An Unlikely Oppenheim for the Transnational World?

In 2000, H. Patrick Glenn, the Peter M. Laing Professor of Law at McGill University, published his ambitious bid to become the doyen of introductory comparative law courses. Legal Traditions of the World: A Sustainable Diversity of Law received the Grand Prize of the International Academy of Comparative Law and was favorably reviewed in a number of European and Asian law journals. Although the book received comparatively little critical attention in American law reviews, it has been used frequently in comparative law courses in United States law schools. The second edition of Legal Traditions of the World, released in 2004 without the “Sustainable Diversity” subtitle, promises to fortify Glenn’s place in the canon of comparative law textbooks. Like the first edition, it contains ten chapters: three “theoretical” chapters discuss Glenn’s concept of tradition and seven “substantive” chapters describe the chthonic, Talmudic, civil law, Islamic, common law, Hindu, and Asian legal traditions. “Chthonic” law here refers to primarily oral legal traditions, including those found in Africa, parts of Latin American, and the South Pacific. The chapter on the “Asian” tradition covers mostly Chinese schools of Confucian and Legalist thought, with some discussion of Buddhist, Taoist, and Japanese legal traditions.

Each of the seven substantive chapters follows a similar format. Glenn describes the historical origins, sources, authorities, and fields of law within each tradition. He then presents the characteristic interpretative methods and legal institutions within each tradition. Finally, in each chapter he discusses the tradition’s attitude toward legal change and its relationship with other traditions. A central question in this final discussion is whether the tradition aspires to universalize application of its laws.

There are few changes between the first and second editions in any of the chapters, and many of those changes which do appear in the second edition take the form of marginalia. Glenn announces in the Preface to the Second Edition that he has added references to electronic resources, notably websites. He also announces that he has extended his treatment of some themes, “notably the nature of tradition, the increase in constitutional protection of chthonic law, the emerging phenomenon of transnational law, the development of Islamic commercial law, and the intense debates in China on the role of law in that country.” However, one should not expect much more substantive change than the addition of, at most, a few sentences. The most noticeable change, in addition to the new listings of websites, is that the first two chapters are slightly more heavily footnoted.

Glenn’s Theory of Tradition

Thus, Glenn continues on the path he set in the first edition, which presents his theory of tradition as the intellectual framework and compass of the entire book. In both editions, nearly every page in the substantive chapters refers to some concept that Glenn introduced in the theoretical chapters. Ironically, although the theory of tradition is
central to the project of the book and although Glenn devotes much of his attention in the second edition to expanding on this theory, it remains written in a style which Thomas Carbonneau fairly complains “Ostensibly ... does not seem to be carefully crafted or elegant.”iv John McEvoy, writing in the McGill Law Journal, agrees that the theoretical chapters “may produce an element of dissonance for the reader.”v

The challenge of reading Glenn’s theoretical chapters differs from the challenge of reading a post-structuralist writer like, for example, Judith Butler. Neither Glenn’s vocabulary nor his syntax is particularly complicated; in fact, both are accessible to an educated lay reader. The difficulty arises from his use of rhetorical devices and his presentation of arguments. While one can occasionally find straightforward deductive arguments in Legal Traditions, one will much more commonly be presented with effects before causes, consequences before antecedents, adjuncts before subjects, and definitions before terms. For example, Glenn discusses the ways in which traditions may be transmitted before announcing that “these combinations of forms or capture of the past may be seen as the essential process of immersion or education in a tradition.”vi The reader must recalibrate her understanding of the previous paragraphs: it turns out that they are about education. Repeated several times throughout the first two chapters, this form of presentation keeps the reader off-guard and requires her to step back mentally from the text in order to reorient herself.

Glenn’s theory of tradition is troublesome in content as well as form, and poses a fundamental quandary. As the reader begins a lengthy and comprehensive tour of the world’s legal traditions, is she in good hands? Can she trust the intellectual authority of her guide, or will she have to disentangle valuable information from a sub-par academic hobby horse? In light of the book’s ambition, scope, and frequent charm, and the praise it has received in the international comparative law community, do the theoretical chapters detract from Glenn’s success as a comparativist, jurisprudent, or teacher? Is there a coherent theme to Glenn’s thought?

This review will contend that Glenn’s thought is both deliberate and formidable, if not entirely successful or coherent. In fact, the execution of Glenn’s normative project in Legal Traditions of the World resembles that of Lassa Oppenheim in his seminal International Law.

Before arriving at this argument, however, there is considerable groundwork to lay. First, there is the matter of the substance of Glenn’s theory of tradition itself. Put most succinctly but least helpfully, Glenn asserts that “tradition is information.” This maxim, which Glenn repeats throughout the book, is defined in contrast with what he describes as the rival theory: that tradition is mere action. To illustrate the difference between the two, Glenn relates the following story:

In the early days of the second world war the British were forced to use light artillery dating from at least the first world war ... The guns did not fire rapidly and a time-motion expert was deployed to suggest ways of improving procedures. He watched the gun crews for some time, took slow-motion pictures, but remained puzzled by the performance of two members of each gun crew who, immediately before firing, came rigidly to attention and remained in this pose for three full seconds ... He
eventually showed the pictures to an old artillery colonel and asked whether he could think of any reason for such strange behavior ... [the colonel] said, 'I have it. They are holding the horses.'

For Glenn, the moral of the story – that old habits often last beyond their utility – reflects a predominant Western bias against tradition. According to this bias, tradition is action devoid of thought, or mindless habit which should be stripped away by the application of reason. This view disappears, Glenn argues, if tradition is seen as a “bran tub” of information, available to individuals or societies as they make choices for themselves. Instead of evoking images of quaint, antiquated customs, the concept of tradition should be compared with a genetic code or with the information available on a computer system. From this analogy, that the content of a tradition is like computer data or genetic code, Glenn extrapolates a number of consequences. First, just as both data and the program that operates upon it are stored in a computer’s memory, tradition comprises both rationality and context. No tradition can be completely rational (or context-neutral), because without context there would be nothing for rationality to act upon. Conversely, no tradition can be completely irrational (or completely context-specific) because even the act of preserving and transmitting a tradition involves performing rational operations upon it. Thus, one cannot speak of the Western tradition, exemplified in the dismissive attitude toward custom in the “holding the horses” story, as purely rational. At best, one can speak of it as a tradition of rationality, a tradition where information about rationality forms part of the context.

