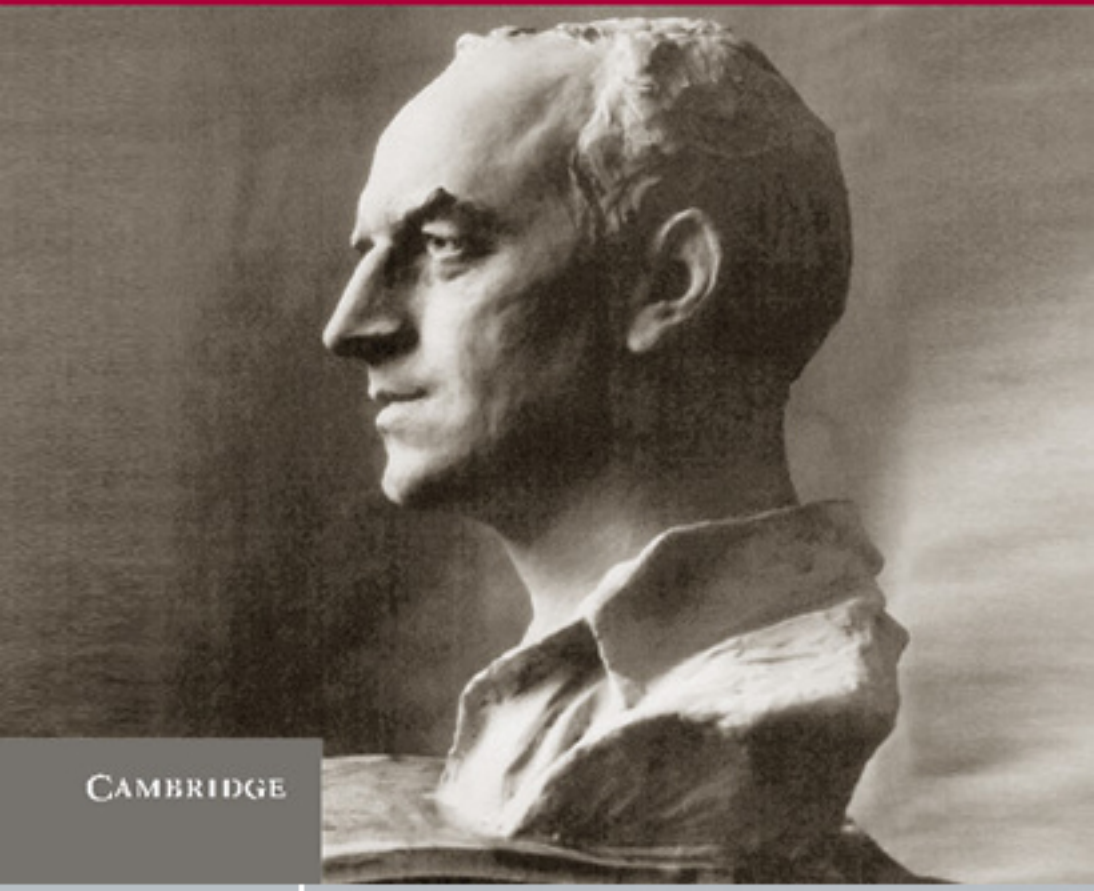
§Law in Context

Karl Llewellyn and the Realist Movement

2nd Edition

William Twining



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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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Second Edition

William Twining
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CAMBRIDGE UNIVERSITY PRESS
Cambridge, New York, Melbourne, Madrid, Cape Town,
Singapore, São Paulo, Delhi, Mexico City

Cambridge University Press
32 Avenue of the Americas, New York, NY 10013-2473, USA

www.cambridge.org
Information on this title: www.cambridge.org/9781107023383

First published 1973
Second edition published 2012

A catalog record for this publication is available from the British Library.

ISBN 978-1-107-02338-3 Hardback

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.

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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?" *Cornall 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).

about legal reasoning,[43] 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.[44] 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.[45] For Twining,

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

[44] William Twining, *General Jurisprudence: Understanding Law from a Global Perspective* (Cambridge: Cambridge University Press, 2009).

[45] 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.

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*[46] 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 become 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

[46] Karl N. Llewellyn, *The Common Law Tradition – Deciding Appeals* (Boston: Little, Brown, 1960).

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 casebooks, he did subscribe to the view that the real rules were causally important in determining legal outcomes, and that various nonrule factors exercised a stabilizing and moderating influence on the operation and development of law.[47] 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 then 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

[47] See especially, Llewellyn, *The Theory of Rules*, *op. cit.* note 10.

H. L. A. Hart's misreading of Llewellyn and misunderstanding of Legal Realism in *The Concept of Law*.[48] 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.

[48] 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

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

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

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 Gesselschaft* (ed. M. Rehbinder) was published in Berlin in 1977 by Duncker and Humblot. This was the German language manuscript on 'Law, the Life

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 *festschrifft* 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-

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-existensive 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.

ACKNOWLEDGEMENTS

Work started on this book in 1963–4. It is impossible to mention all those who have contributed to it during the ensuing years through discussion, comment and advice. I hope that they will accept this general acknowledgement of my debts and that I shall be forgiven by anyone who is left out of the list that follows.

Among those to whom I am particularly indebted are Bruce Ackerman, Peter Fitzpatrick, Arthur Leff, Robert Stevens and Geoffrey Wilson, all of whom read through early versions of the manuscript and made many valuable comments. I have profited from suggestions from Gerhard Casper, Ulrich Drobnig, E. Adamson Hoebel, Clarence Morris, Claire Palley, Rudolph Schlesinger, Robert Summers and Adrian Taylor, to mention but a few. I have also learned much from interviews and discussions with many individuals and especially with students in Dar es Salaam, Yale, Belfast and the Universities of Chicago and Pennsylvania. I wish to thank Sandra Maxwell, Mary Egan and others who typed and re-typed various drafts; all those at Weidenfeld and Nicolson who helped with the production of the book; Gertrude Mittelman who compiled the index; and Alison Harris who helped with the proofs. I am grateful, too, to the Ford Foundation, the Rockefeller Foundation and the Queen's University of Belfast, for grants which enabled me to pursue my research and to the Law Libraries and the Library staff of the University of Chicago, Columbia University, Yale University and the Queen's University of Belfast for unstinting help on many occasions. Above all my thanks are due to two individuals: Soia Mentschikoff Llewellyn put at my disposal the Llewellyn Papers and her own unrivalled knowledge of her husband and his work; her support, encouragement and patience sustained me throughout the project, yet at all times she left me entirely free to exercise my own judgment. Finally, special thanks are due to

my wife who acted as research assistant, editor and critic, and who, above all, by her patience and encouragement, helped to sustain my faith in the worthwhileness of the enterprise.

ABBREVIATIONS USED IN THE TEXT

AALS	Association of American Law Schools
ABA	American Bar Association
ACLU	American Civil Liberties Union
ALI	American Law Institute
KLP	The Karl Llewellyn Papers (see Bibliographical note)
NAACP	National Association for the Advancement of Colored People
NCC	National Conference of Commissioners on Uniform State Laws
NIL	Negotiable Instruments Law
NYLRC	New York Law Revision Commission
RUSA	See URSA
UCC	Uniform Commercial Code
URSA	Uniform Revised Sales Act

BIBLIOGRAPHICAL NOTE

References in the footnotes to KLP refer to the Collection of Karl Llewellyn Papers in the Law School of the University of Chicago. The method of citation follows the inventory in *The Karl Llewellyn Papers: A Guide to the Collection* by Raymond M. Ellinwood Jr. and William L. Twining (Revised edition, 1970, University of Chicago Law School Library Publications), to which reference should be made. This includes a list of the unpublished manuscripts by Llewellyn to be found in the Chicago Collection. A small number of other manuscripts (mainly teaching materials) are in the possession of the Law Library of Columbia University.

The select bibliography in the present book refers to Llewellyn's most important published and unpublished works. A full bibliography of his published writings is to be found in *The Karl Llewellyn Papers* by William Twining (University of Chicago Law School, 1968). That work also contains a description and evaluation of the Karl Llewellyn Collection in Chicago and a selection of hitherto unpublished manuscripts by Llewellyn.

