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## Two Models of General Jurisprudence

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## Dan Priel

### Abstract

The aim of my comment on William Twining's recent book *Globalisation and Legal Scholarship* (2011) 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 nonlaw (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 leads him to various prescriptive recommendations, 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

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\* Associate Professor, Osgoode Hall Law School, York University, Toronto, Canada. I thank Peer Zumbansen and an anonymous referee for their comments. I have tried, in the limited space available, to address their concerns. I also received valuable comments from William Twining. As I state below, we agree on many things regarding the present state of analytic jurisprudence, but, perhaps inevitably, I focus below on our disagreements. Given more space I would have addressed his comments in greater detail. In the circumstances, I limited myself to a few relatively minor changes.

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.<sup>1</sup>

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.<sup>2</sup>

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. HLA Hart looked at the world and concluded that 'in spite of many variations in different cultures and in different times, [law] has taken the same general form and structure'.<sup>3</sup> William Twining looks at it and sees a 'great juristic bazaar' : colourful, suffused with local culture, and filled with legal specimens that resist easy categorisation.<sup>4</sup> For decades now Twining has been urging his readers to take notice of the fact that the legal world is more varied and plentiful than other legal theorists typically describe it, and that it is hopeless to try to capture all its manifestations—past and present, east and west, in developed and developing countries—in a single, fairly unified account. When academics started talking about 'globalisation', Twining was among the first to stress its significance to legal theory; but whereas others feared globalisation would lead to greater uniformity and similarity, where few dominant countries and a small number of multinational corporations (mostly hailing from the

very same countries) push for a global legal monoculture,<sup>5</sup> Twining saw in it an opportunity for further expanding his juristic bazaar.<sup>6</sup>

In his new book, *Globalisation and Legal Scholarship*, Twining provides, with characteristic clarity and eloquence, his latest restatement of these ideas.<sup>7</sup> His 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’.<sup>8</sup> Even with stands already set up in his bazaar for ‘economic analysis, diffusion theory, critical legal theory, feminism’, for ‘comparative international law, regional human rights regimes’ and much else,<sup>9</sup> 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’.<sup>10</sup> Moving from wholesale to retail, Twining suggests various changes to the way law is currently taught (and thought).<sup>11</sup> Among his suggestions is that academic lawyers should pay more attention to traditional ‘global’ areas of law (like conflict of laws), to global problems like climate change, and to the growing significance of global aspects of traditional legal areas like family law. He also urges legal scholars to take a less ‘ethnocentric’ look at other legal systems (including forms of religious law) and to pay greater attention to legal scholars 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. I agree with Twining 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.<sup>12</sup> 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.<sup>13</sup> 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.<sup>14</sup>

Yet I find myself uneasy about Twining's enterprise. The main reason is that, 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',<sup>15</sup> 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 to overtake it);<sup>16</sup> it is, rather, that for Twining jurisprudence is still largely concerned, as it was for Hart, with answering the question 'what is law?'. 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 multiple perspectives, more voices, greater diversity; 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 Mount 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 underwent considerable expansion. The result, says Twining, has been a 'crisis of identity and a possible loss of confidence'.<sup>17</sup> He suggests that the cornucopia of new laws was, initially at least, too much for comparatists to handle. My understanding of the sources of the crisis is completely 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 a lingering concern that comparative law has no point.<sup>18</sup> 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'.<sup>19</sup> The expansion of comparative law that Twining talks about has made this exercise at once less manageable and its pointlessness more palpable. 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 address this problem and change course. 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 ultimate aim is to be able to make ‘sensible generalisations about legal phenomena’,<sup>20</sup> but in order to do that, he will say, we must have a clearer view of the different specimens of law. But it is precisely in his understanding of jurisprudence as concerned with ‘generalisations about legal phenomena’ that Twining shows himself to be closer to Hart’s view of general jurisprudence than may at 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.<sup>21</sup>

Bentham’s ideas are complex, but if pressed to summarise the key ingredients of his conception of what he called ‘universal jurisprudence’, I will 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.<sup>22</sup> Central to his critique of existing institutions has been his relentless attacks on superstition, on blind following of tradition, and on lazy acceptance of the familiar. The universalism of general jurisprudence is ultimately grounded in the scientific search for universal human nature.<sup>23</sup>

*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’.<sup>24</sup> Bentham recognised 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’.<sup>25</sup> 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 civilised nations might, without inconvenience, be the same.’<sup>26</sup>

*Institutionalism.* The key to improving the human condition is the deliberate *creation* of institutions. There is no guarantee that custom, tradition or everyday morality will generate the optimal norms for improving human welfare. Therefore, the main task of the law is not to try and imitate some pre-existing norms (be they social or moral), but to create welfare-enhancing institutions through law.

