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Two Models of General Jurisprudence

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TWO MODELS OF GENERAL JURISPRUDENCE

Dan Priel*

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Abstract: The essay is a comment on William Twining's recent book *Globalisation and Legal Scholarship* (2011), to be published as part of a symposium issue on the book. The aim of my comment is to present and contrast two models of general (or universal) jurisprudence: the one favoured by Twining and the other adopted by Jeremy Bentham. Twining's model aims to be general by capturing the great variety of laws as they exist in the world; by contrast, Bentham argued that it is mostly prescriptive claims about law that can be universal. I argue that the descriptive model suffers from serious flaws: it either has to posit arbitrary boundaries between law and non-law (this is the problem from which HLA Hart's version of descriptive jurisprudence suffers) or it does away with all boundaries, resulting in a shapeless barrage of data (this is the problem with Twining's version of this model). By contrast, I argue, the Benthamite version of general jurisprudence is free from these problems. I then argue that Twining's descriptive approach is subtly tied to various prescriptive recommendations he makes in his book, which I believe are unattractive.

I

Cleanthes: ... Look round the world: Contemplate the whole and every part of it: You will find it to be nothing but one great machine, subdivided into an infinite number of lesser machines, which again admit of subdivisions, to a degree beyond what human senses and faculties can trace and explain. All these various machines, and even their most minute parts, are adjusted to each other with an accuracy, which ravishes into admiration all men, who have ever contemplated them. The curious adapting of means to ends, throughout all nature, resembles exactly, though it much exceeds, the productions of human contrivance; of human design, thought, wisdom, and intelligence. Since therefore the effects resemble each other, we are led to infer, by all the rules of analogy, that the causes also resemble; and that the Author of nature is somewhat similar to the mind of man; though possessed of much larger faculties, proportioned to the grandeur of the work, which he has executed.¹

Philo: Look round this universe. What an immense profusion of beings, animated and organized, sensible and active! You admire this prodigious variety and fecundity. But inspect a little more narrowly these living existences, the only beings worth regarding. How hostile and destructive to each other! How insufficient all of them for their own happiness! How contemptible or odious to the spectator! The whole presents nothing but the idea of a blind Nature, impregnated by a great vivifying principle, and pouring forth from her lap, without discernment or parental care, her maimed and abortive children.²

There is no avoiding it. Some look at the world and see order and patterns; others look at the same world and see multiplicity, diversity, difference. Some are hedgehogs, others are foxes.³ HLA Hart looked at the world and concluded that 'in spite of many variations in different cultures and

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¹ David Hume, *Dialogues on Natural Religion* (OUP 1993) 45 (pt 2).

² *Ibid.*, 113 (pt 11).

³ Cf AW Brian Simpson, *Reflections on The Concept of Law* (OUP 2011) 125. That is Simpson's gloss on the famous distinction between the fox and the hedgehogs.

in different times, [law] has taken the same general form and structure'.⁴ William Twining looks at it and sees a 'great juristic bazaar': colourful, diverse, and filled with different legal specimens suffused with local culture.⁵ For decades now he has been urging his readers to notice that the legal world is more varied and plentiful than other legal theorists have described it, and that any attempt to capture all its manifestations—past and present, east and west, in developed and developing countries—in a single, fairly unified account, is hopeless. When 'globalization' appeared on the academic scene, Twining was among the first academic lawyers to stress its significance to legal theory; but whereas others feared globalization would lead to greater uniformity and similarity—a McLaw, if you wish, where few dominant countries and a small number of multinational corporations (mostly hailing from the very same countries) push for a global legal monoculture⁶—Twining saw in it an opportunity for further expanding his juristic bazaar.⁷