Second, both computer data and genetic code are elemental in a certain sense: they are comprised of a limited range of units of information. Glenn asserts that because of its status as information, a given tradition can be used and understood by anyone – just as anyone can use the data stored on a local area network. Therefore, it does not make sense to speak of traditions as being “incommensurable.” Historically, traditions have always exchanged information, to the point that it is often difficult to identify any given piece of information with just one tradition. In the contemporary world, there is no theoretical reason why a person who identifies with any given tradition cannot retrieve and use information from another tradition.

Third, information is the basis of personal and group identities. “What is a social construction?” Glenn asks, “It is information, adhered to by enough people, for long enough, to achieve general recognition. It is a particular result of tradition, though it could also be seen as tradition itself.” That information is the foundation of identity suggests two important consequences. First, it means that all other groupings, such as race, nationality, or geography, are contingent and dependent upon the information available in a tradition. Second, it means that as soon as one tradition comes into contact with another, both exchange information and grow to incorporate one another. “The conclusion that tradition is the controlling element in determining social identity means that there are no fundamentally different, totally irreconcilable social identities in the world.”

The analogy between computer data and tradition might raise the question of whether traditions are in danger of merging into one another and losing their
identities. Glenn argues that while traditions do lose adherents and sometimes disappear altogether, they also have properties that allow them to remain distinct. Although he does not explain why this is the case, Glenn asserts that there is a certain core of information in all traditions, “without which no other elements of the tradition could stand.”xvi

A greater danger for traditions is that of corruption from within. Glenn argues that there are two types of corruption in tradition: institutional and intellectual. Institutional corruption occurs when individuals use their functional roles within traditions for pecuniary purposes. Intellectual corruption occurs when the information in a tradition continues to be passed along, but loses its normative significance. Bribery is the quintessential form of institutional corruption; dogmatism is the quintessential form of intellectual corruption. It is also under this concept of corruption that Glenn places another pressing issue: “Fundamentalism (as it is presently known) may be a form of intellectual corruption, if it invokes an apodictic interpretation of an entire tradition.”xvii

The Tradition of Comparative Law
By portraying tradition as the source of the social construction of identity, the context for reasoning, and the basis of both cross-cultural exchange and fundamentalism, Glenn has certainly intended the term to carry a heavy load. However, his use of the term “tradition” is not sui generis in comparative law. As Mathias Reimann writes, “In the last quarter century, this concept of a legal tradition has become the dominant paradigm at least in the United States where it has broadened comparative studies to include a legal system’s whole ‘law machine.’”xviii Given Glenn’s own emphasis on the importance of situating reason within a context, it is helpful to ask how Glenn’s theory fits into the “tradition” of comparative law.

Reimann’s essay, “The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century,” offers one perspective on the field’s current status. On one hand, according to Reimann, the field has succeeded at accumulating huge amounts of valuable knowledge. “On the other hand, comparative law has been a serious failure because it has not developed into a coherent and intellectually convincing discipline.”xix The concept of a legal tradition, then, has not lead to systematic theorizing about the field or created a coherent agenda of research. The sub-fields of comparative law, whether defined by geographical specialty (e.g., Japanese law, Latin American law, European law) or area of legal studies (e.g., private law, constitutional law, administrative law) remain largely parochial: scholars in these areas have little communication with their peers in other areas.xx

Comparative law also has failed to show its value for legal practice. Reimann complains that although textbooks frequently claim certain benefits from the study of comparative law, such as a better understanding of one’s own system, ideas for domestic legal reform, and cross-cultural understanding, they rarely follow through on these claims. After the introduction, textbooks lose themselves in the details of legal codes, never reinforcing or returning to the supposedly central purposes of the field.xxi

Answers to some of Reimann’s challenges are implicit in Legal Traditions. By theorizing about tradition, Glenn obviously addresses Reimann’s call for a
theoretical basis for comparative law. Glenn also addresses the problem of parochialism: his book covers most of the world and deals with a wide range of substantive and procedural issues. Yet, there isn’t much talk about comparative law in Legal Traditions of the World. Glenn does not refer to the debates that Reimann and others have engaged in concerning the future of the field. In fact, even when opposing certain ideas such as the incommensurability of legal traditions, Glenn does not refer to opponents or their specific arguments. The book, to a larger extent than one would expect, avoids explicitly engaging the discipline. Thus, one must review Glenn’s earlier writing to get a sense of his place in comparative law. It turns out that in law review articles published over his 30-year career, Glenn frequently opines about active debates in the field. When a reader turns from Legal Traditions of the World to Glenn’s work in law journals, she is immediately struck by a difference in content and style. The topics of Glenn’s articles deal almost exclusively with the relationship between the civil law and common law, or with the standard comparative issues that arise from supranational organizations such as the European Union or NAFTA. Glenn also explicitly engages debates about the method and direction of comparative law, citing the work of his contemporaries more frequently than he does in Legal Traditions. Finally, the difficulties of style that reviewers noticed in the theoretical chapters of the first edition almost disappear: Glenn’s writing style in the law journals is comparatively formal, direct, and tightly structured. Despite these differences, many Glenn’s articles anticipate themes found in the theoretical chapters of Legal Traditions of the World. Most notably, the polemic against a theory of incommensurability appears multiple times in Glenn’s work.

As in Legal Traditions, the idea of a tradition as information is central to his argument that different legal traditions are commensurable. Additionally, Glenn emphasizes both the constant interactions between traditions and the diversity within traditions, often more explicitly linking the project of making comparisons between traditions with the role of comparative law in preserving the diversity of traditions. Hence, Glenn’s earlier work illuminates the connection between his dislike of “incommensurability” and his desire, expressed in the subtitle of the first edition, for a “sustainable diversity of law.”

