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## Taking Globalization Seriously: Towards General Jurisprudence (Book Review of *Globalization and Legal Theory* by William Twining)

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## Review Essay

# Taking Globalization Seriously: Towards General Jurisprudence

WILLIAM TWINING. *GLOBALIZATION AND LEGAL THEORY*. London:  
Butterworths, 2000. Pp. 260.

DORON M. KALIR\*

### I. INTRODUCTION: THE LAMP LIGHTER'S TRAGEDY

When the Little Prince arrived at the fifth planet of his journey, he met the lamplighter. The little prince was not able to reach any explanation of the use of a street lamp and a lamplighter, somewhere in the heavens. Yet the lamplighter seemed to be extremely busy in performing his task. Once every minute he turned the light on and off. The little prince could not fathom the reason for this unusual habit. "Those are the orders," the lamplighter tried to explain. But the little prince was not convinced. The lamplighter made another attempt: "I follow a terrible profession. In the old days it was reasonable. I put the lamp out in the morning, and in the evening I lighted it again." "And the orders have been changed since that time?" asked the little prince. "The orders have not been changed," said the lamplighter. "That is the tragedy! From year to year the planet has turned more rapidly and the orders have not been changed!"<sup>1</sup>

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\* Associate-in-Law, Columbia University School of Law. I would like to thank Michael Dorf, Gideon Parchomovsky, and Andrew Perlmán for their helpful comments, criticisms and suggestions. The usual disclaimer, however, applies vigorously.

1. ANTOINE DE SAINT-EXUPÉRY, *THE LITTLE PRINCE* 47–48 (Katherine Woods trans., Harcourt Brace 1943).

Though introduced more than sixty years ago, the lamplighter's tragedy neatly encapsulates one of the pivotal aspects of the current age of globalization.<sup>2</sup> From year to year the world has been witnessing ever-growing changes, while the existing legal orders—especially those concerning the planet as a whole, i.e., international law—are quickly becoming antiquated. In particular, the view that nation-states alone should monopolize international affairs is an increasingly inadequate proposition.<sup>3</sup> In response, calls for paradigm shifts<sup>4</sup> are emerging<sup>5</sup>—and not only in international law. Labor law,<sup>6</sup> taxation,<sup>7</sup> antitrust,<sup>8</sup> corporations,<sup>9</sup> and securities regulation<sup>10</sup> are all subject to suggestions of revision in light of the

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2. The current age of globalization began in 1989. The fall of the Berlin Wall followed by the other "Revolutions of 1989" (see Bruce Ackerman, *The Rise of World Constitutionalism*, 83 VA. L. REV. 771, 784 (1997) marked the dawn of a new era—post Cold War—in world politics, economy, and law.

3. See Louis Henkin, *That S. Word: Sovereignty, and Globalization, and Human Rights, Et Cetera*, 68 FORD. L. REV. 1, 6–7 (1999).

4. Indeed, Thomas Kuhn, in his seminal work on the history of scientific research from which this term is borrowed (THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 66 (3d ed. 1996)), indicates that "crises are a necessary precondition for the emergence of novel theories." *Id.* at 77. Following Santos (see *infra* note 13), Professor William Twining acknowledges that we are in a state of "paradigmatic transition" (p. 201).

Please note that page numbers in parenthesis throughout this Review Essay, and footnote references without a specified book or article, refer to its subject: WILLIAM TWINING, *GLOBALIZATION AND LEGAL THEORY* (2000).

5. See, e.g., Eyal Benvenisty, *Exit and Voice in the Age of Globalization*, 98 MICH. L. REV. 167 (1999) (suggesting to replace the dominating Westphalian paradigm—a model of international relations that views global conflicts solely in terms of the sovereign states that constitute the global arena—with a new, interest group-oriented transnational conflict paradigm.); see also John O. McGinnis & Mark L. Moveesian, *The World Trade Constitution*, 114 HARV. L. REV. 511 (2000) (suggesting a new blueprint model for the WTO's structure; arguing that by facilitating jurisdictional competition and open capital markets the WTO can help reduce the power of interest groups while making national governments more responsive to their constituents' tastes).

6. George Ross, *Labor Versus Globalization*, 570 ANNALS AM. ACAD. POL. & SOC. SCI. 78 (2000).

7. Reuven S. Avi-Yonah, *Globalization, Tax Competition, and the Fiscal Crisis of the Welfare State*, 113 HARV. L. REV. 1573 (2000).

8. Russell J. Weintraub, *Globalization's Effect on Antitrust Law*, 34 NEW ENG. L. REV. 27 (1999).

9. See, e.g., John C. Coffee, *The Future as History: The Prospects for Global Convergence in Corporate Governance and Its Implications*, 93 NW. U. L. REV. 641 (1999); William W. Bratton & Joseph A. McCahery, *Comparative Corporate Governance and the Theory of the Firm: The Case Against Global Cross Reference*, 38 COLUM. J. TRANSNAT'L L. 213 (1999); Timothy L. Fort & Cindy A. Schipani, *Corporate Governance in a Global Environment: The Search for the Best of All Worlds*, 33 VAND. J. TRANSNAT'L L. 829 (2000).

new epoch.<sup>11</sup> Still, the scope, depth, and range of transformations introduced by globalization appear to require more than a mere provisional revision of the different fields. They call for no less than a thorough rethinking of the “law of laws” itself—jurisprudence.<sup>12</sup> William Twining’s *Globalization and Legal Theory* is one of the first attempts to respond comprehensively to that call.<sup>13</sup>

Professor William Twining of the University College of London (UCL) is more than suited for the task. A self-proclaimed rooted-cosmopolitan,<sup>14</sup> Twining was educated both at Oxford<sup>15</sup> and the University of Chicago. Formerly the Quain Professor of Jurisprudence, a chair currently held by Ronald Dworkin, he is now a Research Professor at UCL. Throughout his long and distinguished career he has taught in Khartoum, Dar-es-Salaam, Belfast, Hong Kong, Kampala, Wasenaar (near Laiden), Bangalore, Belfast, Miami, and Boston, to name just a few places.<sup>16</sup> A prolific writer, Twining has published books on legal theory,<sup>17</sup> legal interpretation,<sup>18</sup> the law of evidence,<sup>19</sup> and legal education.<sup>20</sup> He is the co-editor of the well

10. See, e.g., Barry A.K. Rider, *Global Trends in Securities Regulation: The Changing Legal Climate*, 13 DICK. J. INT’L L. 513 (1995); Bevis Longstreth, *A Look at the SEC’s Adaptation to Global Market Pressures*, 33 COLUM. J. TRANSNAT’L L. 319 (1995).

11. By now, an electronic search of articles containing the word “globalization” in their title yields the comforting message that “your search has been interrupted due to a large number of documents.”

12. See p. 3 (“By the mid-1990s the discipline of law in the United Kingdom and, to a lesser extent, the United States was becoming increasingly cosmopolitan, but its theoretical branch, jurisprudence, seemed to have lagged behind.”); p. 10 (“Globalization . . . seemingly offers fundamental challenges to contemporary legal theory.”). On the relationship between the terms “jurisprudence” and “legal theory,” see p. 11 n.7.

13. Twining cites and discusses at length another work on legal theory, with a post-modern hue, which precedes his: BOAVENTURA DE SOUSA SANTOS, *TOWARD A NEW COMMON SENSE: LAW, SCIENCE AND POLITICS IN PARADIGMATIC TRANSITION* (1995). See in particular pp. 194–244.

14. Twining borrowed the term from Ackerman (pp. 47, 50, 137) (citing Bruce Ackerman, *Rooted Cosmopolitan* 104 ETHICS 516 (1994)).

15. See p. 33 (“I began my study of law in Oxford in 1952, the year in which Herbert Hart was elected to the Corpus Chair of Jurisprudence in succession to A.L. Goodhart. So when I embarked on the study of jurisprudence towards the end of my second year, I found myself at the cusp of two traditions of English legal positivism. I experienced both versions.”).

16. P. 247.

17. WILLIAM TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973); WILLIAM TWINING, *LAW IN CONTEXT* (1997).

18. WILLIAM TWINING & DAVID MIERS, *HOW TO DO THINGS WITH RULES* (4th ed. 1999).

19. WILLIAM TWINING, *RETHINKING EVIDENCE* (1990); WILLIAM TWINING & TERENCE ANDERSON, *ANALYSIS OF EVIDENCE* (1991).

20. WILLIAM TWINING, *ACADEMIC LAW AND LEGAL DEVELOPMENT* (1976); WILLIAM TWINING, *BLACKSTONE’S TOWER: THE ENGLISH LAW SCHOOL* (1994).

known Law-in-Context series (of which this latest book is a part), and—though by his own admission “not a committed Benthamite” (p. 104)—he is one of the greatest Bentham scholars of our generation.<sup>21</sup>

Twining proposes that we take globalization seriously. He claims that “in this era of globalization there is a pressing need for a revival of general jurisprudence.”<sup>22</sup> What is “general jurisprudence”? First and foremost, it is a relative term. It is not identical to universal or global jurisprudence. On the other hand, it focuses on more than one legal system. Indeed, Twining contrasts general jurisprudence with both “particular” and “global” jurisprudence. Set off against particular jurisprudence, general jurisprudence deals with questions that “are not confined to or derived from a *single legal* system and they can be asked of many, if not all, legal systems.”<sup>23</sup> In that sense, general jurisprudence is thinner than particular jurisprudence.<sup>24</sup> Conversely, compared with global jurisprudence, “general jurisprudence is broader and more intellectually ambitious,” since it “includes all the *intermediate stages* between two or more legal orders, traditions, or cultures, viewing law in the whole world and beyond. ‘General’ is relative in a way that ‘global’ is not.”<sup>25</sup> Accordingly, general jurisprudence may include the description and analysis of various levels of law, including global (e.g., global environmental issues), international (e.g., relations between nation-states), regional (e.g., the European Union), transnational (e.g., rules

21. Twining serves as director of the Bentham Project at UCL.

22. P. 13. Twining repeats this proposition throughout his book; see in particular chapters 2 (General and Particular Jurisprudence) and 9 (Epilogue).

23. P. 39 (emphasis added). Twining offers at least three more accounts of general jurisprudence as opposed to particular jurisprudence in this chapter: John Austin’s account (“what I mean by ‘General Jurisprudence,’ the science concerned with the principles, notions, and distinctions which are common to systems of law.”) (p. 22, citing JOHN AUSTIN, *THE USES OF THE STUDY OF JURISPRUDENCE* (H.L.A. Hart ed. 1954) (1863)); Ruth Gavison’s account (“general jurisprudence, the attempt to analyze societies at their most general (like the attempt to analyze human nature) and identify those features common to all social organizations which might lead to the need for similar institutions and practices.”) (p. 37, citing Ruth Gavison, *Comment, in ISSUES IN CONTEMPORARY PHILOSOPHY: THE INFLUENCE OF H.L.A. HART* 28 (Ruth Gavison ed. 1987)); and H.L.A. Hart’s account (“[My theory] is *general* in the sense that it is not tied to any particular legal system or legal culture, but seeks to give an explanatory and clarifying account of law as a complex social and political institution with a rule governed (and in that sense ‘normative’) aspect.”) (p. 38, citing H.L.A. HART, *THE CONCEPT OF LAW*, 239 (2d ed. 1994)).

24. Indeed, both Ronald Dworkin and Atiyah & Summers have made the claim that the account provided by such jurisprudence could only be so thin that it will lack any substantial theoretical value. With that, the claim probably had been addressed to “general” in the sense of “universal” jurisprudence. For a discussion, see pp. 41–43.