PART ONE

The Rise of the Realist Movement 1870-1931

Introduction

A common error in contemporary jurisprudence consists in treating all 'legal theories' as if they were rival attempts to answer the same question or set of questions. The most obvious form of this error is to assume that all such theories represent purported answers to the ambiguous question: 'What is law?' There can be few jurists of note who have not been subjected to criticism which either distorts or ignores what they were trying to do. This study starts from the premise that jurisprudence is not a one-question subject and that the realist movement is significant in large part because its members helped, both directly and by the responses they provoked, to shed light on some relatively neglected topics.

Despite a recent tendency towards more sympathetic treatment, a depressingly high proportion of the enormous secondary literature on American legal realism consists of superficial interpretation and unnecessary polemics. While a variety of factors, political, cultural and academic, has no doubt contributed to this state of affairs, the error of treating all legal theories as comparables is at once the most significant and the most easily avoided. It is an elementary axiom of intellectual history that the first step towards understanding a thinker is to identify the questions which worried or puzzled him. In the case of the variously defined aggregation of American jurists known as 'the realists' it is especially important to identify the main concerns of the early members of the movement and their forerunners. It is worth risking charges of over-simplification to begin by setting those concerns in a broad historical context.

Professor Max Rheinstein has suggested that three problems arising out of the American legal experience have dominated the consciousness of her jurists:[1] the problem of adapting the

common law to the circumstances of the New World; the problem of giving specific content to the broad formulas of the constitution of 1787 and of adapting these formulas to meet changing conditions; and, thirdly, the preservation of the unity of the common law in a heterogeneous country with a multiplicity of jurisdictions. To this list might be added two related problems: that of modernization of the law in the wake of the industrial and technological revolution that swept the United States in the period after 1870, and the problem of simplification of the sources of law, as the legal profession and the courts became more and more swamped by the prodigious output of legislation, regulations and reported cases. In turn, these attempts to simplify helped to generate a reaction based on the view that the preferred 'solutions' did not take adequate account of the complexities of modern life.

In this interpretation, which itself reflects the perspective of a law teacher in a leading American law school, adaptation of law, and judicial adaptation in particular, constitute the principal theme. The reception of the common law into the United States involved the importation of doctrines and techniques developed in a small, homogeneous, relatively stable aristocracy into a large, heterogeneous, fragmented, expanding democracy.[2] The constitution of 1787 required interpretation and reinterpretation to keep the political framework of the Union strong, but flexible, in the face of new demands. The rapid growth of urbanization and industrialization in the late nineteenth century and after were seen as leading to a marked social lag—a gap between modern needs and the capacity of established institutions to meet them. In the case of law the problem of adaptation was made additionally acute by certain important inhibitions on radical legal change. Governmental power has been both limited and widely diffused in the United States. The constitution, with its distribution of authority between the federal government and the various states, and its system of checks and balances, has proved to be remarkably tough and resilient. But the diffusion of power, coupled with the dominance of special interest groups in some state governments contributed to the result that the various legislatures have, during some periods, been relatively ineffectual as agencies of legal change, especially in respect of private law, and the initiative has often passed else-

where. A large part of that initiative passed to the courts, especially in the period preceding the relatively late growth of administrative agencies. Much of the history of American public law is written in terms of the activities of the federal judiciary and especially of the Supreme Court; to a lesser but nonetheless considerable extent the state courts have a comparable place in the story of the adaptation and development of private law. Courts, in the United States as elsewhere, have been conceived first and foremost as institutions for the resolution of individual disputes. They were not designed as law-making agencies. Such a role was not easy to reconcile with the idea, enshrined in the constitution, of 'a government of laws and not of men', a phrase which suggests, *inter alia*, that judges should impartially apply pre-existing rules to the disputes before them. Moreover, because their proceedings are public, and because of the modern practice of publishing judgments of superior courts, their work is peculiarly accessible to close scrutiny. Judicial processes are among the most visible of decision-making processes.[3]

The relative importance of the courts, their visibility and the conflict between role and ideal made it almost inevitable that they should occupy a high proportion of the attention of American jurists in the twentieth century. In fact academic law in the United States has had an extraordinarily court-centred tradition, as is illustrated by the predominance of the case method in law teaching, the emphasis placed by legal historians on judicial development of the law, the enormous literature on the Supreme Court, and the concern with the nature of judicial processes in jurisprudence.

Adaptation to changed conditions has been only one of the perennial problems of law in United States history. The size of the country and its multiplicity of jurisdictions generated the further related needs of unification and simplification of law. The common law when exported abroad has proved to be sturdy, surviving to a remarkable extent translation to different climates, cultures and political systems. The preservation of a common consciousness and of a basic similarity in approach among common lawyers has been largely independent of the location of political power. The United States provides a striking example of the capacity of the common law tradition to outlive both

decolonization and the subsequent diffusion of power through a federal structure.

The resilience of the common law made the problem of maintaining its unity in the United States rather less acute than the problem of adapting it to changed conditions. Despite the decentralization of political authority, especially in the sphere of private law, the common law in the various states was slow in showing distinct signs of growing apart. However, by the middle of the nineteenth century the need for something to be done about the preservation of the unity of American law began to be recognized. Since private law for the most part fell within the jurisdiction of the states, none of the major organs of the federal government—congress, the federal courts, nor the executive—was well placed to see law in the United States as a whole. The state legislatures and courts were even less well-equipped to do so. Accordingly the main burden of the task fell on non-governmental agencies, notably to the law schools and the bar.

The contribution of the leading law schools in this respect was important. Even from the early days of the Litchfield Law School,[4] many of them insisted on regarding themselves as national institutions concerned with the law of all the American jurisdictions, not just the local law, and they drew their students from all over the United States; by doing so they ensured that the leaders of the profession would have a national outlook and a shared heritage. The same perspective dominated the approach to research and writing of the leading legal scholars. Thus law schools did much to preserve and foster a high degree of uniformity in respect of education and research, thereby helping to maintain a single legal culture. But as institutions they were individualistic and so were the law teachers; schools and individuals duplicated each others' efforts, with relatively little sharing out of functions or coordination. The steady pressure of the overriding problem did stimulate various attempts to produce coordination at a national level. Institutions proliferated; some, like the National Conference of Commissioners on Uniform State Laws and the American Law Institute,[5] were especially created to deal with problems of unification and reform, some represented special interests, such as the American Bar Association and the Association of American Law Schools. Perhaps the biggest single contribution to maintaining uniformity of laws was made by the

leading treatise writers of the nineteenth and early twentieth centuries, several of whom were associated with Harvard: Story, Williston, Beale, Gray and Thayer.[6] Their treatises, and associated scholarly productions, helped not only to unify, but also to simplify and systematize the common law in the United States. The proliferation of precedents and of other authoritative sources generated a perennial need for simplification, which was made especially acute by the very success of efforts to maintain a single legal culture. For the state courts were prepared to pay almost as much deference to precedents from other American jurisdictions—and beyond—as they were to their own. The result was that from the middle of the nineteenth century up to the present day American lawyers and judges have had to cope with a body of reported cases which is so vast and varied as simply to undermine the basic rationale of a system of precedent. Thus the relative ineffectiveness of the legislatures and the unmanageability of the primary sources of law were among the factors which gave American legal scholars the opportunity to play a much more important part in their legal system than their counterparts in the British Isles.

The American realist movement can be viewed as one phase of the response of American jurists to the problems of unification, systematization and modernization of American Law. Legal realism was, in the first instance, a product of the concerns of a number of teachers of law, nearly all of whom were based in a few leading law schools on the eastern seaboard of the United States. These concerns reflected the complex situation of American academic lawyers: as teachers they were faced with the problems of the aims, the methods and the quality of formal preparation for the practice of law; as scholars they needed to ask: What should be the functions and the scope of legal research? As intellectuals of a kind they were affected by some powerful trends in contemporary American social and philosophical thought. As lawyers they had a dual perspective in that they were called on to identify, at least in part, with the practitioners working in the existing legal structure, while at the same time they were particularly well placed to see law in the United States as a single system, transcending the boundaries of the various state and federal jurisdictions. As reformers, they were acutely conscious of a seeming lag between

legal and social change. To understand the realist movement it is important to see it in the context of these concerns.

