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ENHANCING THE PROSPECTS FOR GENERAL JURISPRUDENCE

Brian Z. Tamanaha *

I.	The Current Dominance of a Narrow Perspective on Law	71
II.	The Missing “Home” of Twining’s General Jurisprudence.....	76
III.	A Viable General Jurisprudence.....	80

Many people attuned to the bewildering cacophony of events and swift pace of change in the world today will experience a sense of disorientation, or at least uncertainty and unease. Settled assumptions about politics, society, religion, economics, security, world peace – and about life and a meaningful existence – are all being challenged in a myriad of seemingly destabilizing ways. The world we once knew, or thought we knew, is no more. Although in hindsight its earlier roots can be discerned, this unanticipated state of extraordinary flux has come upon us suddenly, particularly in the past decade, rendering many of our long-held beliefs inadequate and obsolete.

In response, many observers are struggling to see and describe, to frame and grasp, or to articulate what is going on and where we are headed. Our traditional operational framework serves reasonably well when it matches our circumstances and projects; but the circumstances have changed radically. Our old ideas and understandings are not only inadequate; they affirmatively inhibit us from perceiving the new and unfamiliar.

The socio-legal arena – the realm of law and society – has arguably experienced these changes more swiftly and more extensively than almost any other particular province, in part because the socio-legal arena reaches and touches just about everything. What is a socio-legal theorist to do under these circumstances? More pointedly, what is a socio-legal theorist who aims to produce a general jurisprudence – which aspires to operate at a broad level of generality and application – to do?

William Twining is no ordinary socio-legal theorist. He has lived and worked in both Western and non-Western countries around

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the world. He has a vast knowledge of traditional legal theory, yet he is anything but a traditionalist. He is one of the world's experts on the writings of Jeremy Bentham. Twining wrote the leading text on Karl Llewellyn and one of the most important works on the Legal Realists, a text still read and cited more than three decades after he produced it. His books and theories on Evidence are standard material in the Anglo-American common law world. In addition, he writes always-informative and frequently creative articles on an extraordinary range of legal subjects, including legal education, legal interpretation, comparative law, law and society, legal positivism, legal pluralism, legal sociology and anthropology, postmodernism, globalization, and, of course, general jurisprudence.¹ In the terms of the scope of his learning and writings, no one in the legal academy is comparable to Twining. In particular, no similarly accomplished legal theorist – Twining held the Quain Chair in Jurisprudence at University College London, also held by such luminaries as John Austin and Ronald Dworkin – has drawn from and incorporated into his legal theory work so much material traditionally excluded from the field.

Before proceeding, a personal disclosure is necessary. William is a friend. We have engaged in many personal and intellectual discussions. His work has influenced my thinking and writing in legal theory in more ways than I can identify. I find myself in substantial agreement with his observations and analysis – alas, even with his criticisms of my arguments. Consequently, rather than critically responding to Twining's substantive arguments in his article² (which I find convincing), I will reflect on what it means to produce a general jurisprudence and on how it can be best understood and furthered.

There are theorists who think it is neither desirable nor possible to construct a general jurisprudence: that in the postmodern age all attempts at macro-level theorizing are exercises in domination

¹ See generally William Twining, *A Post-Westphalian Conception of Law*, 37 LAW & SOC'Y. REV. 199 (2003); WILLIAM TWINING, GLOBALISATION AND LEGAL THEORY (2000); WILLIAM TWINING, *Reviving General Jurisprudence*, in THE GREAT JURISTIC BAZAAR, 335 (2002).

² See William Twining, *General Jurisprudence*, 15 U. MIAMI INT'L & COMP. L. REV. 1 (2007).

or western intellectual hegemony, or elaborate fictions or useless abstractions.³ As someone who has attempted to construct a general jurisprudence, I am not one of those skeptics, and will not rehash their arguments. Instead, I will critically approach Twining's general jurisprudence from the standpoint of an ally. I share many of the same aims, and the points I raise are strategic rather than substantive. I explore what I think are barriers to the building of a general jurisprudence and I suggest ways to get around these barriers.