In his new book, *Globalisation and Legal Scholarship*, Twining provides, with characteristic clarity and eloquence, his latest pithy restatement of these ideas.⁸ Twining's overall 'message is anti-reductionist: it emphasises the complexity of legal phenomena and warns against simplistic, exaggerated, false, meaningless, superficial, and ethnocentric generalisations about law in the world as whole' (p 19). Even with stands already set up in his bazaar for 'economic analysis, diffusion theory, critical legal theory, feminism' (p 49), for 'comparative international law, regional human rights regimes' (p 49) and much else, Twining is still on the lookout for more, wondering whether there are 'significant arcane, unnoticed or invisible legal orders that so far have escaped the attention of legal scholars' (p 45). Moving from wholesale to retail, Twining suggests various changes to the way law is currently taught (and thought) (e.g., pp 29–31, 46–48, 57) including greater attention to traditional 'global' areas of law (like conflict of laws), to global problems like climate change, a heightened awareness of the new global aspects of traditional legal areas like family law, a less 'ethnocentric' look at other legal systems (including forms of religious law), and greater attention to the work of legal scholars coming from, and whose work focuses on, the problems and needs of developing countries.

Much of this is indisputable. No doubt, there is more to this world than Western Europe and North America, there is more to legal theory than analytic jurisprudence, and there are many global problems that call for supranational legal solutions. Yet I find myself uneasy about

⁴ HLA Hart, *The Concept of Law* (3rd edn, OUP 2012) 240, also *ibid*, 3.

⁵ William Twining, 'The Great Juristic Bazaar' (1976) 14 *Journal of the Society of the Public Teachers of Law* (new series) 185.

⁶ See, for example, R Daniel Keleman & Eric C Sibbitt, 'The Globalization of American Law' (2004) 58 *International Organization* 103 (arguing that there has been a shift in 'advanced industrialized democracies' towards 'American legal style'); Daniel W Drezner, 'Globalization and Policy Convergence' (2001) 3 *International Studies Review* 53.

⁷ Earlier treatments include William Twining, *Globalisation and Legal Theory* (Butterworths 2000) and William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (CUP 2009). Many of the ideas are already found in Twining (n 5), long before talk of 'globalization' was in vogue.

⁸ William Twining, *Globalisation and Legal Scholarship* (Wolf Legal Publishers 2011). All subsequent references to this book are made parenthetically in the text.

Twining's enterprise. On the one hand, I agree that legal philosophers, in their search for the 'nature' of law, have given us impoverished accounts of law and have concerned themselves with marginal questions that may well have no answer.⁹ I have said before that legal philosophers' lack of interest in what law is like in the real world, often leads them to extrapolate from the few legal systems they have some familiarity with to a supposed account of what law in general is.¹⁰ I have expressed doubt about the usefulness of the methods of analytic philosophy for explaining the nature of a social practice, and I have chided legal philosophers for not paying more attention to the writings of legal historians, comparative lawyers, and legal sociologists whose work could provide useful information for any attempt at an illuminating discussion on law in general.¹¹

So why the unease? I am uneasy about Twining's enterprise because, perhaps surprisingly given my opening remarks, Twining ends up closer to Hart than he perhaps imagines, and definitely closer to him than I would want. Twining calls his approach an 'internal critique' that 'maintain[s] discernible continuities with our general jurisprudential heritage' (p 35), and perhaps as a result he ends up, like Hart, thinking of general jurisprudence as a primarily descriptive enterprise. It is not just that analytic legal philosophers are welcome to his juristic bazaar (as long as they do not try overtake it);¹² it is, rather, that for Twining jurisprudence is still largely, as it was for Hart, a classificatory exercise. In the remainder of this short comment I outline my worries about this approach and then present what I think is a superior alternative.

II

Twining wants legal theory with more diversity, more voices, more perspectives; but after we have collected and displayed all of them, what then? What are we to do with all that we have amassed? Why, to be blunt, should we bother collecting all this information about law? On the evidence of this book, Twining's answer is like George Mallory's response to why he wanted to climb the Everest: 'because it's there'. That seems to me the wrong approach to jurisprudence.