In this perspective, the controversies between analytical and sociological jurists and between 'formalism' and 'functionalism' appear, at least in part, to reflect differences over the priorities to be given to the relatively 'static' needs of unification and systematization and the 'dynamic' need for continuous adaptation of legal institutions to changed conditions and values. In the United States the complexity of its legal system and the pace of change during the past hundred years have combined to accentuate the strain between these competing needs. The realist movement represents part of the radical vanguard who called for a 'dynamic' jurisprudence as a basis for bringing a greater sense of urgency to bear on the problems of adapting the legal system to the needs of the twentieth century.

While it is helpful to see the realist movement in the context of a broad interpretation of American legal history, this is only one aspect of the concerns of the early realists. Their general intellectual milieu is no less important. Apart from its relationship to the international literature of jurisprudence, realism can be seen as part of a general movement in American social thought which is sometimes characterized as 'the revolt against formalism'. In a useful study Morton White has pointed to the close affinities between certain leading figures in several disciplines at the turn of the century, notably John Dewey and the pragmatists in philosophy, Charles Beard and J. H. Robinson in history, Thorstein Veblen the economist and satirist, and Mr Justice Holmes in jurisprudence.[7] All of these men were innovators in their fields; all of them were eager 'to come to grips with life, experience, process, growth, context, function'.[8] All rejected the emphasis placed in their respective disciplines on deductive logic, abstraction and analogies from mathematics. Although they were instrumentalists, they tended to be anti-Benthamite, or at least to be ambivalent towards him, being particularly critical of the ahistorical approach of English utilitarians.[9] 'In their positive ideas they showed great respect for science, historical method, economic interpretation and cultural analysis.'[10] Of particular relevance to the student of realism was their insistence on the unity of truth and the logic of its discovery and a disrespect for artificial boundaries between disciplines. It is dangerous to generalize about the intel-

lectual development of so independent-minded and diverse a group as the early realists, but it is fair to say that 'the revolt against formalism' was an important part of the general intellectual climate that fostered their approach.

The historic problems of the American legal system, the writings of men such as Dewey, Bentley, Veblen and Beard, and the whole vast heritage of European jurisprudence, especially that of England and Germany, are all an essential part of the background of American legal realism. However, especially in the early phases, the foreground is dominated to a large extent by some more immediate, specialized concerns of academic lawyers about how they should approach their tasks of teaching and scholarly research. One premise of this essay is that the rise of the realist movement is best understood by concentrating on a few individual law teachers, all of whom happened to be based on three eastern law schools, Harvard, Yale and Columbia. To some extent the ideas of these particular individuals reflected trends in other law schools and in the world outside; to some extent they were unique or idiosyncratic or path-breaking. Accordingly, the next three chapters will consist of a series of sketches, which taken together illustrate the main threads in the story of the rise of the realist movement from 1870 to 1931 and bring into focus the complex interplay of juristic, technical legal, philosophical and educational issues which lies at the root of realist thought.

I

Langdell's Harvard

The story of the development of the Harvard Law School after 1870, and of American legal education as a whole, is commonly presented as a straightforward example of charismatic leadership.[1] In that year Christopher Columbus Langdell was appointed professor and shortly afterwards was elected Dean of the Harvard Law School. He was responsible for a number of innovations, the best known being the case method of instruction. Langdell's approach was based on a coherent but simple theory of law teaching, which he applied with consistency and determination. This theory provided the basis for an educational orthodoxy which underlies much of modern American legal education. It is arguable that in the hundred years that followed Langdell's appointment there have been few radical changes in American legal education, despite numerous attempts at innovation and experiment. The fundamentals of the Langdellian orthodoxy survived to a remarkable degree periodic bouts of dissatisfied introspection on the part of law teachers, and it was only in the late 1960s that the combination of racial tension, student unrest, the war on poverty and the war in Vietnam threatened to rock the established order in some leading law schools.

Presented thus, the story does less than justice to the richness and complexity of developments in American legal education between 1870 and 1970[2] But it is useful as a device for dramatizing the conflict of ideas that underlies the realist controversy. In so far as legal realism was in the first instance a reaction against an approach to law that was characterized as 'formalism', Langdell can be treated as a leading representative of this approach. To some critics (notably Holmes and Frank) Langdell quite explicitly symbolized 'the enemy';[3] in their hands the symbol deteriorated into caricature, and this too is revealing, for it is a good example

of a tendency to over-reaction on the part of some realists, which in turn made them vulnerable to charges of extremism.

The gist of Langdell's theory is to be found in two famous passages. In the preface to his casebook on contracts he stated:

> Law, considered as a science, consists of certain principles or doctrines. To have such a mastery of these as to be able to apply them with constant facility and certainty to the ever-tangled skein of human affairs, is what constitutes a true lawyer; and hence to acquire that mastery should be the business of every earnest student of law. Each of these doctrines has arrived at its present state by slow degrees; in other words, it is a growth, extending in many cases through centuries. This growth is to be traced in the main through a series of cases; and much the shortest and best, if not the only way of mastering the doctrine effectually is by studying the cases in which it is embodied. But the cases which are useful and necessary for this purpose at the present day bear an exceedingly small proportion to all that have been reported. The vast majority are useless, and worse than useless, for any purpose of systematic study. Moreover the number of fundamental legal doctrines is much less than is commonly supposed; the many different guises in which the same doctrine is constantly making its appearance, and the great extent to which legal treatises are a repetition of each other, being the cause of much misapprehension. If these doctrines could be so classified and arranged that each should be found in its proper place, and nowhere else, they would cease to be formidable from their number.[4]

Fifteen years later, on the commemoration of the 250th anniversary of the founding of Harvard College, he explained the basis of his approach as follows:

> [It] was indispensable to establish at least two things; first that law is a science; secondly, that all the available materials of that science are contained in printed books. If law be not a science, a university will best consult its own dignity in declining to teach it. If it be not a science, it is a species of handicraft, and may best be learned by serving an apprenticeship to one who practices it. If it be a science, it will scarcely be disputed that it is one of the greatest and most difficult of sciences, and that it needs all the light that the most enlightened seat of learning can throw upon it. Again, law can be learned and taught in a university by means of printed books. If, therefore, there are other and better means of teaching and learning law than printed books, or if printed books can only be used to the best advantage in connection with other means, – for instance, the work of a lawyer's office, or attendance upon the proceedings of courts of justice, – it must be confessed that such means cannot be provided by a university. But if printed books are the ultimate sources of all legal knowledge; if every student who would obtain any mastery of law as a science must resort to these ultimate

> sources; and if the only assistance which it is possible for the learner to receive is such as can be afforded by teachers who have travelled the same road before him, – then a university, and a university alone, can furnish every possible facility for teaching and learning law.... We have also constantly inculcated the idea that the library is the proper workshop of professors and students alike; that it is to us all that the laboratories of the university are to the chemists and physicists, all that the museum of natural history is to the zoologists, all that the botanical garden is to the botanists.[5]

Langdell had no pretensions to being an original legal theorist. These statements are two rare examples of occasions on which he made explicit his more general assumptions. Allowance must be made for the point that the preface to a casebook and a commemorative address are not contexts which normally call for a carefully phrased statement of a theoretical position. However, these two statements, read together, are singularly revealing and several features of them call for comment. Firstly, Langdell placed great emphasis on law as a 'science', analogous to physical sciences such as chemistry and botany.[6] It will be seen later that 'the scientific analogy' also had a powerful grip on the minds of several leading realists, for example Cook and Moore; but the concept of 'science' did not have identical associations for these jurists, although their ideas had some common roots in nineteenth-century positivist thought. To Langdell 'science' conjured up the ideas of order, system, simplicity, taxonomy and original sources. The science of law involved the search for a system of general, logically consistent principles, built up from the study of particular instances. Like the scientist, the lawyer should study original sources; like the botanist, he must select, classify and arrange his specimens.[7] In the passages quoted, Langdell does not explicitly distinguish normative from descriptive propositions but confidently equates legal principles with scientific laws; he makes no mention of experimentation and empirical observation. He asserts, rather than argues, that reported cases are the only possible 'specimens' and that the law library is closely analogous to a chemist's laboratory or a botanist's garden. Each of these ideas was to be challenged in due course.