To state my position at the outset: I question whether a general jurisprudence can be successful in the absence of an intellectual home in which to nurture and accumulate knowledge for this project. Twining is less troubled by this concern, for he believes that a general jurisprudence is already being constructed. In his understanding, jurisprudence is an activity that constitutes the speculative aspect of law. As law changes to move beyond the particular, jurisprudence changes in conjunction therewith, and hence jurisprudence becomes more general. In this paper, I raise doubts about whether this understanding of general jurisprudence is adequate. More generally, I explore what it means to construct a general jurisprudence, probing whether it can or should be understood as a category of theorizing about law, or as an academic discipline, or as a discreet project, or in some other way.

I. The Current Dominance of a Narrow Perspective on Law

As Twining points out, "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 of morals."⁴ Owing to these traits, western legal theory provides an inadequate and misleading framework for understanding or describing law today. Consider two fundamental propositions enshrined within legal theory: that law is the product of the state, and that state law has a monopoly on the legitimate application of force in society. These two propositions are virtually taken for granted within legal theory, but they make little sense in a world characterized by overlapping and interpenetrating legal regimes, and in light of the fact that the functions of dispute

³ Twining, *supra* note 2, at 46-47.

⁴ *Id.* at 6.

resolution and security (both policing and military) traditionally held by the state are being privatized in many places.

Transnational business law known as the new *lex mercatoria*, for example, is neither the product of nor tied to any particular state (it is produced almost entirely through private parties) and certain of its norms and institutions are entirely independent of the power of the state. Consider also the legislative, administrative, and executive powers of the European Union and its complex interrelation with the legal authority of the individual member nations. What about human rights norms and the international criminal courts, both of which challenge legal authority of the nation state? What about religious law? Islamic Law, for example, exists in various forms of interaction with state legal regimes, ranging from selective incorporation, to theocracy, to internal contestation and conflict. Is the “law” in Lebanon the law of the state or the law of Hezbollah?

Extending the inquiry beyond official state legal regimes raises even more complex questions. Around the world today there are systems of customary law in various shapes, forms, and modes of interaction with state law. In some situations, state law incorporates, or is influenced by, bodies of customary law; customary law is sometimes superior to state law; sometimes it is independent of state law.⁵ Examples of “unofficial” law include Gypsy law, as well as more esoteric forms of law, like mafia law or squatter law. Furthermore, there are the many autonomous forms of normative ordering – whether or not called “law” – that course through social life, often exerting a greater influence on social behavior and social order than the distant or weak state legal system.⁶

Anyone striving to understand law as a theoretical or social matter will arbitrarily leave out much of the legal universe if this is not recognized and considered. It is remarkable to note, therefore, that the overwhelming proportion of books and articles on jurisprudence rarely address these subjects. This assertion holds for all four categories of jurisprudence distinguished by Twining: analytical, normative, sociological, and critical.⁷ Analytical jurists

⁵ See, e.g., BRIAN Z. TAMANAHA, UNDERSTANDING LAW IN MICRONESIA: AN INTERPRETIVE APPROACH TO TRANSPLANTED LAW (1993).

⁶ See Twining, *supra* note 2, at 33-34.

⁷ See *id.* at 3.

justify this omission by insisting that their domain largely consists of conceptual analysis and clarification, which can be conducted without close attention to the flux of actual events. They almost exclusively occupy themselves with an analysis of Western legal concepts. This avowed blinkering is particularly relevant to a general jurisprudence because, as Twining points out, the most influential historical advocates of a general jurisprudence, including Jeremy Bentham, John Austin, and H.L.A. Hart, have worked within analytical jurisprudence.⁸ Theorists who engage in normative jurisprudence, like Ronald Dworkin, insist that by its nature this type of analysis requires immersion into particular state legal systems.⁹ This narrows the focus in two distinct ways, it centers the normative analysis on particular systems rather than on a more general level, and it engages almost entirely in *internal* normative debates. Most practitioners of sociological jurisprudence, theorists who apply sociological insights to issues in legal theory, also largely focus their inquiry on state law. Similarly, most theorists engaged in critical jurisprudence - critical legal studies, critical feminism, critical race theory, and critical internationalism - link their analysis to state legal systems or to international legal regimes.

