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## 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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Information on this title: [www.cambridge.org/9781107644786](http://www.cambridge.org/9781107644786)

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First published 1973

Second edition published 2012

First paperback edition 2014

*A catalogue record for this publication is available from the British Library*

ISBN 978-1-107-02338-3 Hardback

ISBN 978-1-107-64478-6 Paperback

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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. Bowl, 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.

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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.<sup>1</sup> 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.<sup>2</sup>

<sup>1</sup> 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.

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

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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,<sup>3</sup> and continuing as the primary point of Jerome Frank's *Law and the Modern Mind*,<sup>4</sup> 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 non-legal 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.<sup>5</sup> 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.

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

<sup>4</sup> Jerome Frank, *Law and the Modern Mind* (New York: Brentano's, 1930).

<sup>5</sup> 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*

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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.<sup>6</sup> The Realist challenge to this view, a challenge sometimes described in terms of indeterminacy<sup>7</sup> and sometimes in terms of functionalism or instrumentalism,<sup>8</sup> 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.<sup>9</sup>

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,<sup>10</sup> 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).

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

<sup>7</sup> 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.

<sup>8</sup> Kalman, *op. cit.* note 5, pp. 29–31.

<sup>9</sup> 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.

<sup>10</sup> 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.

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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.<sup>11</sup>

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<sup>12</sup> as a central figure in the Realist tradition,<sup>13</sup> 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.<sup>14</sup> 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 Indecis: 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.

<sup>11</sup> 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).

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

<sup>13</sup> 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.

<sup>14</sup> 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.

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are actually the product of political and economic choices – is, once again, claimed to be the true version of Legal Realism.<sup>15</sup>

## 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,<sup>16</sup> insisting that Legal Realism was centrally about recognizing the non-neutrality and consequent political choices implicit in substantive legal doctrine.<sup>17</sup> 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.<sup>18</sup>

<sup>15</sup> 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).

<sup>16</sup> 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.

<sup>17</sup> 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.

<sup>18</sup> 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.

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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.<sup>19</sup>

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,<sup>20</sup> is in some tension with the fact-focused particularism of Hutcheson,

<sup>19</sup> 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.

<sup>20</sup> See Llewellyn, *op. cit.* note 10; Karl Llewellyn, “A Realistic Jurisprudence: The Next Step,” *Columbia Law Review*, vol. 30 (1930), pp. 431–65.

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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,”<sup>21</sup> 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.<sup>22</sup> 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,<sup>23</sup> for others it is the belief that judges do not decide on an outcome until after consulting the relevant legal rules,<sup>24</sup> for still others it is the belief that judicial opinions are an accurate description of the

<sup>21</sup> *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.

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

<sup>23</sup> 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.

<sup>24</sup> See Hutcheson, *op. cit.* note 3; Frank, *op. cit.* note 4.

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thinking and reasoning processes of judges,<sup>25</sup> 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.<sup>26</sup> And so on. And thus when Holmes observed, famously, that “The life of law has not been logic, it has been experience,”<sup>27</sup> 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

<sup>25</sup> 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.

<sup>26</sup> 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.

<sup>27</sup> Oliver Wendell Holmes, Jr., *The Common Law* (Boston: Little, Brown, 1881), p. 1.

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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,<sup>28</sup> 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

<sup>28</sup> Especially in “Some Realism about Realism,” *op. cit.* note 12.

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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,<sup>29</sup> and although the work of numerous scholars has illuminated Llewellyn's special role in the development of commercial law as we know it,<sup>30</sup> 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

<sup>29</sup> 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.

<sup>30</sup> 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.

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1920s until the 1960s, were at the pinnacle of American legal thought.<sup>31</sup>

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,<sup>32</sup> and that Llewellyn was arguably the most important of the Realists. Others – Herman Oliphant,<sup>33</sup> Underhill Moore,<sup>34</sup> and Joseph Hutcheson,<sup>35</sup> as well as the more complex Holmes and Gray<sup>36</sup> – may have been earlier. And others – Jerome Frank,<sup>37</sup> Thurman Arnold,<sup>38</sup>

<sup>31</sup> 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.

<sup>32</sup> 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.

<sup>33</sup> 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.

<sup>34</sup> 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.

