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Book Review of Karl Llewellyn and the Realist Movement, by William Twining

Edward A. Purcell Jr.
New York Law School, edward.purcell@nyls.edu

William Twining, *Karl Llewellyn and the Realist Movement*. South Hackensack, New Jersey. Fred B. Rothman & Co., 1973. xiv, 574 pp. $25.00.

When the clamor of partisan debate fades, scholars are presumably in a position to judge historical events more clearly and completely. Certainly distance is essential for any adequate evaluation of "legal realism," that diffuse, exciting, infuriating, pretentious, perceptive, and incomplete "movement" which was born at the turn of the century, matured in the twenties, dominated much of the thirties, and then . . . what? Perhaps even in the seventies our perspective is not yet quite long enough.

William Twining, an Englishman by birth, set out to examine the nature of legal realism through a study of its most sophisticated spokesman, Karl N. Llewellyn. The author had studied under Llewellyn in the late fifties and, after the latter's death, organized his private papers and unpublished manuscripts for the University of Chicago Law School. Utilizing those extensive papers, and drawing on the personal knowledge of Professor Soia Mentschikoff (Llewellyn's widow and co-worker) and other contemporaries, Twining presents the fullest and most judicious account of Llewellyn's career currently available. The book is thoughtful and critically balanced. Its greatest strengths lie in its suggestions of the complexities of "realism", in its informative elaboration of Llewellyn's jurisprudence, and in its careful attempt to probe the intellectual consequences of a "realist" approach in the life-long work of one individual.

Not intended as a full-scale biography, the book skips over large areas of Llewellyn's personal life, his relationships with friends and colleagues, and often his own motivations. The main lines of his career are sketched in, however, and flashes of his personality and character do come through. Twining, for example, discusses Llewellyn's poetic impulses and stylistic peculiarities, seeing them as parts of an artistic temperament which colored his legal work. Clearly, the metaphor of artistic creation increasingly informed his discussions of the Grand Style, and a more personal biography might well stress the importance of that temperament even more than Twining does. Proper judging, Llewellyn argued in 1960, shows "a desire to move in accordance with the material as well as within it, to carve with the grain like Konenkov, to reveal the latent rather than to impose new form."[1] That metaphor, and the sensibility behind it, perhaps goes a long way in

1. Karl N. Llewellyn, *The Common Law Tradition: Deciding Appeals* (Boston, 1960), p. 222.

explaining Llewellyn's differences from such fellow realists as Cook, Oliphant, and Moore. Even in the early thirties, when he was pushing a behavioral focus most strongly, Llewellyn never made a total or exclusive commitment to quantification, objectivism, or scientism. As he moved in the late thirties from the problem of how to predict judicial decisions to the problem of how to make them, the artistic metaphor increasingly outweighed the scientific one.

While Twining concerns himself only in part with Llewellyn the individual, he is centrally concerned with Llewellyn the thinker. The main purpose of the book, the author explains, is to provide the reader with a general and integrated introduction to Llewellyn's jurisprudence. He focuses on the major books and stresses the particular context in which each was written as well as their relationship to Llewellyn's maturing philosophy of law. The analyses are lucid and, though generally complimentary, often critical. His discussion of several unpublished manuscripts, especially *Law in our Society* and *The Theory of Rules* (large sections of which are included in the appendices), is helpful in casting light on Llewellyn's later probings. The book provides a perceptive and comprehensive summary of his jurisprudence, bringing out the continuity of his thought without obscuring its unfinished and exploratory nature. Llewellyn's greatest contribution, Twining declares, was his attempt to concretize sociological jurisprudence—to discuss specifically *how* legal scholars could study the law in sociological, empirical terms. "His capacity to fertilize, to stimulate and to put familiar things in a fresh perspective is perhaps unsurpassed in the common law world" (p. 371). High praise, indeed, but largely deserved. There is a tenacity in Llewellyn's work, a determination to grapple with the practice of legal institutions, a feel for the richness of the particular case, that give it a continued vitality and freshness. Twining has done a major service in reemphasizing the broad achievements of a scholar who is too often remembered for his eccentricities.