This narrow focus, it must be emphasized, is sensible under many circumstances. It suffices for the everyday purposes and activities of the bulk of lawyers and legal officials whose work revolves around state legal systems. The notion that the legal universe is comprised of the law of the state and of international law - the duo-Westphalian system of law¹⁰, as Twining points out - has dominated our understanding of law for several centuries precisely because they have been of preeminent concern to legal professionals in this period. Reinforcing the fact that traditional understandings and the realities of practice encourage a narrow focus, there are two major impediments to being more expansive: first, it requires hard work, and second, much of the information necessary to expand our thinking about empirical reality is not readily available. It is difficult enough to master a single subject within a particular legal system. Going beyond this narrow focus requires examining the actual activities of

⁸ *Id.* at 17-18, 22.

⁹ *Id.* at 13.

¹⁰ *Id.* at 5.

legal officials (police, prosecutors, judges, probation officers, corrections officers, etc.) in connection with the rules, examining the actual behavior of the populace in relation to the legal rules, and examining other normative and legal systems and societies. These are daunting tasks that few can undertake successfully.

Two different fields have managed to escape the artificially narrow assumptions perpetuated about law by the standard view: comparative law and social scientific approaches to law. In the early stage of the discipline, comparative law scholars were primarily occupied with comparisons between common law and civil law legal systems. Their subject matter, however, sensitized them to the variability of legal forms outside the West, and exposed them to unfamiliar phenomena (like Hindu law or Islamic law) that do not fit neatly within the standard understanding. Comparative scholars soon recognized the inadequacy of merely focusing on the official trappings of the law. They realized that although the Turkish Civil Code was modeled on the Swiss Civil Code,¹¹ the reality of law in Turkey would be obscured if one merely considers it as an example of a civil law system. Theoretical debates about the necessity to locate a proper *tertium comparationis* – a consistent baseline of comparison – directed the attention of comparativists toward the social-legal realm and required them to engage in functional analysis and to pay attention to social and legal actions.

Similarly, while many social scientists who study law remain within the standard duo paradigm,¹² a sizeable number of legal anthropologists and legal sociologists repudiate this view. A pioneering work in anthropology, Bronislaw Malinowski's *Crime and Custom in Savage Society*,¹³ formulated an influential argument that "law" is not linked to the state or its institutions, but rather is found in social relations.

The field of legal anthropology incorporates this rejection as one of its core premises. Legal anthropologists produced studies of institutionalized norm enforcement or institutionalized dispute

¹¹ See Seval Yildiri, *Aftermath of a Revolution: A Case Study of Turkish Family Law*, 17 PACE INT'L L. REV. 350, 356 (2005).

¹² Twining, *supra* note 2, at 32.

¹³ BRONISLAW MALINOWSKI, *CRIME AND CUSTOM IN SAVAGE SOCIETY* (6th impression, Routledge & Kegan Paul Ltd. 1951).

processing, usually in non-Western countries, characterizing these as “law” or legal systems, despite the fact that these legal systems were independent of any state or colonial legal systems. These systems constituted “law” in the sense that they played a significant role in maintaining social order and were seen as authoritative by the populace. This body of literature, in turn, influenced a group of legal sociologists who documented the existence of parallel social-ordering phenomena in Western societies that operated in the shadow of state law. Eugen Ehrlich, one of the founders of legal sociology, argued that societies have official state law and unofficial “living law” and he urged legal scientists to pay attention to both.¹⁴ Socio-legal studies came to focus on various aspects of the relationships between legal phenomena and social phenomena: observing the activities of legal officials and their impact, and observing the social sources of order and their interaction with the official state law.¹⁵

Drawing from the quick sketch above, a few basic points can be made. Legal professionals – lawyers and judges in particular – can adequately conduct their activities with an exclusive focus on their own official legal system. Owing to this fact, legal education – the immediate purpose of which is to train lawyers for their professional activities – must satisfy this narrow focus, and, furthermore, has *little incentive to go beyond it*. Lawyers who are confronted with tasks that go outside of the standard municipal law – in connection with human rights cases, or the *lex mercatoria*, or when foreign law is relevant to the case at hand – can incorporate this body of law into their practice without altering any assumptions of the standard view. For traditional and expedient reasons, the narrow focus of legal theorists matches the narrow focus of the legal profession. Legal theory holds a respected but peripheral position within the legal academy (and is seen widely as irrelevant to the practice of law). The central focus for developing knowledge of and about law, to state the key point, lies in knowing what is necessary to function as a lawyer.