<sup>35</sup> 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.

<sup>36</sup> 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.

<sup>37</sup> 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.

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and Fred Rodell<sup>39</sup> – 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;<sup>40</sup> and of his role in the creation of modern commercial law<sup>41</sup> – 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,<sup>42</sup> he has made major contributions to thinking

<sup>38</sup> 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.

<sup>39</sup> 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.

<sup>40</sup> 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.

<sup>41</sup> See references *op. cit.* note 29.

<sup>42</sup> 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).

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about legal reasoning,<sup>43</sup> and in much of his recent work he has attempted, with much success, to try to understand legality in a world of highly diverse cultures and legal systems.<sup>44</sup> As the afterword to this edition makes stunningly clear, Twining thinks and writes about the nature of law in a way that situates him at an angle from the mainstream of contemporary analytic jurisprudence, but it would be a mistake to confuse his iconoclasm with a lack of sophistication or a lack of knowledge. When *Karl Llewellyn and the Realist Movement* was first written in 1971, Twining was very much a part of the world of jurisprudence, and it is a world with which he remains connected and one he understands well. And thus one of the things that sets *Karl Llewellyn and the Realist Movement* apart from most of the other books and articles about Llewellyn and about Legal Realism is that the meticulous and exhaustively documented historical account that Twining provides is combined with an understanding of legal theory that is evident from Twining's other work, but which in this book frames and informs his analysis of Legal Realism in unique and important ways.

## V

Twining's Llewellyn and Twining's Realism are both very much informed by a particular point of view. Thus, although there are those – this author among them – who are inclined to see a substantial shift in Llewellyn's thought over the years, and who are inclined to take seriously what some think of as the more extreme claims of Legal Realism, Twining sees mostly consistency in Llewellyn's thought throughout the years, and he is at pains to emphasize that many of the seemingly more guarded conclusions of Llewellyn's later work were present even from the beginning.<sup>45</sup> For Twining,

<sup>43</sup> See William Twining & David Miers, *How to Do Things with Rules* (London: Butterworths, 4th ed., 1999).

<sup>44</sup> William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge: Cambridge University Press, 2009).

<sup>45</sup> Thus, there are themes in Llewellyn's later work that are foreshadowed, and in a more understated way than in *The Bramble Bush*, in *The Case Law System in America* (Chicago: University of Chicago Press, Paul Gewirtz, ed., Michael Ansaldi, trans., 1989), originally written in German as *Präjudizienrecht und Rechtssprechung in Amerika*, published in Germany in 1933, and based on lectures that Llewellyn delivered in Leipzig in 1928.

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Llewellyn was never as extreme as the opening pages of *The Bramble Bush* suggest, and never as narrowly focused on appellate adjudication as some have thought. And thus for Twining the full compass of Llewellyn's thought and contribution were there to be found by the careful reader almost from the very beginning. Similarly, therefore, a full appreciation of Realism is, for Twining, an appreciation of Realism's focus on legal culture as well as appellate adjudication, and an empirical and sensitive understanding of law's determinacies as well as its indeterminacies.

Twining's account thus takes a strong position, and that is part of its value, both for those who agree and those who disagree. For those who disagree, at least in part, Twining's accurate excavation of the origins of Llewellyn's later thought in Llewellyn's earlier writing may slight important differences of emphasis. Yes, there are connections between the Llewellyn of *The Bramble Bush* and "Some Realism About Realism" on one hand and the Llewellyn of the Uniform Commercial Code and *The Common Law Tradition*<sup>46</sup> on the other, but there may also be discontinuities. And this should not be surprising. Over the course of a long and complex career, Llewellyn not only grew older (and maybe wiser), but became more immersed in the world of practice and the world of law reform, and became more aware of the role of law in other cultures. It would be surprising if such a wealth of experiences over thirty years did not change the thought of someone with as curious and fertile a mind as Llewellyn, and consequently it may tell only part of the story to emphasize the undoubted continuities over time without also noting the numerous changes over the span of a long and productive career in different institutions in different places and with at least somewhat different roles and responsibilities.