25. P. 254 (emphasis added).

for multi-national corporations), inter-communal (e.g., the relations between ethnic or religious groups), territorial state (e.g., the law of sub-national jurisdictions, such as Quebec), sub-state (e.g., religious law officially recognized in a plural legal system), and non-state (e.g., the laws of subordinated peoples).<sup>26</sup> In short, general jurisprudence encompasses theories that apply to more than one particular legal system, but not necessarily to all legal systems.

While introducing at length the historical and theoretical background of the concept, Twining stops short of providing a substantial account of the *content* of general jurisprudence in the age of globalization. Rather, the central message of his work, as he puts it, “is one of complexity. It is intended to challenge simplistic assumptions and narrow reductionist perspectives rather than to present a neatly a packaged theory” (p. 247). Consequently, readers who anticipate a detailed account of the new general jurisprudence may feel somewhat unsatisfied. Part IV of this Review Essay suggests the beginnings of such an account.

Another central claim Twining advances is the need to rethink comparative law from a global perspective.<sup>27</sup> Two of the book’s chapters are dedicated to this issue, concluding with a strong recommendation for the introduction of “cosmopolitan legal studies” into the legal curriculum. However, here as well Twining refrains from specifying the exact content of the theory he posits. Recognizing the weight of such a task, he admits, “this is a daunting program that is beyond the capacity of a single Mr. Palomar.”<sup>28</sup> Even outlining such a program is a large undertaking, which must be left to another occasion” (p. 190). One may only hope that such an occasion is soon to occur.

My review proceeds in three parts. Part II provides an account of the jurisprudence of *Globalization and Legal Theory*. Due to the novelty of many of the issues discussed in the book, as well as their importance to the understanding of Twining’s recommendations, I have provided a longer than usual account of several chapters. Part III touches upon one of the central jurisprudential dichotomies introduced by Twining—the distinction between general and particular jurisprudence. Twining compares different accounts of the distinction using pairs of canonical jurists. In particular, he compares

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26. P. 139 (discussing the different levels of law).

27. See *infra* notes 62–70 and accompanying text (discussing chapter seven, *Globalization and Comparative law*); see also Epilogue, pp. 255–56.

28. Twining’s reference here is to Italo Calvino’s MR. PALOMAR (William Weaver trans. 1985) (1983).

H.L.A Hart's *Postscript*<sup>29</sup> with Dworkin's *Law's Empire*.<sup>30</sup> In this part, I juxtapose Twining's record of this exchange with seemingly conflicting accounts provided by other commentators and suggest resolving the apparent conflict. Part IV brings to the fore the concept of general jurisprudence in the age of globalization. Placed in that context, I will suggest that a new general jurisprudence should respond to the challenges posed by globalization. I first identify the driving forces behind globalization, mainly new economic markets, the Internet, and the trend towards democracy. Then, I suggest that some of the current American schools of thought may respond to these very phenomena. Economic analysis of law, feminism, and critical race studies may all have something interesting to say on globalization. My last step is to propose that a transnational version of these theories should form the main body of a new global jurisprudence.

In all, apart from its citation system,<sup>31</sup> this thought-provoking work is a great read. Full of astute observations and catchy phrases,<sup>32</sup> this eloquently written work succinctly conveys the multifaceted nature of globalization and its challenges to legal theory. Most importantly, it fires the opening shot in what will probably become a vehement debate over the nature of the new century's prevailing jurisprudence.

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29. The second edition of Hart's classic, *THE CONCEPT OF LAW* (*supra* note 23), which appeared in 1994, is identical to the first edition published in 1961 save for a postscript written in 1992. This addition to the book, which was edited by Penelope A. Bulluch and Joseph Raz, deals mainly with Dworkin's criticisms of Hart's theory [hereinafter HART, POSTSCRIPT].

30. RONALD DWORKIN, *LAW'S EMPIRE* (1996) [hereinafter DWORKIN, EMPIRE].

31. In the best Oxfordian tradition, the book uses the note-abbreviation method. Each citation is first abbreviated and then referred to only by its short form, with no reference to the original (full) citation. Thus, a reader who wishes to know what "BMR" means on p. 123 n.1, will have to patiently go through the previous thirteen pages until reaching the answer. To top that, some of the abbreviations appear on a special list at the beginning of the book—again with no reference; and, every twenty notes a new count begins. While it is rare to find kind words written about the *Bluebook* system of legal citation—indeed, the relation of most writers towards it often range from ridicule (*see, e.g.*, Patrick M. McFadden, *Fundamental Principles of American Law*, 85 CALIF. L. REV. 1749, 1749 (1999) ("With the cool detachment of anthropologists describing human sacrifice among the Maya, the editors of the *Bluebook* thus calmly report on that particular human custom of legal citation.")) to serious criticism (*see, e.g.*, Richard A. Posner, *Goodbye to the Bluebook*, 53 U. CHI. L. REV. 1343 (1986))—it is safe to assume that most American readers will miss it here. My sincere hope is that later editions will be more user-friendly.

32. I particularly enjoyed "what color is Hercules' passport?" (p. 44); "[t]he bad-man is amoral rather than immoral" (p. 122); and "[c]ombine globalization and post-modernism and one has a dangerous liaison" (p. 195).

## II. THE JURISPRUDENCE OF GLOBALIZATION AND LEGAL THEORY

In depicting another work, Boaventura de Sousa Santos's *Toward a New Common Sense*,<sup>33</sup> which he later describes as "probably the most important theoretical work to date on globalization and law" (p. 251), Twining writes:

Substantial parts of the book had been published before and, although they have been extensively revised, the work moves along a variety of levels and has a feeling of fragmentation that makes it difficult to read. Unity is imposed on the contents in the first and last parts by an intellectually ambitious and abstract statement of a general social theory. The result is rather like a *gigantic sandwich* containing a variety of succulent ingredients held together by a less appealing outer casing (p. 197, emphasis added).

One can hardly imagine a better description of Twining's own work. Though not gigantic in length,<sup>34</sup> the book can be accurately described as an analytic sandwich. Of the nine chapters, only the book's first and last (introduction and epilogue) provide the inevitable "intellectually ambitious" framework of general jurisprudence in the new era. Together with the penultimate chapter, a book review of Santos's work, they consist of the only chapters yet to be published. The other chapters are lectures previously delivered over the past decade and set in chronological order. While most repeat and re-emphasize the need for the revival of general jurisprudence in the age of globalization, all fall short of elaborating on what precisely such a theory would entail. At times, it feels as if the author has made a vigorous attempt to persuade his audience of such a need, but by the time he succeeded he had to move on to the next chapter, starting from square one again. (Another feature of the lamplighter's tragedy, perhaps.)

Twining opens his book with a short description of his project. "It seemed that the time was ripe for a revival of a more general jurisprudence. However, what this might involve was far from clear. It seemed a daunting task. So I decided to begin with a series of preliminary forays, starting with that part of our heritage of juristic ideas with which I was most familiar, viz. Anglo-American

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33. See *supra* note 13.

34. The book holds a very tightly written 260 pages, compared to Santos's "gigantic sandwich," which holds 519 pages (p. 197 n.7).



jurisprudence from 1750 to the present day” (pp. 3–4). This concise passage, as later ones may reveal, consists of both the pros and the cons of the entire work. While there are few who are as closely familiar with the canonical Anglo-American jurisprudential writings of the last three centuries as Professor Twining, it is not clear why it is *there* that one should begin her search for the underpinnings of a new jurisprudence. It is perfectly conceivable to look first at the nature and characteristics of the new process and then to look for an appropriate jurisprudence, rather than to define a process by past jurisprudence. Moreover, as I have already indicated, the question of *what* this general jurisprudence might actually involve remains far from clear by the end of Twining’s book. With that said, this work is still a provocative thought-experiment in adjusting old-school theories to a new-school world.

### A. *Defining Globalization*

Twining begins his discussion by presenting his notion of globalization. He states, “We are now living in a global neighborhood, which is not yet a global village.”<sup>35</sup> Next comes the definition of globalization, a mission some commentators have given up on due to the catch-all nature of the term.<sup>36</sup> It is thus one of the book’s virtues to present a short, clear, and, in my mind, very sound

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35. P. 40. To me, the image of a “global village” never captured the true image of globalization. Take the Internet for example, one of the signatory icons of the age. The size of its community is enormous. A recent Nielsen/NetRating study estimated that in November 2000 the “Internet universe” (number of people with Internet access) consisted of a little over 315,747,000 people. More than half of these are active Internet users. See <http://www.eratings.com/news> at Table 2: Average Usage, At-Home, November 2000. This diverse community—diverse in almost every respect—uses a mammoth web of roads and often-clogged highways, often without knowing of or sharing with each other. These are hardly characteristics of a typical village, but rather those of a huge city, cyber Gotham if you will. And while one may sympathize with the romantic hue attached to the village image, “a global metropolis” seems to depict the new community in a much sounder way. Cf. SASSKIA SASSEN, *THE GLOBAL CITY* (1991) (describing New York, London, and Tokyo as multinational, multicultural social structures).

36. See, e.g., Mark Tushnet, *1999–2000 Supreme Court Review: Globalization and Federalism in a Post-Prinz World*, 36 *TULSA L.J.* 11, 11 n.1 (2000) (“Defining globalization is notoriously difficult. As one commentator observes, the word is often ‘a simple catalogue of everything that seems different since, say, 1970, whether advances in information technology, widespread use of air freight, speculation in currencies, increased capital flow across borders, Disneyfication of culture, mass marketing, global warming, genetic engineering, multinational corporate power, new international division of labor, international mobility of labor, reduced power of nation-states, postmodernism or post-Fordism.’ Peter Marcuse, *The Language of Globalization*, *MONTHLY REVIEW*, July–Aug. 2000 at 23. I think [states Tushnet,] the term helpful nonetheless, and do not attempt a precise definition here.”).

definition of the term. “‘Globalization’ refers to those processes which tend to create and consolidate a unified world economy, a single ecological system, and a complex network of communications that covers the whole globe, even if it does not penetrate every part of it.”<sup>37</sup> With that, Twining goes on immediately to explain that globalization does not imply homogenization<sup>38</sup> and that “the global does not exclude the local, but rather they interact in very complex, sometimes contradictory ways” (p. 5). The tensions between the global and the local on the one hand, and between general and particular jurisprudence on the other, are thus presented as inevitable by-products of the trend towards globalization. As we shall see in Part IV, however, Twining stops short of developing the idea that the factors behind globalization—the global economy, the world ecosystem, and new means of communication—could serve as the main principles upon which the new jurisprudence will be built. Rather, he focuses on the historical and analytical aspects of the term general jurisprudence.

### B. *Defining Legal Theory*

After concluding that globalization “seemingly offers fundamental challenges to contemporary legal theory” (p. 10), Twining moves on to consider the nature and role of jurisprudence itself. Here, obviously on very familiar grounds, he offers a very rich and distinctive account of the role and nature of jurisprudence within the discipline of law.<sup>39</sup> Twining begins with the familiar, the theoretical and historical aspects of jurisprudence, which entails

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37. P. 4. To be sure, Twining’s discussion of the term and its possible implications stretches over seven pages (pp. 4–10). This presentation of the argument is thus necessarily simplified.

38. *See also* p. 89.

