TWINING ON LEGAL THEORY

WALTER PROBERT

William Twining (ed.). *Legal Theory and Common Law*. (Oxford: Basil Blackwell, 1986). viii + 268 pp. Notes, index. $45.00.

In this volume, William Twining, who is Quain Professor of Jurisprudence at University College in London, has produced and edited a worthy and provocative collection of essays. Most are authored by academics in British legal education. An appended exception is an article by Karl Llewellyn attesting to the importance of jurisprudence as a required course in law school, included apparently as a sort of a memorial to the influence he bore over several of the contributors.

While this book presents arguments that may be of peculiar relevance to English readers, the essays are generally international in import and sufficiently cosmopolitan to interest anyone concerned about the relationships of high level theories such as jurisprudence and philosophy to the teaching and understanding of law and its fields. According to Twining, there has been a conspicuously increasing concern over the ever-widening gap between legal theory and teaching and practice. He seems to attribute the trend to the likes of H.L.A. Hart (1961) and Ronald Dworkin (1986) and their devotees and critics for moving jurisprudence ever closer to philosophy and away from workaday concerns. There is now, Twining holds, a "felt need to cultivate the middle ground" (p. 4). Accordingly, this collection grew out of a 1984 workshop in London given to building a bridge "between the general and the particular in academic law" (p. 5), exercises, if you will, in special jurisprudence.

Some of the essays explore the insights such middle-level theory may bring to this or that curricular field or, in a few instances, how jurisprudential theory may be illuminated. Richard Tur, for instance, explores criminal law to attempt a brash sort of consolidation of legal positivism and natural law, resulting in what he calls "normative positivism" and in the process treating criminal law as a "positive moral order" (p. 195). On the other hand, Cento Veljanovski brings economic theory to bear on torts in a kind of "just folks" comprehensibility that may even delight the skeptic and at least give credit to his more general thesis that the application of almost any external theory in nonlegal terms will bring helpful insights to a field.

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The pedagogical and ideological slants in this collection will surprise any stateside reader who has stereotyped either English law teaching or legal theory. Take for example, David Sugarman's essay on "The Making of the Textbook Tradition," that suggests there were antiexpository influences at work even during the "classical period" of legal education and theory of the late 1800s. At that time writers like Dicey (1905) and Holland sounded like our own Langdell in their search for the few underlying principles that would explain law and expose students to its systematic and harmonious glories. Sugarman's comments on the influence in England of the university system and the legal profession may help to explain why legal realism's influence has been so long in the closet.

Brian Simpson's exploration of the way to think about the common law comes across as a rather restrained kind of legal realism. He perceives the common law as essentially a muddle and, as a model of rules, either Austin's (1832) or Hart's (1961), a futile ideal at best. Still he finds predictability, at least in England, in what he calls custom, within the legal profession's consensus about the state of law. All the same, he is definitely subversive of the textbook approach. According to Twining's introduction, all of the contributors are in some way similarly subversive.

Twining also tells us that five of the authors adopt "critical" perspectives, apparently a code word for critical legal studies orientation. But again they play in a relatively low-key manner, although clearly, as Twining forewarns, opposed to the "assumptions of liberal legal thought" (p. 5). In that vein, is Hugh Collins's essay on contract theory, in which he argues that liberalism's conflicting assumptions regarding individual autonomy and governmental paternalism do not provide a coherent explanation for the law of contracts. Then there is Katherine O'Donovan's interesting thrust that it is the legal structure itself that produces and reenforces (in England?) the cultural perception of the family and the roles within it, to the apparent disadvantage of women and children. She relies on a theory that has not yet had sufficient play in our jurisprudence: that the categories of language actually control thinking and perception.

It is this sort of deep digging into assumptions that marks the basic theme of the book and unites what might otherwise seem just a collection of diverse speculations. These authors appear to see a key role for legal theory as being not to provide models to control thought in the manner of Austin, Hart, or others but rather to ask questions and articulate assumptions, including those relating to legal theory. Quite rightly much is made of the way in which one's implicit, unarticulated law-view influences thought and action. One may thus be an Austinian without ever having heard his theory.

Twining's contributions are especially geared to explore the

roles of theory. Indeed, in his explorative essay on evidence, he provides a map of the tasks of jurisprudence and legal theory, demonstrating his indebtedness to Llewellyn as well as to Oxbridge linguistic philosophy. Thus does he challenge the assumption, which has pervaded jurisprudence and law-related discourse generally, that there is a vantage point from which one may describe or know law in some general or transcending way. He opts instead for an inescapable pluralism that takes account of the "multiple perspectives and levels" (p. 62) at which law phenomena are approached. As he rightly points out, when Oliver Wendell Holmes, Jr. (1897), for instance, in his seminal essay, "The Path of the Law," recommended looking at law as a prediction of judicial behavior, he was addressing "an ordinary office lawyer thinly disguised" (p. 63). We may wonder why Twining does not appreciate that in the second half of his article Holmes actually shifts perspectives to see law from the angle of the appellate judge, the more frequent perspective of jurisprudential analyses. Roger Cotterrell, in his essay on property, prefers to "aim for a unifying perspective which incorporates and transcends limited participant perspectives" (p. 84) rather than to "condemn the study of law to the incoherence of a babel of voices drowning each other out" (p. 84).

Twining did not invent his invaluable insight, but he does manage to elaborate it and others provocatively in his individual contributions and in the book that he has produced.

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