Take, for a start, Twining's discussion of comparative law. In line with his general thesis, Twining tells a story of a traditionally narrow discipline, committed mostly to comparing 'black letter' private law doctrine from a few European legal systems, that about twenty years ago has undergone considerable expansion. The result, says Twining, has been a 'crisis of identity and a possible loss of confidence' (p 49). He suggests that the cornucopia of new law was, initially at least, too much for comparatists to handle. My reading of the reasons for the crisis is completely

⁹ See Dan Priel, 'Is There One Right Answer to the Question of the Nature of Law?' in Wil Waluchow & Stefan Sciaraffa (eds), *The Philosophical Foundations of the Nature of Law* (OUP 2012) 322 (cited below as Priel, 'One Right Answer?'); Dan Priel, 'The Scientific Model of Jurisprudence' in Jordi Ferrer Beltrán et al, eds, *Neutrality and Theory of Law* (Springer 2013) 239; Danny Priel, 'Jurisprudence and Necessity' (2007) 20 *Canadian Journal of Law and Jurisprudence* 173; Dan Priel, 'The Boundaries of Law and the Purpose of Legal Philosophy' (2008) 27 *Law and Philosophy* 643.

¹⁰ See Priel, 'One Right Answer?' (n 9) 339–40.

¹¹ See Dan Priel, 'Jurisprudential Disagreements and Descriptivism' (unpublished manuscript); Dan Priel, 'Positivism and the Separation of Law and Jurisprudence', available at <http://ssrn.com/abstract=1951912>.

¹² See William Twining, 'Academic Law and Legal Philosophy: The Significance of Herbert Hart' (1979) 95 *Law Quarterly Review* 557, 574–76; Twining, *General Jurisprudence* (n 7) 56–60.

different. The problem as I see it, a problem that troubled comparative lawyers long before its recent expansion, has been what to do with their materials after gathering them. As I see it, the main reason for the sense of malaise and defensiveness in much comparative law scholarship has been because of a lingering concern that comparative law had *no point*.¹³ The mere collection of the laws of different legal systems on a certain matter, and their juxtaposition one next to the other, is by itself a rather pointless exercise: The French do it this way, the English do it that way; so what? One critic of the methods of comparative law has aptly called this the “telephone-book approach” to comparative law.¹⁴ The expansion of comparative law that Twining talks about has made this exercise at once less manageable and its pointlessness more palpable; and to the extent that we see change in comparative law today, it is, I think, to a large extent the result of the need to react to this problem. One concern I have about Twining’s call for expanding our juristic bazaar is that it looks too much like the telephone-book approach to jurisprudence.

Twining would no doubt deny that he is after mere cataloguing. His aim is ultimately to be able to make ‘sensible generalisations about legal phenomena’ (p 50), and if we wish to do that, we must do so with a clearer view of the different specimens of law. But it is precisely in understanding jurisprudence as concerned with ‘generalisations about legal phenomena’ that Twining shows himself to be closer to Hart’s view of general jurisprudence than may first appear, and it is precisely what they share that I think may need rethinking. To see that, it is useful to compare their ideas with an altogether different conception of general jurisprudence, the one offered by Jeremy Bentham.¹⁵

Bentham’s ideas are complex, but if pressed to summarize the key ingredients of his conception of universal jurisprudence, I would mention three:

Universal human nature. Bentham’s ideas are rooted in the Enlightenment belief in the power of rational thought to create institutions to improve the human condition.¹⁶ Central to his critique of existing institutions has been his relentless attacks on superstition, on blind following of

¹³ I agree here with William Ewald, ‘Comparative Jurisprudence (I)? What Was It Like to Try a Rat?’ (1995) 143 *University of Pennsylvania Law Review* 1889, 1961–65.

¹⁴ *Ibid*, 1983.