39. Pp. 11–13. Such an account is hardly paralleled by American introductory literature on the subject. Since Karl Llewellyn’s observation that “Jurisprudence is as big as law—and bigger,” (in *JURISPRUDENCE: REALISM IN THEORY AND PRACTICE* 372 (1962)), most American commentators are less interested in evaluating the term itself. Rather, they begin their discussion either by considering, like Hart, what is “law” (*see, e.g.*, Ronald Dworkin, *Introduction, in THE PHILOSOPHY OF LAW* 1–9 (1977); GEORGE CHRISTIE & PATRICK MARTIN, *JURISPRUDENCE* 1–11 (2d ed. 1995)) or by providing an historical perspective of the prevailing trends (*see, e.g.*, RICHARD POSNER, *THE PROBLEMS OF JURISPRUDENCE* 4–23 (1990)). Perhaps the reason for that lies, as Posner suggests, in the absence of an established meaning to the term (*Id.*, at 2, n.2, citing R. Tur, *What Is Jurisprudence?*, 28 *PHIL. Q.* 149 (1978)). Hence, Posner states, “I use the word to mean the set of issues in or about law that philosophy can illuminate.” *Id.*

synthesizing, analyzing, and simplifying functions.<sup>40</sup> He augments this account by pointing to some additional features of legal theory, which may have some exciting implications for global jurisprudence (but unfortunately are not further discussed). Consider the relationships between law and other disciplines. Since legal-theory discourse is often characterized by a high level of abstraction, it may serve a cross-disciplinary function. The example Twining provides—theories of justice as being a concern of lawyers, economists, and political theorists—brings the point home well. But one may take the argument a step further. By using its bridge-over-troubled-disciplines function, legal theory could place global phenomena such as world economic markets, the trend towards democratization, and global warming *within* the legal discourse. One result of that might be the consideration of the “law-and” theories as primary candidates for shaping the new jurisprudence. Second, jurisprudence is involved “in the construction of working theories for participants (for example, prescriptive theories of legislation, adjudication, mediation, or advocacy)” (p. 12). Here, again, one can think of some exciting global legal implications.<sup>41</sup> Finally, legal theory may help in the development of “legal technology—that is the invention or creation of concepts, devices, institutions, and procedures as solutions to practical problems” (*id.*). New times call for new measures, and a global jurisprudence most emphatically should be creative in that respect.

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40. P. 11 (“Theory can perform a variety of functions. By standing back one can survey the field, or some sector of it, as a whole and see how different parts are related to each other: one might call this the mapping or synthesizing function. Theorizing can help us to construct and clarify conceptual frameworks, models, ideal types, and other thinking tools—this might be called the conceptual or analytical function. Constructing general concepts, principles, taxonomies and hypotheses can also save repetition and by economizing—one might call it the simplifying function.”).

41. One such implication might be a theory on Kant’s vision of a “cosmopolitan constitution.” See Jeremy Waldron, *What Is Cosmopolitan?* in *PHILOSOPHICAL DESIGNS FOR A SOCIO-CULTURAL TRANSFORMATION* 841, 842–43 (Tetsuji Yamamoto ed. 1998) (discussing Emanuel Kant, *On the Common Saying: ‘This May Be True in Theory, But It Does Not Apply in Practice,’* in *KANT: POLITICAL WRITINGS* 61, 90 (Hans Reiss ed. 1991)). As Twining clarifies, however, such a vision didn’t entail an approval of one world government. See p. 73 n.4 (“[Kant rejected] a centralized regime of world government on the grounds that it would either be a global despotism or else an unstable and fragile empire torn by civil strife.”) In addition, one may think of constructing theories for a new generation of alternative dispute resolution. See, e.g., Ethan Katsh et al., *E-Commerce, E-Disputes, and E-Dispute Resolution: In the Shadow of ‘eBay Law,’* 15 *OHIO ST. J. ON DISP. RESOL.* 705 (2000). (I thank Orna Rabinovich-Einy for this reference.)

Next, Twining turns to present the work's prevailing theoretical distinction, between particular and general jurisprudence.

Particular jurisprudence focuses on the general aspects of a single legal system or order or its constituent phenomena, for example, American constitutional theory or the basic concepts of English law. General jurisprudence focuses on legal phenomena in more than one jurisdiction—i.e. several, many, or all legal system or orders.<sup>42</sup>

General, however, is a relative term. It may be practically local, as in two or more legal systems within one jurisdiction; but characteristically general jurisprudence avails itself of much broader concepts such as the common law world or universal natural law. The most interesting applications of general jurisprudence, as already observed, are revealed in the intermediate levels between the two extremes of locality and universality.

### C. *Defining the Task: General Jurisprudence in the Age of Globalization*

Once all the pieces of the puzzle are introduced, it is time to define the task. As we saw earlier, a central claim made by this work is that “in this era of globalization there is a pressing need for a revival of general jurisprudence.” But why? What is the reason for such a pressing need? Although Twining does not suggest a direct explanation for that question, the structure of his entire work provides, I believe, a powerful justification. An understanding of the need for general jurisprudence can be achieved by synthesizing three of Twining's central claims. First, the relationships between the global and the local in the age of globalization are intricate and complex. The former does not exclude the latter, and they both

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42. P. 13. Compare this argument to Anthony D'Amato's account of the distinction between analytical and sociological jurisprudence. *ANALYTIC JURISPRUDENCE ANTHOLOGY* xi (Anthony D'Amato ed. 1996) (“Analytic Jurisprudence concerns the internalities of law—what law is and how we determine what it is, whether it is consistent and by what standards we measure consistency. . . . In contrast, Sociological Juris-prudence . . . deals with . . . externalities of law—how law connects to, is informed by, or derives from, social values, policies and norms. . . . Analytic Jurisprudence is *general* in conception; it applies to any legal system anywhere in the world. In contrast, Social Jurisprudence derives its content from *particular* legal systems.”) (emphasis added). Indeed, most of the analytical jurists that D'Amato includes in his anthology—Hart, Dworkin, Kelsen, Holmes, and Llewellyn, to name just a few—are considered “general jurisprudence” jurists by Twining.

interact in many, very complicated ways. Second, compared with *particular* jurisprudence, general jurisprudence has something to say about more than one legal system. Third, compared with *global* jurisprudence, general jurisprudence is sensitive enough to deal with all the intermediate levels between the particular and the global, including the global level itself. Hence the need for general jurisprudence. On the one hand such a theory may challenge parochial, "black-box" (self-contained) theories.<sup>43</sup> On the other, it may entail "an adequate consideration of a variety of intermediate stages" (p. 249), thereby rejecting "simplistic assumptions and narrow reductionist perspectives" (p. 247) which are presented by global theories.

By now, the reader may be convinced of the need for developing a general jurisprudence. In particular, such a need exists since "much of twentieth century Anglo-American jurisprudence has been either quite local or else intermediate" (p. 249). But what exactly does such a task entail? What are the main tenets of the new jurisprudence? What are its main claims? What is its relation to other current trends in legal thought? Somewhat surprisingly, the book does not tackle these questions directly. Rather, it provides a less-than-full account of some of the key elements of the new jurisprudence.<sup>44</sup> Here are some of these points. First, it is useful to clarify what general jurisprudence is *not*. It does not involve "any necessary commitment to particular positions on universality, cultural or legal relativism, or the scope from developing a global meta-language, or empirical generalizations about legal phenomena. Such issues are all contested" (p. 254). One may wonder why the new jurisprudence refrains from taking a stand on contested issues (is not that one of the tasks of legal theory?), but we can hold that question for the moment. Second, the central question for general jurisprudence should be, as Twining puts it, "how far is it feasible and desirable to generalize about law, conceptually, normatively, historically, empirically, etc., across jurisdictions, national boundaries, traditions, and cultures?" (*id.*). But surely that question does not take us much further, at least without proper guidelines for evaluation. Moreover, it seems that prior to dealing with the question

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43. The notion of "black-box" theories is discussed at length in several parts of the book. See generally chapter 2 (General and Particular Jurisprudence: Three Chapters in a Story). As examples of theories that were "exclusively American in focus, sources and cultural assumptions," Twining mentions the Critical Legal Studies and the Economic Analysis of Law as they existed in the early 1990s (p. 58).

44. A summary of these points is presented in the Epilogue (pp. 254-55), from which the following analysis is taken.

of “*how far*,” one has to deal adequately with the question of “*how*.” In other words, what are the main features of the theory’s basic framework? Third, Twining suggests developing “an adequate conceptual framework and a meta-language that can transcend particular legal cultures” (p. 89). What would such a framework entail? At first stage it will include “fundamental legal concepts such as rule, obligation, rights and sanction.” But in addition to these by-now-familiar terms, the new jurisprudence will contain an account of concepts “of historical, anthropological, sociological, or political jurisprudence” (p. 255). Moreover, in addition to its conceptual-elucidation aspect, the new jurisprudence will include “issues concerning form and structure, reasoning and rationality, and many other issues shared with rational philosophy” (*id.*).

To be sure, this account of the new jurisprudence is indeed food for thought. The need to incorporate new concepts as well as to introduce new ideas about form and structure, into the new theory seem theoretically and pragmatically sound. With that, I must admit that its high level of abstraction makes it almost impossible to refute. Who could (or would) seriously contest a proposal to include new, more comprehensive, and up-to-date concepts into legal theory? Who can argue with the need to deal with “issues concerning form and structure” in the new world-order? Indeed, one might have expected a more controversial account of the image of the next general jurisprudence. And while Professor Twining rightly deserves to be commended for his important call to promote (and revive) general jurisprudence, most readers might have expected to learn more about its nature.

If the book’s main task is not to portray in detail the image of a new theory, what is it? The principal body of this work consists of three parts. First, a historical, analytical, and critical survey of general jurisprudence as seen by the great Anglo-American jurists of the past three centuries. Second, the study of comparative law and its possible implications to a new legal theory. Finally, a detailed comparison between this project and a previous, post-modern work by Santos. I will discuss each of those in turn.

#### D. *The Canonical Jurists and General Jurisprudence*

Chapters 2–5 are dedicated to a survey of the great Anglo-American jurists and their relations to the notion of general jurisprudence. All the familiar analytical figures are here—from Bentham and Austin to Holmes and Kelsen; from Llewellyn and

Rawls to Hart and Dworkin—all had something substantial to say about general jurisprudence. Twining's conclusion from this survey is positive: "On the whole, they are more relevant than might at first be apparent" (p. 250). Indeed, Twining centers his entire intellectual effort on demonstrating the added value these great thinkers contribute to the discussion. And yet, despite—and maybe because of—the intensity of this effort Twining leaves his reader with a sense of uneasiness. Apart from Rawls and Dworkin, not one of the distinguished members of the group has lived to witness the process of globalization. Not one of the works cited has been written against a factual background that includes the Internet, CNN, or global markets—to name just a few signatory signs of the time. And while some have used relevant terms, such as "citizen of the world" by Bentham, for example, one wonders if that fact alone entitles them to participate in the debate of the shape of the new jurisprudence. A relevant question in this context is whether there is any connection between the "world" Bentham saw (or even envisioned) in the late eighteenth century and the world as it is today—be it a global village, neighborhood or, better yet, a metropolis. In short, why should globalization jurisprudence be ruled from the grave by people who could not know, even if they would have really desired to, the first thing about globalization?

At this stage the American reader may encounter a vague sense of *déjà-vu*. The debate on whether the writings of old jurists should dictate the meaning of currently used notions sounds all too familiar. One of the most vehement arguments in American constitutional theory today revolves precisely around such issues.<sup>45</sup> In a way, however, Twining is turning the originalist argument on its head, by trying to argue in favor of an "original" understanding of a "text" that is yet to be written.<sup>46</sup> Twining would probably argue in

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45. The body of literature on the debate between originalists and non-originalists is enormous. See, e.g., ANTONIN SCALIA, *A MATTER OF INTERPRETATION* 38 (Amy Gutman ed. 1997) ("But the Great Divide with regard to constitutional interpretation is . . . between *original* meaning (whether derived from Framers' intent or not) and *current* meaning.") (originalist); CHARLES L. BLACK, *A NEW BIRTH OF FREEDOM* 15 (1997) ("Some people, faced with this question [of constitutional interpretation], would try to dig up every scrap of paper that happens to have survived since the eighteenth century; and to piece together some sort of 'intent,' with very little weight given to the transcendently relevant piece of paper, on which the duly enacted text of Ninth Amendment was written.") (anti-originalist).