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*.<sup>27</sup> 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 he had found the key to the science of jurisprudence. Hart also famously presented his own work in jurisprudence as ‘general and descriptive’.<sup>28</sup> In 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.<sup>29</sup> 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 places provide.<sup>30</sup> 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 for Hart is not the *source of* justice-generating institutions; rather, law is something that by its very nature should match pre-institutional norms of justice.<sup>31</sup>

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.<sup>32</sup> And like Hart, he adopts a fundamentally sociological approach to jurisprudence.<sup>33</sup> 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 practised 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 skeptic 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.<sup>34</sup>

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.<sup>35</sup> 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”’,<sup>36</sup> he criticised it not for being too broad, but for being too narrow!<sup>37</sup> By limiting ourselves 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 already quoted, he hopes to identify some ‘sensible generalisations about legal phenomena’,<sup>38</sup> he also tells us that ‘we are not yet very well-equipped to provide an overarching 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’.<sup>39</sup> For the foreseeable future, it seems, all we can do 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 generalisations. 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 and it will revolutionise our understanding of the subject, but that seems rather unlikely. More significantly, without a theoretical perspective, without an aim, it is not clear which data we should be looking for, and, again, why. Finally, as Daniel Dennett put it, ‘[l]eaving something out is not a feature of failed explanation, but of successful explanations’,<sup>40</sup> and that all theories (Grand or otherwise) are provisional in the sense that they can be amended or even refuted by further empirical findings. That they may be revised or even eventually discarded 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 organisation from non-Western societies enables him to avoid *this* predicament, but for the high price of eliminating 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 preference for descriptivism (although perhaps of a 'thicker' kind than Hart's)<sup>41</sup> 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 into it.<sup>42</sup> 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'.<sup>43</sup> Institutional economists (it is they, not contemporary legal

positivists, who are Bentham's true heirs) have further developed these ideas, comparing institutions for their tendency to promote human welfare.<sup>44</sup> 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.<sup>45</sup> 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.<sup>46</sup> But Twining is wary of critique. Those Western scholars who criticise non-Western and religious law are accused of being 'ethnocentric',<sup>47</sup> 'orientalist[ic]',<sup>48</sup> and for conveying 'a stereotypically Western bias'.<sup>49</sup> Even Bentham, a cosmopolitan if ever there 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'.<sup>50</sup>

### III

It is at this juncture that Twining slips almost imperceptibly from the descriptive into the prescriptive, although what he criticises are not different legal systems, but legal scholars. Globalisation has opened our eyes not just to the number of legal systems out there, but also to their constant interactions: 'today no scholar, or even student, of law can focus solely on the domestic law of a single jurisdiction',<sup>51</sup> 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?' <sup>52</sup> I venture to guess that most teachers of these subjects in the two countries would answer 'yes' ; and with good reason. Muslims account for 4.4% and 5.5%, respectively, of the population of these countries.<sup>53</sup> These are not the numbers that would normally be considered to require a change in the curriculum. (Almost 9% of the UK population is Roman Catholic; should British lawyers also be instructed on teachings of the Catholic Church on finance and lending?) 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 are, it is unclear why Islamic law should be forced on other parties who may be 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 conclusion 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 theorise 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 the model of personal law has had a rather spotty record in the countries in which it has been in force.<sup>54</sup>

To the extent that one finds an explanation for this position, it is found in Twining's list of 'simplistic assumptions'<sup>55</sup> shared by most mainstream Western academic lawyers, which he criticises. One of them is the view that 'modern law and modern jurisprudence are secular'.<sup>56</sup> Twining opposes this 'secularis[t]'<sup>57</sup> assumption and urges legal scholars to get to know better religious law and to incorporate it in their work.<sup>58</sup> As someone who believes that 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 what Twining offers before I am persuaded of the advantages of adopting (or incorporating into a modern legal system) normative systems developed 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 underlay Bentham's idea of universal jurisprudence.<sup>59</sup>

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 recognised) 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’.<sup>60</sup> Twining’ s arguments suggest that he believes the maps currently drawn by legal theorists use poor projections and result in a distorted view of what the legal world looks like. This may be true, but my worry is that he may have succumbed to the opposite problem, memorably described by Borges,<sup>61</sup> of drawing a map that is an exact copy of the object it depicts. Though this map has no distortions, it too is useless.