The next point to note is that Langdell's conception of law is court-centred. Only cases are explicitly mentioned as primary sources and they are to constitute the basic diet of law students. The courts are seen as the primary agencies of legal change,

which itself is seen as a very slow evolutionary process. There is perhaps even a hint that the common law may be nearing the end of the process of historical growth, culminating in a final, logically complete system. However, this is not a necessary implication of Langdell's statement.

Finally, it is important to see the connection between Langdell's assumptions about law and his pedagogical ideas. The connecting link is the view that law is an autonomous science, quite distinct from other disciplines, and that legal education should be co-extensive with legal science. Law consists solely of principles or doctrines and, in law school at least, law students should study nothing but law.[8] Langdell was not necessarily a philistine and he did not deny the value to lawyers of a broad liberal education, but to provide this was not part of the function of a law school.

If Langdell's conception of law set rather narrow limits on the scope of legal education, his conception of 'science' provided the basis for a stimulating mode of instruction. In the light of experience it is easy to see that Langdell's version of 'the case method' was based on sound educational premises: it required the intensive study of primary sources; by treating cases in chronological sequence he gave both concreteness and historical perspective to the study of legal rules; the method required disciplined participation rather than passivity on the part of students; it was more sceptical and more lively than the dreary rote learning that it in large part replaced; and, in the hands of a good teacher, sustained by the competitive atmosphere of the American law school, it secured many of the values of small-group teaching in a remarkably economic fashion. Finally, the case method involved an important switch from emphasis on learning rules of law to emphasis on skill in 'legal analysis, legal reasoning, legal argument and legal synthesis'.[9]

Langdell also invoked the idea of 'science' to give academic respectability to a form of vocational training. 'If law be not a science, a university will best consult its own dignity in declining to teach it',[10] he could declare confidently in 1886, secure in the knowledge that his conception of legal science had been firmly established at Harvard. But was the study of 'legal science' consistent with the aim of preparation for legal practice? Langdell gave a glib answer. 'The true lawyer' is one who has such a mastery of legal principles as to be able to apply them with

'constant facility and certainty to the ever-tangled skein of human affairs'.[11] As a statement of the qualities and skills that go to make up a good lawyer this formulation is inadequate and misleading. At best it covers only one group of skills which are very important for some types of lawyer. It ignores other skills and qualities that might be developed by a rounded system of legal education and it assumes that there is only one type of 'true lawyer'; this assumption was not accurate in Langdell's day and over time it has probably become less and less tenable. In short, Langdell selected one lawyer-like quality and treated it as if it were the only one. This enabled him to beg one of the central questions facing contemporary legal education, namely, what other skills and qualities of lawyers can appropriately be developed in a university law school?[12] Furthermore, the distortion in Langdell's rationalization of what he was doing was subsequently reflected in a corresponding tendency to over-use the case method: one method of developing one type of skill became the predominant method of formal professional training.

The weaknesses of Langdell's theory should not be allowed to obscure his great contributions to legal education and legal scholarship. It was by no means solely because of the case method that Harvard Law School prospered under his leadership. During his time admission standards were raised, a rigorous system of examining was introduced, the foundations of a great library were laid, an outstanding faculty was recruited, and an atmosphere was generated which encouraged scholarly research and writing of a high order. In short, a great educational institution was created. In the sphere of legal research the contribution of Harvard was of particular significance. Between 1886 and 1920 Harvard scholars, notably Williston, Beale, Gray and Thayer, took the lead in writing a series of monumental legal treatises which won immediate recognition among practitioners as well as among legal scholars at home and abroad. These were truly scholarly works, more substantial than many students' textbooks and more systematic and more rigorously analytical than ordinary practitioners' reference works. The assumptions and attitudes underlying these treatises bore a close affinity to Langdell's conception of law. The approach adopted by their authors was well suited to the systematization and simplification of law in a relatively stable society. They conceived of their task as that of

extracting principles from the morass of decided cases; on the surface this involved neutral analysis and exposition of the existing law, but the variety of their sources allowed for an element of choice and hence of quiet, interstitial creation. However, their work was later criticized as being static and conservative by jurists who were more concerned with the problems of adjustment to change. As Professor Max Rheinstein has said:

> The American legal scholars became the preservers of the uniformity of law in the United States. They addressed themselves to this task in ways similar to those of the legal scholars of Europe during the centuries in which they had the task of preserving legal uniformity, namely through the formation of a system and elaboration of concepts. This enterprise of [men like] *Beale* and *Williston, Bogert* and *Wigmore* culminated in the Restatement of the American Law Institute. Of necessity, these people used the method of the jurisprudence of concepts as it had been brought to high perfection in stable 19th century Europe, on the continent as well as in England.
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> The method was unavoidable in order to achieve the systematization of the law, so urgently necessary in America. It did not stand up, however, to the dynamics of the 20th century, the least so in the country in which the legislatures have proved to be unable to adapt and develop the law, particularly the private law.[13]

Although even as late as the 1960s Harvard Law School was regarded by some as the headquarters of Langdellian orthodoxy, the situation is very much more complicated than that. Langdell was not as doctrinaire as his critics suggest, his ideas were not slavishly followed, and Harvard for the most part followed a flexible policy of recruiting to its faculty men of outstanding ability and giving them great freedom to pursue their own ideas according to their own lights. If an orthodoxy prevailed, it was never oppressive nor doctrinaire. Moreover, the first significant attack on Langdell's ideas was mounted from within.

In 1880 Oliver Wendell Holmes Jr took issue with Langdell. In a review of *A Selection of Cases on the Law of Contracts* he wrote:

> Mr Langdell's ideal in the law, the end of all his striving, is the *elegantia juris* or *logical* integrity of the system as a system. He is, perhaps, the greatest living legal theologian. But as a theologian he is less concerned with his postulates than to show that the conclusions from them hang together.[14]

The Olympian figure of Holmes presides, like some brooding

omnipresence, over all discussions of American legal realism. While it would be foolish to deny that he was its most important forerunner, it is impossible to delineate his relationship to the movement with precision. It is difficult in the history of ideas to distinguish between affinity and influence and between symptom and cause; in the case of Holmes there are other complicating factors: he recognized that judges can and do make law, but he was the leading protagonist of judicial restraint; he had no systematic, integrated philosophy, his taste for paradox invited conflicting interpretations of his ideas, and it is not always easy to distinguish between those who were genuinely his intellectual disciples and those who were mainly admirers of Holmes the man, the genial patrician, the impish visionary and the courageous judge.[15] Moreover, in a juristic tradition that has been dominated more by sages than by philosophers, Holmes was the Supreme Sage. His Delphic aphorisms can be made to serve as convenient catch-phrases which somehow make detailed criticism of them appear pedantic. 'The life of the law has not been logic, it has been experience',[16] intoned Holmes in 1881. 'What precisely is meant by "experience" here?' asks the critic. 'Is it meaningful to contrast "logic" and "experience"? Is it not absurd to suggest that logic has nothing to contribute to legal thought?'[17] Such criticisms have some force, but the aphorism survives largely because of, rather than in spite of, its succinct and suggestive ambiguity.