¹⁵ Twining’s book contains an appendix which discusses Bentham’s essay ‘Place and Time’ in Stephen G Engelmann & Philip Schofield (eds), *Selected Writings* (Yale UP 2011) 152. Twining concludes on the basis of this essay that ‘[t]he gap between Bentham and Montesquieu is not so great’ (p 67). That is a startling conclusion. Much of Montesquieu’s *Spirit of the Laws* is dedicated to explaining how factors like geography and national temperament affect the content of law in different places. Bentham recognized this fact, but his focus was on showing how laws could be used to overcome these differences for the sake of a single goal (the promotion of happiness). See Bentham (this note) 168. Indeed, he criticized Montesquieu for confusing ‘[t]he question of fact and the question of proprietary’, *ibid* 171, for drawing from the fact that there is an explanation to the differences between the laws of different nations the conclusion that these differences are justified. Bentham’s ‘Place and Time’ thus confirms what we find in the rest of Bentham’s writings, that he had no sympathy for the conservative implications of Montesquieu’s (and, and as we shall see, Twining’s) approach. See further in the text below.

¹⁶ See generally Douglas G Long, *Bentham on Liberty: Jeremy Bentham’s Idea of Liberty in Relation to His Utilitarianism* (University of Toronto Press 1977) 13–25; Roy Porter, *Enlightenment: Britain and the Creation of the Modern World* (Allen Lane 2000) 415–22.

tradition, and on lazy acceptance of the familiar. The universalism of general jurisprudence is ultimately grounded in the scientific search for universal human nature.

Prescriptivism. Bentham's contrast between 'local' and 'universal' jurisprudence is the distinction between 'the laws of such or such a nation or nations in particular' and 'the laws of all nations whatsoever'.¹⁷ Bentham recognized that at the level of description there are endless differences between legal systems. Therefore, the universality of jurisprudence lay for him not at the level of description—here, 'to be, strictly speaking, universal, [jurisprudence] must confine itself to terminology'.¹⁸ Rather, universal jurisprudence was mostly concerned with prescription: 'It is in the censorial line that there is the greatest room for disquisitions that apply to the circumstances of all nations alike'. He was careful in framing this claim: 'That the laws of all nations, or even of any two nations, should coincide in all points, would be as ineligible as it is impossible: some leading points, however, there seem to be, in respect of which the laws of all civilized nations might, without inconvenience, be the same'.¹⁹

Institutionalism. The key to improving the human condition is the deliberate *creation* of institutions. There is no guarantee that custom, tradition, or common-sense, everyday morality will generate the optimal norms for improving human welfare.

Though Hart often presented his own work as belonging to the same philosophical tradition as Bentham's, he in fact rejected all three ingredients of Bentham's approach. His theory does not give a significant role to human nature. Instead, Hart grounded his account of law in an analysis of a *practice*.²⁰ Practices for Hart are rule-governed activities accompanied by a certain attitude of 'acceptance', and it is in the idea of law as a kind of practice that Hart thought to have found the key to the science of jurisprudence. Hart also famously presented his own work in jurisprudence as 'general and descriptive'.²¹ His view, nowadays widely accepted, jurisprudence is primarily a morally neutral inquiry into the nature of law. Though Hart may have shared Bentham's belief that some institutions were necessary for human welfare, a notable feature of his theory of law is just how devoid it is of any explicit discussion of the role or place of institutions.²² His rejection of institutionalism was twofold. First, following John Austin, Hart took general jurisprudence to be the search for what law is in all times and places, thus keeping out of his discussion the constraints and opportunities that the different institutional structures of different times and

¹⁷ Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, JH Burns & HLA Hart, eds (Clarendon Press 1996) 294.

¹⁸ *Ibid.*, 295.

¹⁹ *Ibid.*

²⁰ See Dan Priel, 'Towards Classical Legal Positivism' (unpublished manuscript), available at <http://ssrn.com/abstract=1886517>. The remnants still found in his account were then studiously removed in the work of his followers. See *ibid.*, 16–19.

²¹ Hart (n 4) 239. He also famously called his book an essay in 'descriptive sociology'. *Ibid.*, vi.