Perhaps more significant, it may be important to recognize that Llewellyn at his most extreme may have been more correct than Twining and many others have recognized. Rules may not be "pretty playthings," as Llewellyn, to his regret, noted in the opening pages of *The Bramble Bush*, but the extent of their causal contribution to legal outcomes may still be exaggerated by those who make their living thinking and teaching about legal rules and legal doctrine. Indeed, although Llewellyn was insistent throughout his

<sup>46</sup> Karl N. Llewellyn, *The Common Law Tradition – Deciding Appeals* (Boston: Little, Brown, 1960).

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life that real legal rules diverged in important ways from the literal meaning of the “paper rules” that one could find in statute books and that are summarized in black letters in hornbooks and case-books, he did subscribe to the view that the real rules were causally important in determining legal outcomes, and that various non-rule factors exercised a stabilizing and moderating influence on the operation and development of law.<sup>47</sup> But perhaps Llewellyn, whose admiration for the culture of real lawyers and real judges was considerable, and who respected the collective wisdom of the legal establishment (he called them “the lawmen”), overestimated, whether always or eventually, the determinacy of even law broadly conceived, and underestimated the role that ephemeral personal, psychological, political, and economic factors played in causing legal results. Perhaps, therefore, the less qualified utterances of the earlier Llewellyn, along with the even less qualified utterances of Jerome Frank, for example, and others, still have more to teach us than Twining’s Llewellyn, or even anyone else’s Llewellyn, or possibly even the later Llewellyn, may have imagined.

## VI

That Twining’s picture offers falsifiable hypotheses and strong but debatable conclusions is, of course, an unqualified virtue and not a vice. Even as originally written, this is a book that not only provides a wealth of historical detail and interstitial insight, but also stakes out a position about the meaning of Legal Realism and about the nature of Llewellyn’s thought that no legal theorist or historian of American legal thought can afford to ignore. But now, with the addition to Twining’s genuinely new and lengthy afterword that concludes this volume, the importance of the book is even greater. The afterword offers a series of personal insights into the conception and writing of the original book that will now become an important part of the historical record about Realism and about Llewellyn. But the afterword also situates Llewellyn and Realism within the modern jurisprudential terrain, a terrain just beginning to develop in the late 1960s and early 1970s. This is a terrain that tends, by and large, to ignore Llewellyn and to ignore Legal Realism, with most of its inhabitants remaining largely in the thrall of

<sup>47</sup> See especially, Llewellyn, *The Theory of Rules*, *op. cit.* note 10.

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H. L. A. Hart's misreading of Llewellyn and misunderstanding of Legal Realism in *The Concept of Law*.<sup>48</sup> Moreover, it is a terrain, as Twining emphatically believes, that has achieved a degree of philosophical sophistication at the expense of the empirical Realism that was central to Llewellyn's thought, and, more important, at the expense of understanding the phenomenon of law as it exists in the world we know.

As with his interpretations of Llewellyn and Realism, Twining's concerns about the directions of modern legal theory, concerns that are very much in evidence in the afterword, will attract objections as well as agreement. But this too is to be applauded and not dismissed. In offering in the afterword new and important historical data along with crisp and challengeable claims about the nature of legal theory as it is practiced today, Twining has combined the historical with the jurisprudential in a way that is both faithful to the original book, and that makes the book and its new afterword required reading for all those who wish to understand Karl Llewellyn, Legal Realism, American legal thought, and the nature of law itself.

<sup>48</sup> In Chapter Seven of *The Concept of Law* (Oxford: Clarendon Press, 2d ed., Penelope A. Bulloch & Joseph Raz, eds., 1994), Hart not only ignores Llewellyn's qualifications of the early passages of *The Bramble Bush*, qualifications that Hart himself had acknowledged several years earlier in H. L. A. Hart, "Positivism and the Separation of Law and Morals," *Harvard Law Review*, vol. 71 (1958), pp. 593–629, at p. 615 note 40, and thus not only too easily brands Llewellyn as a "rule skeptic," but makes several more substantive blunders. He characterizes Realism as being concerned only with the external prediction of judicial decisions, although Llewellyn and others had long recognized the internal as well as external points of view. And he accuses the Realists of conflating the disputed edges of legal rules with all of law, although once again Llewellyn and others had explicitly insisted that their claims about legal indeterminacy were limited to litigated or appellate cases, and that litigated cases bear the same relationship to the underlying pool of disputes "as does homicidal mania or sleeping sickness, to our normal life." Karl N. Llewellyn, *The Bramble Bush: On Our Law and Its Study* (New York: Columbia Law School, 1930), p. 58. A valuable modern edition of *The Bramble Bush* is Karl N. Llewellyn, *The Bramble Bush: On Our Law and Its Study* (New York: Oxford University Press, Steven Sheppard, ed., 2009).

