

To understand the force of this question, consider again the example of A successfully recovering his mistaken payment from B, the mistake being that he paid B instead of C. Though the mistake here appears to be self-evident, it is often overlooked that the example silently assumes that A is under some (contractual, statutory etc.) duty to pay C but under no duty to pay B and that, furthermore, it is precisely because of the existence of this duty that A can solidly establish his mistake in paying B. Suppose next however that A pays B without such a duty to C. Now A has much greater difficulty in showing that he did pay by mistake, for the simple reason that it will not be easy for him to disprove that he may have paid B to make a gift, or to liquidate a genuine but technically unenforceable debt, or in order to settle or compromise a possible (which may later turn out to be an unfounded) claim against himself, all of which payments A may indeed not have been mistaken about but have come merely to regret. In other words, A will have to show that he paid B in the mistaken execution of a 'duty' rather than just unwisely, a point perhaps best caught by French law (art. 1235 CC) according to which: *tout payement suppose une dette: ce qui a été payé sans être dû, est sujet à répétition*. To say all this is admittedly to make only a very general point, but it also happens to be the basic one around which all our manifold questions concerning mistake in quasi-contract ultimately revolve. Of course we shall find that we cannot answer these questions just by reaffirming a principle of recovery for any payment *de l'indu*; we shall rather have to look at this principle in relation to all its negative counterparts (e.g., 'voluntary' payments such as gifts, 'honest debts', etc.) and then see how the positive and negative results compare severally and jointly in the various legal systems concerned. And this very detailed job still needs to be done.

PHILOSOPHY OF LAW

KARL LLEWELLYN AND THE REALIST MOVEMENT. By William Twining.
London: Weidenfeld & Nicolson, 1973. Pp. xiv and 574.

*Reviewed by Grant Gilmore**

Professor Twining is English and Oxford-trained—two points which are not entirely without significance. He came to the University of Chicago for a year's graduate study in 1957 and there fell under Llewellyn's influence. After Llewellyn's death in 1962 he organized and catalogued the immense mass of papers which Llewellyn had left. In preparation for writing the present volume he seems

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to have interviewed at length every available person (including this reviewer) who had had any significant contact with Llewellyn during his professional career.¹

It is, no doubt, as difficult for the English to understand Americans (or vice versa) as it is for men to understand women (or vice versa). Even so, attempts to communicate across the cultural (or sexual) gulf are not without interest. Travelers in a foreign land see many things which, by long familiarity, have become invisible to the natives. English legal scholars have not much concerned themselves with the strange law-ways (as Llewellyn might have put it) of their transatlantic cousins. We are in Professor Twining's debt for this long, sympathetic report of his observations amongst us.

Before proceeding further I will take issue with a proposition which, it seems to me, is implicit in much of his discussion. (If I have misread him, the following comments are directed not to Professor Twining but to some mythical, composite figure whom we may call the compleat Oxonian.) The proposition is that only those who have received formal training in technical philosophy are entitled to be taken seriously in matters of general legal theory or philosophical jurisprudence. If that were true, the only jurists, past or present, to whom we should pay any attention are Professors H. L. A. Hart and Ronald Dworkin. With deference, I suggest that we are not that badly off. I do not know where the line is to be drawn between general (or high-level) theory and particular (or low-level) analysis; I do not think that there is any point or profit in drawing such a line. Llewellyn had little interest in the technical philosophical literature (which he may or may not have been familiar with). However that may be, I submit that his general theories about law are entitled to be taken quite as seriously as his particular analyses of cases.

Professor Twining's book comes in two unequal segments. The first five chapters, plus a concluding chapter (something over a hundred pages in all, including footnotes) are devoted to the Realist Movement. The balance (well over four hundred pages) is Llewellyn—his life, summaries of his writings (published and unpublished), commentaries on the writings, and an account of his work on the Uniform Commercial Code.