²² See generally Robert S Summers, 'Legal Institutions in Professor H.L.A. Hart's Concept of Law' (2000) 75 *Notre Dame Law Review* 1807. Raz ascribes to Hart an institutional approach to legal theory, but he uses the term differently from me. See Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (rev ed, OUP 1995) 204.

places provide.²³ The second way in which Hart rejected Bentham's institutionalism was in his adoption of what has been the hallmark of natural law, an anti-institutionalist conception of the relationship between law and justice. Law is not the *source* of justice-generating institutions; rather, law is something that by its very nature should match pre-institutional norms of justice.²⁴

On all this Twining's position is close to Hart's, although he gets there via a somewhat different route. Twining seems to give little credence to Bentham's belief in the universality of human nature and his attempt at grounding law on that (*cf* p 60).²⁵ And like Hart, he adopts a fundamentally sociological approach to jurisprudence.²⁶ The difference between them is that Hart thought that the philosophical *method* of introspection and conceptual analysis could answer this question better than any 'external' observation of the kind practiced by sociologists. That really is the essence of his search for 'the concept' of law'. Twining's preference is for more observation and less introspection, but apart from that Twining's jurisprudence, just like Hart's, is essentially 'descriptive'. Hart opted for 'descriptive jurisprudence' because he was a (mild) moral sceptic and also because of his non-institutional conception of morality. As far as I can tell, Twining gets there because he is wary of passing judgment on legal practices, especially those of non-Western cultures.²⁷

The result is in many respects even more descriptive than Hart's approach. By trying to identify *the* concept of law, Hart purported to correct various 'misunderstandings' about it.²⁸ Twining seems reticent about doing even that. It is notable that when he had once discussed Brian Tamanaha's idea that 'Law is whatever people identify and treat through their social practices as "law"',²⁹ he criticized it not for being too broad, but for being too narrow!³⁰ By limiting ourselves

²³ Hart was in fact more extreme in this regard than Austin. See Priel, 'Jurisprudence and Necessity' (n 9) 199–200; Dan Priel, 'H.L.A. Hart and the Invention of Legal Philosophy' (2011) 5 *Problema* 301, 311–16.

²⁴ For an explicit endorsement by a follower of Hart see John Gardner, *Law as a Leap of Faith: Essays on Law in General* (OUP 2012) ch 6.

²⁵ See also Twining, *General Jurisprudence* (n 7) 125–26, for criticism of 'post-Enlightenment secularism' as parochial and a call for a 'genuinely cosmopolitan general jurisprudence'.

²⁶ I know full well that the last sentence will be considered complete nonsense by many, both among Hart's followers and his detractors. Hart's critics have claimed that despite Hart's aspirations for contributing to 'descriptive sociology', there is very little of that in *The Concept of Law*. See, for example, Twining (n 12) 565; Ronald Dworkin, *Justice in Robes* (Harvard UP 2006) 215; Colin M Campbell, 'The Career of the Concept' in Philip Leith & Peter Ingram (eds), *The Jurisprudence of Orthodoxy: Queen's University Essays on H.L.A. Hart* (Routledge 1988) 1, 20–21. Hart's supporters, on the other hand, insist that Hart's 'conceptual' inquiry was very different from the kind of empirical, sociological inquiry of the kind Twining is interested in. See Gardner (n 24) 274–89, especially 275–76. But I stand by my claims. Hart thought philosophy was the *correct* way of doing sociology, which is why he considered his book a contribution to both. I explain this further in Dan Priel, 'Jurisprudence and Psychology', in Maksymilian Del Mar (ed), *New Waves in Philosophy of Law* (Palgrave Macmillan 2011) 77, 79–80.

²⁷ In this he seems to take 'the internal point of view' to mean that one can only challenge a practice embedded in a certain culture from 'within' that culture. If this is so, he favours Winch's version of the internal point of view (see Peter Winch, *The Idea of a Social Science and Its Relation to Philosophy* (2nd edn, Routledge 1990) 86–91), over the milder version adopted by Hart.

²⁸ Hart (n 4) 240.

