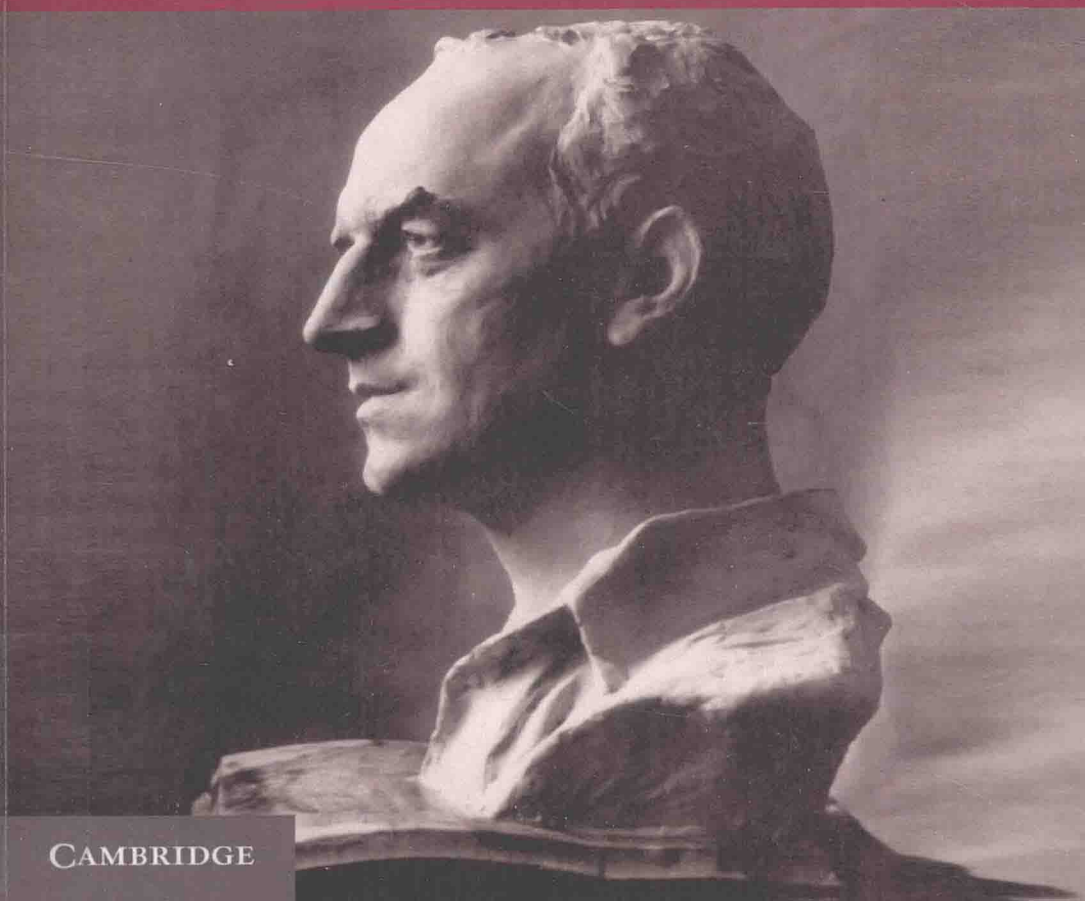
§Law in Context

Karl Llewellyn and the Realist Movement

2nd Edition

William Twining



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William Twining
University College London

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Cover photo: The photograph depicts a bust of Llewellyn by the Russian sculptor Sergei Konenkov, who later came to be regarded as one of the leading Russian artists of the twentieth century. Karl and Betty Llewellyn befriended Konenkov in New York in 1924 and helped him to obtain commissions for busts of leading American luminaries, including three Supreme Court Justices. (See M. T. Lampard, J. E. Bowlt, and W. R. Salmond, *The Uncommon Vision of Sergei Konenkov 1974–1971: A Russian Sculptor and His Times*, New Brunswick: Rutgers University Press, 2001; KLRM 421, 447.) The original of the Llewellyn bust is in the University of Chicago Law School, and a cast is in the University of Miami Law School.

KARL LLEWELLYN AND THE REALIST MOVEMENT, SECOND EDITION

First published in 1973, *Karl Llewellyn and the Realist Movement* is recognized as a classic account of American Legal Realism and its leading figure. Karl Llewellyn is the best known and most substantial jurist of the variegated group of lawyers known as the American Realists. A man of wide interests and colorful character, he made important contributions to legal theory, legal sociology, commercial law, contract law, civil liberties, and legal education.