While the author's attention to Llewellyn's jurisprudence is thus valuable and helpful, the resulting doctrinal emphasis seems at times to stand in the way of a more fruitful historical analysis. The relationship between Llewellyn's work on the Uniform Commercial Code and his *magnum opus*, *The Common Law Tradition*, for example, is treated primarily in terms of jurisprudential consonance rather than in terms of specific historical connections. The long chapter on *The Common Law Tradition* (1960) comes *before* the chapters on the U.C.C., even though, as Twining points out, Llewellyn's major contributions to the Code came in the years from 1937 to 1953. Thus while the author perceptively explores the important jurisprudential similarities, he sometimes

ignores the questions of how and why Llewellyn's thought gradually changed through time as well as the problem of what specific impact his varied experience in drafting the U.C.C. had on his subsequent theoretical writings. Again, Twining treats Llewellyn's involvement in the Sacco-Vanzetti case out of chronological order in a late catch-all chapter. He is clearly right in seeing the episode as an illustration of Llewellyn's institutional-professional orientation, but might not the *time* of its occurrence be of considerable further (and even jurisprudential) importance? It seems suggestive at the least that the period of Llewellyn's greatest involvement with the Sacco-Vanzetti National League coincided precisely with the writing of *The Bramble Bush*. Surely it is more than plausible that there was some connection either consciously in his mind or unconsciously in his mood between the institutional fate of the two ill starred defendants and that much maligned sentence: *"What these officials do about disputes is, to my mind, the law itself."*[2] Though there may be no conclusive documentary proof available, the exploration of such a possibility might well illuminate an important part of Llewellyn's early career.

In two long chapters the author addresses himself to the fascinating and complex problem of the origin and philosophy of the Uniform Commercial Code, Llewellyn's major contribution to American legal practice. Twining is not, as he repeatedly acknowledges, a specialist in commercial law. Hence, given the immense analytical difficulties involved, the strength of the chapters lies largely in its cautious warnings and tentative proximations, rather than in any definitive conclusions. The author discusses the history of the code's origins, of Llewellyn's central organizational role, and of the institutional procedures involved in its creation. Additionally, he raises many of the important problems which surround the Code itself—its class and economic biases, its relation to consumer protection, and, ultimately, the political and social significance of such professionally sponsored "technical" legal reforms. The chapters are informative, and they provide a thoughtful study of the relationship between legal theory and changing legal institutions.

Two understandable shortcomings detract from the overall contribution of the chapters on the U.C.C. First, the author avoids the painstaking but revealing task of tracing carefully the various changes in the draft codes, which would have allowed more precise estimates as to who was influential at which time and on what issue. Moreover, the problem of Llewellyn's personal influence on *particular* sections of the Code is often blurred. "Llewellyn only

2. Karl N. Llewellyn, *The Bramble Bush: On Our Law and Its Study* (Dobbs Ferry, N. Y., 1951), p. 12.

exceptionally used his key position to push through pet ideas of his own in the face of opposition" (p. 300), Twining tantalizingly concludes. Yet he does not elaborate on what those exceptional instances were or why Llewellyn chose to fight on them. Second, although the author ably discusses much of the "jurisprudence" of the Code, he does not fully discuss the question of the historical significance of that jurisprudence. The U.C.C. clearly represented at least a partial ratification of a more flexible, pragmatic, and even "realistic" view of commercial law. To what extent was the generally weak opposition to the Code due to a broad change in the way lawyers conceived of the nature of law? Certainly, as Twining persuasively argues, the economic convenience and conservatism of the Code were crucial to its acceptance as were the prestige and openness of its sponsors. And yet the question remains: how significant was the change that occurred in the intellectual environment during the preceding fifty years? Samuel Williston, the great contract specialist of a previous generation, opposed much of the Code, and, as Twining points out, in 1950 Williston was almost wholly ignored. The innovations of the U.C.C. have been frequently discussed, though usually in an abstract and piecemeal fashion. A comprehensive study of the intellectual origins of the U.C.C., which admittedly lies beyond the purpose of this book, would illuminate more precisely the extent and character of the influence that Llewellyn and realism had on American legal thought and practice.