Succinctness and suggestiveness are the two outstanding qualities of Holmes' famous paper 'The Path of the Law', which contains in the space of a few pages an extraordinary number of strikingly provocative statements about legal education and law. Among these is a passage which has often been treated as summarizing Holmes' 'Theory of Law' (whatever that may mean):

> Take the fundamental question, What constitutes the law? You will find some text writers telling you that it is something different from what is decided by the courts of Massachusetts or England, that it is a system of reason, that it is a deduction from principles of ethics or admitted axioms or what not, which may or may not coincide with the decisions. But if we take the view of our friend the bad man we shall find that he does not care two straws for the axioms or deductions, but that he does want to know what

the Massachusetts or English courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.[18]

To understand this passage and its significance it is necessary to see it in the context not only of the 'Path of the Law' but also of the occasion on which it was delivered. In 1897 Holmes, who had been a member of the Supreme Judicial Court of Massachusetts since 1882, was invited to give an address at the dedication of a new hall at Boston University School of Law. Langdell had resigned from the deanship of Harvard two years before, but he was still teaching and his influence was not only dominant there, but had also spread rapidly to other law schools. It is quite clear that 'The Path of the Law' is directed at law students and their teachers, and that much of it is a not very indirect attack on some aspects of the new orthodoxy in legal education.

In fact Holmes spread his fire rather wide and not all the ideas that he criticized are attributable to Langdell: he warned against 'the pitfall of antiquarianism' in legal history ('for our purposes our only interest in the past is for the light it throws upon the present'),[19] he dismissed as unenlightened the practical minded who undervalued jurisprudence ('We have too little theory in the law rather than too much'),[20] he placed the study of Roman law 'high among the unrealities',[21] and he deplored the neglect of economics by lawyers ('For the rational study of the law the blackletter man may be the man of the present, but the man of the future is the man of statistics and the master of economics').[22] But Holmes' main shafts were directed against two fallacies: the tendency of students when learning law to fail to distinguish clearly between law and morality and 'the fallacy of the logical form', that is 'the notion that the only force at work in the development of the law is logic'.[23]

The device of the bad man is introduced initially to deal with the first fallacy: 'If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.'[24] While it may be true that the 'bad man's' main interest in legal

rules is as aids to predict what will happen to him rather than as guides to socially correct action,[25] the idea of prediction is unnecessary for the purpose of distinguishing between law as it is and law as it ought to be. As critics of 'the prediction theory' have pointed out, it is strange to say that advocates, judges, textbook writers or legislators are primarily concerned to *predict* judicial decisions;[26] yet from such standpoints too the distinction between law and morals is also relevant and useful.

But 'the bad man' is a neat device for dramatizing the point that there are other ways of looking at law than as a logically consistent body of rules. For the purposes of the intending practitioner there is a more realistic way of viewing the subject-matter of his studies and this is inevitably linked to the idea of prediction. In the opening paragraph of 'The Path of the Law' Holmes made clear the significance of this for legal education:

> When we study law we are not studying a mystery but a well-known profession. We are studying what we shall want in order to appear before judges, or to advise people in such a way as to keep them out of court. The reason why it is a profession, why people will pay lawyers to argue for them or to advise them, is that in societies like ours the command of the public force is intrusted to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgements and decrees. People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared. The object of our study, then, is prediction, the prediction of the incidence of the public force through the instrumentality of the courts.[27]

This passage clearly indicates that Holmes treated his audience as intending private practitioners, who would spend much of their time as office lawyers giving advice. In advocating that they should adopt the standpoint of the 'bad man', he was presumably not intending to suggest that they should be unethical or amoral, but rather that they should be clear thinking, hard-headed and realistic and that as law students they should look at law in the same way as they would look at it in practice. This Langdell and his colleagues were patently failing to do and Holmes was expressing in a memorable way the standard criticism of the practitioner against academic law. But Holmes was careful to dissociate himself from the anti-intellectualism and narrow-

mindedness of some men of affairs. Indeed he ended on a note that was visionary and idealistic:

> An intellect great enough to win the prize needs other food besides success. The remoter and more general aspects of law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.[28]

Holmes and those who followed him in talking of law in terms of predictions of judicial decisions have been much criticized, mainly on the ground that they confused the concepts of 'prediction' and 'legal rule'.[29] When Holmes' definition, if such it was, is taken as the basis for a purportedly rounded theory of law which could accommodate a variety of standpoints, including particularly those of the judge, the legislator, the expositor of legal doctrine and the 'good' citizen who looks to legal rules as guides to conduct, then it is indeed vulnerable to such criticism. However, the critics have tended to overlook the fact that the context of the 'bad man' statements was a discussion of legal education and that Holmes is much more illuminatingly treated as putting forward an alternative philosophy of legal education to that which was prevailing at the time than as expounding a complete philosophy of law.[30]

Holmes's views on legal education are scattered throughout his many speeches, essays and letters.[31] It was obviously a matter about which he cared deeply, but he was sceptical of the value of sustained analysis of educational problems. A result was that he did not spell out in detail the implications of an approach to legal education which takes the standpoint of 'the bad man'. He did not point out, perhaps he did not realize, that its implementation would almost inevitably involve redefinition of the subject matter of study, a re-classification of its component parts, the introduction of hitherto little used or unused source materials, and the development of a new genre of legal literature, which would need, in many instances, to be preceded by extensive research. The failure on the part of Holmes and his contemporaries to realize the full implications of the kind of perspective he was advocating in 'The Path of the Law', together with the enormous practical difficulties of implementing an approach

related to that perspective, must be counted among the most important reasons for the survival of the Langdellian system for many years.

One of Langdell's contemporaries, John Chipman Gray (1839–1915), is sometimes treated as the first American legal realist.[32] Gray was one of the great Harvard figures of the period. For many years the only member of the Harvard faculty to continue in legal practice while engaged in 'full-time' teaching, Gray was considered by both practitioners and scholars to be the leading property lawyer of his time. A down-to-earth, undoctrinaire individualist, a master of the magisterial lecture, and more obviously a man of affairs than most of his colleagues, Gray went his own way at Harvard and was only converted very late to 'the case system'. At a time when members of the bar were inclined to be very critical of Langdell's innovations, Gray did much to allay their suspicions, but he was never a wholehearted devotee of the case method himself.[33] Indeed he shared Holmes' distrust of Langdell's approach to law, the distrust of the practitioner for the over-logical theorist. He appears to have normally been circumspect in expressing his opinion of Langdell, but in a letter to the president of Harvard he left no doubt about his attitude:

> In law the opinions of judges and lawyers as to what the law is, *are* the law, and it is in any true sense of the word as unscientific to turn from them, as Mr Langdell does, with contempt because they are 'low and unscientific', as for a scientific man to decline to take cognizance of oxygen or gravitation because it was low or unscientific. . . . Langdell's intellectual arrogance and contempt is astounding. One may forgive it in him or Ames, but in an ordinary man it would be detestable. The idols of the cave which a school bred lawyer is sure to substitute for the facts *may be much better material for intellectual gymnastics than the facts themselves and may call forth more enthusiasm in the pupils,* but a school where the majority of the professors shuns and despises the contact with actual facts, has got the seeds of ruin in it and will and ought to go to the devil.[34]

Although deeply suspicious of 'school men', Gray conformed to scholarly conventions. His most important work of scholarship, his famous *The Rule Against Perpetuities*,[35] belongs to the same genre as the treatise of Williston, Beale and Thayer. Nor do his influential six volumes of *Select Cases and Other Authorities in the Law of Property*[36] suggest a marked unorthodoxy in his ideas on legal research. His reputation as a heterodox jurist rests almost

entirely on his last book, *The Nature and Sources of Law*.[37] Except as an example of his felicitous style of writing, this is not typical of his work as a legal scholar. Published in his seventieth year, it was the only substantial incursion into jurisprudence by one who was generally regarded as a down-to-earth property lawyer. Indeed, his close friend Holmes later commented to Laski: '[A]nd intimately as I knew Gray I didn't suspect him [of being a philosopher] until his book came out.'[38]

The extent of the unorthodoxy of *The Nature and Sources of Law* has sometimes been exaggerated. The one really striking idea, which has attracted much critical attention, is Gray's assertion that nothing is law until it has been declared to be so by the courts.[39] Gray drew a sharp distinction between law and sources of law and advanced the strange theory that a statute is not 'law' but is only a source of law.