Several corollaries to Glenn’s thoughts on incommensurability, diversity, and information exchange emerge in his articles. First, Glenn seems generally wary of the concept of law as a system. In “The Groundings of Codification,” he argues that the notion of a “natural law code” based on either a liberal universalism (such as the French Civil Code) or the idea of a national spirit (such as the German BGB) can no longer withstand the strain of contradictions between the original coherence of the code and demands for different conceptions of justice in the contemporary world. Thus, new codes in places like Quebec, Russia, and Vietnam have rightly shown less pretense toward systematic coherence and timelessness, and more emphasis on particular political and economic challenges. Glenn is encouraged by this development, argues that legal education in Western countries ought not continue to support what he calls the “hegemonic and binary tendencies” of systematic, rational codes. Further, he criticizes the ideal of comprehensively reforming a legal institution, and urges reformers to consider
more modest adjustments. Comprehensive reforms, he argues, are likely to lead to unintended consequences. xxix
Second, Glenn argues for the abeyance of traditional conflict-of-laws principles. The civilian conception of private international law, by requiring that courts apply a conflict-of-laws analysis whenever there are potentially two laws in question, reinforces the idea that whenever different legal systems are involved in a dispute, there must be a choice between one and the other. xxx Glenn sees the English rule as superior because it raises conflict-of-laws issues only when they are pleaded by the parties.xxxi Since the English rule allows the parties to control the choice of law agenda, it encourages parties to use a comparative method to identify and contract for principles of law rather than a conflict method of choosing between incompatible laws.
Third, Glenn’s dislike of conflict of laws informs his numerous writings on the legal harmonization of common markets. He repeatedly contrasts the European Union, which has chartered comparative law commissions to develop formal European codes, with the NAFTA countries, which have engaged in legal harmonization on an informal basis.xxxii As one might expect, Glenn favors the NAFTA approach. Informal harmonization, he argues, solves one of the challenges of globalization: it allows nations to engage in both convergence and informed divergence based on their local needs and international relationships.xxxiii
Thus, the concepts of incommensurability and tradition as information, which appear in the seemingly idiosyncratic theoretical chapters of Legal Traditions of the World, are actually linked to a large body of commentary on contemporary issues in civil law and supranational institutions. Many of the positions that Glenn stakes out in his theory of tradition – positions which he does not explicitly contrast to the work of other scholars and which do not even engage legal issues – emerge from his work in the most traditional areas of Western comparative law: the comparison of the civil law and common law, and projects of legal harmonization. Glenn’s dislike of the exclusive, binding law of the nation-state and the systematic, abstract nature of the civilian codes, for example, suggests an underlying motivation for his theory of tradition.
While Glenn’s agenda within comparative law might seem like the antecedent and his theory of tradition the consequent, Chapter Five of Legal Traditions, “A Civil Law Tradition: The Centrality of the Person,” reverses the relationship. Glenn here embeds his account of the civil law within his theory of tradition and leaves implicit his policy recommendations.xxxiv If these recommendations arise in the minds of his readers, they appear to be consequences of Glenn’s theory.
Viewed in light of his earlier work, then, “A Civil Law Tradition” relates an important story for Glenn’s readers: it sets the stage for his rebellion against what he perceives to be the orthodox view of law in the West. Glenn begins the chapter by narrating the rise of Roman law within the context of existing Talmudic law and European chthonic law, both of which he discussed previously.xxxv While the Romans eventually codified their law and exported it throughout their empire, the chthonic laws in the provinces continued to exist. Therefore, when Rome fell and Roman law retreated, there was not an abrupt legal vacuum so much as a resurgence of the chthonic law.xxxvi When Roman law rose again in the 10th through 13th centuries
(in part because of the threatening rise of Islamic law), chthonic law, which Glenn describes as “able to tolerate a lot of different ways of life,” again fell into abeyance.

The development of modern civil law thus was characterized by debates not between chthonic and written law, but entirely within written law. The debate among various forms of written law, however, continued along several dimensions: scientific notions of systemization came to challenge the comparatively casuistic Roman law, authority was vested in either natural reason or the written text (regardless of its rationality), and the new nation-state struggled against the authority of the Church and Empire. Positions within these dimensions often combined in politically expedient and institutionally convenient ways. Glenn argues that medieval Europe was characterized by levels of inequality higher than those present, for example, in Islamic or Asian societies. Thus, the modern Western notion of human rights became connected to the challenges to the medieval order found in codified law and the nation-state. Eventually, the political, social, and economic forces of the time gave preeminence to law that was systematic, positive, and national. Insofar as there was a visible counter-tradition, it reflected the naturalist or casuistic sides of the debate. “[Thus] when Savigny became famous in Germany for defending an ‘historical school’ of jurisprudence, he meant, not the old chthonic (volk) law, but the old roman law – the old, roman, common law of Europe as opposed to new national codifications.”

As a consequence of the ascendancy of the new codifications, “we find a civilian tradition of explicit rationality in law. It’s been developing for a very long time and its greatest moments may now be over (those of the great codifications).” It is this civilian concept of rationality that Glenn contrasts with the concept of “context” within his theory of tradition. It is also from within this concept of rationality that Glenn finds the origin of mandatory application of conflict of law rules, the derogation of custom, and the concept of incommensurable legal traditions. Ironically, though, the rational civilian tradition, and the expansion of some of its core concepts into the common law (especially in the United States) undermines the normative authority of the law. Since they were systematic and deductive, the civilian codes created an ideal of “mechanical” adjudication which would, at its best, remove all discretionary considerations, including considerations of justice. Thus, the civilian codes “did turn law into fact, and dead fact at that, with the notion that roman law wasn’t really normative for Europe but was only the law of the Romans, a particular people at a particular time who made their particular law.”

