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Legal Theory and Common Law

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LEGAL THEORY AND COMMON LAW. Edited by *William Twining*. Oxford: Basil Blackwell. 1986. Pp. viii, 267. \$49.95.

Interest in legal theory is experiencing a resurgence as a result of debate among scholars in the traditional, Critical Legal Studies, and Law and Economics schools. Yet, one must wonder if these discussions of legal theory will ever inform practice in basic legal fields such as contracts, torts, or evidence. Some effects undoubtedly will result as scholarly judges incorporate various legal theories in their decisions, but gaps in understanding greatly handicap broad utilization of these theoretical debates.

In *Legal Theory and Common Law* William Twining¹ attempts to close the “gap between legal theory and particular fields of legal study” (p. 1). Twining asserts that both students and practitioners experience this gap. He writes: “[M]any students complain that they see little or no connection between jurisprudence and the rest of the curriculum. Similarly many academic lawyers assert that some debates in legal philosophy or the sociology of law or critical theory have become too ‘sophisticated’ or ‘abstruse’ for them to understand” (p. 1). Believing that an understanding of jurisprudence is essential to all members of the legal profession, Twining has assembled a collection of essays discussing the need for jurisprudential education and the application of legal philosophy to specific fields of law.²

1. William Twining is Quain Professor of Jurisprudence at University College London.

2. Five of the contributors to *Legal Theory and Common Law* originally presented their essays at the W.G. Hart Workshop on Legal Theory held in London in July 1984. Those authors and their essays are: Norman Lewis, Professor of Public Law at the University of Sheffield, *Public Law and Legal Theory*; Neil MacCormick, Regius Professor of the Law of Nature and the Law of Nations at the University of Edinburgh, with W. Twining, *Theory in the Law Curriculum*; David Miers, Senior Lecturer in Law at University College, Cardiff, *Legal Theory and the Interpretation of Statutes*; Katherine O'Donovan, Senior Lecturer in Law at the University of Kent, *Family Law and Legal Theory*; and Richard Tur, Benn Law Fellow at Oriel College, Oxford, *Criminal Law and Legal Theory*. These essays were revised slightly for inclusion in this book.

Three of the essays are reprints from previous publications: Karl Llewellyn, *A Required Course in Jurisprudence*; Brian Simpson, Professor of Law at the University of Kent and the University of Chicago, *The Common Law and Legal Theory*; William Twining, *Evidence and Legal Theory*.

The remaining five essays were written specifically for publication in this book: Hugh Collins, Fellow of Brasenose College, Oxford, *Contract and Legal Theory*; Roger Cotterrell, Reader in Legal Theory at Queen Mary College, London, *The Law of Property and Legal Theory*; Mary Stokes, Fellow of Brasenose College, Oxford, *Company Law and Legal Theory*; David Sugarman, Reader in Law at Middlesex Polytechnic, *Legal Theory, the Common Law Mind and the Making of the Textbook Tradition*; Cento Veljanovski, Lecturer in Law and Economics at University College London, *Legal Theory, Economic Analysis and the Law of Torts*.

All the contributors except the late Karl Llewellyn are associated with universities in Great Britain. This hinders only slightly American application of the theories discussed. After all, legal theory shares philosophical strains with all western cultures and, of course, American common law was derived from the English. Also, the contributors often discuss both English and

The contributors to this book were given broad rein and Twining admits that each essay "deals with what the author thinks to be theoretically significant about their subject" (p. 5). The result is essays written at varying levels of abstraction. The contributors' economic and political philosophies, however, are more consistent. Twining admits: "[t]here is a discernible pattern, some would say bias, in the list of authors: all of them are more or less dissatisfied with the Expository Tradition³ in one way or another" (p. 4; footnote added). To be more specific, most of the contributors are dissatisfied with the liberal tradition of John Stuart Mill⁴ and the common law.⁵ This book, then,

American precedents. There are, however, certain limitations to the book's British origins that should be noted.