This intellectual biography sets Llewellyn in the broad context of the rise of the American Realist movement and contains a brief overview of Llewellyn's life and character before focusing attention on his most important works, including *The Cheyenne Way*, *The Bramble Bush*, *The Common Law Tradition*, the *Uniform Commercial Code*, and some significant manuscripts. In this second edition the original text is unchanged and is supplemented with a foreword by Frederick Schauer and a lengthy afterword in which William Twining gives a fascinating personal account of the making of the book and comments on developments in relevant legal scholarship over the past forty years.

William Twining is the Quain Professor of Jurisprudence Emeritus at University College London and a regular Visiting Professor at the University of Miami School of Law. He was a pupil of Karl Llewellyn in 1957–58 and put Llewellyn's very extensive papers in order after his death in 1962. Twining's recent writings include *Rethinking Evidence* (2nd edition, 2006), *General Jurisprudence* (2009), and *How to Do Things with Rules* (5th edition with David Miers, 2010), all published by Cambridge University Press and recognizable as part of the Realist tradition.

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FOREWORD

Frederick Schauer

I

Legal Realism is contested terrain. Whether we label the perspective *legal realism*, or *Legal Realism*, or *American Legal Realism*, there have been for at least eighty years serious disputes about just what Legal Realism is and what it claims. Moreover, the terrain is contested not merely because there are disagreements around the edges – that is, with respect to the borderline cases of what is or is not a Realist perspective.[1] Rather, the very nature of Legal Realism is contested, as we can see from the existence of widely divergent views about just what the core claims and commitments of Legal Realism are.

A sample of the various positions claiming the Legal Realist banner will make the extent of this disagreement clearer. Thus, some theorists believe that Legal Realism is centrally about the relative importance of facts in adjudication, in contrast to a traditional view allegedly holding that abstract rules are more important determinants of legal outcomes than are the facts of particular cases.[2]

[1] In this foreword, *Legal Realism* will be capitalized, in part to emphasize the differences between Legal Realism as a view about some or many aspects of law, on one hand, and the various forms of philosophical realism, on the other. In the fields of metaphysics and meta-ethics, for example, realist perspectives stress the existence of some external or objective reality, as opposed to the view that what we perceive as moral or physical reality is no more than the creation of human cultures or the minds of individual human beings. By stressing the mind independence of an external reality, therefore, most embodiments of philosophical realism are virtually the exact opposite of Legal Realism, at least insofar as Legal Realism in most of its forms is understood to place an emphasis on discretion, indeterminacy, non-objectivity, and the human element in legal decision making.

[2] See especially Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford: Oxford University Press, 2007);

Those who subscribe to this understanding of Legal Realism's core commitments do not, of course, saddle the traditional view with the implausible position that abstract legal rules can be applied to particular cases without regard to the facts presented in those cases. Nevertheless, an important difference remains in emphasis between a traditional view that the determination of which facts are relevant comes from preexisting legal rules, and a Legal Realist view holding that judicial and other legal decisions are made primarily on the basis of all the facts of a particular controversy that a particular judge deems relevant, without regard to whether some array of preexisting legal rules makes those facts relevant.

Closely allied with this view about the importance of the facts of particular controversies is the idea that realism is centrally about the sequencing of decision making and justification. Going back at least as far as Judge Joseph Hutcheson's famous 1929 article about the role of the hunch in judicial decision making,[3] and continuing as the primary point of Jerome Frank's *Law and the Modern Mind*,[4] theorists and commentators often designated as Legal Realists have argued that judges do not first consult the law and thereafter reach a decision on the basis of that law, as the traditional picture would have it. Rather, Hutcheson and Frank and many others have claimed, judges initially reach a decision about which party ought to prevail, often on the basis of a full range of both legal and nonlegal facts and factors, and then, and only then, do they consult the law in order to justify or rationalize a decision made substantially on nonlegal grounds.

Still another view of Realism contrasts realism with formalism, or at least something claimed to be formalism.[5] Here Realism's target

Brian Leiter, "American Legal Realism," in Martin P. Golding & William A. Edmundson, eds., *Blackwell Guide to the Philosophy of Law and Legal Theory* (Oxford: Blackwell Publishing, 2005), pp. 50–66; Brian Leiter, "Legal Realism," in Dennis Patterson, ed., *A Companion to Philosophy of Law and legal Theory* (Oxford: Blackwell Publishers, 1996), pp. 261–79.

[3] Joseph J. Hutcheson, Jr., "The Judgment Intuitive: The Function of the 'Hunch' in Judicial Decision," *Cornell Law Journal*, vol. 14 (1929), pp. 274–88.

[4] Jerome Frank, *Law and the Modern Mind* (New York: Brentano's, 1930).

