

# University of Miami International and Comparative Law Review

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Volume 15  
Issue 1 *Volume 15 Issue 1*

Article 3

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4-1-2007

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### Recommended Citation

Dennis Patterson, *Twining's Complaint*, 15 U. Miami Int'l & Comp. L. Rev. 61 (2007)  
Available at: <https://repository.law.miami.edu/umiclr/vol15/iss1/3>

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## TWINING'S COMPLAINT

*Dennis Patterson*<sup>1</sup>

It is a great pleasure to read and comment upon William Twining's lucid and insightful analysis of the current state of jurisprudence. I consider it a stroke of good fortune to have been present at the IVR meeting in Granada, Spain when Twining first presented this article as a lecture. I distinctly recall how everyone in the grand hall was engaged by the lecture and lined up to ask questions and continue the dialogue on a topic for which most everyone has an opinion – the future of jurisprudence.

In the article that grows out of the lecture, I find a great deal to which I am sympathetic. In general, Twining's call for a less parochial jurisprudence is one with which I am in agreement. His sensitivities to the challenges posed by globalization and the push for an increasingly cosmopolitan state of law are likewise both timely and sensible suggestions.<sup>2</sup> But, while globalization is a central theme in his article,<sup>3</sup> Twining is not interested in globalization *as such*. Globalization is simply the latest context in which Twining renews his long-standing complaint against analytic jurisprudence. This is his charge:

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 questions they inherited,

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<sup>2</sup> For my own views on the importance of globalization in the context of international trade and the need for a new legal regime, see Ari Afilalo and Dennis Patterson, *Statecraft, Trade and the Order of States*, 6 CHI. J. OF INT'L L. 725-759 (2006).

<sup>3</sup> Here is how Twining sums up his argument with respect to globalization: "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." See William Twining, *General Jurisprudence*, 15 U. MIAMI. INT'L & COMP. L. REV. 1, 10 (2007) (hereinafter *General Jurisprudence*).

which in turn was based on a narrow conception of law that centered on legal doctrine and its presuppositions. 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 for the law in action.”<sup>4</sup>

Analytic jurists fail to appreciate the subtleties of context in striving for a universal account of the nature of law. As Twining sees it, analytic jurisprudence has tended to remain aloof from the particulars of doctrine and context. In the course of a succinct reprise of one of the theses in Nicola Lacey’s account of the relationship of philosophy to sociology, Twining tells us what is missing from the discussion in analytic jurisprudence:

[L]egal concepts and legal doctrine can only be understood in the institutional and practical context of their use and [for example] 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 . . . . Many of us have argued for many years that law, including legal doctrine and concepts, needs to be understood in context.<sup>5</sup>

Simply stated, Twining’s complaint is that analytic jurisprudence refuses to take sociology seriously. He correctly sees the pursuit of a general conception of the “nature of law” during the last 50 plus years of analytic jurisprudence as a steady move away from the particulars of legal practice and toward increased abstraction.<sup>6</sup> But I can hear my friends in analytic jurisprudence

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<sup>4</sup> *Id.* at 26.

<sup>5</sup> *Id.* at 30, discussing Nicola Lacey, *Analytical Jurisprudence versus Descriptive Sociology Revisited*, 84 TEX. L. REV. 945 (2006) (hereinafter *Analytical Jurisprudence*).

<sup>6</sup> For a survey of some of the work of the last twenty-five years, see Les Green, *General Jurisprudence: A 25<sup>th</sup> Anniversary Essay*, 25 OXFORD J. LEGAL STUDIES, 565-580 (2005).

saying: "So what? We don't do sociology." Of course, despite their differences, Twining and analytic jurists seem to share the view that philosophy and sociology are different enterprises.

With respect to their differences, Twining distinguishes philosophy and sociology using Lacey's critique of Hart, specifically, Hart's reluctance to take law seriously from a sociological point of view. According to Lacey, Hart – and those who follow him<sup>7</sup> – try "to maintain a sharp distinction between philosophical and empirical questions."<sup>8</sup> Twining elaborates his view of the distinction by reprising Lacey's account of the shortcomings of Hart and Honoré's book *Causation in the Law*.<sup>9</sup> Lacey asks rhetorically "[W]hat kind of book would *Causation* have been had it been written by a legal theorist inspired by Wittgenstein rather than by Austin?"<sup>10</sup> Lacey answers:

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>11</sup>

Twining observes, correctly, that Lacey's point was a general critique "of attempts to draw a sharp line between philosophical and

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<sup>7</sup> See Twining, *General Jurisprudence*, *supra* note 3, at 27 (mentioning Joseph Raz)

<sup>8</sup> See *id.* (citing Lacey, *Analytical Jurisprudence*, *supra* note 5).

<sup>9</sup> H.L.A. HART & TONY HONORÉ, *CAUSATION IN THE LAW* (1959).

<sup>10</sup> NICOLA LACEY, *A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM* at 218 (2004). Of course, there are works of jurisprudence written from the point of view of the later Wittgenstein. Here are two of them: DENNIS PATTERSON, *LAW AND TRUTH* (1996); PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* (1991).

<sup>11</sup> Twining, *General Jurisprudence*, *supra* note 3, at 29 (quoting NICOLA LACEY, *A LIFE OF H.L.A. HART: THE NIGHTMARE AND THE NOBLE DREAM* at 218 (2004)).

social perspectives on law . . . .”<sup>12</sup> In his review of Lacey’s book, philosopher Thomas Nagel was sharply critical of Lacey’s criticism of Hart. He went so far as to suggest that Lacey simply does not know, or has failed to recognize, what philosophy is about.<sup>13</sup> It is Twining’s reaction to and comment upon Nagel’s criticism that provides insight into Twining’s view of the distinction between philosophy and sociology. Twining writes:

[Nagel] completely misses the point of [Lacey’s] 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

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<sup>12</sup> *Id.*

<sup>13</sup> Nagel wrote:

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.