Foreign jurists (like their American counterparts) have long been baffled by the curious episode which is generally known as American Legal Realism. One reason for the bafflement is that the term Realism (like the term Watergate) has come to have both a narrow meaning and a broad meaning. Narrowly, there was an inconsequential and altogether dreary exchange of law review articles in the early 1930's. Broadly, the period between the two World Wars witnessed in this country the breakdown of our orthodox or classical theory

1. My own contact with Llewellyn was as a member of the drafting staff for the Uniform Commercial Code, principally from 1946 to 1954. Llewellyn was the Chief Reporter for the entire Code project. I attempted to give my own appreciation of the man and his work in an obituary notice which appeared in 71 *Yale L.J.* 813 (1962).

of jurisprudence which had gone virtually unchallenged during the half-century before World War I. Llewellyn played a notable role both in the narrow law review controversy—his article, “Some Realism about Realism,”² was generally taken as the manifesto of the new “school”—and in the broad movement of tearing down and rebuilding.

Llewellyn insisted throughout his life that there had never been a Realist “school,” “movement,” or what not.³ In making such denials he presumably had the law review controversy principally in mind. He certainly never denied the existence of a broad movement in American legal writing which manifested itself during the inter-War period nor did he mean to stigmatize all the legal thinkers of his generation (including himself) as methodologists without a theory. He was more than willing to describe his own theoretical writings as examples of “Realistic jurisprudence”⁴ and would no doubt have been willing to admit that, in the broad sense, there had indeed been such a school or movement.

Professor Twining treats the Realist Movement in this country as an American exclusive—that is, as a local event or happening which has no connection with the broader or deeper currents of jurisprudential thought in England or on the continent of Europe. Indeed, he “localizes” the movement to the extent of suggesting that it was mostly a matter of proposals for curricular reform put forward by members of the Columbia law faculty during the 1920’s and by members of the Yale faculty during the 1930’s. We owe to this localizing approach a series of excellent chapters on the development of American legal education from Langdell’s reorganization of the Harvard Law School during the 1870’s to the Columbia controversy during the 1920’s which ended inconclusively with the break-up and dispersion of that great faculty. (Llewellyn seems to have been the only member of the reform group who stayed on at Columbia after the break-up.)

I suggest that Realism (in the broad sense) was not as American as apple pie; neither was it a matter of academic in-fighting in the Ivy League. My own thought is that Realism was the American version of a process through which, arguably, all legal systems pass at

2. 44 *Harv. L. Rev.* 1222 (1931). The article, which had been written by Llewellyn in collaboration with Jerome Frank (although it was published under Llewellyn’s name alone), was a reply to Dean Pound’s “The Call for a Realist Jurisprudence,” 44 *Harv. L. Rev.* 697 (1931).

3. A year or so before his death Llewellyn read a draft of a piece of mine which appeared as “Legal Realism: Its Cause and Cure,” 70 *Yale L.J.* 1037 (1961). He commented: “Where you all go wrong is in thinking that Realism was a theory. It was not. It was merely a methodology.” He developed the same idea in a Note on “Realism and Method” which appears as Appendix B in his last work, *The Common Law Tradition*, p.508 et seq. (1960).

4. “I therefore claim to know what it [“Realistic jurisprudence”] was about, and what it is about. I now put forward, explicitly as a proper product and exhibit of *real* realism, this book.” The comment appears in the course of the note on “Realism and Method” cited *supra* n.3 at p. 512 (emphasis in original).

a particular point in their growth. There is, first, an attempt to achieve a high degree of formal unity in the substantive law on the basis of the existing case law. After enjoying great popularity for a generation or two, the initial formulation goes into its period of break-down and becomes the butt of savage attacks by reforming jurists who, denying the possibility of achieving unity on the level of case law, call for general codification. Thus, in English legal history the Benthamite reaction against Blackstone's Commentaries seems to correspond with the Realist reaction against "Langdellian" jurisprudence.⁵ Conceivably the same sequence appears in French legal history during the period between Montesquieu's *De l'Esprit des Loix* and the Napoleonic codification but my ignorance of French juristic thought in the second half of the eighteenth century is so nearly total that my opinion is entitled to no weight.