46. Even Justice Scalia agrees that the "original meaning" of a text relates to the meaning *at the time of its drafting*. SCALIA, *supra* note 45, at 38. In the case before us, then, a "fusion of horizons" (see HANS GEORGE GADAMER, *TRUTH AND METHOD* 306–07 (Weinsheimer & Marshall trans., 2d ed. 1994)) occurs: the time-of-the-drafting and the current are one. As a result, even a committed originalist would hesitate to go back in time in order to discern authoritatively the meaning of the term.

response that since the term “general jurisprudence” has already been discussed in academic circles for more than two hundred years, there is no good reason to ignore such a vast body of scholarship. While powerful, I think this answer misses an important point. The issue is not whether one may consult the old jurists on the correct interpretation of general jurisprudence. Rather, it is whether one can consult them on the issue of general jurisprudence in the age of globalization. The question is one of context. To be sure, in constructing the contextual meaning of the term global jurisprudence one is welcome to consult great past jurists and their thoughts on the contextual meaning of the term. Indeed, such a dialogue between different accounts of the term through time may yield a reflective interpretive equilibrium.<sup>47</sup> Nonetheless, it is obvious that the weight of the input of past jurists to notions such as global markets, the Internet, and international corporations is limited. Therefore, their total impact in shaping the current, contextual meaning of the term should not be over emphasized.

I have walked a considerable length in trying to show that turning to past writers as an exclusive source of learning on general jurisprudence in the age of globalization is not sufficient. But such an argument calls, in turn, for the introduction of a different account of general jurisprudence. I will suggest an outline for such an account in Part IV. To be sure, my account will also be based, in part, on past writings. We can only see afar because we are standing on the shoulders of our predecessors. And yet, I argue that the writings we should rely upon do not merely respond to the “general” aspect of the new jurisprudence; rather, they respond to it being the age of globalization.

It is time to return to Twining’s account of the great jurists. Here Twining walks calmly along the familiar paths of his jurisprudential garden. The accounts in this part are extremely knowledgeable, detailed, and, once set in their proper context, very helpful to understanding the concept of general jurisprudence. A few short comments are still in order. First, readers who expect to find a general introduction to the writings of each of the great thinkers might be disappointed. For example, the discussion of Hart’s account does not explain what Primary and Secondary Rules are, or the meaning of the Rule of Recognition.<sup>48</sup> The exposition of Bentham’s account,

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47. See JOHN RAWLS, *A THEORY OF JUSTICE* 48–51 (1971).

48. For a useful introduction see BRIAN BIX, *JURISPRUDENCE: THEORY AND CONTEXT* 31–49 (2d ed. 1999). See generally NEIL MCCORMICK, *H.L.A. HART* (1983); MICHAEL BAYLES, *HART’S LEGAL PHILOSOPHY: AN EXAMINATION* (1992).



though very extensive (pp. 91–107), does not include his definition of utility, or an explanation of why non-legal rights are, in his opinion, “nonsense upon stilts.”<sup>49</sup> Rawls’ account (pp. 69–75) does not deal with the “veil of ignorance,” and so on. One possible explanation for these omissions is that the discussions are intentionally designed to have one focal point—they deal only with the aspect of the theories that may have a direct bearing to general jurisprudence.<sup>50</sup> Another more likely explanation is that these chapters were previously delivered, and published, as public lectures for professional audiences, thereby without need or time for such introductory remarks. However, since this book is aimed at a much wider audience than the lectures, one may hope that these gaps will be filled in future editions.

How did Twining select the *dramatis personae* of his book? Is the collection of analytical positivists, realists, liberalists, and neo-naturalists merely arbitrary? Or is it Twining’s view of a systematic historical account of Anglo-American legal thought? Before we approach Twining’s answer, one must bear in mind a warning made by the renowned English historian, Edward Carr, of the subjective and ever time-dependent nature of historical accounts.<sup>51</sup> But Twining evidently did not pick up a random list of famous writers. Instead, he relies on a recent academic survey which determined the eight representatives of the current canon in taught jurisprudence in England, Australia, and common law universities in Canada.<sup>52</sup> These eight figures—Hart, Dworkin, Rawls, Finnis, Austin, Bentham, Kelsen, and Llewellyn—are the basis of his historically analytical survey. As I indicated earlier, Twining does a very impressive job in tying the legal theory of each to the concept of general jurisprudence. To be sure, there are others who may have contributed to the

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49. P. 106. For such an explanation, see ROSS HARRISON, *BENTHAM* 77–105 (1983) (setting the famous saying against the background of the French declaration of rights).

50. Though this is a possible explanation, one can judge a legal theory against a single argument and still provide an excellent account of its main themes. For a sound demonstration see DANNIS PATTERSON, *LAW AND TRUTH* 59–128 (1996) (reviewing the theories of Hart, Dworkin, and Fish in light of a single question—what does it mean to say that a proposition of law is truth).

51. EDWARD H. CARR, *WHAT IS HISTORY?* 24, 28 (1961) (“In the first place, the facts of history never come to us “pure,” since they do not and cannot exist in a pure form; they are always refracted through the mind of the recorder. . . . The third point is that we can view the past, and achieve our understanding of the past, only through the eyes of the present. The historian is of his own age, and is bound to it by the conditions of human existence.”).

52. Hilaire Barnett, *The Province of Jurisprudence Determined—Again!*, 15 *LEG. STUD.* 88 (1995), cited on p. 57, n.3. Though the survey did not include American schools, it would be fair to say that these prominent thinkers play a central role in most introductory jurisprudential texts published here.

discussion on general jurisprudence no less, and possibly even more than the commentators Twining discusses. Lon Fuller's idea of the internal morality of law<sup>53</sup> and Leslie Howfeld's remarkable analytical framework of rights<sup>54</sup> are merely two examples that come to mind.<sup>55</sup> But this is anecdotal; the point that Twining is trying to deliver—about the relevance of past thinkers to the notion of general jurisprudence—is well taken.<sup>56</sup>

### *E. A Special Case: Comparative Law and General Jurisprudence*

After introducing the views of the main canonical jurists vis-à-vis general jurisprudence, Twining moves on to examine “the prevailing assumptions underpinning work in specialized sub-disciplines that contain a strong transnational element” (p. 251), namely comparative law. At the outset, Twining warns us that “I do not consider myself to be a comparatist.” But the two chapters to follow are full of indications to the contrary. Twining demonstrates deep familiarity with most of the relevant literature on both sides of the Atlantic. He accurately presents the current prevailing notions and then suggests the logical implications for general jurisprudence.

Chapter 6, *Mapping Law*, deals primarily with Twining's bold, but ultimately futile, attempt to map the entire world's legal terrain. The experiment took place in three different continents (Africa, Europe, and America) and over almost forty years (1958–1996). But more than the report on the experiment itself, it is helpful to read Twining's post-mortem account of the reasons for its failure. Though his analysis is very thorough and detailed, it can be fairly reduced to a single sentence: “the phenomena of law are probably too complex to be depicted on a single map or picture” (p. 151). Indeed, the main theme of the chapter is that “describing a legal order is rather like describing a city in that both are highly complex phenomena that can be depicted in many different ways from a great variety of vantage points and perspectives” (p. 212). To demonstrate

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53. LON FULLER, *THE MORALITY OF LAW* 33–91 (rev. ed. 1969).

54. Wesley Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* (1913).

55. It should be stated, in all fairness, that Twining is very familiar with both of these works and that the two scholars are mentioned more than once in this book.

56. As I have indicated earlier, it is my belief that this discussion is not contextual, in that it disregards the globalization factor of the term.

this point, Twining draws heavily on Italo Calvino's *Invisible Cities*.<sup>57</sup>

However, this attempt to map, particularly in the age of globalization, may be futile for another important reason. Mapping presupposes the fixed nature of its subject. If by the time the map is made the terrain (be it physical, mental or cyber) has undergone a transformation, the map would no longer be of value.<sup>58</sup> As we have seen, globalization is defined, first and foremost, as a process.<sup>59</sup> By its nature, every process is transient. In the case of globalization in particular, as Twining himself acknowledged, the process involves "the rapidity of changes" (p. 223). Journalist Thomas Friedman captured this point well by writing that with globalization, we are not only dealing with "a dynamic ongoing process" but rather with one that has a "defining measurement of . . . speed—speed of commerce, travel, communication and innovation."<sup>60</sup> And while it may be persuasively argued that every theory, legal theories included, should not render itself obsolete with every variation of circumstances, it is also true that a theory that is intended to serve such a transitory process may simply not be well suited for the challenge of mapping.

From geographical or physical mapping Twining advances to mental mapping. Here he addresses issues like global statistics, ranking of legal systems in general and the rankings of law schools, primarily the ranking conducted by the *US News and World Report*. I found his remarks on the nature of comparison extremely illuminating.<sup>61</sup>

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57. ITALO CALVINO, *INVISIBLE CITIES* (William Weaver trans., Harcourt Brace & Company 1974). Later Twining suggests to add this book, "in which Marco Polo gives 55 highly imaginative accounts of 55 different cities, or 55 accounts of one city, Venice, or more plausibly, 55 accounts all of which implicitly use Venice as the reference points of comparison" (p. 212), to our juristic cannon (p. 254).

58. The Little Prince can again be of help, this time from the planet of the geographer:

"We do not record flowers," said the geographer. "Why is that?" (asked the little prince.) "We do not record them," said the geographer, "because they are ephemeral." "What does that mean—ephemeral?" "Geographies . . . are books which of all books are most concerned with matters of consequence. They never become old-fashioned. It is very rarely that a mountain changes its position. It is very rarely that an ocean empties itself of its waters. *We write on eternal things.*"

ANTOINE DE SAINT-EXUPÉRY, *supra* note 1, at 53–54 (emphasis added).

59. See *supra* note 37 and the text accompanying.

60. THOMAS L. FRIEDMAN, *THE LEXUS AND THE OLIVE TREE* 9–10 (expanded ed., Anchor Books, 2000).

61. For example, on page 164, we find that "We use comparators not only to compare two or more objects, but also to describe individual phenomena."

Chapter 7 deals with globalization and comparative law.<sup>62</sup> One of the working premises Twining advances here is that today, “nearly all legal studies are cosmopolitan in that legal scholars, law students and many professional actors regularly have to use sources, materials and ideas developed in more than one jurisdiction and in more than one legal culture” (p. 255). Is that claim valid for American legal studies? As long as one considers the United States—Federal and State legal systems combined—as one jurisdiction or legal culture,<sup>63</sup> the assertion could be vehemently contested. American commentators have strongly emphasized the parochial nature of the American legal discourse.<sup>64</sup> Elsewhere in the book, Twining himself attests to that phenomenon, arguing that “much American writing cites only or mainly or almost exclusively American sources even when dealing with issues that are not merely local” (p. 128). It seems, then, that either American legal studies are not yet cosmopolitan, or that the United States should be considered as a micro-cosmos of its own.<sup>65</sup> In any event, while the validity of the claim as positive law can be contested, it seems that most will agree on it as being a worthy cause.

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62. See also Annelise Riles, *Wigmore's Treasure Box: Comparative Law in the Era of Information*, 40 HARV. INT'L L. J. 221, 223–24 (1999) (“This moment of fascination with things global, and the demands that this creates in all aspects of legal scholarship and practice, call for a reconsideration of the rules. This would seem to be precisely the task of comparative law—hence the renewed interest in the field. Comparative legal scholarship is thought to be sorely needed both as a tool for solving the new problems of globalization and because it seems to be the key to a wider understanding of global, transnational, or cross-cultural legal phenomena. Indeed, comparativists have been quick to embrace this somewhat amorphous but powerful rationale for their projects.”) (footnotes omitted).