¹⁴ EUGEN EHRLICH, *THE FUNDAMENTAL PRINCIPLES OF THE SOCIOLOGY OF LAW* (1975).

¹⁵ See BRIAN Z. TAMANAH, *REALISTIC SOCIO-LEGAL THEORY: PRAGMATISM AND A SOCIAL THEORY OF LAW* (1997); see also Brian Z. Tamanaha, *The Folly of the ‘Social Scientific’ Concept of Legal Pluralism*, 20 *J. OF LAW & SOC.* 192 (1993).

Comparative law scholars, legal anthropologists, and legal sociologists have worked outside of this narrow focus, but they are marginal academic fields. Comparative law has a toehold in the legal academy. Legal sociologists and legal anthropologists are subfields of sociology and anthropology, respectively, and are generally ignored by the legal academy.

Knowledge about law arises from two different realms: the activities of legal actors, and the activities of academics. This marks a significant differentiation in the production of legal knowledge and knowledge about law. Legal actors respond to and develop legal knowledge in connection with the demands and practices of legal systems. In contrast, academics develop knowledge about law in connection with the concerns and demands of their academic fields. This differentiation results in the production of radically different paradigms, perspectives, and knowledge. Consequently, although there is a vast body of legal knowledge and knowledge about law, it is not coherent or unified. There is no comprehensive framework within which to collect this information and bring it all together.

The upshot of this discussion is that aspiring to a general jurisprudence runs contrary to a fundamental constraint on the modern production of knowledge. Knowledge develops in clearly defined and sharply delineated specializations, each with their own terminology, conceptual apparatuses, seminal texts, and sources of institutional support. An approach to law which aims to be general in scope, normatively sophisticated, and empirically informed, must straddle multiple institutional and specialization barriers.

II. The Missing “Home” of Twining’s General Jurisprudence

Twining’s article would appear to refute my assertion that there are significant barriers that operate against a general jurisprudence. His analysis moves easily across all of the aforementioned fields of knowledge.¹⁶ Twining situates his general jurisprudence within jurisprudence proper, which he places within the legal academy.¹⁷ Jurisprudence, in his understanding, is a speculative activity that reflects upon and accompanies law. Twining’s critical

¹⁶ See Twining, *supra* note 2.

¹⁷ See *id.* (discussing the philosophies of such legal theorists as Bertram, Hart, Dworkin, Glenn, and Santos).

argument is that analytical jurisprudence suffers from two major defects.¹⁸ First, it fails to keep up with the push of globalization which requires that jurisprudence go beyond attention to the narrow Western view of law tied to Western nation states (and International law).¹⁹ Second, it pays inadequate attention to the reality of law – going beyond black-letter law to see how the law actually operates and, more importantly, to examine actual social conduct relating to law, including non-state legal phenomena.²⁰ Twining suggests that a general jurisprudence of the type he describes promises to cure these defects.

Although he directly engages the analytical jurisprudence tradition, Twining's discussion and references also range across the literature of comparative law and of law and society studies. He takes up at length Patrick Glenn's comparative framework for legal traditions, explores the argument of legal anthropologist Simon Roberts, and refers to the ideas of various legal sociologists.²¹ Besides analytical jurisprudence, none of these rich and varied theoretical and empirical works are presented by the theorists themselves as works in general jurisprudence. Instead, they are situated in their own particular fields.