Glenn’s Normative Project

To say that Glenn adheres to an outlook on civil law, and the Western legal tradition generally, is not to say that he is necessarily engaging in jurisprudence. In the theoretical chapters, he does not introduce a “concept of law” or explicitly criticize the concepts of others. It is true that the “substantive” legal traditions which he introduces do have jurisprudential import. For example, when addressing the chthonic tradition, Glenn argues that there is not a distinct line between legal and non-legal forms of normativity. Similarly, some of the world legal traditions, including the Asian legal tradition and the Hindu legal tradition, are not formally enforced through the authority of the state. Indeed, when discussing the Japanese
legal tradition, Glenn only mentions in passing the Japanese civil code and constitution. While in the case of Japan one could argue that passing over the formal legal system is a mistake, Glenn’s recognition of legal traditions which do not sharply divide legal from non-legal norms or which do not gain legality from their relation to state authority does suggest a stance on certain important jurisprudential issues. Nonetheless, Glenn does not elaborate on these implicit positions, and Hart or Dworkin probably would not call Legal Traditions of the World a book of jurisprudence. Nor is Legal Traditions a work of social science. Glenn does not seem to care about applying a consistent method of historical explanation. It is true that while narrating the development of a particular legal tradition, he occasionally does seem to apply a functional analysis to historical issues. For example, in his account of the growth of the nation-state, he observes, “As states develop, and develop into democratic institutions, functions of legislation and execution develop, and separate themselves from the more rudimentary form of government which is dispute settlement.” Similarly, when discussing how the civilian method of investigative procedure came into being, he notes that “[S]ince substantive law existed, there was general agreement that judges had to get the facts right, so the substantive law would be applied where it was meant to be applied.”

However, just as frequently, the informality of his narration belies any sort of rigorous historical method. Speaking of how the Romans developed institutions which supported public participation in the law, he writes, “You couldn’t just do it; all you could do was provide a possible point of departure and watch for a few centuries.” Later in the civil law chapter, he speaks of a “project” of developing concepts of human rights: “This enormous project required a larger one in its place. The existing law was relational and obligational. People were stuck in their existing relations to one another, often hierarchical, and that’s where the law said they had to stay. So not only did the law have to be changed, there had to be overpowering reasons to change it.” In both cases, Glenn suggests a teleological view of history best described as “cheeky.” Such poetic license concerning the cunning of history, however, is not accompanied by sincere analysis. The reader is left with an impressionistic portrait of selected events and institutions leading to the development of a legal tradition. Thus, Legal Traditions of the World stakes a number of normative claims about the law while engaging in neither formal jurisprudence nor its social scientific deconstruction. Glenn acknowledges these normative claims only intermittently, but when he does it is without pretext of disengagement. In the conclusion to his civil law chapter, for example, he observes, “You really can’t get away from the idea that the civil law tradition is somehow associated with dominance. The romans dominated, then the national civilians dominated (so out went the chthonic ways), then the world became a zone of influence of civil laws, as the colonization process occurred.”

Glenn’s entire body of work suggests such deep moral engagement within and about the Western legal tradition. Yet, by offering neither systematic argument nor empirical observation about the Western conception of law, Glenn does not fight this dominance directly. Legal Traditions functions most frequently, and best, not as argument but as reference, introduction, and description.
In this sense, Glenn's work reflects that of Lassa Oppenheim, whose International Law has been the standard introductory textbook for generations of Anglo-American lawyers. In the book, Oppenheim famously offered a non-theoretical statist and positivist account of international law: the field recognized states as the only parties and treaties and customary law as the only sources. Thus, Oppenheim did not recognize natural law claims about how states ought to behave, and he did not advocate building supranational organizations that could enforce international law in the same manner that states enforced their domestic law. Further, he did not engage the sociological ideas of contemporaries such as Max Weber, who sought to understand the nature of social and organizational change.

His refusal to engage in theoretical debates or to openly discuss his methodology led some scholars to doubt that Oppenheim was a particularly deep thinker. Anthony Carty, for example, describes Oppenheim as "merely the humblest scribbler of student manuals." Other scholars, such as Martin Schmoeckl, have more charitably argued that Oppenheim's approach chiefly reflects his consciousness of his audience. "The elementary nature of the main text," Schmoeckl suggests, "helps to inform the public and to spread the knowledge of international law." In his article, "Legal Positivism as Normative Ethics," Benedict Kingsbury offers another interpretation of Oppenheim's project, one which I will argue could also apply to Glenn. Kingsbury suggests that Oppenheim wrote International Law to support a sophisticated normative agenda. "Oppenheim's statist account of international society need not be read as a myopic description of what is, nor even as a convenient simplification to make analysis manageable," he argues. "It can be read normatively, as stating an assumption which he believed was necessary as a condition for a real and workable international law."

According to Kingsbury, Oppenheim believed that the key role of international law was to manage the tension between progress and pluralism. On one hand, unlike realists such as Carl Schmitt, he recognized the capacity for the international community to become more peaceful and interrelated through time. On the other hand, he believed that preserving a balance of power among nation-states was the only practical way of maintaining an environment where peaceful and egalitarian interrelationships could develop. Kingsbury argues that what Jeremy Waldron said of Kant could likewise apply to Oppenheim: In the transition from moral philosophy to political philosophy, Kant insists that we now take account of the fact that there are others in the world besides ourselves. And he insists that we are to see others not just as objects of moral concern or respect, but as other minds, other intellects, other agents of moral thought, coordinate and competitive with our own. When I think about justice, I must recognize that others are thinking about justice, and that my confidence in the objective quality of my conclusions is matched by their confidence in the objective quality of theirs. The circumstance of law and politics is that the symmetry of self-righteousness is not matched by any convergence of substance, that each of two opponents may believe they are right.

Positivism, Oppenheim felt, serves such a Kantian conception of political pluralism in two ways. First, a positivist theory of law requires what Hart calls a Rule of
Recognition – i.e., a way of distinguishing legal norms from non-legal norms.

In the context of international law, the Rule of Recognition was state consent – either through traditional practice (e.g., customary international law) or through formal treaty. Since each state was formally equal in its capacity to consent, positivism implies the doctrine of sovereign equality. Oppenheim felt that, if observed, sovereign equality was an important bulwark against the hegemony of powerful nations. Second, Oppenheim seemed to believe that promoting a positivist conception of international law would ultimately improve compliance. By explicitly naming sources of law, positivism aspires to an ideal regime of clear, written rules. Although the international system lacks a central authority with the power to punish states that violate international law, the existence of a space for legal arguments, based on the prior consent of states and clear rules, encourages state actors to take law seriously. The creation of a well-developed field of positive international law and a cadre of competent lawyers to navigate it turns out to be a self-fulfilling prophecy. Thus, in a sense, Oppenheim’s pedagogy is itself among the most effective forms of advocacy.