[5] See Laura Kalman, *Legal Realism at Yale 1927-1960* (Chapel Hill, North Carolina: University of North Carolina Press, 1986). See also Theodore M. Benditt, *Law as Rule and Principle: Problems of Legal Philosophy* (Stanford, California: Stanford University Press, 1978), pp. 2–5; Brian Bix, *Jurisprudence: Theory and Context* (London: Sweet & Maxwell, 3d ed., 2003), pp. 179–80; Robert S. Summers, *Form*

is said to be the view that law is often, usually, or almost always determinate, such that the law dictates a particular result, or at least renders ineligible most of the outcomes that would be otherwise eligible on moral, political, economic, or pragmatic grounds.[6] The Realist challenge to this view, a challenge sometimes described in terms of indeterminacy[7] and sometimes in terms of functionalism or instrumentalism,[8] is the view that in all, most, or many cases, especially in the controversies that wind up in court or wind up in appellate courts, the law simply does not uniquely determine a result, the consequence being that the law leaves open to the judge or other decision maker a wide range of possible results, results that the decision maker may or must select on nonlegal grounds.[9]

The foregoing forms of Legal Realist claims are all about judicial decision making, but other Realist perspectives are about academic or empirical method. What do we want to know about law, and how do we go about finding it? Thus, Legal Realism is often thought of as the empirical (and largely external) examination of law and its processes, with the aim of allowing lawyers and others to predict legal outcomes,[10] or of offering social science insights

and Function in a Legal System (New York: Cambridge University Press, 2006), pp. 28–9; Anthony J. Sebok, *Legal Positivism in American Jurisprudence* (Cambridge: Cambridge University Press, 1998), pp. 75–83; Brian Z. Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (Princeton, New Jersey: Princeton University Press, 2010).

6 For an analysis and qualified defense of formalism, see Frederick Schauer, "Formalism," *Yale Law Journal*, vol. 97 (1988), pp. 509–48.

7 See Kent Greenawalt, *Law and Objectivity* (New York: Oxford University Press, 1992), p. 11; Roger Shiner, *Norm and Nature: The Movements of Legal Thought* (Oxford: Clarendon Press, 1992), p. 217; Mark Tushnet, *Red, White, and Blue: A Critical Analysis of Constitutional Law* (Cambridge, Massachusetts: Harvard University Press, 1988), pp. 191–6.

8 Kalman, *op. cit.* note 5, pp. 29–31.

9 See Brian Leiter, "Law and Objectivity," in Jules Coleman & Scott Shapiro, eds., *Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford: Oxford University Press, 2002), pp. 969–89.

10 The importance of seeing law at least partly in terms of predicting legal outcomes is a major theme of Oliver Wendell Holmes, "The Path of the Law," *Harvard Law Review*, vol. 10 (1897), pp. 457–78. The Realists embraced this idea, see, for example, Karl N. Llewellyn, *The Theory of Rules* (Frederick Schauer, ed., Chicago: University of Chicago Press, 2011), pp. 55–60, but took it one step further. Holmes believed that knowledge of legal rules and legal categories would facilitate accurate prediction, but the Realists, *contra* Holmes, stressed that identifying various nonlegal factors would often make for better predictions.

or conclusions about the nature of law itself, or, more commonly, identifying the determinants of legal outcomes. And thus a common claim is that a multiplicity of different forms of social science inquiry about law and legal decision making, forms of inquiry that are to be contrasted with the close textual and doctrinal analysis that still pervade legal education and legal scholarship, constitute the preeminent contribution of Legal Realism.[11]

A more modern characterization of Realism goes in a quite different direction, focusing less on judicial decision making and more on the substance of law. More particularly, this view, which tends to see Robert Hale[12] as a central figure in the Realist tradition,[13] understands Legal Realism as the denial of law's alleged neutrality. Legal rules and doctrines, according to this critique, are traditionally thought to be natural, neutral, or both.[14] To the extent that this view exists, then the contrasting view – that legal rules or legal baselines

And thus the modern political scientists who emphasize the role of nonlegal factors in determining and predicting Supreme Court decisions are properly understood as heirs to this strand of Realism. See, for example, Saul Brenner & Harold J. Spaeth, *Stare Indecisis: The Alteration of Precedent on the Supreme Court , 1946-1992* (New York: Cambridge University Press, 1996); Jeffrey J. Segal & Harold J. Spaeth, *The Supreme Court and the Attitudinal Model Revisited* (New York: Cambridge University Press, 2004). For a valuable analysis of the relationship among prediction, Holmes, and Realism, see William Twining, "The Bad Man Revisited," *Cornell Law Review*, vol. 58 (1972), pp. 275–303.