²⁹ Brian Z Tamanaha, *A General Jurisprudence of Law and Society* (OUP 2001) 166 (emphasis omitted).

to practices people call 'law', he said, we inevitably impose our perspective, derived from a different culture, on practices of other cultures. And though, as quoted, he hopes to identify some 'sensible generalisations about legal phenomena' (p 50), he also tells us that 'we are not yet very well-equipped to provide an over-arching Grand Theory or even many reliable generalisations about the hugely complex phenomena of law in the world as a whole: as yet we lack concepts, data, hypotheses and models adequate for the task' (p 18). All we can do, it seems, is collect our samples of law, stick a pin through them, and put them on display.

The problem with this view is that it is hard to see what more we need to be 'equipped' with before we are in a position to make such generalizations. In this age of Big Data, the problem we are facing is too much, not too little, information. It is similarly unclear to me what concepts or models we currently lack, or for that matter what in Twining's view a Grand Theory in this area is supposed to achieve. Admittedly, it is *possible* that we will discover an example or aspect of law in some currently unknown 'arcane' corner of the planet, which will revolutionize our understanding of the subject, but that seems rather unlikely. More significantly, without a theoretical perspective, without an aim, it not clear which data we should be looking for, and, again, why. Twining seems to forget that '[l]eaving something out is not a feature of failed explanation, but of successful explanations',³¹ and that all theories (Grand or otherwise) are provisional in the sense that they can be refuted by further empirical findings. That they may be revised or challenged does not mean we should not try to make them.

One way of looking at Twining's enterprise is that it takes Hart's descriptive jurisprudence to its logical conclusion and in this way exposes the logical fallacy found at the core of descriptivism. The entire enterprise of descriptive jurisprudence is concerned with the need to be able to separate law from non-law. Unfortunately, without pretheoretical agreement on what belongs to the domain (law) to be explained, the theorist can always reject possible counterexamples to his theory as not instances of law and therefore as irrelevant to his conclusions about the nature of law. Twining's desire not to exclude from the category of law various forms of social organization from non-Western societies enables him to avoid *this* predicament, but for a high price, namely the elimination of all criteria for clearly distinguishing law from non-law. In this way Twining undermines the necessary basis for what he purports ultimately to achieve: 'sensible generalisations' about law. Hence the dilemma of descriptive general jurisprudence: either adopt question-begging criteria for the category of law, or abandon all criteria. Hart was caught on the first horn of this dilemma; Twining, on the second.

Twining's extreme descriptivism leads him also, perhaps inevitably, to reject the other elements in Bentham's universal jurisprudence. For Bentham, gathering information about the differences of time and place among laws was justified as part of his relentless critique of existing legal regimes and his desire to design legal institutions aimed at improving human welfare. This was a general feature of Bentham's thought, and his conception of universal jurisprudence fit right

³⁰ See William Twining, 'A Post-Westphalian Conception of Law' (2003) 37 *Law & Society Review* 199, 225–31.

³¹ Daniel C Dennett, *Consciousness Explained* (Penguin 1991) 454.

into it.³² Central to Bentham's thinking about the need for institutions was the belief that not all institutions are created equal: some perform this job better than others, and some are positively harmful. As he put it, '[a] bad form of government may...render it ineligible to introduce a set of laws...which under a good government would be consummately beneficial; the same thing may be said of bad religion, and a bad system of manners'.³³ Institutional economists (it is they, not contemporary legal positivists, who are Bentham's true heirs) have further developed these ideas, comparing competing institutions on their conduciveness to human welfare.³⁴ Applied to law and legal institutions, this is comparative law, of sorts, but one that due to its critical edge does not suffer from the problems of the telephone-book approach. By contrast, the sense one gets from Twining's book is that the legal theorist is there to faithfully record and 'understand' various forms of human law in order to generate from them (if not today, then one day, after we have gathered all the data) some general ideas about law (p 37). But Twining is wary of critique. Those Western scholars who criticize non-Western and religious law are accused of being 'ethnocentric' (p 45), 'orientalist[ic]' (p 46), and for conveying 'a stereotypically Western bias' (p 46). Even Bentham, a cosmopolitan if there ever was one, does not escape this censure: 'some passages' in his essay on the geographical and temporal differences between laws 'appear racist or Islamophobic to modern eyes' (p 66).³⁵