Glenn, as we have seen, clearly does not subscribe to Oppenheim’s positivism. In fact, he sees positivism as a corrosive influence in Western jurisprudence, rotting away the normative roots of law. However, Glenn’s pedagogical project in Legal Traditions of the World is likewise intended to recast comparative law as a well-developed field of trans-traditional information. Further, Glenn’s project ultimately shares Oppenheim’s goal of managing the relationship between pluralism and progress. Given these similarities between their normative projects, one should not be surprised to find analogies between their respective positions within their fields. The differences between their implicit jurisprudential stances is due less to principled disagreement than to the structural differences between early 20th century international law and early 21st century transnational law. These similarities across disagreement will become clearer upon examining how the early 20th century jurisprudential debates that consumed Oppenheim influenced American comparative law.

Just as Oppenheim watched England battle his native Germany during World War I, a number of prominent German comparativists emigrated to the United States in time to witness World War II from the perspective of their adopted country. According to Vivian Grosswald Curran, whose article on the history of comparative law in the United States will inform this discussion, comparative law in Germany had long diverged from mainstream jurisprudence. While other German scholars had turned decisively to positivism, the comparativists remained adherents to natural law theory. This makes a certain sense: positivism does not have much to say about why laws are similar or different across jurisdictions, while naturalism has always been predisposed to look for that which is universal in all societies.

The World War II experience entrenched this bias toward naturalism. The German émigrés had seen how courts under the Nazi regime faithfully applied discriminatory laws without regard for justice. Positivism seemed morally bankrupt precisely because it separated the legitimacy of a law from the question of whether
it was just. Likewise, the American realist movement rejected any relationship between the law as such and universal reason or justice, calling such a relationship “transcendental nonsense.”lxii The émigrés’ conviction that objective theory and natural laws should be the basis for legal analysis took the form of a rejection of realism, but paradoxically was itself in large measure caused by their reaction to the devastating power over law of the social and political realities of Nazi Europe.”lxiii

Having seen the power of the exclusionary state and the manipulation of positive law for its purposes, the comparativists viewed their mission as uncovering the universal human standards of justice. Therefore, comparative law began with a jurisprudential outlook which placed it at odds with other fields of law in the United States. As times have changed, however, the natural law position itself has become untenable within comparative law. The project of identifying universal norms has in the last quarter century come under attack from many quarters, not the least of these being the developing world.lxiv

However, the state-based positivism endorsed by Oppenheim remains unsuitable for comparative law, and has even lost its luster in international law. Increasingly, the locus of cross-border disputes is often not a nation’s Foreign Ministry or State Department, but ordinary courts, administrative agencies, or arbitration tribunals. Additionally, migration between nations has accelerated, leading to the growth of immigrant communities within the state, which frequently agitate for state recognition of their own legal traditions.lxv

Comparativists have struggled both from within their inherited tradition and through the resources of other fields to come to terms with the problems of the new “post-national” world. Some scholars have proposed importing the concept of incommensurability from poststructuralist theory to preserve differences.

Curran, for example, calls for scholars to “engage in the rich and fruitful discussion of differentiation versus subordination and inequality that scholars in other areas have been developing to address dilemmas raised by the law’s blindness to difference.”lxvi Others have argued that such attentiveness to incommensurability is an apology for oppressive governments. These “liberal anti-pluralists,” as Gerry Simpson calls them, to a greater or lesser degree see adherence to liberal democracy as a qualification for full membership in the transnational community.lxvii

While the analogy is not perfect, in some ways the contemporary differences between proponents of incommensurability and proponents of liberal anti-pluralism mirror the early 20th century differences between international law realists and international humanitarian theorists. Both debates concern the relationship between pluralism and progress. Both question whether and how the law can mediate disputes between unfamiliar and often unequal parties. It is with respect to his role in the contemporary debate that Glenn resembles Oppenheim. Like Oppenheim, Glenn avoids discussing social scientific explanations for the current status of the transnational legal order, preferring instead to focus on the status of the law. Also like Oppenheim, Glenn’s project is taxonomical and pedagogical: he is providing a common vocabulary for lawyers working across traditions, giving them the competencies necessary to work together. Finally, like Oppenheim’s International Law, the pedagogical focus of Legal Traditions of the
World obscures its sustained underlying engagement in the normative debates of the day.

Specifically, Glenn sets out to accomplish three goals related to his general normative project. First, Glenn seeks to show the diversity already present in the midst of each complex tradition. “All of these complex, major traditions,” he argues, “achieve complexity because of their proven ability to hold together mutually inconsistent sub-traditions.” Each tradition, Glenn stresses, already has a diversity of substantive norms, methods of reasoning, institutions, and schools of thought. In fact, the way in which traditions themselves maintain their core identities despite difference models how differences between traditions can be mediated.

Problems of conflict between traditions can often be solved by disaggregating each tradition – by identifying the diversity of information which the tradition can deploy to resolve conflict.

Second, Glenn attempts to demonstrate that challenges as well as exchanges of information between traditions are common and healthy. He discusses, for example, how Western and Islamic traditions compete to persuade sub-Saharan Africans of their respective ideals of human rights and social justice. Further, he argues that traditions can act in complementary fashions. “Individualistic traditions may borrow, and use, informal notions of normativity to complement themselves. Collectivist traditions may borrow, and use, instruments of self-empowerment, again to complement themselves.” Such interactions preserve the possibility of validly criticizing, or at least questioning, another tradition, without advocating hegemony over that tradition.

Third, Glenn entices students to consider the possibility of lawyering between traditions. “Acting positively to sustain diversity in law should improve communication between lawyers of the world. It should enhance the prospect for peaceful settlement of disputes, enhance the legal mission.” Lawyers in this respect should critically examine their traditions’ attitude toward universality. “If major legal traditions are to co-exist in the world, without themselves contributing in a major way to violence, imperialism and suppression, it therefore seems necessary to examine somewhat more closely the teaching of different traditions with respect to universalism and what is known in the west as tolerance.”