In attempting to refute 'the declaratory theory' of judging (which he attributed to J. C. Carter) and to explain 'gaps' in the law, Gray was led to place great emphasis on the fact that the final authority for resolving doubtful points of law is vested in the courts and not in the legislature. He summarized his theory about the nature of law in the form of a definition:

> The Law of the State or of any organized body of men is composed of the rules which the courts, that is, the judicial organs of that body, lay down for the determination of legal rights and duties.[40]

This provocative statement has already been accorded more critical attention than it deserves, for neither is it based on particularly acute analysis nor does it appear to have been widely adopted, except as a convenient Aunt Sally.[41] Indeed, it is difficult to understand in what sense this is thought to be 'realistic'.[42]

The Nature and Sources of Law for the most part reflects the conventional wisdom of the time and there is little in the book that is either original or profound. Its chief virtues are its lucidity and its homely common sense which help to make it unusually readable for a treatise on legal philosophy. Philosophically it is rather naive, the work of a learned man of affairs who wandered belatedly into the realms of abstract analysis. Its main claim to originality lies in the great, indeed the excessive, significance attached to the finality of judicial decisions. As so often happens in jurisprudence, the weakest part of the work has been the main

reason for its continued prominence. In fact Gray's ideas presented no serious threat to the Langdellian orthodoxy. In his emphasis on judicial law-making, and in his rather simplistic manner of testing juristic theories to see if they 'fit the facts', Gray could be said to have taken a step away from Austin and Langdell in the direction of realism. But in his teaching he was, if anything, pre-Langdellian, he was an oustanding but essentially orthodox legal scholar and as a theorist he went less far than Holmes in questioning the basic assumptions of his colleagues or in suggesting the basis for a more empirically oriented approach to law.

Less easy to explain is the relationship of Roscoe Pound to Langdellism and to the realist movement. As the leading prophet of sociological jurisprudence Pound might be expected to have been an open critic of the former and a member, or at least an ally, of the latter. Instead, as Dean of the Harvard Law School for twenty years, he presided with little apparent discomfort over what many considered to be the main stronghold of Langdellian orthodoxy, and he was one of the foremost critics of realism.

The names of Holmes and Pound are often linked. Both were Harvard men, both were pioneers of sociological jurisprudence in the United States, and between them they dominated American jurisprudence for many years. They had contrasting styles: Holmes was a patrician sage, given to aphorisms; Pound was a savant with little of Holmes' cutting edge but unrivalled in the breadth of his reading and in his capacity for synthesizing the ideas of others. Some measure of Pound's achievement is indicated by the extent to which the names of some of his better known papers have become catch-phrases: 'The Limits of Effective Legal Action',[43] 'Mechanical Jurisprudence',[44] 'Survey of Social Interests',[45] 'Law in Books and Law in Action',[46] and 'The Need for a Sociological Jurisprudence'.[47] Where Pound did not originally coin these phrases, he was largely responsible for giving them wide currency.

Pound saw more clearly than anyone, and earlier than most, the relevance to law of 'the revolt against formalism'. In a famous passage, published in 1909, he wrote:

> Jurisprudence is the last in the march of the sciences away from the method of deduction from predetermined conceptions. The sociological movement in jurisprudence, the movement for pragmatism as a philosophy of law,

the movement for the adjustment of principles and doctrines to the human conditions they are to govern rather than to assumed first principles, the movement for putting the human factor in the central place and relegating logic to its true position as an instrument, has scarcely shown itself as yet in America.[48]

This and many other similar passages could be interpreted as prophecies of the advent of realism. And, as Llewellyn later acknowledged, 'half of the commonplace equipment' of the new jurisprudence of the 1920s and 1930s had been provided by Pound:[49] the theory of interests, the idea of law as a form of social engineering, the emphasis on interdisciplinary cooperation and on the need for factual data about the law in action, concern with the nature of judicial discretion, were among the themes that were given an airing by Pound before the realist movement got under way at Yale and Columbia.

Yet somehow he seemed unable to avoid reducing such ideas to the status of bland generalities to which 'legal monks'[50] could render lip-service and continue to behave as before.[51] And Pound proved on many occasions to be remarkably unperceptive about the practical implications of his general ideas. At Harvard during his Deanship, despite continuous self-appraisal on the part of the faculty,[52] there were remarkably few changes in the style and content of the undergraduate curriculum, and the kind of innovations that might have been expected of a sociologically oriented Dean were for the most part relegated to the status of fringe activities.

Two incidents, in themselves relatively minor, illustrate the failure of America's leading jurist to realize the promise of his own teachings. In 1915 he deliberately restricted his own course on jurisprudence to postgraduates, the implication being that this subject was at best an optional extra, which might confuse, distract, or—it has been suggested—contaminate the ordinary run of intending practitioners.[53] In 1923–4 Pound was actively involved in the American Law Institute's plans for the *Restatement of Law*. In connection with this he was asked to prepare a paper on classification of law.[54] Classification was a special interest of Pound's—his first scholarly work had involved an elaborate taxonomy of Nebraskan plants[55]—and the occasion provided an excellent opportunity for him to question the prevailing mode of dividing law into a number of overlapping, ill-defined 'fields' such

as contract, tort, equity, conflicts of law, and to suggest a scheme of classification which more adequately reflected sociological and economic categories. Pound's paper might well have been written by someone who had never heard of 'sociological jurisprudence'. He did little more than to provide a potted history of various theories of classification, only to reject most of them in favour of acceptance of the traditional categories of the common law: 'Our law has grown up around certain conceptions which have been developed by analogy such as Contract, Tort, Trust. We ought to use these categories as far as we can.'[56] This comforting advice was accepted by the American Law Institute.

A considerable proportion of the work of members of the realist movement can be viewed as a series of attempts to concretize sociological jurisprudence, by seeking to apply it in practice in a variety of spheres. From this point of view Pound should have been the high priest of the realist movement rather than one of its fiercest critics. It will be seen later that Pound's attacks on realism were based largely on misunderstanding and that his antipathy did not seem to be rooted in any profound intellectual disagreements.[57] Similarly, the main complaint of realists who criticized Pound, such as Llewellyn and Oliphant, was not that his ideas were wrong, but that their detailed implications had not been worked through thoroughly and in sufficient detail for sociological jurisprudence to be more than a set of vague aspirations.[58] Pound's theories were not in such a form that they could be *used* in reforming the law or legal education or legal research or by judges or practitioners in their daily work. To them Pound's weakness was that too often he was prepared to allow jurisprudence to be treated as a subject apart.

The association with Harvard of men like Holmes, Gray and Pound no doubt ensured that there was no simple victory there for a cloistered, over-logical approach to law. The scepticism of Holmes was a powerful antidote to crude dogmatism, men like Gray ensured a healthy tension between the system-builder and the practitioner, and Pound managed at least to give an aura of respectability to talk of 'sociological jurisprudence'. At a later stage the presence of a Felix Frankfurter or a T. R. Powell indicated that this was no mere temple of slumbering orthodoxy. But in the teaching and research activities of the school the spirit of Langdell more than the spirit of Holmes was in the ascendant,

and, in other leading law schools, Harvard was seen more and more as the headquarters of 'legal theology'. A fairly typical picture of the law school by one who later reacted against it was painted by Thurman Arnold in his autobiography:

In the fall of 1911 I entered Harvard Law School. It was a new and exciting experience. Enough of my Western manners had rubbed off so that I was no longer lonely. The professors at Harvard, compared with the Princeton faculty, seemed intellectual giants. The narrow logic of the law, the building of legal principle on the solid basis of a long line of precedents, and the analysis of cases in class by the Socratic method were fascinating. It was also fun to have to work hard, which one never did at Princeton. But the world of the Harvard Law School was as much a world of eternal verities and absolute certainties as it had been at Princeton. The study of human society was divided into fields in which scholars could work without having to acquaint themselves with what people were doing in other fields. The principal fields were law and economics. Then there was another field called the social sciences, though real scholars were dubious about whether this field was truly a science. It was felt that only superficial scholars would be content to work in the field of sociology. The study of psychology was something no sound scholar would care to be caught dabbling in. The idea that thinking was a form of human behavior lay far beyond the horizon. The writings of Freud were completely unknown to properly educated men.