III

It is at this juncture that Twining slips almost imperceptibly from the descriptive into the prescriptive. Globalization has not just opened our eyes to the number of legal systems out there, but to their constant interactions: 'today no scholar, or even student, of law can focus solely on the domestic law of a single jurisdiction' (p 30), because different legal systems are no longer independent of each other (if they ever were). Twining offers the following example: 'Can a teacher of municipal law in UK or the Netherlands concerned with housing finance, or consumer credit, or small businesses today justifiably ignore Islamic banking and finance?' (p 40). I venture to guess that most teachers of these subjects in the two countries would answer 'yes'; and with

³² See Philip Schofield, 'Jeremy Bentham and HLA Hart's "Utilitarian Tradition in Jurisprudence"' (2011) I *Jurisprudence* 147; Priel (n 20) 8–11.

³³ See Bentham (n 15) 167.

³⁴ See eg, David S Landes, *The Wealth and Poverty of Nations: Why Some Nations Are So Rich and Some So Poor* (WW Norton 1998); Douglass C North & Robert Paul Thomas, *The Rise of the Western World: A New Economic History* (CUP 1973); Daren Acemoglu & James Robinson, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty* (Crown Business 2012).

³⁵ True, in 'Place and Time' (n 15) Bentham is critical of Islam and Islamic law, but one must remember that in other writings he was also extremely critical (and at much greater length) of Christianity. Bentham was also a lifelong critic of English institutions and he strongly disagreed with various French laws. Even in 'Place and Time' Bentham often compares Asian and Islamic law favourably to European legal systems, and, typically, it is English law that is singled out the harshest criticism. Despite all this, to my knowledge no-one has ever thought of calling Bentham an Anglophobe or a Francophobe: here his critique, whether accepted or not, is taken at face value. Somehow his criticism of non-European legal systems is not treated in the same way. It should also be noted that Bentham has shown willingness to accommodate his utilitarian ideas to Islamic contexts. See Jeremy Bentham, *Securities against Misrule and Other Constitutional Writings for Tripoli and Greece* (OUP 1990).

good reason. Muslims account for about 3% and 5%, respectively, of the population of these countries. These are not the numbers that would normally require a change in the curriculum. (About 9% of the British population is Roman Catholic. Does this require the teaching of Canon law?) Furthermore, without evidence (that Twining does not supply) there is no reason to believe that all Muslims in these countries are interested in Islamic law governing their affairs. Even for those who do, it is unclear why Islamic law should be forced on another party, if it is uninterested in it.

These numbers are valuable for putting Twining's claim in perspective (just as they are for answering those who talk of an imminent Islamic takeover of Europe), but for our purposes the more significant issue is how Twining's commitment to descriptivism of the kind that refuses to impose any limiting constraints or theoretical limits on his subject-matter leads him to the view that society should *favour* the proliferation of legal systems. Though distinct, this prescriptive idea seems to be of a piece with Twining's descriptivism: just as we should not impose our categories on legal phenomena, just as we should not try to theorize them in a way that could be seen to impose upon them our cultural biases, so we should abandon the idea (and ideal) of law that applies to all.

The effect of this view is to turn all law into something like personal law, a law that attaches to individuals anywhere in the world based on their affiliation with a certain cultural or religious community. This is particularly vivid in his call for law teachers to learn and teach Islamic law on consumer credit on the assumption that this is the law that should govern Muslims living in Britain and the Netherlands. He adopts this view despite the fact that, to put it mildly, the model of personal law has had a rather spotty record in the countries in which it has been in force.³⁶

To the extent that one finds an explanation for this position, it is found in Twining's list of 'simplistic assumptions' (p 38) shared by most mainstream Western academic lawyers, and which he criticizes. One of them is the view that 'modern law and modern jurisprudence are secular' (p 39). Twining opposes this 'secularis[er]'³⁷ assumption and urges legal scholars to get to know better religious law and to incorporate it in their work (pp 30, 33, 40, 46).³⁸ As someone who believes this 'simplistic' assumption is true (or, if not currently true, that we should strive to make it true), I would want to see much more than Twining offers to be persuaded in the advantages of adopting or incorporating into a modern legal system, normative systems developed

³⁶ On some of the problems with personal law in two jurisdictions see Marc Galanter & Jayanth Krishnan, 'Personal Law and Human Rights in India and Israel' (2000) 34 *Israel Law Review* 101.