Bentham had hoped to become the great codifier of his time. Llewellyn, luckier in his dates, did become the architect of the Uniform Commercial Code, which Professor Twining properly describes as "one of the most ambitious legislative ventures of modern times."⁶ Unfortunately, Professor Twining's discussion of the Code, of Llewellyn's part in its drafting, and of Llewellyn's published work in the commercial law field (principally sales) is the weakest part of the book. Sales is the only area of the substantive law which Llewellyn ever studied intensively; his general theories of legal growth and development derived entirely from his reconstruction, based on an immensely detailed knowledge of the case law, of the course of sales law from the early nineteenth century to his own time. During the 1930's Llewellyn, in addition to putting together a remarkable casebook, published a magisterial series of articles on sales (which, on rereading, are as impressive as when they first appeared). Professor Twining, who disclaims any expertise in the field, passes them by almost without comment or analysis.⁷ He also accepts what seems to me to be an idealized version of how the Code was drafted and foregoes any attempt to relate the Code to other developments in American law during the past forty or fifty years or to the other aspects (or manifestations) of Llewellyn's own thought. The Code, which was Llewellyn's principal occupation for fifteen years, is, for better or for worse, one of the major legal artifacts of the twentieth century. It is easy to sympathize with Professor Twining's disinclination to mess around with such grubby material. However, a book

5. Professor Twining, at the end of his concluding chapter on "The Significance of Realism," links the names of Bentham and Llewellyn: "In developing working theories and usable hypotheses there will be some of us who will feel attracted simultaneously by thinkers as seemingly diverse as, for example, Bentham and Llewellyn. Both are products of the intellectual milieu of the common law and they have more in common than may first appear" (Twining, p. 387).

6. Twining, p. 270.

7. "Some of these [articles on contract and commercial law] have been highly regarded by experts in the field. No attempt will be made here to do justice to them as contributions to the study of substantive law" (Twining, p. 337).

about Llewellyn which treats his major work and accomplishment as inconsequential by-play (which can be left to "experts in the field") can hardly be regarded as definitive.

The Common Law Tradition/Deciding Appeals, which appeared two years before Llewellyn's death, was designed to be the culmination of his life's work: a comprehensive statement of his jurisprudential theories. Professor Twining notes that in this country the book was widely reviewed and, by most reviewers, enthusiastically praised. In England it was passed over in silence; not one review appeared in any English legal periodical. On the book's current status in this country, I have this report for whatever it may be worth. During the spring of 1974 I assigned it for reading in a seminar attended by a group of twenty-odd second and third year law students at Yale. Not only had none of the students ever read the book; none of them had ever heard of it. Professor Twining seems to have ambivalent feelings about the book which he describes as "a warty giant but . . . a giant nonetheless."⁸ He is, on the whole, skeptical about the book's major thesis (which I will come to in a minute) but praises its "aperçus" and concludes that it "promises to be a rich source of insight into judicial processes for many years to come."⁹

During the 1930's Llewellyn evidently hit on the idea that interesting conclusions about judicial techniques (or the judicial process) could be drawn from the intensive study of all the cases (whatever they might be about) decided by a given court on a given day. He first tried the idea out in a series of Storrs Lectures which he gave at Yale in 1940, using as his text all the cases decided by the New York Court of Appeals on July 11, 1939 (281 N.Y. 13-317). He made further experiments of the same type (using different courts) in other lectures which he gave during the 1940's and 1950's. Finally, further studies of various courts ("current samplings") were made in the late 1950's in preparation for publication. According to Llewellyn, *The Common Law Tradition* "gathers together, in mature and tested form, the substance"¹⁰ of the work which had begun with the Yale lectures in 1940.