First, Twining remarks that the contributors' opinions are, to a certain extent, reactions to the new analytical jurists [who] were either largely apolitical or, like Ronald Dworkin . . . propounded versions of liberalism that were unlikely to satisfy either the left or the right in Britain in a period of political polarization in which it was becoming less and less convincing to claim that law was or could be politically neutral.

P. 3. Thus, there are undercurrents of British politics in the essays. Some of these undercurrents may be unappreciated by or simply inapplicable to American readers.

Second, the arguments sometimes rely on specific English legal institutions. Norman Lewis' essay *Public Law and Legal Theory* suffers most from this complaint. Lewis writes in his introductory paragraph that it is "the 'search for the [British] constitution' which represents the important exercise to be conducted" in public law. P. 99 (footnote omitted). Obviously such a search would be shortlived in America. This is not to say, however, that the essay is completely irrelevant to American jurists; it is just less relevant than the others. Another example is Cento Veljanovski's essay *Legal Theory, Economic Analysis and the Law of Torts*, which is most interesting as one English scholar's view of the American Law and Economics School. The reasoning of this school has been largely ignored by courts in England.

3. The Expository Tradition, as explained by contributor David Sugarman, embodies the theory

that law may appear chaotic but is, in fact, internally coherent. This cohesion derives from the fact that law is grounded upon relatively few general principles. The legal scholar [is] in a unique position to tease out the general principles underlying the law and impart this sense of cohesion through the teaching of general principles and the systemization of those principles in law textbooks. . . .

. . . . In short, exposition, conceptualization, systematization and the analysis of existing legal doctrine became equated with the dominant tasks of legal education and scholarship. Pp. 29, 31.

4. John Stuart Mill was an English philosopher who lived from 1806 to 1873. His theories are best summarized in *Utilitarianism*, *On Liberty*, and *Considerations on Representative Government*, three of his many essays. Mill was a strong supporter of individual freedom. In *On Liberty* he wrote:

The object of this Essay is to assert one very simple principle, . . . that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. . . . The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.

J.S. MILL, *On Liberty*, in *UTILITARIANISM, ON LIBERTY, AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT* 72-73 (H. Acton ed. 1972). Mill's theories, and those from which they are derived, embody the philosophy known as "classic liberalism."

is somewhat misnamed; its title actually should be *Legal Theory and Its Potential to Eradicate Common Law*.

Twining begins with two essays attacking the deficiencies of the common law. Brian Simpson initiates the assault, arguing against the theory that common law represents a positivistic set of rules. Attacking John Austin⁶ in particular, Simpson writes:

The notion that the common law consists of rules which are the product of a series of acts of legislation (mostly untraceable) by judges (most of whose names are forgotten) cannot be made to work, if taken seriously, because common law rules enjoy whatever status they possess not because of the circumstances of their origin, but because of their continued reception. [p. 14]

Simpson posits rather that the common law is customary law, which is derived from common beliefs or practices within a society. As such, common law depends on cohesion among its practitioners which no longer exists. Thus, Simpson concludes "the common law is more like a muddle than a system" (p. 24). He then suggests:

[T]he only effective technique for reducing the common law to a set of rules is codification, coupled of course with a deliberate reduction in the status of the judiciary and some sort of ban on law reporting . . . [p. 24]

Simpson's essay is followed by David Sugarman's elaborate historical account of the development of common law theory and teaching. Sugarman, in this book's best contribution from the Critical Legal Studies school, decries legal theorists for establishing the formalistic, expository tradition of legal education. He posits that English jurists of the late nineteenth century established the expository method of teaching in a quest for professional legitimacy. Traditionally, lawyers had not obtained their training at a university but rather through practice. The law faculties established during the nineteenth century promoted the theory that there were universalities in law that a prospective attorney could learn in the classroom. In doing so, Sugarman argues, the jurists artificially narrowed and formalized the definition of law.