³⁷ In Twining, *General Jurisprudence* (n 7) 6 note 10, 7, he tells us that on a global scale ours is an age of religious revival.

³⁸ See Timur Kuran, *The Long Divergence: How Islamic Law Held Back the Middle East* (Princeton 2010); see also Landes (n 34) 411–15 (focusing on the economic impact of gender inequality); cf Timur Kuran, 'The Discontents of Islamic Economic Morality' (1996) 86 *American Economic Review (Papers and Proceedings)* 438, 438 ('Notwithstanding the claim that Islamic economics provides a superior alternative to the secular economic doctrines of our time, its real purpose is to help prevent Muslims from assimilating into the emerging global culture whose core elements have a Western pedigree'), 439 ('Islamic economics has contributed little to economic issues of great relevance to modern living'). Admittedly, not everyone accepts this explanation, see Acemoglu & Robins (n 34) 61, although they do not address Kuran's arguments.

in (and for) a different era and grounded in what we have every reason to believe are false foundations.

IV

The summary of my position is simple: The overwhelming inclusiveness of Twining's juristic bazaar inevitably implies the loss of the critical perspective that was so central to Bentham's universal jurisprudence. Like Twining, Bentham was aware of the range of wares in the great juristic bazaar, but unlike him, Bentham had no compunctions about telling us to stay away from some of them. This unwillingness to critically assess and compare social institutions, especially those of other (non-Western, non-secular) cultures is an unfortunate far cry from the Enlightenment vision that underlies Bentham's idea of universal jurisprudence.³⁹

If we think—and there is ample evidence suggesting that we should think—that institutions can make a difference to people's welfare, then we should not be merely in the business of preserving and nurturing all legal systems out there, as collectibles to be maintained and displayed for the sake of diversity. One way of thinking of general jurisprudence that would take seriously Bentham's approach to general jurisprudence would be to reorient the now dominant questions about the 'nature' of law to understanding law by comparative evaluation of the strengths and weaknesses of different possible legal institutions. This (as Bentham fully recognized) is not a call for 'one size fits all' solutions, as differences between countries and regions (in their natural resources, size, population size and density, culture, and many other factors) are obviously relevant to the choice and design of institutions; it is definitely not the claim that all legal wisdom is found in the West. It is the more modest, but not insignificant, claim that in the choice between Bentham's prescriptive model of universal jurisprudence and Hart's and Twining's descriptive model of general jurisprudence, we should side with Bentham.

This is clearly the case if we hope to use law for improving people's lives; but as we have seen, it is necessary even for Twining's own aim of giving us a 'map of law in the world' (p 40). Twining's arguments suggest that he believes the maps currently drawn by legal theorists are made with poor projections and result in a distorted view of what the legal world looks like. This may be true, but my concern is that we may have succumbed to the opposite problem, memorably described by Borges,⁴⁰ of a map that is an exact copy of the object it depicts. Though this map has no distortions, it too is useless.

³⁹ Those who wish to dismiss this view presented here as some kind of right-wing neo-imperialist apologia should note that it is the view that tells us that each legal system must be understood from its own point of view, that criticism should only be allowed 'from within', that we should let internal processes take their course, is thoroughly conservative. Beyond this, they should consult Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Harvard UP 2001) *passim*, but especially 9–17.

⁴⁰ Jorge Luis Borges, 'On Exactitude in Science' in Andrew Hurley (trans), *Collected Fictions* (Penguin 1998) 325.