There are several different ways to understand the relations between these various disciplines and general jurisprudence. One possibility is that Twining hopes to alter the horizons of analytical jurisprudence in the direction he prescribes; though he recognizes that contemporary analytical jurists are, if anything, doggedly striding in the opposite direction and becoming narrower and more abstract. Another possibility is that Twining offers general jurisprudence as an organizing framework for comparative law. Lending support to this interpretation, Twining defines general jurisprudence in terms congenial to the self-understanding of comparative law: "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) from the micro-comparative to the

¹⁸ *Id.* at 23.

¹⁹ *Id.* at 26-32.

²⁰ *Id.* at 32-35.

²¹ *Id.*

universal.”²² Yet another possibility is that Twining sees a general jurisprudence as central to the sociological study of law and society. Perhaps these are not alternative possibilities. Perhaps general jurisprudence represents the next stage in the development of a sophisticated and comprehensive theoretical, and empirically informed, understanding of law and society that encompasses and partakes of all of these currently separate fields.

Twining might well consider these questions about the academic placement of general jurisprudence to be irrelevant. As I indicated at the outset, he believes that jurisprudence is a speculative activity that goes with law; as such, a general jurisprudence is gradually being built regardless of how we label or categorize it. Twining assumes a modest and open position:

I am sometimes asked to specify the kinds of issues and lines of inquiry that I would include within my view of General Jurisprudence. That is a reasonable request. But it would be contrary to the spirit of this paper to set out a 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.²³

I wish to make three closely connected points about this passage. First, a “general jurisprudence” in the sense promoted by Twining does not constitute a *discipline*.²⁴ The project he describes bears no resemblance to what goes by this label in analytical jurisprudence, as Twining makes clear. Unless he uses the phrase in reference to the recent and isolated work of Twining, Tamanaha, and a handful of others, *our discipline* simply does not exist as such. The thrust of my earlier assertions is that *no single* discipline approaches the law in the terms urged by Twining. Analytical jurisprudence is a discipline, as is comparative law, legal sociology, and so forth; but

²² *Id.* at 19.

²³ *Id.* at 52 (emphasis added).

²⁴ Webster’s Ninth New Collegiate Dictionary, 360 (1990) (explaining that “discipline” is a “subject that is taught” or “a field of study”).

none of these disciplines shares the scope and parameters of the general jurisprudence project envisioned by Twining.

This brings me to the second point. Beyond the thin sense that each generates knowledge about law, these various disciplines are not in fact engaged in a “collective enterprise.” To the contrary, they frequently are hostile to, dismissive of, or simply ignore one another. Exceedingly rare is the individual who, like Twining, is conversant in all of their respective literatures. Consequently, if the general jurisprudence he describes *must be* a collective enterprise, as he says, then it has slim prospects of even getting off the ground.

The third point follows along similar lines. The very fact that Twining conceives of his general jurisprudence in a way that involves “multiple perspectives and conceptions of the subject matters”²⁵ reduces the likelihood that it can be achieved. The problem is not with having multiple perspectives, which is commonplace today and can be a healthy factor in the production of knowledge. It is just hard to imagine, however, that a collective discipline can develop if there is no overlapping consensus on the subject matter because a collective discussion must revolve around basic shared themes.

Twining suggests that the subject matter of a general jurisprudence is a theoretically, normatively, and empirically sophisticated understanding of law and society from multiple perspectives at every level from the micro to the universal.²⁶ That is too broad a charge. Will there be a shared community of discourse? Will there be progress or an accumulation of knowledge? Can a “discipline” develop around a field that claims to focus on just about everything about law and society beyond a single legal system?

I do not intend to place unfair emphasis on particular words in the above passage. Twining probably did not invoke the term “discipline” in the strong sense to which I am holding him; but the thrust of my observations would remain even if he had not used the word. The crucial points, to repeat, are that it cannot be said that the general jurisprudence he promotes is being pursued by any single group of scholars; and, as a separate point, that the extraordinarily expansive, open-minded, ecumenical, and unspecified terms in which he characterizes the project renders it unlikely to be embraced.

²⁵ Twining, *supra* note 2, at 52.

²⁶ *See id.* at 19.