[11] See John Henry Schlegel, *American Legal Realism and Empirical Social* Science (Durham, North Carolina: University of North Carolina Press, 1995); Brian Z. Tamanaha, *Realistic Socio-Legal Theory* (Oxford: Clarendon Press, 1997).

[12] See Robert L. Hale, "Coercion and Distribution in a Supposedly Non-Coercive State," *Political Science Quarterly*, vol. 38 (1923), pp. 470–9.

[13] Hale, an economist and lawyer, was a Columbia colleague of Llewellyn's, but Llewellyn does not list him among the Realists in Karl Llewellyn "Some Realism About Realism," *Harvard Law Review*, vol. 44 (1931), pp. 1222–64. This exclusion may or may not be telling about Llewellyn's view of the core commitments of Realism, although the exclusion of Hale may be no more dispositive than the inclusion of Edwin Patterson, whose work bears few earmarks of any Realist perspective. See William Twining, this volume, p. 410 note 33.

[14] Blackstone is a particularly common target. See Duncan Kennedy, "The Structure of Blackstone's Commentaries," *Buffalo Law Review*, vol. 28 (1979), pp. 209–382. It is not at all clear just who actually believed (or believes) that the substantive baselines of legal doctrine are either natural or neutral. Most of the standard suspects, e.g., Herbert Wechsler, "Toward Neutral Principles in Constitutional Law," *Harvard Law Review*, vol. 73 (1959), pp. 1–35, turn out on close reading and inspection to either have had more complex views or to have believed nothing of the kind.

are actually the product of political and economic choices – is, once again, claimed to be the true version of Legal Realism.[15]

II

Each of the foregoing understandings of Legal Realism has its adherents. Members of and sympathizers with the Critical Legal Studies Movement, for example, tend to promote the last mentioned of these interpretations,[16] insisting that Legal Realism was centrally about recognizing the non-neutrality and consequent political choices implicit in substantive legal doctrine.[17] And both the qualitative and the quantitative empirical social scientists who study the operation of law claim to be fostering the "new legal realism," even as their methods (and home disciplines) vary widely.[18]

[15] See, for example, Neil Duxbury, *Patterns of American Jurisprudence* (Oxford: Clarendon Press, 1995); Barbara H. Fried, *The Progressive Assault on Laissez Faire: Robert Hale and the First Law and Economics Movement* (Cambridge, Massachusetts: Harvard University Press, 1998); Morton J. Horwitz, *The Transformation of American Law 1870-1960* (New York: Oxford University Press, 1992), pp. 169–246; Gary Minda, *Postmodern Legal Movements: Law and Jurisprudence at Century's End* (New York: New York University Press, 1995). This substantive conception of Realism is also apparent in the Introduction, chapter introductions, and organization (which does not get to issues of legal reasoning and decision making until Chapter 6) of William W. Fisher III, Morton J. Horwitz, & Thomas A. Reed, eds., *American Legal Realism* New York: Oxford University Press, 1993).

[16] See Horwitz, ibid.; Minda, ibid.; Guyora Binder, "Critical Legal Studies," in Patterson, *A Companion to Philosophy of Law, op. cit.* note 2, pp. 280–90. See also Andrew Altman, *Critical Legal Studies: A Liberal Critique* (Princeton, New Jersey: Princeton University Press, 1990), pp. 106–17.

[17] It is worth noting, however, that one of the goals of Critical Legal Studies is/was also to continue the more conventionally understood dimensions of the Realist project, in particular the focus on law's indeterminacy and the consequent choices open to a judge in any particular case. See, for example, Duncan Kennedy, "Freedom and Constraint in Adjudication: A Critical Phenomenology," *Journal of Legal Education*, vol. 36 (1986), pp. 518–62; Mark Tushnet, "Critical Legal Studies: An Introduction to Its Origins and Underpinnings," *Journal of Legal Education*, vol. 36 (1986), pp. 505–17.

[18] Compare Howard Erlanger *et al.*, "Is It Time for a New Legal Realism?" *Wisconsin Law Review*, vol. 2005 (2005), pp. 335–63, with Daniel A. Farber, "Toward a New Legal Realism," *University of Chicago Law Review*, vol. 68 (2001), pp. 279–393, with Thomas J. Miles & Cass R. Sunstein, "The New Legal Realism," *University of Chicago Law Review*, vol. 75 (2008), pp. 831–51. See also Victoria E. Nourse & Gregory C. Shaffer, "Varieties of New Legal Realism: Can a New World Order Prompt a New Legal Theory?" *Cornell Law Review*, vol. 95 (2009), pp. 61–137.