## Notes

- 1 David Hume, *Dialogues Concerning Natural Religion* (Oxford University Press, 1993 [1779]) 45 (pt 2).
- 2 *Ibid*, 113 (pt 11).
- 3 HLA Hart, *The Concept of Law* (Oxford University Press, 3rd edn 2012) 240; see also *ibid*, 3.
- 4 William Twining, 'The Great Juristic Bazaar' (1976) 14 *Journal of the Society of the Public Teachers of Law* 185.
- 5 See eg R Daniel Keleman and 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.
- 6 Earlier treatments include William Twining, *Globalisation and Legal Theory* (Butterworths, 2000) and William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge University Press, 2009). Many of the ideas are already found in Twining (n 4), long before talk of 'globalisation' was in vogue.
- 7 William Twining, *Globalisation and Legal Scholarship* (Wolf Legal Publishers, 2011).
- 8 *Ibid*, 19.
- 9 *Ibid*, 49.
- 10 *Ibid*, 45.
- 11 *Ibid*, eg 29 – 31, 46 – 48, 57.
- 12 See Dan Priel, 'Is there One Right Answer to the Question of the Nature of Law?' in Wil Waluchow and Stefan Sciaraffa (eds), *The Philosophical Foundations of the Nature of Law* (Oxford University Press, 2012) 322; 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.
- 13 See Priel, 'Is there One Right Answer to the Question of the Nature of Law?' (n 12) 339 – 40.
- 14 See Dan Priel, 'Jurisprudential Disagreements and Descriptivism' (2014) 8 *Problema* 483; Dan Priel, 'Positivism and the Separation of Law and Jurisprudence' (2011) Osgoode CLPE Research Paper No 26/2011, [http://papers.ssm.com/sol3/papers.cfm?abstract\\_id=1951912](http://papers.ssm.com/sol3/papers.cfm?abstract_id=1951912) (accessed 3 October 2013).
- 15 Twining (n 7) 35.
- 16 See William Twining, 'Academic Law and Legal Philosophy: The Significance of Herbert Hart' (1979) 95 *Law Quarterly Review* 557, 574 – 6; Twining, *General Jurisprudence* (n 6) 56 – 60.
- 17 Twining (n 7) 49.
- 18 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 – 5.
- 19 *Ibid*, 1983.
- 20 Twining (n 7) 50.
- 21 Twining's book contains an appendix which discusses Bentham's essay 'Place and Time' in Stephen G Engelmann and Philip Schofield (eds), *Selected Writings* (Yale University Press, 2011) 152. Twining concludes on the basis of this essay that '[t]he gap between Bentham and Montesquieu is not so great' (Twining (n 7) 67). That is a surprising 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 recognised 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, 'Place and Time' (this note) 168. Indeed, he criticised Montesquieu for confusing '[t]he question of fact and the question of propriety' (*ibid*, 171), ie 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.
- 22 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.
- 23 See Jeremy Bentham, *A Fragment on Government*, Ross Harrison (ed) (Clarendon Press, 1988) 25 – 26.
- 24 Jeremy Bentham, *An Introduction to the Principles of Morals and Legislation*, JH Burns and HLA Hart (eds) (Clarendon Press, 1996 [1780/89]) 294.
- 25 *Ibid*, 295.
- 26 *Ibid*.
- 27 See Dan Priel, 'Towards Classical Legal Positivism' (2011) Osgoode CLPE Research Paper No 20/2011, [http://papers.ssm.com/sol3/papers.cfm?abstract\\_id=1886517](http://papers.ssm.com/sol3/papers.cfm?abstract_id=1886517) (accessed 3 October 2013). The remnants