Simpson's and Sugarman's essays set the tone for the other contributors: the first order of business for all is to propound a unified but

5. This is less true of the essays by Cotterrell and Veljanovski.

6. John Austin was an English jurist who lived from 1790 to 1859. He is credited with introducing exactness of thought and expression to legal terms and theories. In doing so, Austin attempted to distinguish law from custom and positive law from social norms. He wrote:

Of all the concise expressions which I have turned in my mind, "the philosophy of positive law" indicates the most significantly the subject and scope of my Course. . . . Now general jurisprudence, or the philosophy of positive law, is not concerned directly with the science of legislation. It is concerned directly with principles and distinctions which are common to various systems of particular and positive law; and which each of those various systems inevitably involves. . . . [T]he philosophy of positive law[] is concerned with law as it necessarily is, rather than with law as it ought to be: with law as it must be, *be it good or bad*, rather than with law as it must be, *if it be good*.

1 J. AUSTIN, LECTURES ON JURISPRUDENCE 33 (R. Campbell ed. 1869) (emphasis in original).

broadened theory for their respective areas of law. Some contributors, however, assume they write in areas of law that already possess a unified theory. For these authors *Legal Theory and Common Law* becomes a forum for espousing their particular theories. In the words of Austin, some contributors address the question of what law *is*, attempting to broaden the positive definition, while others address the normative question of what the law *ought to be*.⁷ These two approaches are exemplified by Twining's essay *Evidence and Legal Theory* and Mary Stokes' essay *Company Law and Legal Theory*.⁸

Twining begins his essay by criticizing the law of evidence for being too formalistic. He argues that scholarly treatment of the subject of evidence is usually limited to discussion of the established rules and generally does not adequately address the broader question of how triers of fact can decide cases about which they have no first-hand knowledge. Twining asserts that "the theorist has a much more important role to play in subverting divisions and building intellectual bridges than in settling lines of demarcation" (p. 62). He then outlines five tasks or areas of investigation for the legal theorist: (1) intellectual history; (2) "High Theory" or "the exploration of fundamental general questions related to the subject-matter of law as a discipline"; (3) "[m]iddle-order theorizing" or "the development of prescriptive working theories"; (4) the conduit function, "the relationship between law and at least the more general aspects of all other disciplines related to law"; and (5) the integrative or synthesizing function described as "articulating frames of reference which provide a *coherent* basis for law as a discipline" (p. 64; emphasis in original).⁹

Twining follows his categorization with suggestions of fertile areas of scholarly investigation and integration within each category. For example, in the area of intellectual history Twining criticizes historical debates for being limited solely to the consideration of established rules and for ignoring developments in psychology, forensic medicine, and other sciences. To Twining, these disciplines must inform the subject of evidence. Similarly, in the area of philosophy he suggests that further analysis of the independence of fact from belief may be fruitful. The essay continues with a short critique of Bentham's *Rationale of Judicial Evidence*,¹⁰ highlighting areas where Bentham could be modernized, and concludes with a note cautioning jurists against believing that any theory will be stable for all time. Twining believes that in his essay he develops "a mapping theory [that] charts relations between lines of enquiry and raises questions [as opposed to] a general theory

7. *Id.*

8. Four contributors share Twining's approach (Twining, Cotterrell, Lewis and Veljanovski), five share Stokes' (Stokes, Miers, Collins, O'Donovan and Tur).

9. Twining's categories are referenced by other contributors.

10. J. BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE* (London 1827).

[that] purports to provide answers to such questions" (p. 77). In this effort he is generally successful, although one might wonder if his essay is not really a revisitation of legal realism.

In sharp contrast, Mary Stokes attempts to provide no such framework for inquiry but rather proposes a specific theory. She begins by asserting that the central preoccupation of corporate law has been to legitimize the power of corporate managers. She asserts that previous attempts to legitimize this power have failed because they relied on liberal¹¹ theories of competitive markets. This reliance was a "mistake" for three reasons, all related to the growth of firms. First, firms have become monopolistic or oligopolistic and therefore no longer compete in competitive markets. Second, management has become separated from ownership, and as a result managers are no longer interested in maximizing the stockholders' investments. Instead, their interest in perpetuating their own power eliminates the profit motive as the primary criterion for management actions. Finally, economic power in large firms is exercised through intrafirm bureaucracies rather than as a result of competitive market forces. Stokes then devotes thirteen pages to the impossibility of reconciling current corporate legal practice with its ideological foundations, concluding: "The legal model's attempt to equate corporate managers with ordinary entrepreneurs acting so as to maximize the profits of the company should be recognized for what it is — a failure" (p. 173).