This, of course, brings up the broader question of the nature and significance of the whole phenomenon known as legal realism. Here again Twining's careful judgments clarify aspects of the movement. He emphasizes the institutional origins of Realism, "dominated to a large extent by some more immediate, specialized concerns of academic lawyers about how they should approach their tasks of teaching and scholarly research" (p. 9). Since the narrower professional and pedagogical roots of the movement have often been slighted, Twining is on solid ground in emphasizing the immediate academic context, and especially in analyzing the internal developments within the Yale and Columbia law schools which helped nourish "realistic" attitudes. His discussion of Pound, Cook, Corbin, and Hohfeld delineates their roles as transitional figures, and his chapter on the attempts at curriculum revision at Columbia in the twenties clarifies the institutional context as well as the theoretical conflicts that engaged many of the innovators. Emphasizing the difficulty of accurately generalizing about such a movement, Twining carefully points out the differences that separated those who have been lumped together as realists. He praises Llewellyn's "sensitivity to the

nuances of the particular" (p. 387), and he himself exhibits a similar sensitivity. The wisdom of such an approach for the study of a phenomenon as vague as "legal realism" is apparent, and there is much merit in his suggestion that scholars should now attempt to more carefully chart the nature of the movement through a number of individual intellectual biographies.

Even though Twining warns that he is not attempting a complete study of legal realism, his approach does raise certain caveats. While his emphasis on the institutional context of the twenties is important, for example, he tends to push it too far. "After 1928," Twining declares, "the realist movement lost such coherence as it ever had" (p. 67). Such a thesis tends to reflect the author's particular reference point—coherent academic debate within two major law schools—rather than the full scope of the intellectual and social movement, vital though amorphous, which was developing even before 1928. It is ultimately a definition of legal realism that Twining presents, one that is organizationally convenient but historically constricting. By identifying realism with the efforts toward curriculum reform at Columbia and Yale, the author simplifies the problem of analysis and in part creates for himself the relative "coherence" that he sees before 1928. His focus obscures the equally important truth that realism was also an integral part of two broader movements which go back at least to the turn of the century: intellectually, the cross-discipline movement toward pragmatism, behaviorism, and quantification; and socially, the spread of academic institutionalism, educational professionalism, and "scientific" reformism. Twining is undoubtedly right that in some sense 1928 marks a break, but from a broader perspective it is the sociological and intellectual continuity, not the internal institutional change, that seems more significant.

By viewing realism after 1928 as "two fragmented" to sustain meaningful generalizations (p. 377), Twining provides a justification for turning his attention solely to Llewellyn and largely ignoring many of the other manifestations of realism. As a reasonable device to make his study manageable, this is of course wholly legitimate and unexceptional. Llewellyn alone is well worth a book of such length. As an historical interpretation, however, the thesis that realism became "too fragmented" to warrant generalized analysis ignores one of the most important problems in twentieth century American law: how have the changing conceptions of the nature of law and of the judicial process associated with "realism" affected working legal institutions. To Twining's great credit, he is well aware of that problem and in fact devotes parts of his book to its analysis. By the general thrust of his own argument, the date 1928 is only a minor significance.