63. *But see* p. 128 (“is there one American legal culture that encompasses California, Boston and Cripple Creek Colorado?”).

64. See George P. Fletcher, *Comparative Law as a Subversive Discipline*, 46 AM. J. COMP. L. 683, 690 (1998) (“The striking feature of American jurisprudential debate is its provinciality. The arguments go forward as though we are the only legal system in the world. The world may be getting smaller. Investment brokers are now as familiar with the Asian markets as they are with the NASDAQ. But despite the cant about globalization and global law programs, we teach law much the same way as we have since the time of Langdell.”); *see also* Ackerman, *supra* note 2, at 772–73 (“But the global transformation has not yet had the slightest impact on American constitutional thought. The typical American judge would not think of learning from an opinion by the German or French constitutional court. Nor would the typical scholar—assuming, contrary to fact, that she could follow the natives’ reasoning in their alien tongues.”) (footnotes omitted). Twining himself laments on the parochial nature of legal theory in America. *See* p. 58 (“[American jurisprudential movements of the last two decades] are almost exclusively American in focus, sources and cultural assumption.”).

65. Although it seems that the latter option falls under Twining’s definition of legal pluralism. *See* pp. 82–88.

The other main points of this chapter, all sound in my mind, can be summarized in the following way.<sup>66</sup> First, a (by now familiar) distinction should be drawn between parochial or local and cosmopolitan legal studies. While parochial studies tend to look at one legal system, cosmopolitan legal studies involve a substantial cross-jurisdictional or foreign dimension. Today, few legal scholars can afford to be strongly parochial, in particular with respect to their focus or sources.<sup>67</sup> Second, most legal systems today share the concepts of legal pluralism,<sup>68</sup> multiple levels of ordering,<sup>69</sup> and integrality. A major contributing factor for that development is the collapse of the notion of a "black-box" community, a self-contained, completely autonomous social unit. As a result, even a rudimentary description of these legal systems necessarily involves at least an implicit comparison. "In a loose sense, we are all comparativists now" (p. 255). Third, in order to prepare legal students for the cosmopolitan age, comparative methods should be introduced into every legal program. With that, because we are still in a stage of transition, the motto should be, "think global, focus local" (p. 256). Fourth, there is room for more specialist scholars, associations, journals, courses, and projects on comparative law. Due to the growth of the discipline, it requires more than ever the insights, knowledge, and skills that such specialized forms of learning can bring. Fifth, though the practice of comparative law has been substantially developed in recent years, the theoretical aspect of the field has not followed suit. As a result, there is a tendency to shy away from addressing difficult theoretical questions concerning comparability, comparative method, the construction of usable cross-cultural concepts, generalization, and so on. A related point, sixth, is that institutionalized comparative law has tended to be marginalized

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66. Pp. 174–93. Twining himself summarizes this chapter on pp. 255–56. My analysis here relies to a great extent on this summary.

67. By "focus" Twining means the theory's issues. "A *focus* is strongly parochial if it is limited to local parish pump issues" (p. 128). By "sources" he means the origin of the references used. "Juristic writing may be local or parochial in respect of *sources*. For example, much American writing cites only or mainly or almost exclusively American sources, even when dealing with issues that are not merely local." *Id.*

68. That is, they have more than one set of orders co-existing in a single geographic space. The concept is discussed on pp. 82–88. As an example to a pluralist legal system the author brings Tanzania in the 1960s. The legal system there involved "local legislation, Islamic, Hindu, and 'customary' law. English common law and 'statutes of general application' served as a residual law under a standard 'reception clause.' All of these bodies of law were recognized by the state and some formed part of a single national legal system" (p. 83).

69. *See supra* notes 25–26 and accompanying text.

in academic circles.<sup>70</sup> Few modern canonical jurists have paid much sustained attention to comparative law and its theoretical problems (p. 177). As a result, comparative law tended to be quite isolated from mainstream legal theory. However, comparative law and legal theory are interdependent. Foreign and comparative legal studies provide much of the raw material for developing a new general jurisprudence.

The penultimate chapter, Globalization, Post-modernism and Pluralism, serves in two capacities. First, it introduces at considerable length Santos's post-modernist work on globalization and legal theory.<sup>71</sup> This is Twining's "textbook" for the seminar on globalization (p. 257). Two other post-modern works that are considered are Susan Haak's project on "innocent realism"<sup>72</sup> and Italo Calvino's *Invisible Cities*.<sup>73</sup> Second, it juxtaposes Twining's conservative account<sup>74</sup> with some unorthodox post-modernist arguments. Apart from the inevitable jargon, Twining is doing an exceptional job here in elucidating some of the most complex concepts of legal post-modernism.<sup>75</sup> On the other hand, at times the two accounts—conservative and post-modern—seem to stand so far apart, speak in such different terms and address so many different issues that it is very hard, if not impossible, to create a meaningful dialogue between them.<sup>76</sup> Even the point that comes across most clearly—the different kinds of predictions the works are willing to

70. Cf. Fletcher, *supra* note 64, at 690–95 (suggesting a detailed account of the reasons for the failure of comparative law as an academic discipline both in the US and in other countries.); Riles, *supra* note 62, at 224 ("For decades, comparativists have watched interest in their scholarship wane to the point that one of the principal preoccupations of the field has become how to convince "mainstream" legal scholars of the value of their enterprise.").

71. SANTOS, *supra* note 13.

72. SUSAN HAAK, *MANIFESTO OF A PASSIONATE MODERATE* (1998).

73. CALVINO, *supra* note 57.

74. P. 195 ("The argument was essentially conservative in that it suggested that there is much in our heritage of canonical texts that is worth preserving and using in this changing situation.").

75. For example, Twining distinguishes between *imaginative* and *irrationalist post-modernism*. The former "emphasizes the elusiveness of reality, the fallibility of what passes for established knowledge, the importance of attending to multiple perspectives and points of view, a resistance to closure, and a playful style that treats metaphor and imagination as necessary to understanding complex phenomena;" the latter "seems to involve commitment to strong versions of cultural relativism, epistemological skepticism, anti-rationalism and irrationalism" (p. 196). While embracing, within certain limits, the idea of imaginative post-modernism, Twining rejects the notions presented by irrationalist post-modernism.

76. See, e.g., p. 203 ("Some readers may dismiss this part of *Toward a New Common Sense* as incomprehensible. I personally find the metaphors intriguing, but frustratingly vague. . . . I read these chapters (and Santos's subsequent address) with enjoyment and skepticism in equal measure.").

make—does not contribute much to the understanding of Twining's project.<sup>77</sup> In short, while the chapter can be seen as an invaluable source for the understanding of otherwise inaccessible texts, it contributes little to the understanding of Twining's own project.

The last chapter, Chapter 9, Epilogue, succinctly summarizes the entire project. It is followed by an appendix that introduces the seminar Twining gives on globalization and law, including a list of the suggested readings.

### III. HART, DWORKIN, AND GENERAL JURISPRUDENCE: THREE VIEWS OF THE CATHEDRAL?

#### A. *Three Different Views*

In the previous part we saw the distinction between general and particular jurisprudence. Historically, by the late-eighteenth century and for most of the nineteenth century, English jurisprudence was assumed to be general, primarily due to the writings of Jeremy Bentham (1748–1832), a “citizen of the world,”<sup>78</sup> and his disciple John Austin (1790–1859).<sup>79</sup> In the late-nineteenth century the trend shifted, as British law schools began to move towards particular jurisprudence, primarily due to practical considerations of the curriculum. This trend continued until 1961, when H.L.A. Hart revived general jurisprudence in the first edition of his *Concept of Law* (pp. 25–35, 249). But it was not until 1992, in his posthumously published *Postscript to the second edition*, that Hart used the distinction in a substantial mode.<sup>80</sup> Here, the term general

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77. P. 223 (“The main difference between Santos’s and my interpretations of globalization seems to be largely one of time scale. He readily concedes that in the medium and the short term the nation state is likely to remain by far the most significant actor at nearly all levels and what he calls ‘counter-hegemonic forces’ are currently underdeveloped and weak. Conversely, given the rapidity of change and the complexity of the processes, I do not feel capable of making confident predictions about the longer term. Where he is utopian and optimistic, I am agnostic and rather more pessimistic.”).

78. JEREMY BENTHAM, A FRAGMENT ON GOVERNMENT 397–98 (J.H. Burns & H.L.A. Hart eds. 1977), cited at p. 16 n.2.

79. Pp. 15–24.

80. Pp. 35–38, 249. Twining contends that Hart drew no sharp distinction between general and particular jurisprudence in the first edition to his book, and that even his later works “on causation, intention, responsibility and rights could reasonably be interpreted as contributions to particular jurisprudence.” (p. 35). I beg to differ with this assertion as long as it relates to Hart’s classic (co-authored with A. M. HONORÉ) on CAUSATION IN THE LAW (2d ed. 1985). This work is considered by many to be a classic demonstration of the application of methods of analytic philosophy—general analytical philosophy—to law.

jurisprudence was invoked as a basis for comparison between Hart's own work and Ronald Dworkin's *Law's Empire*.<sup>81</sup> The two enterprises, Hart contended, were "radically different." While his was *general* "in the sense that it is not tied to any particular legal system or legal culture," Dworkin's was "addressed to a *particular* legal culture,"<sup>82</sup> which is usually the theorist's own and in Dworkin's case is that of Anglo-American law."<sup>83</sup> For this and other reasons, Hart could not see the logic in comparing the two works.<sup>84</sup>

Hart's account—depicting his own work as general while Dworkin's as particular—is compellingly challenged by Twining. While agreeing with Hart that his own work "is clearly in the tradition of general jurisprudence," Twining describes Hart's particularistic account of Dworkin as "absurd" (p. 38). First, he argues that the idea that interpretation of a social practice involves "showing it in its best light"<sup>85</sup> is not limited to any legal system.<sup>86</sup> Second, Dworkin's account of Hercules, while he may not be "a citizen of the world," provides a model for judging "in any liberal democracy" (p. 39). Finally, "Dworkin's criticisms of legal positivism are not confined to England and the United States" (p. 39).

Still, in order to convincingly claim that Dworkin's account is general, Twining had to overcome yet another zealous contender—Ronald Dworkin himself. Indeed, it was Dworkin who insisted that "interpretive theories are by their nature addressed to a particular legal culture, generally the culture to which their authors belong."<sup>87</sup>

81. DWORKIN, *EMPIRE* *supra* note 30. In explaining his decision to focus on Dworkin's critique, Hart wrote that "he [Dworkin] has not only argued that nearly all the distinctive theses of this book are radically mistaken, but he has called in question the whole conception of legal theory and of what it should do which is implicit in the book." HART, *POSTSCRIPT*, *supra* note 29, at 239.

82. *Citing* DWORKIN, *EMPIRE*, *supra* note 30, at 102.

83. HART, *POSTSCRIPT*, *supra* note 29, at 240.

84. *Id.* at 241 ("It is not obvious why there should be or indeed could be any significant conflict between enterprises so different as my own and Dworkin's conceptions of legal theory.").

85. P. 39 (*citing* DWORKIN, *EMPIRE*, *supra* note 30, at 90).

86. P. 38. For an argument placing Dworkin's "law as integrity" credo in even a wider context—that of the postmodern "web of knowledge"—see Michael Dorf, *Truth, Justice and the American Constitution*, 97 COLUM. L. REV. 133, 137 n.17, 146–48 (1997) (reviewing RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996) and DENNIS PATTERSON, *LAW AND TRUTH* (1996)) (convincingly showing that no practical differences exist between Patterson's post-modern account of "law and truth" and Dworkin's theory of "law as integrity.").