It would be tempting to dismiss as irrelevant these contrasting perspectives on the true nature of Legal Realism. The disputes, some might say, are merely contests about a label, and labels are just that – labels with no intrinsic reality. But the temptation should be resisted. Labels often make a difference in terms of how we perceive, categorize, and organize the world, or at least some part of it, and the battle over how we should understand Legal Realism and the tradition that created it is in reality a battle over ownership of the legacy of perhaps the most important strand of American legal theory, or at least the most characteristically American strand of American legal theory. Any attempt to frame or to reframe Legal Realism, therefore, is best understood as an offer or attempt to reach an understanding of a large component of the American legal tradition.[19]

Of course the various perspectives on or strands of Legal Realism need not be thought of as necessarily mutually exclusive. The importance of an external empirical study of the determinants of legal decisions, for example, is fully compatible with the view that nonlegal factors are preeminent among those determinants; and the view that nonlegal factors are of principal importance is similarly compatible with the view that the equities of the particular facts of particular cases are among the most important of the nonlegal factors. On the other hand, the view that legal rules are indeed causally important in judicial decision making, but that the rules that are causally important diverge from the "paper rules" found in law books, a view most attributable to Llewellyn,[20] is in some tension with the fact-focused particularism of Hutcheson,

[19] It is worthwhile noting here that the connections between American Legal Realism and the Scandinavian Legal Realism of Axel Hägerström, A. Vilhelm Lundstedt, Karl Olivecrona, and Alf Ross (see Gregory S. Alexander, "Comparing the Two Legal Realisms – American and Scandinavian," *American Journal of Comparative Law*, vol. 50 [2002], pp. 131–74 [2002]) are, at best, attenuated. Although, as Alexander argues, the Scandinavian Realists shared some political goals with many of the American Realists, the fundamental core of Scandinavian Realism was skepticism about the objectivity (or even the point) of morality, a view drawn from the logical positivism that flourished during the period when many of the Scandinavian Realists were writing. Some American Realists may have been similarly skeptical of the objectivity of morality, but the American Realist enterprise tended to be far removed from addressing such issues.

[20] See Llewellyn, *op. cit.* note 10; Karl Llewellyn, "A Realistic Jurisprudence: The Next Step," *Columbia Law Review*, vol. 30 (1930), pp. 431–65.

Frank, and others. Even putting such tensions aside, however, matters of emphasis are important. Consequently, the question of the true or central nature of Legal Realism persists. It was a question that very much concerned Llewellyn in "Some Realism about Realism,"[21] and it is a question the importance of which should not be easily dismissed as simply being about mere labels.

Asking about the real nature of something, however, is fraught with perils. Famously, J. L. Austin treated "real" as his primary example of what he (unfortunately) called a "trouser-word," in the sense of there being some other word, the negation, that "wore the trousers" by virtue of playing the leading role.[22] Thus, we do not really know what it is for something to be real unless we have an understanding of the particular form of unreality that the designation of something as real is intended to reject. The statement that a coat is made of real fur, for example, is an assertion that the coat is not made out of imitation fur, but it is not an assertion that the fur is not toy fur, yet in other contexts real means not a toy, as when in some contexts we talk about a real car when we mean precisely to say that it is not a toy car.

In the context of law, therefore, it is interesting to wonder just what form of unreality the various claims of Legal Realism to be real are attempting to deny. There are numerous candidates for such claimed unrealities, and each of the characterizations of Realism described here is premised on a belief that there is a certain kind of unreality that would be usefully disabused by accepting the Realist challenge. Thus, for some the relevant unreality is the belief that legal decision making is rule-intensive rather than fact-intensive,[23] for others it is the belief that judges do not decide on an outcome until after consulting the relevant legal rules,[24] for still others it is the belief that judicial opinions are an accurate description of the

[21] *Op. cit.* note 9. It is important to note, however, that Llewellyn, both in this article and elsewhere, had a decidedly non-essentialist view about the nature of Legal Realism, believing that it was more a state of mind than a program or a movement and believing that multiple and partially divergent perspectives could all properly be characterized as Realist.

[22] J. L. Austin, *Sense and Sensibilia* (G. J. Warnock, ed., Oxford: Oxford University Press, 1962), pp. 15–19, 63–77.

[23] See especially Leiter, *Naturalizing Jurisprudence*, *op. cit.* note 2, pp. 73–80. See also Frederick Schauer, "Introduction," in Karl N. Llewellyn, *The Theory of Rules*, *op. cit.* note 10, pp. 1–28.