The Project in Practice

While it might be possible evaluate Glenn’s normative project solely on the basis of one’s attitude toward his brand humanistic pluralism, the question remains: does he effectively convey his views through the book? To investigate and then evaluate how Glenn’s project functions in practice, this section will explore his treatment of Islamic and Asian law. These two legal traditions both possess long histories and massive numbers of adherents. They also differ in terms of their engagement with the West. Currently, Islamic law is often seen in the West as a distant but pressing threat – to Western norms of human rights and the secular state. Asian law is often viewed from a more engaged perspective: with the growing economic power of East Asia, dealing with the practical consequences of Asian legal tradition for business and diplomacy takes high priority. Albeit in different ways, knowledge of these two traditions is pertinent to the future. Perhaps to acknowledge their importance,
Glenn's treatments of the Islamic and Asian traditions are among the most thorough in the book.

Concerning Glenn's first goal of demonstrating the inner diversity of major legal traditions, it would appear that Islam might serve as a counterexample. Like Christianity, Islam is a revealed religion: faith in revelation is a non-negotiable requirement for claiming the tradition. Islam, however, is more "positivist" about the content of revelation: Muhammad's words were transcribed immediately from speech into the writing which would eventually become the Koran, without the intercession of time or secondhand reports. Although only about 500 of the 6000 verses in the Koran deal directly with law, the Koran is nonetheless the primary source of the entire legal tradition. Further, the Islamic tradition maintains prohibitions on heresy and apostasy, which sometimes carry the penalty of death.

In other ways, however, Islam allows more diversity within the tradition than Western legal traditions. Islam contains four schools of law (madhahib) which hold different substantive rules and permit different forms of legal reasoning. However, parties may adhere to whichever school they choose, and may without sanction change schools for the purpose of gaining more favorable substantive law.

In North American legal terms, this would be equivalent to allowing parties to forum-shop without requiring them to obtain personal jurisdiction. Further, the Islamic tradition in many places tolerates informal, non-Islamic custom, sometimes to the extent of allowing it to render inoperative certain aspects of Islamic law.

Thus, the revealed religious law of Islam retains the capacity to incorporate divergent opinions, even as it maintains its coherence.

What Glenn describes as the Asian legal tradition permits even more diversity because it does not emanate from a single Rule of Recognition. Instead, several powerful normative traditions function within a single legal ecology. East Asian religions, especially Buddhism, Taoism, and Shintoism, rarely proffer legal authority and may not even suggest a particular social direction (e.g., form of government, ideals of community). Confucianism, which Glenn sees as the most characteristic element of the Asian legal tradition, self-consciously avoids recourse to formal law in favor of dispute resolution through persuasion. Since it is in principle secular and rational, Confucianism could better be described as a socially instantiated political philosophy. Finally, a formal legal tradition, fa, exists, but is viewed by many as a necessary evil. Glenn compares the role of fa to the role of the judiciary in France: because of past abuses, it retains little social prestige and remains an object of suspicion for many within the tradition.

While advocates of religion, Confucianism, and formal law have in the past viewed one another with animosity, all three elements of the tradition have coexisted for centuries. Thus, law in Asia exists in the midst of what Glenn calls "normative richness."

Concerning both Islamic and Asian law, Glenn does not appear particularly concerned about how the different aspects of each tradition coexist. One will not find much discussion of the complicated and sometimes violent relationship between Confucianism and the Asian religions, for example. Nor will one learn why, out of hundreds of schools of law in early Islamic history, only four survive today.
This lack of explanation is most telling of his narration of those points in history, present in both the Islamic and Asian traditions as well as Roman tradition, where development and change in the law appeared to stop. Speaking of the Islamic phenomenon of “closing the door of endeavor,” Glenn simply remarks: “With the completion of the great works, however, and the compilations of the hadith, further human invention appeared incompatible with the divine nature of law and the implementation which had already occurred.”

He notices that the end of legal innovation coincides with the end of new scientific discoveries among Muslims, but seemingly ascribes it to consensus. In the same manner, Glenn notes that Chinese leadership in science and technology declined after the thirteenth century AD, but again presents the process as one of consensus. What the legal traditions and normative fields themselves might have had to do with this consensus (if one ever did exist), he does not explain.

More edifying is Glenn’s discussion of exchange between traditions, both historically and in the present. In this respect, his discussion of Islam is a virtuoso performance, which extends beyond the chapter on the Islamic tradition proper. Islam’s historical influence on the West, he suggests, recapitulates the two major ways in which Western traditions are now influencing Islam. Concerning the relationship between Islam and the development of the common law, Glenn theorizes that the Inns of Court, which for centuries were the primary institutions for legal education in England, are in fact Islamic in origin. Additionally, Islam influenced both the procedures, including trial by jury, and the substance, especially in commercial and land law, of English common law.

By contrast, Islam inspired an “anxiety of influence” in the emerging neo-roman civilian tradition, even if it transferred fewer actual legal ideas. The powerful Muslim empires in Spain and the Southern and Eastern Mediterranean during the eleventh through thirteenth centuries presented legal norms which were considerably more rational, detailed, and prestigious than the chthonic laws then dominant in Europe. Glenn argues that the presence of these rival norms greatly accelerated the revival of Roman law and the establishment of modern universities in Europe. The challenge of a strong and persuasive outside tradition forced Europeans to more energetically draw upon their own traditional resources. Today, both the Asian and Islamic traditions face challenges from ascendant civil and common law traditions which resemble the challenges that Islam presented Europe. In particular, both traditions have dealt with Western criticism stemming from the concept of human rights. In the Islamic tradition, this has in some cases lead to a reconsideration of how Islamic law is applied. For example, some Muslims have called for reading the injunction to cut off the hands of thieves according to secondary meanings. Thus, hands would be a metaphor for power or capacity, as the tongue is a metaphor for speech. In other cases, Muslims have defended elements of their traditions which are at odds with human rights, but have been forced to justify these elements with new arguments. Speaking of gender inequality in inheritance, Glenn writes: “This is defended (defense implying criticism) in terms of the male obligation of support.”
The Asian legal tradition has dealt with Western challenges by drawing upon historical debates within orthodox Confucian teaching and other philosophical schools. For example, Western critics complain that the Asian tradition focuses excessively on group rights, to the detriment of the individual. Adherents to Asian traditions respond that there is room within Confucianism for concerns such as the dignity of the person, self-assertion, and moral autonomy. As Glenn notes, “It is possible to write a book on The Liberal Tradition in China.”