87. DWORKIN, *EMPIRE*, *supra* note 30, at 102.



But Twining is not fazed. First, he invokes Sir T.E. Holland's<sup>88</sup> example of a geologist who has studied only English strata. Does that make his findings "English geology"? Holland's response is negative: the findings could be scientific only if the generalizations about them "would hold good everywhere" (p. 28). Second, while agreeing with Dworkin that in order to be practical, "jurisprudence . . . has to be local and particular," Twining claims that "that does not mean that the core elements in his theory only apply to one system" (p. 41). Third, and most importantly, Twining depicts Dworkin's account of his own theory as inaccurate. "Dworkin may have done himself a disservice by claiming to advance a theory of adjudication. What he is really advancing is a theory of correct interpretation of legal norms" (p. 45). Hercules is not only a symbol of a great judge. He also stands as a model for anyone who is interested in making informed decisions as to what the law prescribes, be it public officials, lawyers, or good citizens. Using Dworkin's own theoretical tools, Twining concludes, "one doubts whether labeling Dworkin's theory as a 'theory of adjudication' is making it the best it can be. It has a much wider reach than that" (p. 46).

Twining's first argument is arguably misplaced. It seems that invoking Holland's geology example is to assume the very question being argued. Geology is different from law both in that it deals with natural phenomena rather than social practices and due to the tendency of its subjects to appear in similar forms all over the world (and, as we know today, on other planets as well). For example, when Déodat de-Dolomieu discovered a common rock-forming mineral in the late-eighteenth century, his findings were not limited to any particular jurisdiction. On the contrary, Dolomite rocks appeared, then and now, in many places around the world, and they all share the same characteristics. In contrast, law is a social artifact, a man-made phenomenon. It appeared in different cultures at different times in many distinct forms.<sup>89</sup> By its nature it cannot be identical, but rather, at most, share some common principles or conceptions. True, these are the same features general jurisprudence would like to reveal. But from here to geology there is still a considerable distance. Comparing law to geology, in short, simply begs the question.

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88. Sir T.E. Holland (1835–1926) was an Oxford Professor from 1874 to 1910. See p. 26 n.9.

89. Cf. Leslie Green, *Philosophy and Law: The Concept of Law Revisited*, 94 MICH. L. REV. 1687, 1687 (1996) (reviewing HART, *CONCEPT*) (presenting the following as one of the main theses of Hart's book: "Law is a social construction. It is a historically contingent feature of certain societies, one whose emergence is signaled by the rise of a systematic form of social control and elite domination.").

But let us return to Twining. As noted earlier, he agrees with Hart that *The Concept of Law* is of a general nature. By now, he also concludes that "*Law's Empire* advances a general theory of law, or at least of adjudication; it contains very few concrete examples of interpretation and those are mainly illustrative" (p. 41). And while agreeing that "some of Dworkin's other writings are more local," he argues that they "can be interpreted as application of the general approach."<sup>90</sup> Thus, Twining finds both Hart's and Dworkin's works to be of a general nature.

Other commentators have examined this issue and come up with yet another option: both Hart and Dworkin deal with *particular* jurisprudence. Twining discusses in that respect P.S. Atiyah and Robert Summers, who argued in their seminal comparative work of England and the United States<sup>91</sup> that Dworkin and Hart could be best understood as contributing to his own legal system (p. 42). In another comparative report, Richard Posner expresses an almost similar opinion:

The preface to *The Concept of Law* says that the reader is free to take the book as "an essay in descriptive sociology"<sup>92</sup> and so taken, especially in contrast to Dworkin's writings, it is illuminating as a stylized description of the modern English legal system by a knowledgeable insider, just as Dworkin's jurisprudence is illuminating as a stylized description of the methods of liberal Supreme Court Justices, and just as the discussion of corrective justice in the *Nicomachean Ethics* is illuminating as a stylized description of the Athenian legal system of Aristotle's day.<sup>93</sup>

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90. P. 41. Twining does not make a reference here to Dworkin's *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* (1996), published four years prior to his own book, though a perfect candidate for a local application of Dworkin's general approach. For an elaboration of this argument, see Dorf, *supra* note 86, at 138-43.

91. P.S. ATYAH & ROBERT S. SUMMERS, *FORM AND SUBSTANCE IN ANGLO AMERICAN LAW* (1987).

92. HART, *supra* note 23, at v.

93. RICHARD POSNER, *LAW AND LEGAL THEORY IN ENGLAND AND AMERICA* 20 (1996) [hereinafter POSNER, *ENGLAND AND AMERICA*] (lecture one: "Hart vs. Dworkin, Europe vs. America").

## B. Resolving the Puzzle?

There are, then, at least three different accounts of Hart's and Dworkin's enterprises. The first—Hart's own—asserts that his work is one of general jurisprudence, while Dworkin's is of particular nature. Dworkin, it seems, would agree with that analysis, at least with regard to his part in it. The second account, by Twining, claims that both works are of general jurisprudence: while Hart was right in portraying his work as transcending legal systems, Dworkin was too cautious in describing his as merely an Anglo-American adjudication theory. Finally, two comparative accounts of the English and American legal systems have argued that both works could be best seen as contributing to particular jurisprudence.

Though at first sight these accounts seem conflicting, a closer look may reveal that all three are but different views of the same cathedral.<sup>94</sup> In order to put those meta-theoretical evaluations in their proper perspective, however, one may turn to the basic distinction between law as a contextual phenomenon and as an abstract, acontextual phenomenon.<sup>95</sup> "Law" can be seen either as an independent notion, divorced from its particular occurrences, or as an empty shell, filled with content only when "at work."<sup>96</sup> Questions

94. The *locus classicus* of all theoretical views of a cathedral is, of course, Guido Calabresi & Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (an allusion to Monet's Rouen Cathedral series). Twining, I presume, would prefer to use Calvino's metaphor of fifty-five depictions of the same city. Responding to the idea of objective existence versus different appearances, Carr noted that "[i]t does not follow that, because a mountain appears to take on different shapes from different angles of vision, it has objectively either no shape at all or an infinity of shapes." CARR, *supra* note 51, at 30. I will not explore here another route of reconciling all three accounts—that of admitting that they simply respond to different questions and thus serve different purposes. Twining considers such a solution. See p. 39 ("Jurisprudence is a wasteland of false polemics and one way of disposing of such squabbles is to show that the best interpretation of two apparently conflicting positions is that they provide answers to different questions rather than rival answers to shared questions."); see also BIX, *supra* note 48, at 12 ("The short answer to [questions of conflicting theories of general jurisprudence] is that different theories seem to be responding to different types of inquiries and are making different kinds of claims.").

95. This distinction, echoing the classic dichotomy between concepts and precepts, is as old as philosophy itself. In his famous attempt to synthesize the two, Kant wrote: "[w]ithout sensibility no object would be given to us, without understanding no object would be thought. Thoughts without content are empty, intuitions without concepts are blind. . . . The understanding can intuit nothing, the senses can think nothing. Only through their union can knowledge arise." IMMANUEL KANT, *CRITIQUE OF PURE REASON*, A 51 B/75 (N. Kemp Smith trans., 2d ed. 1933) (1781).

96. See Andrei Marmor, *INTERPRETATION AND LEGAL THEORY* 35 (1992) ("The basic presumption underlying the analytical approach to jurisprudence is that a distinction exists between the abstract concept of law and its realization in particular institutions. An attempt to characterize the concept of law is basically independent of attempts to answer questions on

such as “what is law?” are generally of interest to people holding the former view, while contextual questions, such as whether a pre-existing debt constitutes a valid consideration,<sup>97</sup> belong to the latter.<sup>98</sup>

This distinction between jurisprudence at large and the study of “law at work”<sup>99</sup> can provide a useful criterion for assessing different accounts of a jurisprudential work. Someone who adheres to such a distinction would be drawn to, or at least would be willing to accept, the *general* aspects of a legal theory, those aspects which apply to more than one system regardless of the specific context of its appearance. Conversely, one who eradicates the notion of an independent law, one who deems acontextual law as unsound, would tend to emphasize the particular aspects of a legal theory.

Richard Posner is an outspoken representative of the “law in context” camp. He believes that the question “what is law?” is of no real value.<sup>100</sup> He also suggests that it is Hart’s belief in the notion of acontextual law that created the (wrong) impression of the general nature of his work.<sup>101</sup> Properly viewed, then, Hart’s account should be put into context. Not surprisingly, Atiyah and Summers share this resentment for an isolated notion of law: “In our view, then, the primary subject matter of jurisprudence is not a single universal subject matter, abstracted from the variant phenomena of law in all societies. It should, rather, consist of relevant features of the

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what the law requires in this or that situation. ‘What is the law?’ and ‘What is (or should be) the law on a given issue?’ are, according to this traditional view, separate and basically independent questions.”)

97. *Swift v. Tyson*, 41 U.S. (16 Peters) 1 (1842).

98. Note that at times, contextual questions may relate to the term “law” as well. For example, if an act contains the word “laws” in it, such as in the Rules of Decision Act (see *Swift, id.*), the term must be interpreted; nonetheless, this interpretation will not be stripped of context. See POSNER, ENGLAND AND AMERICA, *supra* note 93, at 8–10.

99. H.L.A. Hart, *Definition and Theory in Jurisprudence*, in H.L.A. HART, *ESSAYS IN JURISPRUDENCE AND PHILOSOPHY* 21 (1983).

100. POSNER, ENGLAND AND AMERICA, *supra* note 93, at 2–3 (“[L]aw’ is so difficult, maybe impossible to define acontextually. . . . I have nothing against philosophical speculation. But one would like it to have some pay-off; *something* ought to turn on the answer to the question ‘What is law?’ if the question is to be worth asking by people who could use their time in other socially valuable ways. Nothing does turn on it. I go further: the central task of analytic jurisprudence is, or at least ought to be, not to answer the question ‘what is law?’ but to show that it should not be asked, because it only confuses matters.”).

101. *Id.* at 37 (“Now we know why the concept of law is so elusive. Writers on jurisprudence [i.e., Hart] treat it as a universal topic; they decontextualize it; yet actually it is local. Within the context of a specific legal system, with its own settled expectations concerning the judicial function, it is possible to pronounce a judicial decision ‘lawless’ because it relies on considerations or materials that the local culture rules out of bound for judges.”).

phenomena of law in one or more particular societies.”<sup>102</sup> As a result, both comparative accounts focus on the particular nature of the two works.

On the other end we find Hart and others, such as Joseph Raz. They firmly believe in the existence of the concept of “law” or of “legal system” as such.<sup>103</sup> As a result, they would have no difficulties in delineating their own work, or that of others, as one of general jurisprudence.<sup>104</sup> Recall that Twining, a student of Hart and, like him, an analytical positivist, agreed that “Hart’s work is clearly in the tradition of general jurisprudence.”<sup>105</sup>

Dworkin is the most intricate. He opens his introduction to a collection of essays on the philosophy of law with an illuminating discussion of “what is law?”<sup>106</sup> On another occasion, while comparing legal positivism and natural law theories to his, he wrote: “Neither of the two positions fits the actual practice of lawyers and judges . . . the third, interpretive, view of law fits the practices of lawyers, judges, and other legal officials naturally and convincingly.”<sup>107</sup> And in introducing the philosophy behind *Law’s*

102. ATIYAH & SUMMERS, *supra* note 91, at 418.

103. See JOSEPH RAZ, *THE CONCEPT OF A LEGAL SYSTEM* 1 (2d ed. 1980) (“This work is an introduction to general study of legal systems. . . . A comprehensive investigation may result in what could be called a theory of legal system. Such a theory is general in that it claims to be true of all legal systems. If it is successful it elucidates the concept of a legal system, and forms a part of general analytic jurisprudence.”).