The problem lies in the factors that enable and limit the production of knowledge about law. Twining's vision of a general jurisprudence is not supported by any current discipline that produces knowledge about law. To be successful, Twining must persuade a significant subset of individuals working within these separate disciplines to embrace the general jurisprudence project as their own. They must then be willing and able to surmount the barriers (e.g. conceptual, knowledge, terminology, and institutional barriers) that distinguish these disciplines and keep them separated. Knowledge-producing traditions are self-perpetuating, and they enforce conformity in various ways. This includes, for example, professors grooming graduate students, judgments about what projects merit funding, acceptances for publication, and hiring decisions. Under these circumstances, it is difficult to recruit others to join a homeless project, however attractive, that exists mostly in the works of a visionary thinker.

III. A Viable General Jurisprudence

My position should not be read as defeatist. To the contrary, I believe a general jurisprudence is a viable project, though I am far less confident than Twining that it is already being built. My argument has several implications and recommendations for the success of such a project.

One strategic point is that the prospects for a general jurisprudence are enhanced if it is situated within an existing intellectual and institutional framework. As I indicated earlier, legal professionals can function adequately without a sophisticated legal theory, without empirical knowledge of law, and certainly without a general jurisprudence. No friendly reception can be found in that direction. Instead, general jurisprudence must be housed in an academic framework, because that is the nature of the project.

The obvious place for a general jurisprudence of the type Twining envisions is in sociological – not analytical – jurisprudence. This field is avowedly committed to the production of theoretically and empirically sophisticated accounts of the relationship between law and society. This is the core of the project that Twining promotes.²⁷ Although much of the current focus within the discipline

²⁷ See *id.* at 34.

remains on particular legal systems, there is no impediment to encouraging greater interest in more general studies of law – something already taking place within sociological jurisprudence.

When building a general jurisprudence, practitioners of sociological jurisprudence can, and should, draw upon all of the various bodies of literature and subjects identified and discussed by Twining.²⁸ They should build in a manner that, over time, creates shared terminology, concepts, and knowledge. Glenn's theoretical work²⁹ on comparative legal traditions and Roberts's work³⁰ on disputing systems can be easily incorporated into sociological jurisprudence, creating a foundation for Twining's general jurisprudence.

Twining will likely agree that sociological jurisprudence has an affinity with his general jurisprudence, but his assertion that a general jurisprudence must also include a strong normative dimension³¹ raises a problem. Sociological jurisprudence, at least traditionally, has tended to abstain from engaging in normative debates, though there are exceptions. This reflects the broader tendency of social scientists to refrain from normative engagements in their empirical work. Twining's desire to include normative and participatory components in his general jurisprudence³² conflicts with these aspects of sociological jurisprudence.

Although the aforementioned tension can likely be managed in a way that conforms to Twining's vision, the following comments raise a more direct challenge. In my view, the concept of law is central to virtually every attempt at a general jurisprudence. Twining has indicated that he believes it is not fruitful – and perhaps impossible – to expound a single concept or definition of law other

²⁸ See *id.* at 28-32.

²⁹ See *id.* at 36 nn.99-100. See also H. Patrick Glenn, *A Transnational Concept of Law*, in THE OXFORD HANDBOOK OF LEGAL STUDIES 893 (Peter Cane & Mark Tushnet eds., 2003); H. Patrick Glenn, *Persuasive Authority*, 32 MCGILL L.J. 261 (1987).

³⁰ Twining, *supra* note 2, at 51. See also Simon Roberts, *After Government? On Representing Law Without the State*, 68 MOD. L. REV. 1 (2005); SIMON ROBERTS & MICHAEL PALMER, *DISPUTE PROCESSES: ADR AND THE PRIMARY FORMS OF DECISION-MAKING* (2d ed. 2005).

³¹ See Twining, *supra* note 2, at 56-57.

