agendas. Certainly, in respect of each field there are potential issues deserving of theoretical attention at local (i.e. specialized) levels and at various higher levels of abstraction. Santos is an example of a jurist who has tried to develop an overarching social theory of law, which is closely related to concrete social and political issues and trends.<sup>175</sup>

Legal theory can develop on the back of specialized areas of legal scholarship; of course, it can also respond directly to what are perceived to be major global issues, such as war and peace, poverty, economic and social development, environmental issues, pandemics, genocide, terrorism and so on.<sup>176</sup> Again there are many lists and

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<sup>173</sup> This seems to be an important example of a concept that could benefit from further rigorous philosophical analysis and development.

<sup>174</sup> SANTOS, TOWARD A NEW LEGAL COMMON SENSE, *supra* note 106, at Ch. 5, 6.

<sup>175</sup> TWINING, GLT, *supra* note 1, at 194-244, includes a detailed critique of SANTOS, TOWARD A NEW COMMON SENSE, *supra* note 106. The subsequent Santos’ text – TOWARD A NEW LEGAL COMMON SENSE, *supra* note 106 – contained some substantial revisions.

<sup>176</sup> Nearly forty years ago Julius Stone wrote a paper on “Trends in Jurisprudence in the Second Half Century” printed in BARBARA HATHAWAY, JULIUS STONE: A BIO-BIOGRAPHY (1980). This can make for quite depressing reading in that the agenda of issues still looks quite contemporary, some debates that he treated as overworked are still alive, and some of the issues in his program have not yet been implemented, including the better integration of analytical and socio-legal approaches. Twining, *The Province of Jurisprudence Re-examined*, *supra* note 1. But there have been some changes: for example the question: “in what ways might state law (or law more broadly conceived) serve to further or obstruct the attainment of the Millennium Goals?” is a good deal more promising than the highly ambiguous question: “What is the role of law in development?” about which members of the Law and Development agonized, to little avail.

agendas, representing different standpoints, ideologies, and interests. One should not expect a consensus. But adopting a global perspective and asking what are the implications of “globalization” for jurisprudence and the discipline of law can at least stimulate thought and debate about potential new lines of inquiry and the directions in which we, as jurists, should be heading.