[24] See Hutcheson, *op. cit.* note 3; Frank, *op. cit.* note 4.

thinking and reasoning processes of judges,[25] and there is also the form of unreality represented by the belief that the best way to understand law is by engaging in the largely nonempirical analysis of reported appellate opinions.[26] And so on. And thus when Holmes observed, famously, that "The life of law has not been logic, it has been experience,"[27] he not only established himself as a Realist precursor in seeking to debunk a long-held belief about the nature of common law reasoning, but emphasized that we understand legal perspectives substantially by what they seek to reject. Had there not been a tradition of treating common law development as a process of logical discovery, Holmes's quip would have made no

[25] Even outside of the Realist canon and explicit discussions about Realism, there is a normative debate about whether judges are or should be candid in their opinions. Compare David Shapiro, "In Defense of Judicial Candor," *Harvard Law Review*, vol. 100 (1987), pp. 731–50, with Scott C. Idleman, "A Prudential Theory of Judicial Candor," *Texas Law Review*, vol. 73 (1995), pp. 1307–1417. And Richard A. Wasserstrom, *The Judicial Decision: Toward a Theory of Legal Justification* (Stanford, California: Stanford University Press, 1961), distinguishes the role of law in causing legal decisions – the logic of decision – from its role in justifying them – the logic of justification.

[26] It is often said that "we are all Realists now," Gary Peller, "The Metaphysics of American Law," *California Law Review*, vol. 73 (1985), pp. 1151–1290, at p. 1151; Joseph William Singer, "Legal Realism Now," *California Law Review*, vol. 76 (1988), pp. 465–544, at p. 467, but it is far from clear that that is actually so. Obviously the truth of the claim that we are now all Realists depends on the conception of Realism that the claimant holds, but there are at least some indications that the main lines of the Realist critique remain resisted. For one example, consider the torts casebook developed by Leon Green, a central Realist figure. Green believed that the determinants of outcomes in torts cases were not formal doctrines such as foreseeability and proximate cause and reasonable care, but rather the factual situations in which claims arose. As a result, he organized his casebook not around the traditional legal categories of tort law, but instead around the factual categories of the world, such as railways and animals. Leon Green, *The Judicial Process in Torts Cases* (St. Paul, Minnesota: West Publishing Co., 1931). Yet it is noteworthy that no modern torts book takes a similar approach. Is this rejection of Green's approach based on the view that Green was empirically mistaken, and that the formal categories of tort law have more to do with outcomes in tort cases than the factual situations in which tort claims arise, or is it perhaps because there is more resistance to the core claims of Legal Realism than the common incantation of "we are all Realists now" appears to imagine? On the latter possibility, albeit with a somewhat different conception of Realism in mind, see Hanoch Dagan, "The Realist Conception of Law," *University of Toronto Law Journal*, vol. 57 (2007), pp. 607–60.

[27] Oliver Wendell Holmes, Jr., *The Common Law* (Boston: Little, Brown, 1881), p. 1.

sense. It gets its bite precisely from the existence of what it seeks to rebut. And so too with much of Legal Realism, whose enduring importance stems largely from the cluster of traditional views about legal thought and judicial decision making that it has sought, from the beginning, to challenge.

III

But if there are competing conceptions of Legal Realism, and thus competing conceptions of just which accepted belief about the nature of law and legal decision making is in need of debunking, how are we to resolve the controversy? One possibility is that there is no need to resolve it at all. If Legal Realism is more a state of mind than a concrete position, as Llewellyn long insisted,[28] then it could well be that the various positions associated with Realism are connected by nothing more than a family resemblance, a cluster of related positions sharing no common features among all. And it is also possible that the claims of Legal Realism are appropriately modified over time in order to recognize the needs and issues of the present rather than the issues that happen to have occupied a certain group of people at a particular time. Just as history, even the history of the same events, is (or must be) rewritten for each generation, maybe so too is the history, the meaning, the legacy, and the importance of Legal Realism different now than it was in the 1980s, and different in the 1980s from what it was in the 1950s, and different in the 1950s from what it was in the 1930s.