104. Hart in fact opens his famous book with a discussion of “What is law?” However, Richard Fallon is right by pointing out that less than “the law” as such, Hart discusses the context in which the question is likely to arise: that of a legal system. Richard Fallon, *Reflections on Dworkin and Two Faces of Law*, 67 NOTRE DAME L. REV. 553, 554–55 (1992).

105. P. 38. In an article written in 1991, however, Twining expressed a very “contextual” concept of law. While considering some unifying elements of the series “Law in Context” which he edited, Twining wrote:

One possible solution might be to spell out a theory of law as a basis for the series as a whole. This, however, would almost certainly turn out to be either too vague to be useful or so dogmatic as to be both controversial and constricting. . . . Nearly all legal theories are contextual, with the possible exception of Kelsen’s Pure Theory and its poor relations. . . . [A] characteristic of the tradition we are reacting against is that . . . “theory” is not considered as having a direct bearing on “practice,” which would include the practice of legal writing.

William Twining, *Reflections on ‘Law in Context,’* in *LAW IN CONTEXT*, *supra* note 17, at 44. A possible explanation would be that while these remarks were written in the *context* of a particular (English) text-book series, in regard to globalization and legal theory the approach is, and should be, quite different.

106. Dworkin, *supra* note 39, at 1–9.

107. Ronald Dworkin, *Law and Morals*, in *THE OXFORD COMPANION TO PHILOSOPHY*, 473–74 (Ted Honderich ed. 1995).

*Empire*, he states: “This book takes up the internal, participants’ point of view; it tries to grasp the argumentative character of our legal practice by joining that practice and struggling with the issue of soundness and truth participants face.”<sup>108</sup> Andrei Marmor depicted that quality of being multifaceted well, claiming that Dworkin’s theory of “law as interpretation” successfully challenges the traditional division between “what is law?” and “what is (or should be) the law on a given issue?”<sup>109</sup>

It is no wonder, therefore, that Dworkin’s theory can be depicted by him or by others either as of a general or a particular nature (granted that his main source of inspiration is the practice of the American Supreme Court). Yet, Twining was right in pointing to several general aspects of his theory.<sup>110</sup> To those one can add Dworkin’s criticism of pragmatism,<sup>111</sup> his analytical distinction between the pre-interpretive, interpretive, and post-interpretive stages,<sup>112</sup> and many others.<sup>113</sup>

To conclude, the depiction of a legal theory—either by its author or by others—can be explained, in many cases, by one’s view on the notion of acontextual law. As long as one does not believe in such an independent concept, she will mostly turn to the theory’s particular aspects. In the case that one does, she will find no difficulty in ascribing general aspects to the theory. Finally, if one challenges the very distinction between contextual and acontextual “law,” it is most likely that her theory could be depicted as either particular or general.

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108. DWORKIN, *EMPIRE*, *supra* note 30, at 14.

109. Marmor, *supra* note 96, at 35 (“Dworkin’s theory of Law as Interpretation challenges this conceptual division. On the thesis that ‘law is interpretive throughout,’ Dworkin argues not only that accounting for the concept of law is a matter of interpretation, but also, and more interestingly, that such accounts are inevitably tied up with considerations of what the law is there to settle.”).

110. *See supra*, notes 87–90 and accompanying text.

111. DWORKIN, *EMPIRE*, *supra* note 30, at 151–75.

112. *Id.* at 65–68.

113. *See also* BIX, *supra* note 48, at 10. While depicting Dworkin’s theory as an example of a particular jurisprudence (“a theory which tried to analyze and explain only one’s own legal system”), he adds that this description is true only to a limited extent: “However, [Dworkin’s] theories of particular legal system are examples of a general (interpretive) approach to all social practices. There is thus at least that one general claim: that this interpretive approach is appropriate for understanding all legal systems.” *Id.* at 10, n.4.

#### IV. TOWARDS GENERAL JURISPRUDENCE IN THE AGE OF GLOBALIZATION

*Globalization and Legal Theory* can be seen as a “preliminary exploration of how far the ideas of some mainstream Anglo-American jurists might be responsive to the challenges of globalization and the need for a new general jurisprudence.”<sup>114</sup> The structure of the main argument can be broken into two pieces. First, Twining defines globalization and presents the challenges posed by it to legal theory. Emphatically, this part concludes with a call for a new concept of general jurisprudence. Second, Twining suggests a historical and analytical survey of general jurisprudence as discussed by familiar, mainstream jurists.<sup>115</sup> As already mentioned, however, Twining refrains from providing a detailed account of the content of this new general jurisprudence. A claim could be made that once we have established the meaning of globalization on the one hand, and of the (original) concept of general jurisprudence on the other, there exists a need for synthesizing the two, by presenting the concept of general jurisprudence in the age of globalization. Surely this Review Essay is not the proper forum for such a daunting task. A preliminary sketch, however, may be in order. Hence the structure of this part.

First, I suggest looking into the main tenets of, or driving forces behind, globalization. I agree with Twining that these are, primarily, world economic markets and technological innovations, particularly the Internet.<sup>116</sup> To these, I would add the trend towards democratization. Next, I argue that the new jurisprudence should reflect and respond to these forces. I further suggest that some modern American movements—mainly law and economics, feminism, and critical race studies (which the book mostly passes over with silence)—in fact respond to these trends. Finally, I propose considering a transnational version of these theories as possible basis of the new general jurisprudence.

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114. Twining summarizes the project in this way on p. 195.

115. On p. 14, Twining justifies the choice he made with the following: “I have found that starting with the familiar and mainstream has been helpful to me in trying to get to grips with issues that are bewildering in their range, complexity, and pace of change.”

116. See *supra* notes 35–38 and accompanying text.

### A. *Some Thoughts on Globalization*

Twining's account of globalization relies mainly on authorities from the first half of the 1990s, most of whom are non-American. It would be useful, then, to begin our journey with a brief overview of some of the recent American scholarship on the issue. "Globalization," writes Louis Henkin, is "a new word, a new development, a new phenomenon, that has become almost a buzzword. State socialism is gone, and state capitalism, too, is giving way to privatization. A global economy is largely replacing and overwhelming national and regional economies."<sup>117</sup> Echoing these ideas, Mark Tushnet noted: "[t]he current buzz-word about the economy is globalization. In one aspect, globalization entails a reduction in the power of existing governments to regulate economic activity."<sup>118</sup> Adding a technological aspect to this account, Saskia Sassen states, "[t]he growth of a global economy in conjunction with the new telecommunications and computer networks that span the world has profoundly reconfigured institutions, fundamental to processes of governance and accountability in the modern state."<sup>119</sup> One of the most comprehensive accounts of the term is provided by the *New York Times* columnist Thomas Friedman. In his book, *The Lexus and the Olive Tree: Understanding Globalization*,<sup>120</sup> Friedman defines globalization as

the inexorable integration of markets, nation-states and technologies to a degree never witnessed before—in a

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117. Henkin, *supra* note 3, at 5–6 (footnotes omitted). He continues: "Companies created in one country are headquartered in another with branches and subsidiaries, or mines and factories, in third or fourth or fifth or more countries. Multinational companies are swallowing up national companies, and finding themselves subject to the confusion and inefficiency of competing sovereignties." *Id.*

118. Tushnet, *supra* note 36, at 11.

119. SASKIA SUSSEN, *LOSING CONTROL? SOVEREIGNTY IN AN AGE OF GLOBALIZATION*, xi–xii (1995). She goes on to say, "State sovereignty, nation-based citizenship, the institutional apparatus in charge of regulating the economy, such as central banks and monetary policies—all of these institutions are being destabilized and even transformed as a result of globalization and the new technologies." *Id.* Cf. Gordon R. Walker & Mark A. Fox, *Globalization: An Analytical Framework*, 3 *IND. J. GLOBAL LEG. STUD.* 375, 378 (1996) ("The origins of the concept 'globalization' can be traced back to the writings of Wendell Wilkie and the Club of Rome. These early formulations, however, occurred prior to the collapse of Bretton-Woods and the development of the new global communications technology. [With] the macroeconomic and technological preconditions for globalization . . . firmly in place, the modern meaning of 'globalization' implies a global perspective of the particular area of study, a perspective which arises from the increased interdependence of national institutions and national economies.") (footnotes omitted).

120. FRIEDMAN, *supra* note 60.



way that is enabling individuals, corporations and nation-states to reach around the world farther, faster, deeper and cheaper than ever before, and in a way that is enabling the world to reach into individuals, corporations and nation states farther, faster, deeper, cheaper than ever before. This process of globalization is also producing a powerful backlash from those brutalized or left behind by this new system.<sup>121</sup>

Naturally, the economical changes did not happen in a political vacuum. Closely linked to the market-oriented part of globalization, therefore, one can find the tendency toward democratization.<sup>122</sup> Mark Tushnet opened his 1998 Supreme Court Foreword with the following description: “[t]he decade of the 1990s saw a wave of constitutional transformations around the world. The most dramatic constitutional changes have involved the overthrow of totalitarian governments. No less important have been transformations that have helped turn modern welfare states from a focus on a command-and-control regulation to market-oriented regulation.”<sup>123</sup> Noble Prize laureate economist Gary S. Becker observed that “democracy is the soil where capitalism flourishes best.”<sup>124</sup> And Robert Dahl, a prominent political scientist, argued that

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121. *Id.* at 9. Friedman further discusses eight defining characteristics of globalization. First, he asserts, “the driving idea behind globalization is free market capitalism.” Second, the spread of “Americanization—from Big Macs to iMacs to Mickey Mouse” is a prevailing notion. Third, “globalization has its own defining technologies: computerization, miniaturization, digitization, satellite communications, fiber optics and the Internet, which reinforce its defining perspective of integration.” Fourth, “the defining measurement of the globalization system is speed.” Fifth, the “essence of globalization economics . . . is the notion that ‘innovation replaces tradition.’ The present—or perhaps the future—replaces the past.” Sixth, businesses are situated in “a worldwide competition.” Seventh, globalization has its own demographic pattern, “a rapid acceleration of movement of people from rural areas and agricultural lifestyle to urban areas and urban lifestyle more intimately linked with global fashion, food, markets and entertainment trends.” Eighth and last, the three balances around which the globalization system is built: the traditional balance between nation states; a more recent one between nation states and global markets; and finally, the newest of all, that between super-empowered individuals and nation states. *Id.* at 9–15.

122. I do not claim that a democratic regime is a precondition to participating in the global game. China, arguably a major player in the global markets, could serve as a distinct counter example. I do claim, however, that economic markets free from governmental intervention, as well as free cyber-markets of ideas—two of the main pillars of globalization—are bound to flourish in regimes in which the right to have them is institutionally protected.

123. Mark Tushnet, *The Supreme Court, 1998 Term—Foreword: The New Constitutional Order and the Chastening of Constitutional Aspiration*, 113 HARV. L. REV. 29, 29 (1999).

124. GARY S. BECKER & GUILTY NASHAT BECKER, *THE ECONOMICS OF LIFE*, 241–68 (1996) (reviewing approvingly the turn of several regimes towards democracy and open markets).

“Democracy and market-capitalism are like two persons bound in a tempestuous marriage that is riven by conflict and yet endures because neither partner wishes to separate from the other. . . . The two exist in a kind of antagonistic symbiosis.”<sup>125</sup> Thus seen, democratization—or, more accurately, the tendency towards it—can also be seen as a defining phenomenon of globalization. That, in turn, creates some new challenges for models of democracy in the era of globalization, but we can leave this issue for another time.<sup>126</sup>

### B. *Globalization Themes and Legal Theories*

What is the proper relation between these three phenomena—the opening of economic markets, the pervasiveness of the Internet, and the tendency towards democracy—and a new general jurisprudence? *Globalization and Legal Theory* provides no discussion on this point.<sup>127</sup> It seems that properly designed, a new general theory should respond to or at least reflect some of these elements. Indeed, if there is any justification for the emergence of a new legal theory in the age of globalization—be it general or other—it is to be found in the novelty of the globalization itself, its causes and dominant features.