Stokes proposes the corporatist model of the company¹² as the solution to the irreconcilable differences between law and theory that she has identified.

The corporatist view, by perceiving the company as a unit which welds together the interests of its participants into a harmonious common purpose defined as the public good, seems to draw on the ideal of community and seeks to inject it into an area which the dominant legal ideology regulates through contract and hierarchy. [p. 179]

To Stokes, this "ideal is attractive" (p. 179). As a result, her essay first confirms the view that there is a problematic gap between legal theory and practice and then proposes a solution that could be just as much divorced from practice. Stokes does not discuss the philosophical

11. That is, classically liberal. See note 4 *supra*. Liberal economists believe that in a freely competitive market, with easy entry to and exit from the market, individual self-interest, usually manifested in the desire for personal profit, will drive participants to use resources in the most efficient manner. Maximization of individual utility is the desired goal.

12. Stokes describes the corporatist model as possessing three characteristics:

- (1) It recognizes that "the modern public company has become an organization whose significance almost rivals the state." P. 176.
- (2) It supplies "a normative vision of the role of corporate management" so that "[r]eleased from the constraints of both shareholders and any market, managers are free to become public servants." P. 176.
- (3) It legitimizes the power of corporate managers "because they are seen simply to help formulate, articulate and execute the common purpose of shareholders, creditors, employees and the community." P. 177.

grounds for her theory, its inconsistency with current practice in modern capitalist societies, nor the complete economic readjustment it would require to implement this socialistic view of the manager as a public servant.¹³

The final two chapters of *Legal Theory and Common Law* are devoted to the exploration of the need for a separate law school class in jurisprudence. Twining and Neil MacCormick assert in their essay that legal theory teaches students to abstract, to question assumptions, to exploit the inheritance received from previous jurists, and to understand the student's place in relation to history. These skills allow students "to integrate their study of law with their knowledge of other subjects, with their own first-hand experiences and with their beliefs concerning religion, morals, politics and life" (p. 246). Twining then closes the book with an essay written by the late Karl Llewellyn.¹⁴ Llewellyn claims: "Jurisprudence is as big as the Law, and bigger" (p. 256). He argues that law schools should teach jurisprudence because "[t]he relation of a man's life-work to his society and to himself is a duty-job for himself to wrestle with, and a duty-job for us to see that he wrestles with" (p. 255).

Such integration of one's profession with one's personal experience and philosophy is a laudable goal. Unfortunately, this book adds little that is new to that goal's achievement. *Legal Theory and Common Law* posits a very narrow range of acceptable legal theories. The contributors in most cases fail to identify the philosophical underpinnings from which their applied theories are derived. Yet identification of those underpinnings would seem to be a prerequisite to achieving Llewellyn's goals for jurisprudential education. In addition, the contributors' arguments are often more destructive than constructive, leaving the reader more dissatisfied with the role of legal theory at the end of the book than at the beginning. In the end this book will only provide superfluous ammunition to those who already agree with its conclusions and serve to frustrate those who don't.

— Robert R. Morse, Jr.

13. Stokes' goal is to make corporate management "a purely neutral technocracy, balancing a variety of claims by various groups in the community and assigning to each a portion of the income stream on the basis of public policy rather than private cupidity." P. 176 (quoting A. BERLE & G. MEANS, *THE MODERN CORPORATION AND PRIVATE PROPERTY* 312-13 (1967)).

14. This essay is the text of Llewellyn's contribution to *The Round Table on Jurisprudence and Legal History* at the 37th Annual Meeting of the Association of American Law Schools in 1939. Twining believes this is the first time the full text of the essay has been published. P. 258.