Further, Chinese exchange with the West is colored by the fact that China remains attached to a socialist tradition which was originally Western, and which itself offers a systematic critique of the orthodox Western tradition.

The chapters on the Asian and Islamic traditions address Glenn’s third goal, supporting trans-traditional lawyering, less directly than they do the first two. However, there are some lessons which can be extracted. First, Glenn argues that the religious nature of Islamic law is not necessarily a barrier for communication across cultures. While on matters that cut to the heart of Muslim spirituality, outsiders understandably must exercise caution before speaking, Glenn stresses that much of Islamic law, while religious in origin, reads like any other law. For example, Islamic law of contracts, land, and business partnerships resemble Western law in form, if not always in substance. Second, he constantly reminds lawyers that in other legal traditions, law does not have to be positive, to flow from the exercise of state coercion, or to express sharp lines between what is legal and what is illegal. The Islamic tradition recognizes not just states of legality and illegality, but divides acts into prohibited, discouraged, encouraged, and required.

Similarly, the Confucian tradition places high value on persuasion and voluntary settlement of disputes, especially outside an institutional context. While Westerners may not consider these elements of Confucianism to be law in a proper sense, Confucian principles of “alternative dispute resolution” maintained a highly developed commercial society without the aid of positive private law as it has been understood in the West.

Both lessons suggest that trans-traditional lawyering entails negotiating fields of normativity much broader than those found in Western law, but that such fields are nonetheless respectable and sustainable. Thus, a reader of Legal Traditions of the World is likely to come away from the book with a basic understanding of the structure of the Islamic and Asian legal traditions, but not only this. She will have some idea of the diversity of substantive rules, opinions, and methods of reasoning within each tradition, even if she might not gain any special understanding of the political and social implications of these differences. She is likely to have a notion of the current debates among traditions, and to be able to place these debates within a historical context where such exchanges are the norm. Finally, she will find hints about how the legal traditions might affect trans-traditional disputes, and how a lawyer could begin to parse what is required, what is customary, and what is up for grabs in a particular tradition.

Conclusion

As more theoretically minded scholars attacked Oppenheim’s underlying positivism, it is possible to launch attacks on several aspects of Glenn’s theory of tradition, both as it is explained in the theoretical chapters and as it is manifested in the
substantive chapters. One could argue that Glenn’s concept of information is so broad as to be thoroughly uninstructive. While Glenn opposes his concept of information to the merely habitual action of the World War I gunners, he does not indicate how he regards vitally important issues of social practice. Much of what anyone would regard as legal tradition refers to the reproduction of social institutions through practice. For example, it would be impossible to understand the tradition of the legal profession in a given jurisdiction without studying how the structure of legal education reinforces the social status of the profession, which in turn influences the selection of the next generation of lawyers. While some of this education process might consist of written or orally transmitted rules, most will likely be the result of acting within a particular social context. While Glenn has written about such structural issues in the past, Legal Traditions gives little indication of their importance.

The lack of attention to structural issues also manifests itself in the lack of a discussion of distinctively modern legal issues. Industrialization, bureaucracy, the need for universal literacy, modern forms of transportation and information technology, and a globally integrated financial system all create burdens on societies which have only recently been addressed by non-Western traditions. Such new challenges are often cited as the reasons for wholesale transplantation of Western legal models. Debate currently rages over whether non-Western traditions will have to follow Western models in many respects, or whether they can develop their own “alternative modernities.” Such debates often focus on issues of constitutional and administrative law, as well as supranational trade and investment agreements, none of which Glenn addresses.

A problem related to Glenn’s lack of attention to structural issues is his inconsistent treatment of agency in his accounts of social and legal change. As described above, Glenn sometimes presents the traditions as themselves making decisions about their futures, sometimes describes the action of members in changing traditions, and sometimes blandly refers to consensus within a tradition. Thus, when discussing Confucianism, Glenn mentions only in passing that communists and others criticized it for enshrining hierarchical relationships. While a discussion of Western pressure for subjective human rights appears in almost every chapter, Glenn devotes little attention to the battle between traditional hierarchical relationships and new, seemingly homegrown, impulses toward social equality. Is the delegitimation of hierarchy the result of new information from the West, changed social circumstances, or simply the decision of individuals? Does it go along with the demands of modernity, or is it the property of a particular tradition? What does Glenn make, for example, of postcolonial Islamic feminists who choose to wear head covering while agitating for equal rights? Who or what is the author of their movements?

Since other comparativists have addressed them, one could view the problems of structure, modernity, and agency as challenges from within comparative law.

The jurisprudential arguments of other legal fields raise their own challenges. For example, many of Oppenheim’s arguments for positivism, as refined and qualified by Thomas Franck, find no analogies in Glenn’s work. The Kantian opinion applied by Kingsbury to Oppenheim calls for a strict division between
politics and morality, which suggests that judges must adhere to positivist formalism. In other words, judges must support pluralism by limiting their decisions as far as possible to binding sources of legislation. Glenn suggests, by contrast, that by introducing the ideas of multiple traditions into legal reasoning, judges can renew the normative character of law, explicitly rebuilding the attachment between morality and politics. In this respect, Legal Traditions of the World continues Glenn’s earlier advocacy of using foreign law as persuasive authority rather than excluding it outright through conflict of law rules.

Based on their respective attitudes toward judicial discretion, one could call Oppenheim a formalist and Glenn an anti-formalist. Perhaps in international law and comparative law, the role of formalism properly differs. Both formalism and anti-formalism have their strengths and weaknesses. Formalism grants equal standing to parties and, through arms-length procedures, prevents intimidation by the powerful. However, it often ignores the reality of power imbalances outside the legal realm, and obscures the true nature of the interests in conflict. Anti-formalism does offer the possibility of a more flexible, conciliatory approach to dispute resolution, but also can exacerbate abuses of power within the legal system. In the international sphere, arms-length interaction makes sense, since diplomats – who, by virtue of their positions, can be said to share a common culture – are paid to behave strategically in order to maximize their respective nations’ power. The deployment of trans-traditional law, by contrast, is much more likely to take place in contexts where an arms-length assessment of the other can lead to preventable mistrust, as fear of strategic action overshadows honorable intentions. Thus, one could argue that Oppenheim’s formalism and Glenn’s anti-formalism can both serve the purposes of pluralism, albeit in different contexts.

