

KARL LLEWELLYN AND THE REALIST MOVEMENT. By William Twining. South Hackensack: Fred B. Rothman & Co., 1973. Pp. 574.

*Karl Llewellyn and the Realist Movement*<sup>1</sup> is an intriguing book, one well worth reading in its entirety by any student of legal philosophy. Parts of it—those describing the intellectual ferment at the Harvard, Columbia, and Yale law schools, out of which the Realist Movement developed, during the first 30 years of this century—are “must” reading for anyone interested in the development of legal education in this country. However, to avoid disappointment, it is necessary to state at the outset what this book does not purport to do. It is not an attempt to discuss the philosophical underpinnings of that diverse and amorphous phenomenon known as American legal realism, although it does contain some valuable insights on that score. Furthermore, while Twining presents a very valuable overview of the work done by the leading figures of American legal realism, he does not engage in any thorough analysis of that work, nor does he try to relate the work of the Scandinavian legal realists to that of the American legal realists. I am not, of course, suggesting that these are shortcomings of Twining’s book. I am merely trying to describe what the reader may expect to find in the book, particularly because the title is capable of creating expectations that will not be fulfilled.

The book contains the most complete biography of Llewellyn in print. Much of the biographical material was developed from people who knew Llewellyn well including his third wife, Soia Mentschikoff, a distinguished legal scholar in her own right. Twining was himself a student and friend of Llewellyn in his later days at Chicago. The book bears considerable evidence of the respect and affection of a student toward his teacher.

To the general reader the most interesting part of the book is the description of the evolution of legal education in America from Langdell’s reforms in the 1870’s to the advent of Roosevelt and the New Deal in the 1930’s. Twining’s presentation of this history is organized around the history of the three law faculties mentioned at the beginning of this review. In particular he was concerned with the *reaction* to the Langdellian innovations. Lang-

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1. W. TWINING, *KARL LLEWELLYN AND THE REALIST MOVEMENT* (1973) [hereinafter cited as TWINING].

dell was the pioneer of the modern casebook method of instruction. To him the law consisted of sets of principles that, upon proper analysis, could be distilled out of the cases by a skilled lawyer. His approach was a response to the highly fragmented practitioner-oriented legal education of his time which focused on the lecture method of instruction and encouraged rote learning. As valuable as his approach was, there was a price to be paid for divorcing the study of the law from its living context. Like Roscoe Pound, all the American realists were, to one degree or another, concerned with relating legal education and scholarship to the institutional and social arrangements from which law arises and which it is designed to serve.

The key event in the historical development of American legal realism was the bitter fight over the decanal succession at Columbia in the late 1920's culminating in the selection of Young Berryman Smith in 1928.<sup>2</sup> At that time the Columbia faculty included most of the leading figures in American legal realism, including Herman Oliphant, Hessel Yntema, William Underhill Moore, and William O. Douglas.<sup>3</sup> Oliphant was a disappointed candidate for the position. Within a few years all these men had left Columbia, although it should be pointed out that men like Karl Llewellyn, Edwin W. Patterson, and Noel T. Dowling remained and formed the nucleus of what in the 1930's was a very distinguished faculty. Oliphant and Yntema joined Cook at the Johns Hopkins Institute for the Study of Law, an intriguing adventure which never survived the financial strains of the depression and the siphoning off of talent by the emerging New Deal. In these events Llewellyn played only a minor role. He came to the fore later as a spokesman for legal realism.<sup>4</sup> By the time Llewellyn emerged as a spokesman for "realism," however, the movement had fragmented and was no longer capable of orderly and coherent development. His work, moreover, was more appellate court-oriented than that of many of the American legal realists.

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2. A principal source of the history of these events is J. GOEBEL, *THE SCHOOL OF LAW, COLUMBIA UNIVERSITY* 297-312 (1955).

3. Walter Wheeler Cook, another leading figure, had earlier also been a member of the Columbia Faculty.

4. An important factor in Llewellyn's assuming this role was the publication of his article, *A Realistic Jurisprudence—The Next Step*, 30 *COLUM. L. REV.* 431 (1930). Shortly thereafter followed Roscoe Pound's critical, *The Call for a Realistic Jurisprudence*, 44 *HARV. L. REV.* 697 (1931), which in turn elicited Llewellyn's devastating response, *Some Realism About Realism—Responding to Dean Pound*, 44 *HARV. L. REV.* 1222 (1931).

Among the three major themes of Llewellyn's work that Twining traces were Llewellyn's notion of "law jobs" and the technique of examining the so-called problem cases in the study of institutional arrangements for the settling of disputes.<sup>5</sup> Llewellyn's collaboration with the distinguished anthropologist E. Adamson Hoebel to produce *The Cheyenne Way*<sup>6</sup> is well known. It stands as the paradigm case of what collaboration between a lawyer and an anthropologist should be like, and has been very influential on subsequent anthropological studies.<sup>7</sup> Although Llewellyn's notion of law jobs and the problem case technique are not of course totally original—in the social sciences that kind of original thought would seem impossible—Llewellyn's work on these subjects is characterized by its insight and, even if he had done nothing else, would have deservedly earned him an important place in the history of legal thought.