## PREFACE

At first sight it may seem that few jurists can stake as strong a claim to singularity as Karl Llewellyn: the only American ever to have been awarded the Iron Cross; the most fertile and inventive legal scholar of his generation; legal theory's most colourful personality since Jeremy Bentham; the only common lawyer known to have collaborated successfully with an anthropologist on a major work; a rare example of a law-teacher poet; the chief architect of the most ambitious common law code of recent times; the most romantic of legal realists, the most down-to-earth of legal theorists; the most ardently evangelical of legal sceptics; the most unmethodical of methodologists; and least controvertible of claims, the possessor of one of the most exotic prose styles in all legal literature.

Yet for all his idiosyncrasies, Llewellyn was to an extraordinary degree representative of the best of his generation of American law teachers. This is partly a function of the breadth of his interests. In studying him we inevitably have to learn something of subjects as varied as commercial law, civil liberties, appellate judging, advocacy, legislative drafting, legal education, the sociology of the legal profession, the philosophy of pragmatism, semantics, functional anthropology, the *Sacco-Vanzetti Case*, empirical research into legal processes, law reform, and, of course, the American realist movement. However, Llewellyn mirrored his environment for reasons that lie deeper than the fact that he had a broad perspective and a variety of interests. He could only have been an American; he once summed up his viewpoint as being 'dominantly American, northern, urban, bourgeois, Protestant gentile, academic, liberal, "private" rather than "public" law, "office" rather than "litigation"—and, of course, contemporary'. This is a fair statement, but it says nothing of what was perhaps his most important characteristic. This was an extraordinary capacity for empathy, a Protean quality, which enabled him to

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project himself imaginatively into the position of other people and to assimilate and work with the atmosphere and values of his immediate milieu, whether it was the German army, the American bar, the world of commerce, or a New Mexican Pueblo. This quality is to be found both in his ability to see a wide variety of processes from the point of view of the participants, and in his sympathetic, but not uncritical, identification with the values of the common law, of the legal profession, of the American law school and of many other institutions and groups. Because of it he was sometimes criticized for being fickle or unprincipled and, perhaps with more justice, for being romantically conservative. Nevertheless it was essentially a source of strength, the basis for profound insights into a variety of institutions and processes and for the unexpectedly representative quality of his apparently bizarre writings. This is perhaps why, despite his disclaimers, he can be fairly treated as speaking not only for legal realism but also, in such works as the *Bramble Bush* and *The Common Law Tradition*, for some of the more fundamental values of the common law, and of the American law school during what may come to be viewed as its heyday.

Llewellyn's works comprise nearly 250 published items and a substantial number of unpublished manuscripts. Although there is much overlap and repetition in these writings, no single one gives a comprehensive picture of his thought. The work which most nearly approximates to this is a hitherto unpublished set of materials for a course on jurisprudence. He had planned to use these materials as the basis for a series of lectures in Germany in 1962–3, but he died before he was able to undertake the project. Even if he had lived to complete it, the available evidence suggests that it would probably not have adequately filled the need for a systematic exposition of his ideas. Indeed, the reader must not expect to find in the present work an account of a complete intellectual system, for Llewellyn did not have one. Although by mid-career he had developed a rough framework of ideas, approximating to a general theory, many of his most important contributions were more specific than general. In jurisprudence, too, the judgment of history may be that he was, for the most part, more representative than original.