The author's occasional inattention to broader historical events also helps explain why he regards it as "puzzling" that realism proved to be so controversial (p. 382). He acknowledges the extreme statements made by some realists, but suggests that they were often outweighed by the sound and thoughtful contributions of many others. Realism, however, did not provoke bitter debate simply because too many people overestimated the first and ignored the second. Rather the controversy erupted because a large number of people saw realism as the legal manifestation of a much broader intellectual and professional movement, namely the rise of excessive empiricism, deterministic naturalism, and ethical relativism. Regardless of the accuracy of those judgment-loaded terms, realism did arise intellectually out of the naturalism and pragmatism of the early twentieth century and hence readily fit in to a much broader philosophical debate that was already engulfing American academic life. Realism was labelled and realists identified at the beginning of the thirties, the precise time that economic depression, political experimentalism, and the horror of Nazism all combined to confront thoughtful Americans with a profound intellectual, political, and emotional challenge.

Many of the realists were convinced that they represented the forces of enlightment, science, and reform, and hence many of them saw their critics as obscurantists and medievalists. Their opponents—legal traditionalists, Catholics, and political conservatives among others—viewed realism as part of a broad movement that encouraged mindless fact-gathering and ethical nihilism. Realism, from the time of its formal christening, existed in a tense, anxious, and emotionally charged context that made calm reflection difficult. Given that historical background, there is no puzzle as to why realism proved as controversial as it did.

The emotional character of that debate helped to confuse many issues and to present a distorted picture of a number of thinkers. Llewellyn, especially, was often attacked unfairly. While there are passages in some of his earlier works that made him vulnerable, the overall approach he was suggesting—even in the early thirties—was largely sound, reasonably cautious, and generally suggestive rather than strident. Llewellyn seldom if ever made the kind of extreme and mocking charges that one associates with Cook, Frank, or Arnold. He was more tentative, more catholic, and, ultimately, more perceptive. Llewellyn was ethically a relativist and methodologically a pragmatist, both of which put him fairly on one side of the debates of the thirties. Still, however, his thoughtful and useful work merited a more generous treatment than it often received. Llewellyn was, more than were many of the other realists, an undeserving victim of the anti-realist reaction.

Professor Twining's work is a thoughtful and valuable contribution to the literature on American legal thought. It draws on a great deal of research, states issues fairly and cautiously, and suggests useful lines of inquiry for future work. "Perhaps the most important lesson to be learned from a study of realism," Twining concludes, "is a partial answer to the question: What difference can it make in practice to adopt a sociological (or realist or contextual) approach to law?" (p. 383). While one might doubt the equation sociological-realist-contextual, the broad question is clearly crucial, and Twining takes a significant step toward answering it. If scholars respond, perhaps someday we will have a deeper understanding of just what it really was that realism helped do to American legal theory and practice.

EDWARD A. PURCELL, JR., *Associate Professor, Department of History, University of Missouri, Columbia*

Michael Landon, *The Triumph of the Lawyers: Their Role in English Politics, 1678-1689*. University, Alabama, University of Alabama Press, 1970. 303 pp. $7.50.

In these days of the Bicentennial, it is useful to ponder anew not merely the causative factual origins of the American Revolution, but the intellectual seedbed in which those events germinated.[1] Every generation, applying the past's lessons toward solution of present problems, tends to approach its task in a kind of walking *deja vu*. Seeing dark clouds one morning, and remembering that the last time we saw them a blizzard followed, we don our ski jackets. But unfortunately, sometimes we forget that because this is July we will not have snow, but rain, in which a quilted coat will be more hindrance than protection. Those who ignore history are compelled merely to relive it; those who misapply history relive it with agony. The most recent such misapplication was Vietnam.

The Revolutionary generation took its constitutional frame of reference principally from two sources: the history of England in the 17th century, particularly the period 1640-1689; and the geography of the North Atlantic and the American Eastern seaboard. The latter, to which these brief comments must perforce devote scant attention, emphasized both the colonies' physical isolation and (through the glacial quality of communications) the

1. B. Bailyn, *The Ideological Origins of the American Revolution* (1967) is the exemplar.