Such a reading of Glenn’s comparatively anti-formalist attitude toward law would comport with his experiences as a Canadian. Teaching at McGill after having been a student in British Columbia, Glenn has straddled Anglophone and francophone Canada, and must simultaneously maintain values of diversity and coherence. At its best, Canada itself reflects Glenn’s conception of a healthy tradition: it has held together diverse viewpoints within a common identity. Glenn echoes the work of his McGill colleague Charles Taylor, who has argued that a liberal political system should grant equal standing under the law while nonetheless retaining the power to uphold its particular identity.xcvii Without completely exiling Oppenheim’s positivist conception of law, one might argue that the “Canadian school” has something to teach the rest of the world about how to cope with the legal challenges of a trans-traditional society.

Thus, by diverse means Oppenheim and Glenn hope to attain the same end. In order to mediate progress and pluralism, both shape a field of law which could be shared across borders. Both may have a much larger impact through descriptive pedagogy than they ever could have had through explicit argument. While the jury is still out concerning the success of Glenn’s trans-traditional comparative project, one must underestimate neither the ambition of his project nor its importance in an increasingly transnational world.

ii H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD xxiii (2d Ed. 2004).


vi LEGAL TRADITIONS 12. vii Id. 16. Glenn is evidently fond of this story, as he has used it elsewhere. See H. Patrick Glenn, The Capture, Reconstruction and Marginalization of “Custom,” 45 AM. J. COMP. L. 613 (1997).

viii LEGAL TRADITIONS 16. ix Id. 21. x Id. 17-20. xi Id. 21. (Glenn is obviously not a Mac user) xii Id. 45-47.

xiii Id. 37. xiv Id. 35. xv Id. 38. xvi Id. 38-39. xvii Id. 29. xviii Mathias Reimann, The Progress and Failure of Comparative Law in the Second Half of the Twentieth Century, 50 AM. J. COMP. L. 671, 677 (2002). xix Id., at 673. xx Id., at 696. xxi Id., at 686. xxii See e.g., H. Patrick Glenn, Salience and United in the Mixed Jurisdiction Experience: Traits, Patterns, Culture, Commonalities: Mixing It Up, 78 TUL. L. REV. 79 (2003); Harmony of Laws in the Americas, 34 U. MIAMI INTER-AMERICAN L. REV. 223 (2003);

Integrating Civil and Common Law Teaching Throughout the Curriculum: The Canadian Experience, 21 PENN ST. INT’L L. REV. 69 (2002);


xxiv See Are Legal Traditions Incommensurable?, supra at xx; The Grounding of Codification, 31 U.C. DAVIS L. REV. 765 (1999); The Capture, Reconstruction and Marginalization of ‘Custom,’ 45 AM. J. COMP. L. 613 (1997);


xxv 49 AM. J. COMP. L. at 143. xxvi Id., at 144-45. xxvii The Grounding of Codification, at 765. xxviii Salience and Unity in the Mixed Jurisdiction Experience, at 81.

xxix The Dilemma of Class Action Reform, 6 OXFORD J. OF L. STUD. 262, 274 (1986).

xxx See also Conflicting Law in a Common Market?, at 1797-98. xxxi See Removing the Borders, at 996-97.

xxxii Harmony of Laws in the Americas, at 223 (Informal harmonization includes both enacting piecemeal legal reforms and building the judiciary’s familiarity with the laws of other common market countries on a case-by-case basis). xxxiii See Harmony of Laws in the Americas, at 224.

xxxiv His treatment of the civil law is shorter than his treatment of Islamic law and about the same length as his treatment of Asian law. xxxv In fact, the first five traditions, chthonic, Talmudic, civil, Islamic, and common laws, are presented in a rough chronological order, so Glenn can show the relationships of influence at the founding of each. Hindu and Asian law are in this sense treated separately, since they do not form part of this master narrative. xxxvi LEGAL TRADITIONS OF THE WORLD 131. xxxvii Id. 133. xxxviii Id. 145. xxxix Id. 135. xl Id. 146. Compare with The Grounding of Codification, supra at xxiv. xli Id. 149. xlii Id. 71-72. xliii Id. 328.
xliv See Frank K. Upham, The Place of Japanese Legal Studies in American Comparative Law, 1997 UTAH L. REV. 639, 656 (1997) (arguing that Western comparativists’ tendency not to take seriously Japan’s formal legal system can be seen as bias toward studying the culture and against studying the politics and institutions of non-Western systems).

xlv LEGAL TRADITIONS OF THE WORLD 145.

xlvi Id. 132. xlvii Id. 128. xlviii Id. 141. xlix LEGAL TRADITIONS OF THE WORLD 165.


lii Quoted in Legal Positivism as Normative Ethics, at 406. lii The Internationalist as Scientist and Herald, at 699. liv Id. at 415.


lxvi See e.g., DIPESH CHAKRABARTY, PROVINCIALIZING EUROPE: POSTCOLONIAL THOUGHT AND HISTORICAL DIFFERENCE (2000).


lxviii Legal Traditions 350.

lxix Id. 354.

lxx Id. 208-13.

lxxi Id. 359-60. lxxii Id.

lxxiii Id. 347. lxxiv Id. 171. lxxv Id. 206-07. lxxvi Id. 197. lxxvii Id. 200. (“Islamic law says a great deal about slavery, but does not require it, so as the practice of slavery disappeared the Islamic law of slavery became an inoperative part of the Islamic tradition.”)

lxxviii Id. 313-17.

lxxix Id. 304-06.

lxxx Id. 306.

lxxxi Id. 310.

lxxiii Id. 191.

lxxiv Id. 227.

lxxv Id. 232.

lxxvi Id. 132.

lxxvii Id. 185. lxxviii Id. 321.

lxxix Id. 336. (“If you are a westerner arguing the human rights case, you will be met by opposition which is either Confucian, or communist, or both subtly combined.”) xc Id. 190. xci Id. 186.