Thomas Nagel, *The Central Questions*, LONDON REV. BOOKS, Feb. 3, 2005, at 27. Nagel’s criticisms caused something of a stir. The TLS received and published letters by Hart’s daughter, Joanna Ryan, and philosophers Simon Blackburn and Jeremy Waldron. For the letters and Nagel’s response, see Joanna Ryan, Letter to the Editor, LONDON REV. BOOKS, Feb. 17, 2005 at 4; Simon Blackburn & Jeremy Waldron, Letter to the Editor, LONDON REV. BOOKS, Feb. 17, 2005 at 4; Thomas Nagel, Letter to the Editor, LONDON REV. BOOKS, Feb. 17, 2005 at 4.

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 jurisdictions – is an empirical one. Philosophers who wish to understand legal phenomena need to equip themselves with local knowledge.<sup>14</sup>

Twining's complaint is with philosophy that sees itself as the master discipline, possessed of unique methods and tools, all in the service of “conceptual analysis.” On this view, philosophy is the “master discipline” in that it uses the tools of philosophical analysis to police the discourse of other disciplines as the latter attempt to come to conclusions about the way the world is. So, for example, when a scientist purports to have explained a phenomenon, it is the task of the philosopher of science to take the very idea of “explanation” and articulate the degree to which the scientist has or has not provided an “explanation,” properly understood.

Twining's complaint that philosophy fails to understand words “in context” is regarded by some philosophers (Nagel is a good example<sup>15</sup>) as a failure to understand the enterprise of philosophy. Philosophy is *acontextual for a reason*: its aspiration is to identify the features of a practice (like law) or a concept (like explanation) that are *essential* to that thing being what it is. All too many philosophers think the task of philosophy is to identify the necessary and sufficient conditions for the application of concepts. For them, context is just fodder for generalization. The meaning of concepts lies not in their use (in context) but in features of the concept which transcend the local and contextual.

There is an ironic dimension to Twining's complaint with analytic jurisprudence. His complaint comes at a time when philosophy – especially the conception of philosophy advanced by

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<sup>14</sup> Twining, *General Jurisprudence*, *supra* note 3, at 30.

<sup>15</sup> In fact, Nagel is *so* extreme in his views that he attributes to Wittgenstein the view that “all thought is an illusion.” THOMAS NAGEL, *THE VIEW FROM NOWHERE* 107 (1986).

philosophers like Nagel – is under sustained attack. The rise of “philosophical naturalism,” championed by the American philosopher Willard V.O. Quine has, in the view of some, dealt a severe blow to the idea of philosophy as a first-order discipline. Since the 1950s, philosophical naturalism has sought to undermine precisely the sort of conceptual analysis to which Twining directs his attention. According to Quine, there is no distinction between conceptual and empirical truths. Quineans reject the idea of “conceptual analysis”<sup>16</sup> as first philosophy.

Quinean naturalism is just one position among several in a much larger debate in contemporary analytic jurisprudence. This debate – known as “the methodology debate” – is a serious, self-reflective discussion within analytic jurisprudence about the future of conceptual analysis and the degree to which jurisprudence can be entirely descriptive or whether it “necessarily” involves normative dimensions. The methodology debate within analytic general jurisprudence is not about the traditional question “What is law?,” but, more self-consciously, “How should one do philosophy of law?” This second-order debate is related to the older first-order debate about the nature of law in that the methodology debate began with the question of whether purely descriptive jurisprudence is possible, or whether it instead must presuppose normative and specifically moral commitments.<sup>17</sup> As a positivist, Hart argued that description of the law without justification of the law is possible. Conversely, Dworkin, John Finnis<sup>18</sup> and Stephen Perry,<sup>19</sup> have insisted that jurisprudence must engage in moral justification.

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<sup>16</sup> Twining notes that Brian 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.” Twining, *General Jurisprudence*, *supra* note 3, at 31 (emphasis supplied). To the contrary, Leiter claims that Quine’s repudiation of “the” analytic/synthetic distinction eliminates conceptual analysis. See Brian Leiter, *Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence*, 28 AM. JUR. JURIS. 17, 44 (2003). For discussion, see John Oberdiek and Dennis Patterson, *Moral Evaluation and Conceptual Analysis in Jurisprudential Methodology* in *Current Legal Issues: Law and Philosophy* (forthcoming 2007).

<sup>17</sup> For a clear and concise account of the debate thus far, see Julie Dickson, *Methodology in Jurisprudence: A Critical Survey*, 10 *Legal Theory* 117, 117-56 (2004).

<sup>18</sup> See JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 3-4 (1984).

Although the methodology debate now underway in analytic jurisprudence is not quite the debate Twining would like to have, and a rapprochement between philosophers and sociologists may not be at hand, things are moving in the right direction.<sup>20</sup> At least there is reason for hope.

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<sup>19</sup> See Stephen R. Perry, *Hart's Methodological Positivism*, in HART'S POSTSCRIPT: ESSAYS ON THE POSTSCRIPT TO THE CONCEPT OF LAW 311-54 (Jules Coleman ed. 2001).

<sup>20</sup> For discussion of the possible role of philosophical naturalism in such a rapprochement, see Dennis Patterson, *Notes on the Methodology Debate: Why Sociologists Might be Interested*, in LAW AND SOCIOLOGY 254-258 (Michael Freeman ed., 2006).