The "court studies" are put forward as the essential "research data" on which the book's conclusions or theses are based (or from which they flow). At various points in the book Llewellyn makes half-hearted attempts to persuade the reader that all this is, in some sense, "empirical" or "scientific." In the 1930's Llewellyn (along with the other Realists) had spoken highly of the prospects for "empirical research" in law, although none of them (except Underhill Moore) ever undertook any. In the 1950's Llewellyn's colleagues at the University of Chicago were engaged in well-funded "empirical" studies of the jury and of the arbitration process. Llewellyn's unconvincing pretense that *The Common Law Tradition* is a work of scientific (or social-scientific) research may be taken as an uneasy bow to his

8. Twining, p. 269.

9. Ibid.

10. *The Common Law Tradition*, p. 512.

younger Chicago colleagues who were actually doing the sort of work he had advocated twenty years earlier. Llewellyn's own book is neither better nor worse from having been presented as something which it manifestly was not.

The major thesis of *The Common Law Tradition* is, essentially, an historical or descriptive statement. (It may well be that all general statements about the nature of law or of the legal process, which are precise enough to be meaningful, are of this type.) Llewellyn's thesis goes to the manner in which American appellate courts have been deciding cases from the 1800's until the 1950's. He identifies three distinct periods, each lasting for approximately fifty years. During the first period (pre-Civil War) the courts operated in what Llewellyn calls the Grand Style. During the second period (Civil War to World War I) the Grand Style was lost and replaced by a Formal Style. During the third period (post-World War I) the Grand Style has re-emerged and has now become dominant.

There are many obscurities and lacunae in Llewellyn's thought. He makes, so far as I am aware, no attempt to explain why the Grand Style should have lost out to the Formal Style in the second half of the nineteenth century or why it should have re-emerged in this century. It is unclear whether he hypothesized an endless series of fifty-year cycles or whether he thought that his Formal Style period was a temporary aberration which would not (or at least need not) be repeated. (I am inclined to think that he leaned toward the "temporary aberration" view.) Nor does he ever succeed in making clear what either the Grand Style or the Formal Style consisted of—except that the Grand Style was (and is) a good thing while the Formal Style was a bad one. ("Style," in Llewellyn's lexicon, did not refer to literary felicity [or its absence] but to the process of adjudication.)

I happen to think that Llewellyn's thesis (that there have been three distinct periods in American legal history) is, taken as a descriptive or historical statement, entirely valid. I think that it was, also, profoundly original. I do not share his belief that virtue has triumphed over vice and that everything is now for the best in the best of all possible worlds. I am puzzled by the fact that he apparently did not associate the Formal Style of adjudication with the "Langdellian jurisprudence" which he had so blithely jostled against in the great days of the Realist controversy.

Llewellyn, naturally, would have liked to have us believe that his thought was all of a piece from beginning to end. I am inclined to think that there was a marked discontinuity between his earlier work and his later work. In his great series of commercial law articles published during the 1930's, there was no hint of the re-emergence of the Grand Style: on the contrary, their reconstruction of the course of development was pessimistic, even nihilistic. The 1940 Yale lectures were never published, although, according to Professor Twining's bibliography of Llewellyn's writings, they survive in manu-

script. It would have been interesting to compare them with his final formulation in *The Common Law Tradition*.¹¹

It is to be hoped that Professor Twining's book will serve to stimulate a revival of interest in the work of one of our most original thinkers on law and jurisprudence. If there is anything to Llewellyn's thesis about American legal development (as I believe there is), it would be of the highest interest to learn whether comparable rhythms, sequences or cycles can be identified in other legal systems at various stages in their development. I suggested earlier in this review that American Legal Realism need not be taken as having been as American as apple pie but can (and should) be taken as one instance of a general process. I suggest that the same point holds for Llewellyn's "periodization" of American law over the past one hundred and fifty years. The readers of this Journal are uniquely equipped to undertake such investigations. I trust that some of them will.

11. Twining remarks, somewhat vaguely, that Llewellyn's "concept of 'period style' can be related back directly to his interest in Romanesque and Gothic cathedrals, which he took up seriously as a hobby in 1931" (Twining, p. 204).