Yet, however we seek to define the task of understanding Realism, we cannot, or at least should not, avoid an inquiry that is at least in part historical. There existed real Realists, as it were. Llewellyn, Frank, Oliphant, and many others were real people who had real thoughts and who write real books and real articles. And while there might be genuine debates about whether certain figures were or were not Legal Realists – Oliver Wendell Holmes, John Chipman Gray, Benjamin Cardozo, Robert Hale, and others are often the subject of these debates – these are debates at the periphery, debates about figures whose entitlement to the Realist label is open to legitimate disagreement. But no one seriously

[28] Especially in "Some Realism about Realism," *op. cit.* note 12.

doubts that Jerome Frank, Karl Llewellyn, Felix Cohen, Herman Oliphant, Hessel Yntema, William Douglas, Wesley Sturges, Thurman Arnold, Max Radin, Leon Green, and Underhill Moore, among others, existed at the historical core of American Legal Realism from the 1920s to the 1940s, and an understanding of Legal Realism that does not recognize the centrality of at least most of these major figures is more usefully understood as an attempt to hijack the Legal Realist legacy than to understand or continue it.

Once we acknowledge the importance of history in understanding Legal Realism, and once we acknowledge as well the central position of a small group of principal players in defining what Realism was and remains, we are led to the importance of William Twining's magisterial *Karl Llewellyn and the Realist Movement*. It would be tempting to describe the book as a classic, but that description understates its importance. Although others have written about Karl Llewellyn,[29] and although the work of numerous scholars has illuminated Llewellyn's special role in the development of commercial law as we know it,[30] nothing even approaches Twining's book in its comprehensiveness. If nothing else, it is the definitive intellectual biography of an enduring figure in American legal theory, and the most penetrating analysis of the ideas of one of the small number of people who, from the

[29] See N. E. H. Hull, *Roscoe Pound and Karl Llewellyn: Searching for an American Jurisprudence* (Chicago: University of Chicago Press, 1997); Wilfrid E. Rumble, *American Legal Realism: Skepticism, Reform, and the Judicial Process* (Ithaca, New York: Cornell University Press, 1968); Brian Leiter, "Karl Nickerson Llewellyn (1893–1962)," in *International Encyclopedia of the Social and Behavioral Sciences*, Karl Ulrich Meyer, ed. (New York: Elsevier, 2001), pp. 8999–9001.

[30] See Douglas G. Baird, "Llewellyn's Heirs," *Louisiana Law Review*, vol. 62 (2002), pp. 1287–97; Ingrid Michelsen Hillinger, "The Article 2 Merchant Rules: Karl Llewellyn's Attempt to Achieve The Good, The True, The Beautiful in Commercial Law," *Georgetown Law Journal*, vol. 73 (1985), pp. 1141–84; Allen R. Kamp, "Karl Llewellyn, Legal Realism, and the UCC in Context," *Albany Law Review*, vol. 59 (1995), pp. 325–97; Gregory E. Maggs, "Karl Llewellyn's Fading Imprint on the Jurisprudence of the Uniform Commercial Code," *University of Colorado Law Review*, vol. 71 (2000), pp. 541–88; James Whitman, "Commercial Law and the American Volk: A Note on Llewellyn's German Sources for the UCC," *Yale Law Journal*, vol. 97 (1987), pp. 156–75; Zipporah Batshaw Wiseman, "The Limits of Vision: Karl Llewellyn and the Merchant Rules," *Harvard Law Review*, vol. 100 (1987), pp. 465–545.

1920s until the 1960s, were at the pinnacle of American legal thought.[31]

But the volume's title is accurate. This is a book not only about Llewellyn, but also, and perhaps more importantly, about American Legal Realism. Implicit in the title, of course, is Twining's view that one cannot understand Realism without understanding Llewellyn's thought,[32] and that Llewellyn was arguably the most important of the Realists. Others – Herman Oliphant,[33] Underhill Moore,[34] and Joseph Hutcheson,[35] as well as the more complex Holmes and Gray[36] – may have been earlier. And others – Jerome Frank,[37] Thurman Arnold,[38]

[31] I will not list those who I believe are the others, for fear of treating and ranking legal theorists and thinkers as if they were movie actors or centerfielders.

[32] For a similar view about the importance of biography to understanding Realism, see Roy Kreitner, "Biographing Realist Jurisprudence," *Law & Social Inquiry*, vol. 35 (2010), pp. 765–88.

[33] Oliphant's "A Return to Stare Decisis," *American Bar Association Journal*, vol. 14 (1928), pp. 71–6, as based on a speech given in 1927, and Oliphant had been active in Realist-sounding curricular reform at the Columbia Law School from the early 1920s. Kalman, *op. cit.* note 5, pp. 68–75.

[34] Moore's empirical Realism was evident as early as his 1923 "The Rational Basis of Legal Institutions," *Columbia Law Review*, vol. 23 (1923), pp. 609–17, and he too was involved in the curricular upheavals at the Columbia Law School that started even earlier. Schlegel, *op. cit.* note 8.