³² *Id.*

than in a provisional and context-specific sense.³³ The problems associated with working out the concept of law are formidable and have stumped many generations of thinkers.³⁴ Learning from these failures, Twining takes the following approach:

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, it is not intended that this characterization should carry much theoretical weight; and, third, that this conception represents only one way among several others for categorizing the phenomena for this particular purpose.³⁵

If the goal at hand is to map law from a global perspective, then it is essential that Twining produce criteria for the identification of law. There can be no map otherwise. The first and second caveats follow from his analysis, but the third is puzzling. It makes sense to assert that law can be conceptualized differently between projects – Twining's first caveat. However, if his third caveat implies that even within a particular map there can be different conceptualizations of law, this is worrisome. For the sake of consistency and coherence, one must identify and utilize a single and consistent conceptualization of law for any particular map.

No doubt Twining can clear this up, but I intend my questions to draw out a larger point about what it means to construct a general jurisprudence. Running through this paper is an ambiguity about the nature of the project; an ambiguity hinted at by the presence of two formulations of its label—"general jurisprudence," as Twining tends to call it, versus "*a* general jurisprudence," as I tend to call it. "General jurisprudence" sounds like a field of thought or a discipline – one equally capable of standing alongside, falling within, or even

³³ *Id.* at 35.

³⁴ See Brian Z. Tamanaha, *An Analytical Map of Social Scientific Approaches to the Concept of Law*, 15 OXFORD J. OF LEGAL STUDIES 501 (1995).

³⁵ Twining, *supra* note 2, at 45.

encompassing the established disciplines of analytical, sociological, normative, and critical jurisprudence – and that is how Twining tends to refer to it.³⁶ “A general jurisprudence,” the phrasing I use, is not a field of thought, but refers to a specific theoretical framework for understanding and studying law at a general level. Twining’s “map of law from a global perspective,” alluded to in the above quotation, would constitute a framework of this kind.³⁷ My book, *A General Jurisprudence of Law and Society*, laid out a different framework.³⁸ The number of similar frameworks is potentially limitless, each of which would constitute a general jurisprudence in the sense that I intend.

A sensible way to reconcile these differences is to characterize each given framework as a general jurisprudence, while labeling all such frameworks as examples of or exercises in general jurisprudence. This does not, however, necessitate a field or discipline called general jurisprudence. There is currently no general jurisprudence discipline or field, as I indicated, and there are formidable knowledge and institutional barriers to its emergence.³⁹ The present argument is stronger: that there is no need for such a discipline beyond that of a label applied collectively to individual attempts at constructing a general jurisprudence.

A related and final matter of dispute revolves around what constitutes or qualifies as “a general jurisprudence.” As I argued earlier, Twining’s approach is so expansive that it brings in almost everything about law that goes beyond a particular state legal system.⁴⁰ This expansiveness discards the quality that makes a general jurisprudence distinctively “general.” Twining’s notion of “mapping law from a global perspective” is “general” in the sense that it is broad in scope and application.⁴¹ However, Twining’s approach includes any “theoretical study of two or more legal traditions, cultures, or orders ... from the microcomparative to the

³⁶ See Twining, *supra* note 2, at 2-3.

³⁷ *Id.* at 45.

³⁸ See BRIAN Z. TAMANAHA, *A GENERAL JURISPRUDENCE OF LAW AND SOCIETY* (2001).

³⁹ See *infra* p. 76.

⁴⁰ See *infra* pp. 76-77.

⁴¹ Twining, *supra* note 2, at 45.

universal.”⁴² There is nothing *general* about a microcomparative study of two legal traditions. If it is to have a distinctive meaning and identity, “general” must mean more than “anything not particular.”

These are not merely terminological disputes. They have implications that go to the heart of what *general jurisprudence* means, which will determine the shape it will take, whether it will be a viable project, and what its fruits will be. At this juncture, the meaning of this label is contested, and no single individual or group has final say over how it is defined. It is an old label, initially used by analytical jurists, which Twining and I are attempting to wrest from their grip and reconstruct in the hope that it will help support the production of the kind of knowledge about law that we both deem essential and find lacking. For the reasons indicated in this response, I believe my construction of the term, and suggested placement of the project, is more likely to achieve the objectives that Twining and I largely share.

However it may turn out, there is no doubt that Twining’s work on general jurisprudence stands on its own as a major contribution to the development of a theoretically and empirically sophisticated understanding of law.

⁴² *Id.* at 19.