The field of law in turn was carved up into many separate fields: contracts, agency, corporations, real property, personal property, and so on. The workers in these separate fields had little to do with the workers in other fields. They were joined together at the top by the brooding omnipresence in the sky called the science of jurisprudence. Through the wise application of this science, the accidental inconsistencies of the minor fields were ironed out and the law was made into a seamless web.

Professor Thomas Reed Powell, one of the few rebels on the Harvard faculty twenty-five years later, said: 'If you can think of a subject which is interrelated and inextricably combined with another subject, without knowing anything about or giving any consideration to the second subject, then you have a legal mind.'[59]

This, it may be claimed, is a caricature. But it is fairly typical of the picture of Harvard that was prevalent among those who were seeking to develop an alternative approach at Yale and Columbia in the next two decades. Whether or not the picture was entirely fair is beside the point. In so far as the leaders of the realist movement were in revolt against prevailing attitudes to legal education and legal research, this kind of caricature of Langdell's Harvard provided the principal target.

2

Corbin's Yale, 1897-1918

In the present interpretation six individuals will be singled out as having made key contributions to the rise of the realist movement between 1914 and 1931: Corbin, Hohfeld, Cook, Underhill Moore, Llewellyn and Oliphant. All but the last of these had close connections with Yale Law School during this period. In 1931 Llewellyn and Frank compiled a list of twenty realists,[1] sixteen of whom had at some time been associated with either Yale or Columbia Law Schools, in several cases with both. Scrutiny of the names of notable omissions from this list suggests no bias in favour of the two law schools on the part of the compilers, but rather the reverse. The fact is that, at least up to 1928, the realist movement, in so far as it was a discrete phenomenon, was based on two law schools. It was in some respects analogous to the Bloomsbury Group, in that there was no defined 'membership', no shared dogma, and no concerted programme of action. Rather, the 'movement' consisted of a loosely integrated collection of interacting individuals, with a complex network of personal relationships and an almost equally complex family of related ideas, given some coherence, perhaps, by a shared dissatisfaction, not always precisely diagnosed, with the existing intellectual milieu of law in general and legal education in particular. It is immaterial, from this point of view, that some of the ideas of 'the realists' at Yale and Columbia were shared by people in other institutions, even in the formative period, just as it would not be particularly important, nor surprising, to find that there were contemporaries who had affinities with Maynard Keynes or Virginia Woolf, yet who were not members of the Bloomsbury Group. Of course, the realist movement, like the Bloomsbury Group, must also be put in a wider context. Some of this has already been sketched, but there are aspects that will require further elaboration. The point stressed here is that the *immediate* causes of the rise

of the realist movement are to be found in a somewhat narrow and parochial context, although the movement both reflected much broader trends and had implications beyond the world of the American law school.

The rise to eminence of the Yale Law School is closely linked with the first phase of the realist movement. Up to 1918 the lead was taken by three individuals: Corbin, Hohfeld and Cook. In 1919 an editorial of the *Yale Law Journal* pinpointed two lines of thinking which had gained ascendancy in the law school during the preceding years:

> The first of these is that the rules of human action that we know as law are constantly changing, that no system of human justice is eternal, that law forms but a part of our ever-changing social *mores*, and that it is the function of lawyers, of jurists and of law schools to cause the statement and the application of our legal rules to be in harmony with the *mores* of the present instead of those of an outgrown past. The second matter upon which emphasis has been placed, and the one perhaps which has been most obvious in recent pages of the *Journal* has been the necessity of a more exact terminology leading to a more accurate legal analysis.[2]

The chief proponents of these ideas were Corbin and Hohfeld respectively. Arthur Linton Corbin was born in 1874 and brought up on the prairies of Kansas.[3] Religious scepticism, the pioneer spirit and a grandfather who 'laughed at orthodoxies' set the tone of his early upbringing. His father was a farmer who had taken an active part in making Kansas a 'free state'; his mother was a school teacher for many years. As an undergraduate at the University of Kansas, where he studied biology, anatomy and chemistry, Corbin was deeply impressed by the theory of evolution. From Kansas he went to the Yale Law School in 1897. At the time the law school was an undistinguished institution with an unimpressive body of students. Nearly all of the instruction was given by lawyers and judges for whom teaching was only a sideline. They included some men of outstanding ability, but this merely serves to confirm the general experience that part-time teachers, however distinguished, rarely on their own make a distinguished law school.

The faculty was committed as a matter of firm policy to a uniform method of instruction, known as the 'Yale system'.[4] This represented a deliberate entrenchment of traditional methods of law teaching in resistance to the challenge of Langdell's case

method, which had been introduced at Harvard in 1870–1 and which had soon spread to a number of other law schools. 'We were told', says Corbin, 'that the Case System at Harvard turned out only "case lawyers", who could not argue from "principle", but had to depend on finding a case "on all fours".'[5] The 'Yale system' consisted essentially of lectures, recitations, and the intensive study of set textbooks, such as Robinson's *Elementary Law* (a condensation of Blackstone), Jones on *Mortgages* and Cooley on *Torts*. The object was to teach '*the* principles of *the law*' and the few cases that were studied were almost exclusively used merely as examples. 'Recitations', as the name suggests, involved the examination of students by the teacher on their knowledge of the texts and cases, the standard question being framed to admit solely of a correct or an incorrect answer. Some allowance was made for classroom discussion but, as Corbin says, 'the greatest weakness in the Law School was that we were given no experience in the analysis of complex fact problems, in the comparison of decisions, or in the formation or criticism of supposed rules'.[6] This weakness was the direct result of an explicit and cherished theory as to the best way of preparing men for legal practice—a theory held by men who were themselves first and foremost practitioners and whose ability is not in question.

Corbin graduated with high honours in 1899 and went into practice at Cripple Creek, Colorado. As a student he had not felt particularly critical of the methods or the content of the teaching he had received, but he soon found that what he had been taught seemed to bear little relation to what was expected of him in practice. 'Because my law teachers gave me nothing but canned doctrine, I had to decide problems by the gut method almost exclusively, and the pleadings I drew in four years of practice were a scandal and a crime.'[7]

In 1903 Corbin was invited to join the Yale law faculty. He accepted and took charge of the first year course on contracts. As soon as he started he realized that he was inadequately equipped for the task: his years in practice had no better prepared him for teaching than his time as a law student had prepared him for practice. Now that he was embarking on a career as a teacher and a scholar his central concern was to work out a method of teaching and of exposition of legal doctrine which overcame the inadequacies of the Yale system. He found nothing

in the ideas or methods of his colleagues to help him to resolve his puzzlement and so he started to try to solve the problem for himself.

It is important to grasp the nature of Corbin's concern at this time. He had only heard vaguely of Langdell and he knew nothing of Austin, so he could hardly be said to be reacting against either.[8] Critics of realism are wide of the mark when they assume that it represents a reaction against Austinian jurisprudence. Few, if any, of the realists were much concerned with the same questions that dominated the attention of Austin and his successors. Corbin provides a particularly clear example. There is practically nothing in his early writings which can be interpreted as direct criticism of Austin or Markby or Holland or Salmond. Indeed, at the end of his life he claimed that he had never read Austin and even that 'in my early teaching years I knew *nothing* of Roscoe Pound except that he talked of "sociological jurisprudence" '.[9] He showed no great interest in questions relating to the definition of 'law', the nature of sovereignty, the province of jurisprudence, the relation between law and morals, and so on. In respect of analysis and refinement of legal concepts, far from reacting against the Austinian tradition, Corbin, following Hohfeld, worked vigorously within it. But his chief preoccupation was at quite a different level: he was worried by the teaching methods and barely articulated assumptions of his teachers and early colleagues; with the almost schizophrenic way in which practising lawyers could talk about 'the law' in one way and set about handling actual problems in a manner which seemed to be largely unconnected with their talk; with the difference between the orthodox view of the judge's role, as held by nearly all lawyers and judges and the general public, and the actual function that judges seemed to him to be performing; and, to a lesser extent, with the occasional failure of judges' opinions to explain or justify their actual decisions. In other words, he was primarily concerned about a gap between 'theory' and 'practice'. But the 'theory' involved was not the articulate and comparatively sophisticated jurisprudence of Austin and Holland, but the primitive and barely articulated assumptions of judges, practitioners and laymen. The impetus to develop his own theory did not come from a detached philosophical puzzlement about certain abstract questions concerning the nature of law; it came instead from a

concern to develop a method in teaching and in writing which would minimize the dichotomy of which he was so acutely aware.