Are there theories that do respond to these roots of globalization? At the unavoidable risk of being charged with

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125. See ROBERT A. DAHL, *ON DEMOCRACY*, 166–79 (1998) (analyzing how market capitalism both harms and favors democracy).

126. See, e.g., DAVID HELD, *Rethinking Democracy for a More Global Age: The Cosmopolitan Model*, in *MODELS OF DEMOCRACY*, 353–60 (2d ed. 1996). David Held suggests “the creation of new political institutions which would coexist with the system of states but which would override states in clearly defined spheres of activity where those activities have demonstrable transnational and international consequences.” *Id.* at 354. Cf. Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 *COLUM. L. REV.* 267 (1998) (suggesting a decentralized model of American democracy, in which regional and national-level bodies would serve in coordinating and knowledge-assimilating functions).

127. In fact, the book deals directly with globalization and its causes only at the very beginning—while introducing the term—and close to the end, as part of his review of Santos’s book. The main body of the work contains very little, if any, discussion of issues such as the Internet. A striking demonstration of that can be found in Calvino’s *Invisible Cities*. Although Twining cites extensively from this book and even suggests including it as a part of the juristic canon, he never mentions Calvino’s 1972 vision (or was it a prophecy?) of the World Wide Web. CALVINO, *supra* note 57, at 76 (“In Ersilia, to establish the relationships that sustain the city’s life, the inhabitants stretch strings from the corners of the houses, white or black or gray or black-and-white according to [their nature]. When the strings become so numerous that you can no longer pass among them, the inhabitants leave . . . [and] only the strings remain . . . spider webs of intricate relationship seeking a form.”).

oversimplification, one may dare a positive answer. Law and Economics may have something to say on the behavior—whether rational<sup>128</sup> or less so<sup>129</sup>—of people in world economic markets, as well as to define, analyze, and elucidate the markets themselves. Legal Feminism may propose creative models of cooperation and sharing that are not based on masculine paradigms of “all or nothing.”<sup>130</sup> These models may influence new regulatory schemes for the Internet, as well as other shared technologies.<sup>131</sup> Finally,

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128. “Rational-choice” law and economics is identified, more than anyone else, with Richard Posner. See generally ECONOMIC ANALYSIS OF LAW 3–4 (5th ed. 1998) (opening his book with the claim that “economics is the science of rational choice in the world”); see also Richard Posner, *Rational Choice, Behavioral Economics, and the Law*, 50 STAN. L. REV. 1551, 1551 (1998) (“The editors of the Review have asked me to comment on [a behavioral economics] paper, no doubt because of my identification with rational-choice economics.”). The rationality assumption itself, as Posner demonstrates it, is deceptively simple:

[w]hat I mean by the word [rationality is] choosing the best means to the chooser’s ends. For example, a rational person who wants to keep warm will compare the alternative means known to him of keeping warm in terms of cost, comfort, and other dimensions of utility and disutility, and will choose from this array the means that achieves warmth with the greatest margin of benefit over cost, broadly defined. Rational choice need not be conscious choice. Rats are as least as rational as human beings when rationality is defined as achieving one’s ends . . . at least cost.

*Id.*

129. The inaugural paper on behavioral law and economics, on which Posner was asked to respond, is Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998). The new movement, following the original Behavioral Economics and based upon psychological experiment, challenged the notion that human beings function as merely utility maximizers. As expected, soon symposia were conducted (see, e.g., Symposium, *The Legal Implications of Psychology: Human Behavior, Behavioral Economics, and the Law*, 51 VAND. L. REV. 1729 (1998)) and books began to appear (see, e.g., CASS R. SUNSTEIN, *BEHAVIORAL LAW AND ECONOMICS* (2000)). Daniel Farber, however, warns us from a premature catharsis: “it is too soon to say whether behavioral law and economics will be a successful new paradigm. We are a long way from complete science of human behavior, if indeed such a thing will ever exist. In the meantime, legal scholars will find much to learn from rational choice theory, from cognitive psychology, and from other social sciences. But premature efforts to package this information as a new interdisciplinary ‘movement’ may not be helpful.” Daniel Farber, *Toward a New Legal Realism*, 68 U. CHI. L. REV. 279, 281 (2001) (reviewing SUNSTEIN, *id.*).

130. The classic text is CAROL GILLIGAN, *IN A DIFFERENT VOICE* (1982). By now there is a voluminous literature within Legal Feminism on those issues. See, e.g., Leslie Bender, *A Lawyer’s Primer on Feminist Theory and Tort*, 38 J. LEG. ED 3 (1988), reprinted in CHRISTIE & MARTIN, *supra* note 39, at 1083, 1086 (“Men have constructed an adversary system, with its competitive, sparring style, for the resolution of legal problems. In many ways, it is an intellectualized substitute for dueling or medieval jousting. Much of legal practice is a win-lose performance . . . we can question whether a competitive, win-lose approach is necessary. . . . When we look anew for methods for resolving conflicts, we may decide that win-lose, adversary methods are not the only, or not the best, or even not a preferable method for dispute resolution. Perhaps we could design alternative models that incorporate the perspectives of women and men.”).

131. To be sure, Feminism is not the only source from which one can draw new paradigms for cooperation. In international law such calls are by now well-established. See,

although democracy is probably the “least of the evils” in terms of forms of government,<sup>132</sup> it is equally true that even in such a regime, some groups and individuals are left behind. In particular, when democracy adopts values such as competition, utility maximization, and efficiency—all directly connected with the new culture of market economy—the tendency to harm individuals and groups who cannot adapt to the change may increase.<sup>133</sup> To that end, a theory that takes the minority perspective, such as Critical Race Theory, can be of help.<sup>134</sup>

To be sure, the factors I considered to stand at the heart of globalization are by no means conclusive. So are the possible theories that may correspond to them. Yet the main move from theory to its subject is, in my mind, essential. Accordingly, every attempt to justify a new theory for the age of globalization should be

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*e.g.*, ABRAM CHAYES & ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* 1–28 (1998) (suggesting a theory of compliance, rather than the contemporary enforcement model in treaties regulation, that relies primarily on a cooperative, problem-solving approach instead of a coercive one). With that, international law, though prominent in the context of globalization, is but a particular field, and our interest here is in a new general legal theory.

132. The full citation of Churchill’s classic comment is:

Many forms of government have been tried, and will be tried in this world of sin and woe. No one pretends that democracy is perfect or all-wise. Indeed, it has been said that democracy is the worst form of Government except all those other forms that have been tried from time to time.

Winston Churchill, *Speech, House of Commons, Nov. 11, 1947*, in 7 WINSTON S. CHURCHILL: *HIS COMPLETE SPEECHES, 1897–1963*, at 7566 (Robert James ed. 1974).

133. “Economic actors motivated by self-interest have little incentive for taking the good of others into account; on the contrary, they have powerful incentives for ignoring the good of others if by doing so they themselves stand no gain.” DAHL, *supra* note 125, at 174.

134. Here, again, the amount of literature is daunting. See, *e.g.*, Robin D. Barnes, *Race Consciousness: The Thematic Content of Racial Distinctiveness in Critical Race Scholarship*, 103 HARV. L. REV. 1864, 1864–65 (1990), which states:

Minority perspectives make explicit the need for fundamental change in the ways we think and construct knowledge. In the context of this Response and Critical Race literature in general, the term “perspective”—rendered ambiguous by limitations of language—connotes a typification of minority points of view. Exposing how minority cultural viewpoints differ from white cultural viewpoints requires a delineation of the complex set of social interactions through which minority consciousness has developed. Distinguishing the consciousness of racial minorities requires acknowledgment of the feelings and intangible modes of perception unique to those who have historically been socially, structurally, and intellectually marginalized in the United States. . . . Critical Race Theorists are attempting to integrate their experiential knowledge, drawn from a shared history as “other,” with their ongoing struggles to transform a world deteriorating under the albatross of racial hegemony.

*Id.* (footnotes omitted).

proved, first and foremost, to be able to respond to globalization itself.<sup>135</sup>

### C. *Integrating Legal Theory and Globalization*

The last part of my argument responds to a justified critique voiced by Twining on modern American legal theories. "What is striking about them," Twining writes, "is that they are almost exclusively American in focus, sources and cultural assumptions."<sup>136</sup> The required remedy, then, is to shift the focus of those theories from the parochial and particular towards the multinational and general.

Another predicament may arise from the very unison of different theories into one. Which will determine in the case of conflict? Should one prefer a utility-maximizing solution or one based on corrective justice? What would be the criterion for deciding between different, sometimes opposing views? One possibility would be that the answer is contingent upon proper identification of the *source* of difficulty. If, for example, the problem is caused by a phenomenon that relates to economic markets, a utility-maximizing rule may have prominence. However, if the problem arises in the context of technological sharing, we will turn to corresponding ideas from the school of feminism. But what if the source is unidentifiable? What if it would be exactly the mix of several components that calls for determination? To that I have no answer. I bear in mind Sir Isaiah Berlin's warning of the heresy of one compatible theory.<sup>137</sup>

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135. Thus I reject a possible claim that my analysis imitates Twining's, just in a different time and space. My reliance on current American theories stems from my strong belief that they respond to elements that are essential to globalization.

136. P. 58. For accuracy's sake, I will mention that in this passage Twining referred to Economic Analysis of Law and Critical Legal Studies—both movements which are not discussed elsewhere. Feminist legal ideas are mentioned sporadically, but Twining admits that the book "has not attempted to do justice to them" (p. 251). An example of such an injustice might be the attempt to examine Holmes' theory from the perspective of a "Bad Woman" (p. 125). As Twining well knows, at the time Holmes was writing, and not only then, the use of such a term entailed severe moral judgment. See, e.g., *Terwilliger v. Wands*, 17 N.Y. 54 (1858), cited in JANE GINSBURG, *LEGAL METHODS* 99 (3d ed. 1996) ("Action for slander. The plaintiff proved by Wands that the defendant asked him, Wands, why the plaintiff was running to Mrs. Fuller so much for he knew he went there with no good purpose. Mrs. Fuller was a *bad woman*, and plaintiff had a regular beaten path across his land to Fuller's") (emphasis added).

137. Isaiah Berlin, *Two Concepts of Liberty*, in *FOUR ESSAYS ON LIBERTY* 167 (1969) ("One belief, more than any other, is responsible for the slaughter of individuals on the altars of the great historical ideals—justice or progress or the happiness of future generations, or the sacred mission or emancipation of a nation or race or class, or even liberty itself, which demands the sacrifice of individuals for the freedom of society. This is the belief that

But I also would like to believe that in time a new eclectic comprehensive general jurisprudence would emerge, one that can respond to almost every facet of this very complex phenomenon.

## V. CONCLUSION

Globalization is an extremely broad subject of study. Legal theory may be one of the few which is even more broad. A book about globalization *and* legal theory may easily turn, therefore, into a futile attempt to cover these two infinite oceans. Twining's book, in contrast, is a work bridging the two. That alone is one of the most important virtues of his book. In addition, Twining's report provides an indispensable analytical and historical background of the concept of general jurisprudence. In this Review Essay I have tried to show that in addition to that account, it is possible to outline some substantive features of that new general theory. I hope that Twining's call for further debate on this issue will be answered: it is in the best interest of all of us.

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somewhere, in the past or in the future, in divine revelation or in the mind of an individual thinker, in the pronouncements of history or science, or in the dimpled heart of an uncorrupted good man, there is a final solution. This ancient faith rests on the conviction that all the positive values in which men have believed must, in the end, be compatible, and perhaps even entail one another.”).