[35] Hutcheson's most memorable writing was in 1929, Hutcheson, *op. cit.* note 3, and the roots of his thinking and writing go back somewhat earlier. See Charles L. Zelden, "The Judge Intuitive: The Life and Judicial Philosophy of Judge Joseph C. Hutcheson, Jr.," *South Texas Law Review*, vol. 39 (1998), pp. 905–17.

[36] More complex in the sense that they are better thought of as precursors to Realism than Realists themselves. See Frederick Schauer, *Thinking Like a Lawyer: A New Introduction to Legal Reasoning* (Cambridge, Massachusetts: Harvard University Press, 2009), pp. 124–8.

[37] Especially in *Law and the Modern Mind*, *op. cit.* note 4, but also in, for example, Jerome Frank, *If Men Were Angels* (New York: Harper & Brothers, 1942), and Jerome Frank, "Are Judges Human? Part One: The Effect on Legal Thinking of the Assumption That Judges Behave like Human Beings," *University of Pennsylvania Law Review*, vol. 80 (1931), pp. 17–53. It is common to dismiss Frank as a comparatively unimportant figure in Realist thought, partly because of the infatuation with the naïve and crude version of psychoanalytic theory represented in *Law and the Modern Mind* and other early works, and partly because of his combative and flamboyant language. See, for example, Leiter, *Naturalizing Jurisprudence*, *op. cit.* note 2, pp. 17, 44–5. But Frank's views about the importance of particular facts in particular cases and about the order of decision and justification are important aspects of Realist thought, to which Frank was one of the initial contributors. See Charles Barzun, "Jerome Frank and the Modern Mind," *Buffalo Law Review*, vol. 58 (2010), pp. 1127–58.

and Fred Rodell[39] – may have produced more shock value by the boldness of their arguments, the extravagance of their prose, and the nature of their personalities. But Llewellyn (who had no need to yield to anyone with respect to colorful prose or noteworthy personal characteristics) was there at something close to the beginning, and – by virtue of his positions at Yale, and Columbia, and Chicago; of his anthropological work;[40] and of his role in the creation of modern commercial law[41] – was the pervasive presence of Legal Realism for at least thirty years. To understand Llewellyn is simply to understand Realism, and to understand Realism is to understand Llewellyn, Twining insists, and in that he is not far wrong.

Karl Llewellyn and the Realist Movement was thus when it was first written the right book on the right topic to understand Legal Realism, and it remains so forty years on. The book is comprehensive, meticulously researched, engagingly presented, and, perhaps most important, jurisprudentially sophisticated. Twining started his academic career with Hart, but very soon thereafter became immersed in Llewellyn and Realism. And Twining has continued as a substantial figure in legal theory in his own right. His work on the theory and history of evidence and proof remains definitive,[42] he has made major contributions to thinking

[38] See, for example, Thurman W. Arnold, "The Jurisprudence of Edward S. Robinson," *Yale Law Journal*, vol. 41 (1932), pp. 1282–9. See also Spencer Weber Waller, *Thurman Arnold: A Biography* (New York: New York University Press, 2005); Neil Duxbury, "Some Radicalism about Realism? Thurman Arnold and the Politics of Modern Jurisprudence," *Oxford Journal of Legal Studies*, vol. 10 (1990), pp. 11–41, and the description in Kalman, *Legal Realism at Yale*, *op. cit.* note 5, at pp. 136–41.

[39] See Fred Rodell, *Woe Unto You, Lawyers!* New York: Reynal & Hitchcock, 1935). And see the description of Rodell in Charles Alan Wright, "Goodbye to Fred Rodell," *Yale Law Journal*, vol. 89 (1980), pp. 1456–7.

[40] Karl Llewellyn & E. Adamson Hoebel, *The Cheyenne Way* (Norman, Oklahoma: University of Oklahoma Press, 1941). Various other works with an anthropological orientation, most published in the 1940s and 1950s, are listed in Twining's definitive bibliography of Llewellyn's published and unpublished works. William Twining, *The Karl Llewellyn Papers* (Chicago: University of Chicago Law School, 1968), pp. 47–78. See also Ajay K. Mehrotra, "Law and the 'Other': Karl N. Llewellyn, Cultural Anthropology, and the Legacy of *The Cheyenne Way*," *Law & Social Inquiry*, vol. 26 (2001), pp. 741–72.

[41] See references *op. cit.* note 29.

[42] See especially William Twining, *Rethinking Evidence: Exploratory Essays* (Cambridge: Cambridge University Press, 2d ed., 2006); William Twining, *Theories of Evidence: Bentham and Wigmore* (London: Weidenfeld & Nicolson, 1985).