My principal aim in writing this book has been to make Llewellyn's work more accessible by giving a relatively coherent interpretation of his thought and of its development, especially

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in the sphere of jurisprudence. In doing this I have tried to catch something of the flavour of his personality and of his environment, not only because these are interesting in themselves, but also because, I believe, jurists as well as law are best understood in context. A secondary aim has been to provide the basis for a reinterpretation of American legal realism. The subject is too large and too amorphous to be dealt with fully in a book about any single realist, but Llewellyn's formative period happened to coincide in time and place with a crucial phase in the history of realism. Some account of these matters would have been necessary in any case and I have taken the opportunity to re-tell the story of the rise of the realist movement from 1870 to 1931. If, as I believe, realism must be treated historically before it can be satisfactorily dealt with analytically, this account may help to pave the way for a more detailed history of an interesting phenomenon. The final chapter contains my personal evaluation of the contemporary significance of realism.

It has been said that Llewellyn was too volatile a subject to be capable of a definitive study. I accept this view. Although every effort has been made to give an accurate and balanced account of his thought, selection and an element of liberal interpretation have been inevitable. Llewellyn's writings are very extensive, variable in quality and often rather loosely expressed. If his work is to survive, the wheat needs to be resolutely winnowed from the chaff. I have not hesitated to express my own judgments, but, while not trying to gloss over his weaknesses, I have tried to act on his own working principle that in reading or discussing a jurist or any other type of thinker it is more rewarding to concentrate on his strengths than to dwell on his faults, and that it is usually more important to try to understand than to criticize.

Since this work cannot claim to be without bias, it may help to say a little about its perspective. As a former pupil of Llewellyn, very much in his intellectual debt, as the person who put his papers in order, and as a friend of the family I can claim the intimacy, and the prejudice, of an insider. As an Englishman observing the American scene, as a jurist who was first nurtured on the analytical work of Hart and Austin, and who has subsequently been attracted back to Bentham and Mill, and as a teacher who has spent most of his working life to date in Africa and Ireland, I have most of the disadvantages and few of the advantages of an outsider. As one who knows little commercial

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law and almost no German, I have been unable to do justice to these phases of Llewellyn's work. Finally, as one who is fascinated by jurisprudence, but frustrated by much of its literature, I am particularly concerned to try to break away from some of the worst aspects of its literary tradition and to try to bridge the gap between the complementary and unnecessarily polemical worlds of the English analytical and American sociological approaches. If this work can make a small contribution to this end, it will have served its purpose.

Belfast, 1971

W.L.T.

*Postscript*

Twenty years after the first publication of *The Bramble Bush*, Karl Llewellyn decided to abandon his attempts to make substantial revisions to the text because 'the young fellow who wrote those lectures just isn't here any more' (below, p. 151). It is over twenty years since I began work on *Karl Llewellyn and the Realist Movement* and nearly fourteen since the manuscript was delivered to the publishers. I am naturally delighted that Weidenfeld and Nicolson has decided to re-issue it and that it will simultaneously be produced for the first time in the United States by the publishers of *The Cheyenne Way*. No doubt to the relief of both, I have decided to follow Llewellyn's example and refrain from revising the text. I have, however, taken the opportunity presented by an invitation to deliver the John Dewey Lecture at New York University Law School in October 1984 to take a fresh look at Legal Realism and to comment on some of the more interesting recent research and writing on the subject. The published version of this lecture will indicate some changes in perspective and emphasis, but I hope that it will serve to scotch suggestions of premature senility or radical changes of mind. It also makes it possible to keep this postscript quite brief.

In the period since 1970 there have been significant developments both in relevant specialized work and in the general intellectual climates of academic law in the United States and the United Kingdom. These include some publications that are directly relevant to matters dealt with in this book. Three items can be added to Llewellyn's bibliography: (i) *Recht, Rechtsleben und Gesellschaft* (ed. M. Rehbinder) was published in Berlin in 1977 by Duncker and Humblot. This was the German language manuscript on 'Law, the Life

Cambridge University Press

978-1-107-64478-6 - Karl Llewellyn and the Realist Movement: Second Edition

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of the Law and Society', written in 1932 in connection with his visit to Leipzig (below, p. 107). It is interesting as a statement of Llewellyn's early sociological views and, in particular, of his debt to Weber and his differences with Ehrlich (see further G. Casper in 24 *U. Chi. L.S. Record* 27 (1978)). (ii) In 1981 I came across a hitherto unlisted publication by Llewellyn: 'Law in Society', in Horace Taylor (ed.), *Contemporary Problems in the United States* (1934-5 edn; Harcourt, Brace, New York), vol. 2, pp. 17-25. (iii) In 1981, Soia Mentschikoff and Irwin P. Stotzky published *The Theory and Craft of American Law* (Matthew Bender, New York), which is based on the materials for the course on 'Elements of Law' at Chicago (see below, p. 151, where I probably understated its significance. See further Gerwin and Shupack in 33 *J. Legal Education* 64 (1983).) Finally, two of Llewellyn's works have been published in paperback editions: *The Bramble Bush* (Oceana, 7th printing 1981) and *The Cheyenne Way* (Oklahoma U.P., 1983).