- still found in his account were then studiously removed in the work of his followers. See *ibid*, 16 – 19.
- 28 Hart (n 3) 239. He also famously called his book an essay in ‘descriptive sociology’. *Ibid*, vi.
- 29 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* (Oxford University Press, rev edn 1995) 204.
- 30 Hart was in fact more extreme in this regard than Austin. See Priel, ‘Jurisprudence and Necessity’ (n 12) 199 – 200; Dan Priel, ‘H.L.A. Hart and the Invention of Legal Philosophy’ (2011) 5 *Problema* 301, 311 – 16.
- 31 For an explicit endorsement by a follower of Hart see John Gardner, *Law as a Leap of Faith: Essays on Law in General* (Oxford University Press, 2012) ch 6.
- 32 Cf Twining (n 7) 60. See also Twining, *General Jurisprudence* (n 6) 125 – 6 for criticism of ‘post-Enlightenment secularism’ as parochial and a call for a ‘genuinely cosmopolitan general jurisprudence’.
- 33 I know full well that the last sentence will be considered complete nonsense by many, both among Hart’s followers and among his detractors. Hart’s critics have claimed that despite Hart’s aspirations to contribute to ‘descriptive sociology’, there is very little of that in *The Concept of Law*. See, for example, Twining (n 16) 565; Ronald Dworkin, *Justice in Robes* (Harvard University Press, 2006) 215; Colin M Campbell, ‘The Career of the Concept’ in Philip Leith and 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 Twining is interested in. See Gardner (n 31) 274 – 89, especially 275 – 6. But I stand by my claims. Hart thought his style of philosophy was the *correct way* of doing sociology. 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.
- 34 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* (Routledge, 2nd edn 1990) 86 – 91) over the milder version adopted by Hart.
- 35 Hart (n 3) 240.
- 36 Brian Z Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press, 2001) 166 (emphasis omitted).
- 37 See William Twining, ‘A Post-Westphalian Conception of Law’ (2003) 37 *Law & Society Review* 199, 225 – 31.
- 38 Twining (n 7) 50.
- 39 *Ibid*, 18.
- 40 Daniel C Dennett, *Consciousness Explained* (Penguin, 1991) 454.
- 41 See also n 34. Interestingly, Geertz got the term ‘thick description’ from Gilbert Ryle. See Clifford Geertz, *The Interpretation of Cultures: Selected Essays* (Basic Books, 1973) 6. Ryle was, of course, an Oxford colleague of Hart’s and a fellow practitioner of ordinary language philosophy.
- 42 See Philip Schofield, ‘Jeremy Bentham and HLA Hart’s “Utilitarian Tradition in Jurisprudence”’ (2011) 1 *Jurisprudence* 147; Priel (n 27) 8 – 11.
- 43 See Bentham (n 21) 167.
- 44 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 and Robert Paul Thomas, *The Rise of the Western World: A New Economic History* (Cambridge University Press, 1973); Daren Acemoglu and James Robinson, *Why Nations Fail: The Origins of Power, Prosperity, and Poverty* (Crown Business, 2012).
- 45 It is interesting to note that some economists have argued that Islamic law has been a setback to the economic development of certain countries. See Timur Kuran, *The Long Divergence: How Islamic Law Held Back the Middle East* (Princeton University Press, 2010); see also Landes (n 44) 411 – 15 (focusing on the economic impact of religiously prescribed gender inequality); cf Timur Kuran, ‘The Discontents of Islamic Economic Morality’ (1996) 86 *American Economic Review (Papers and Proceedings)* 438. Kuran states: ‘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.’ *Ibid*, 438. He concludes, ‘Islamic economics has contributed little to economic issues of great relevance to modern living.’ *Ibid*, 439. Admittedly, not everyone accepts this explanation. See, for instance, Acemoglu and Robins (n 44) 61, although they do not address Kuran’s arguments.
- 46 Twining (n 7) 37.
- 47 *Ibid*, 45.
- 48 *Ibid*, 46.
- 49 *Ibid*.
- 50 *Ibid*, 66. True, in ‘Place and Time’ (n 21) 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, singles out the English legal system for 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* (Oxford University Press, 1990 [1823]).

51 Twining (n 7) 30.

52 *Ibid.*, 40.

53 The data on the UK come from the 2011 Census. The data on the Netherlands are taken from [www.pewforum.org/2010/09/15/muslim-networks-and-movements-in-western-europe](http://www.pewforum.org/2010/09/15/muslim-networks-and-movements-in-western-europe) (accessed 3 October 2013).

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

55 Twining (n 7) 38.

56 *Ibid.*, 39.

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

58 Twining (n 7) 30, 33, 40, 46.

59 Those who wish to dismiss this view presented here as some kind of right-wing neo-imperialist apologetics should note that 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, see Brian Barry, *Culture and Equality: An Egalitarian Critique of Multiculturalism* (Harvard University Press, 2001) 9 – 17, *passim*.

60 Twining (n 7) 40.

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