The second major theme of Llewellyn's work upon which Twining focuses is Llewellyn's lifelong study of appellate court decision-making which culminated in the publication of *The Common Law Tradition*<sup>8</sup> two years before Llewellyn's death in 1962. If any one theme could be said to have been the central focus of Llewellyn's intellectual efforts, this was it. Not surprisingly Twining devotes more space to discussing *The Common Law Tradition* than he does to any other of Llewellyn's works.<sup>9</sup> Llewellyn's stated purpose in writing the book was to meet what he felt was a crisis of confidence in the bar about the integrity of decision-making in the appellate courts.<sup>10</sup> Llewellyn was disturbed that so many lawyers were coming to view appellate court decisions as mere acts of will.<sup>11</sup> To Llewellyn, this view of things was totally at variance with the facts. Appellate court decision-making was

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5. Twining discusses this aspect of Llewellyn's work in chapters 8 and 9, at 153-202. One of Llewellyn's major statements of his point of view is his *The Normative, The Legal, and the Law Jobs: The Problem of Juristic Method*, 49 *YALE L.J.* 1355 (1940).

6. K. LLEWELLYN & E. HOEBEL, *THE CHEYENNE WAY* (1941).

7. As Twining notes at 167, 193-96, Llewellyn was not temperamentally suited to do field work. He tended to get emotionally involved with the peoples he was investigating. In the preparation of *THE CHEYENNE WAY* most of the field work was done by Hoebel. Subsequent attempts to conduct further studies of American Indians, in which Llewellyn took a more active role in the gathering of data, were unsuccessful.

8. K. LLEWELLYN, *THE COMMON LAW TRADITION* (1960).

9. TWINING at 270-340.

10. K. LLEWELLYN, *supra* note 8, at 3.

11. K. LLEWELLYN, *supra* note 8, at 3-4.

highly reckonable, and precedent was a very significant restraint on the range of judicial decision.

Central to Llewellyn's thought was the idea that law is a craft with known and accepted traditions and techniques. It was these traditions and techniques that made judicial decision-making reckonable. An important part of *The Common Law Tradition* consists of the identification of a great many techniques of handing precedent with copious citations to cases evidencing these techniques.<sup>12</sup> Llewellyn felt that it was possible to group these techniques according to the degree of legitimacy they possessed, the criterion of legitimacy consisting of a mixture of professional acceptance and the degree of intellectual honesty they reflected. For example, misstating the facts of a prior case and then distinguishing it from the instant case would be an illegitimate technique.

Llewellyn's belief that appellate court decision-making was highly reckonable was not based only on a belief that there was widely accepted agreement on what kinds of techniques of manipulating precedents were legitimate. He also believed that it was often possible to recognize in certain cases that there was such a thing as a "correct result" for those cases. Indeed, certain results were so important that courts would occasionally be obliged to reach them—*i.e.*, to make use of the "leeways" afforded the courts—regardless of what the accepted means of arranging precedents would permit.<sup>13</sup> In most situations, however, technique and result were interrelated. There was, Llewellyn maintained, a "Law of Fitness and Flavor" which enabled those who understood it to know what results justified what technique.<sup>14</sup> Llewellyn posited, finally, a "Law of the Singing Reason" which was fulfilled when "[a] rule which wears both a right situation-reason and a clear scope criterion on its face yields regularity, reckonability, and justice all together."<sup>15</sup> Central to Llewellyn's thought, as it was to that of some of the other "realists," such as Oliphant,<sup>16</sup> was the notion that, if one analyzed the underlying factual situation closely enough, the correct legal solution would become apparent to the perceptive observer. It was assumed that one could look at the "facts" of complicated social situations more or less objectively, rather than being forced to view them through one's pre-existing

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12. K. LLEWELLYN, *supra* note 8, at 77-91.

13. K. LLEWELLYN, *supra* note 8, at 219-22.

14. K. LLEWELLYN, *supra* note 8, at 222-23.

15. K. LLEWELLYN, *supra* note 8, at 183.

16. See Oliphant, *A Return to Stare Decisis*, 14 A.B.A.J. 71 (1928).

conceptual apparatus which includes, of course, a legal substructure.

In discussing *The Common Law Tradition* Twining tries to subject these notions to philosophical analysis, but he is uncomfortable in doing so. This discomfort is understandable because Llewellyn's work does not lend itself to sustained philosophical analysis. Such analysis can make his thoughts seem trite, pretentious, and rather repetitive, which impressions are misleading. Llewellyn's greatness lies in his ability to give insight and inspiration; he was always something of a poet,<sup>17</sup> and his work must be understood in those terms. That is why a discussion of his work, such as Twining's, inevitably becomes in large part biographic. It is simply impossible to separate the man from his work, and it is unfair to Llewellyn to try to do so.

The third major theme of Llewellyn's work which Twining describes is Llewellyn's major accomplishment in helping to organize, and then directing the execution of, that vast project which culminated in the drafting of the Uniform Commercial Code, which has now been adopted by all the states except Louisiana. Here Twining describes the history of the project and the overall point of view which Llewellyn brought to it.<sup>18</sup> Llewellyn was fortunate in having as his Associate Reporter Soia Mentschikoff, a person of real ability and great energy, who was both a loyal and imaginative collaborator.

Llewellyn was a great legal scholar and teacher—he primarily thought of himself as a teacher. He was also a great man. This in itself makes Twining's thoughtful and well-researched book an important one.

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17. Indeed, Llewellyn actually published a book of poetry, *K. LLEWELLYN, PUT IN HIS THUMB* (1931). One should of course also note in this regard Llewellyn's constant emphasis on "style" in judicial decision-making in *THE COMMON LAW TRADITION*.

18. *TWINING* at 270-340.

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