It would not be appropriate here to attempt to provide a comprehensive bibliography about Realism and the contributions of individual Realists published since 1971. It is, however, worth selecting a few works for brief comment. Outstanding is the as yet unfinished historical research of J.H. Schlegel on Realism and Empirical Social Science. This has already added significantly to our knowledge and understanding of the Yale Realists (see especially 28 *Buffalo L. Rev.* 459 (1979) and 29 *Buffalo L. Rev.* 195 (1980)). Robert S. Summers' fine book *Instrumentalism and American Legal Theory* (1982) is a bold attempt to reconstruct a distinctive American 'general theory about law and its use' from the writings of Holmes, Dewey, Pound and some Realists, including Llewellyn. I have reservations about aspects of Summers' enterprise, but our differences are greater than our disagreements. Reference should also be made to Alan Hunt, *The Sociological Movement in Law* (1978), G. Edward White, *The American Judicial Tradition* (1976), Bruce Ackerman, *Reconstructing American Law* (1984), and the useful series of articles by Simon Verdun-Jones in 7 *Sydney L. Rev.* 180 (1974) (Frank); 1 *Dalhousie L. Jo.* 441 (1974) (Llewellyn); 3 *id.* 470 (1976) (Arnold); 5 *id.* 3 (1979) (Cook, Oliphant, Yntema). See also the *estschrift* for Soia Mentschikoff Llewellyn in 37 *U. of Miami L. Rev.* (1984). One pleasing development has been the growth in the number of scholarly biographies and critical studies of American legal thinkers. At a more general level the burgeoning interest in both legal and intellectual history has greatly added to our under-

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standing of the political, intellectual and institutional contexts in which Realism developed.

During the period that this book was being written, intellectual biography seemed to be considered an eccentric indulgence for an academic lawyer; jurisprudence in the United States was muted and in England, at least, Realism was thought to be discredited; both Marxism and Economic Analysis of Law had very few adherents among legal scholars in either country; such terms as critical legal studies, socio-legal, contextual, structuralism and phenomenology have all gained currency in the law-school world since then. The same period has seen major contributions to legal theory, broadly conceived, from Dworkin, Finnis, Fuller, Hart, MacCormick, Nozick, Rawls, Raz, Summers, Unger and many others; the history and theory of contracts has had a particularly rich period; legal history has blossomed and diversified; and there have been interesting developments in legal anthropology. There has also been the welcome revival of a contextual approach to the intellectual history of political thought by Skinner and others. This has strong affinities to the approach adopted in the present work.

The list could be extended almost indefinitely. The significance of these intellectual developments is that if work on this book had begun fifteen years later, it would have taken place in a substantially different intellectual climate. This would have inevitably affected one's concerns, perspectives and judgments of significance. Nevertheless, it is unlikely that it would have resulted in a major change of emphasis on the variety of Llewellyn's contributions, to say nothing of those of other Realists, or on the extent to which their concerns were directed to issues affecting the practice of legal education and scholarship far more than to more abstract questions of legal philosophy. Apart from a few minor corrections and additions, noted in the Dewey Lecture, I am prepared to stand by what I wrote. Indeed, my inclination is to be more emphatic about a number of themes: for example, the value of studying jurists and particular texts in context; the dangers of generalizing about Realism; and, above all, the perennial relevance of realist ideas to continuing attempts to develop coherent and systematic alternatives to approaches that treat the discipline of law as co-extensive with legal dogmatics. I remain committed to the view that the main, but not the only, respect in which the Realist enterprises are of continuing significance is as a brave, but only partially successful, attempt to broaden the study of law from within.

London, January 1985

W.L.T.