Thus, like Langdell, Corbin was first stimulated largely by pedagogical problems to develop a theory of law and of legal education. Never satisfied with the conclusions of others, he began to work out his own approach by trial and error in the classroom, and gradually he evolved a theory to support it. Corbin's educational approach was similar to Langdell's in many respects (except that Corbin made a more extensive use of problems), but their ideas on law were significantly different. The fullest statements of Corbin's theoretical position are to be found in two papers that were separated by almost exactly fifty years. In 1913 an essay entitled 'The Law and the Judges' was published in the *Yale Review*, a 'lay' journal.[10] In 1964, in his 'final legal writing', entitled 'Sixty-Eight Years at Law', he restated his 'major conclusions as to legal education and the nature and growth of law'.[11] The ideas and orientation of the two papers are essentially the same and there is no evidence of a radical shift in Corbin's views during the intervening period. This is not surprising, for Corbin is a striking example of someone who fashioned for himself a basic working theory at an early stage and thereafter devoted himself single-mindedly to detailed work in a field of substantive law. Corbin will be remembered as one of the greatest of contract scholars and much of his greatness lies in the consistency, patience and rigour with which he approached his chosen field of specialization.[12]

'The Law and the Judges' is a curiously eloquent and compact paper. There are echoes of Holmes, Gray and Sumner; there are also traces of the theory of evolution. However, the paper as a whole is a forthright statement of Corbin's own views. The main topic is 'the exact part played by the judge in our social system'. There had recently been a good deal of public controversy about the position of judges. In particular it has been suggested that judicial decisions should be subject to recall by the voters. Corbin, in opposing this suggestion, directs his argument to two main conclusions: first that judges have a discretion to make law in individual cases and should accordingly be both open to criticism and ultimately accountable for their decisions; secondly, that the wise exercise of judicial discretion involves acting in accordance with the *sittlichkeit* of the time, a term which Corbin seemingly

equated with the prevailing sense of justice and the mores of a community.[13] The paper ends with a statement which bears a striking resemblance to a controversial passage in Llewellyn's *The Common Law Tradition*, which was published more than forty years later:

> That judge is just and wise who draws from the weltering mass the principle actually immanent therein and declares it as the law. This has always been the judicial function in all countries, and for its performance the judge must bear the responsibility.[14]

Like Holmes' 'Path of the Law', Corbin's paper is pregnant with both suggestive and controversial statements.[15] For present purposes, however, three themes are of particular relevance. The first is the great emphasis placed by Corbin on the continuous process of change:

> For the growth of the law is an evolutionary process. Its principles consist of such generalizations as may tentatively be made from a vast number of individual instances. The instances change as man and society change, with the climate, with the growth of population, with the progress of invention, with social selection. And as the instances change, so must our generalizations change. So must our idea of justice change.[16]

The second theme, implicit in the last passage, is that all propositions of law must be viewed as 'tentative working rules' arrived at inductively by the examination of the facts and results of all the relevant cases. As each decision is handed down the old formulation of a rule must be re-examined to see if it fits the facts and results of the new case. If it does not, then the relevant cases must be re-examined and a new 'tentative working rule' must be formulated. Fifty years later, in a revealing passage, Corbin articulated the basis for this approach. After stating that as a student he had found reading 'Hornbooks' (students' text-books) 'a total waste of time', he continued:

> I have never been able to memorize, and parrot-like to repeat, the 'rules' and doctrines and generalizations of men, often (if not always) based on quite insufficient life experience and inaccurate observation, but solemnly repeated down the corridors of time. Templin had put me through a book entitled *Inductive Logic* by that clearest minded of men, John Stuart Mill. It was only after beginning the teaching of 'law' that I fully realized that the meaning and value of any 'rule' or generalization are wholly dependent on the specific items of life experience and observation on which they are based.[17]

It is important to note here that Corbin's sceptical approach to legal rules formulated by others did not involve commitment to the idea that rules are a 'myth' or are unimportant: ' "Pared-down principles" there must of course be—"the law"; but it seldom struck me that the ones I found in print were *the ones*.'[18]

A great deal of unnecessary controversy could have been avoided if critics of 'realism' had grasped the distinction between scepticism about textbook formulations of legal rules and scepticism about the very existence of any rules or principles. The term 'rule-scepticism', coined by Frank, and indiscriminately applied by critics to Llewellyn and other realists, obscures this important distinction.[19]

A third theme in Corbin's paper, reiterated in his later writings on contract, and subsequently taken up and elaborated by Karl Llewellyn, is the idea that it is as important to study the facts of cases as to study legal doctrines.[20] Judicial decisions, Corbin suggested, are influenced by the manner in which the facts are perceived as much as by legal authorities; the good lawyer must be able to interpret the facts of his case in terms of the conditions and values of contemporary society; in this he can learn more from the law reports, as 'a mighty storehouse of facts', than from a lifetime of experience;[21] even in arguing a point of law a good lawyer studies the 'facts' of a case with great care. Corbin used Chancellor Kent as an example of a great judge who adopted this approach:

> He further says that in deciding cases his practice was first to make himself perfectly and accurately master of the facts. Then he says: 'I was master of the cause and ready to decide it. I saw where justice lay and the moral sense decided the cause half the time, and I then sat down to search the authorities until I had exhausted my books, and I might once and a while be embarrassed by a technical rule, but I most always found principles suited to my views of the case.'[22]

Corbin's 'Law and the Judges' is of historical interest as one of the earliest realist writings. To the modern reader it will seem, in some respects at least, dogmatic and unsophisticated and on a number of points it is clearly vulnerable to some of the criticisms that were later levelled indiscriminately at realism in general. The fact that it was addressed to a lay audience provides only a partial justification for its main defect, that of oversimplification. On certain points Corbin takes an extreme position by any standards, but people today would not be shocked, as was Professor Simeon

Baldwin, by assertions that judges make law or that the decisions of judges should be freely and publicly criticized in the same manner as those of other responsible decision-makers.[23] But in 1913 such ideas were considered heretical; the paper met with a frigid reception from Corbin's colleagues and from practising members of the legal profession, one outraged reader going so far as to suggest that he should be dismissed from Yale because of it.[24]

Corbin's theory of law, as set out in 'The Law and the Judges', reveals some sharp divergences from that of Langdell. But there were also important similarities. Both men were attracted by 'the scientific analogy', but Langdell's 'theological' conception of science contrasts sharply with Corbin's scepticism of unproven generalizations and his Social Darwinism. Their conceptions of 'induction' were also different. Both men saw the growth of law as an evolutionary process, but Corbin placed much greater emphasis on change as a continuing and vital process which needs to be always in the forefront of lawyers' minds. Both men were specialists in contract and they shared a perspective on law, that made courts the central focus of attention. Corbin was essentially a case-law scholar. He loved the law reports and he devoted the greater part of his energies to reading and analyzing them. He neither undertook nor exhibited much interest in empirical research. In this respect he was not very different from other scholars, like Langdell, who relied almost exclusively on appellate decisions for their source-material and who believed that all the law is to be found in printed books. Corbin may not have assented intellectually to the latter sentiment, but he tended to behave as if he did. But Corbin's manner of reading cases and the use he made of them were significantly different from Langdell's, as is illustrated by his emphatic rejection of the suggestion that 'the vast majority are useless, and worse than useless, for any purpose of systematic study'.[25]

On education matters the ideas of the two men were very similar. Corbin devised his own version of case-method teaching before he learned in any detail about Langdell's innovations at Harvard. Later, Corbin was largely responsible for breaking down resistance to the 'case method' at Yale. On the administrative side he played a leading role in pressing policies which ensured that the institution was built up on sound lines: the quality of the students was improved by the steady raising of admission stan-