

# Book Review: The Great Juristic Bazaar: Jurists' Texts and Lawyers' Stories, by William Twining

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Book Review

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# BOOK REVIEW

*THE GREAT JURISTIC BAZAAR: JURISTS' TEXTS AND LAWYERS' STORIES* BY WILLIAM TWINING (BURLINGTON, U.S.: ASHGATE; ALDERSHOT UK: DARTMOUTH, 2002) 506 PAGES<sup>1</sup>

BY BARRY WRIGHT<sup>2</sup>

Herbert Hart, Karl Llewellyn, Jeremy Bentham, and Oliver Wendell Holmes are giant figures in the history of Anglo-American jurisprudence and legal theory. William Twining was taught by the first two and the polymathic Holmes and Bentham have been a continuing influence on him, especially the latter, whose “brooding omnipresence” is unavoidable at University College London, where Twining has been professor since 1983. Quite apart from finding fresh meanings in the work of these scholars, Twining has contributed enormously to critical thinking about narrative, evidence, fact-finding and proof within contemporary legal theory, and his experiences and interests range well beyond the confines of the Anglo-American world. The book is a superb means of accessing many aspects of Twining’s work and also serves, perhaps more by accident than design, as a useful and accessible intellectual history of the field.

The Collected Essays in Law Series edited by Tom Campbell, of which this book is part, is intended to present representative and comprehensive collections of the work of leading legal scholars. Such projects are fraught with dangers. The process of identifying “leading scholars” is highly subjective. Reprinting the “best of” previously published works can be of questionable utility without some reflection about scholarly development, effort to situate these works within broader scholarly currents, and reassessment. This well-warranted tribute avoids these dangers, and the book’s flaws are trivial (poor production quality, compensated for in part by a useful index).

As author and editor of numerous books and a founding editor of the Law in Context series, Twining is an influential and prolific legal scholar. He has helped to expand the envelope of legal scholarship beyond narrow traditional professional concerns, encouraging legal scholars to think carefully about the place of theory and context. The last four decades has also seen the growth of social and political theory touching on law, influencing the critical legal studies movement and postmodernist approaches to law. Twining has moved in this more external theoretical

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<sup>1</sup> [*The Great Juristic Bazaar*].

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stream to some extent, but law has always been his starting point: "... my primary discipline is law and law is my focus."<sup>3</sup> He also favours attention to experience and the illustrative power of narrative, avoiding abstraction and firm distinctions between theory and practice. This has the great virtue of making his work accessible, its relevance readily grasped.

Rather than create a representative anthology, Twining has selected work with the aim of creating a coherent book that stands on its own and complements rather than replicates his other books.<sup>4</sup> "This work is not a survey of the whole juristic bazaar, but rather a guided tour of part of his home territory by a specialist."<sup>5</sup> The introductory chapter and chapter two have an autobiographical feel, as do, to a lesser extent, the remaining chapters in Part A. The chapters in Part B are organized around the theme of narrative. Both parts underscore Twining's accessible and lively style of presenting ideas through different points of view and narratives. The essays represent mostly the latter half of his career. Institutional and legal development in Africa and editing the works of Karl Llewellyn were his foci up to the early 1970s, although globalization and legal education have been continuing interests.

The book is named after one of the essays that Twining uses to introduce his students to the field. Inverting the title of another essay on Holmes' "bad man" to something like "The Good Man Revisited" would have been equally apt. Twining's commitment to legal education and his students (to whom this collection is dedicated) reflects his modest and generous nature. I had the good fortune of studying with him as a postgraduate student at the University of London, just after he was appointed Quain Professor of Jurisprudence at University College (a position he held until 1996 when he became the University College London Research Professor of Law). Our horizons, in many cases narrowed by professional law studies, were expanded by his course on Jurisprudence and

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<sup>3</sup> *The Great Juristic Bazaar*, *supra* note 1 at 16.

<sup>4</sup> William Twining, *Karl Llewellyn and the Realist Movement* (London: Weidenfeld & Nicolson, 1973); *Rethinking Evidence* (Oxford: Basil Blackwell, 1990), the culmination of two decades of theoretical work on evidence and proof; *Law in Context: Enlarging a Discipline* (Oxford: Oxford University Press, 1997), which explores the educational and scholarly institutions of law and the role of theory; *Globalization and Legal Theory* (London: Butterworth, 2000), which reflects his most recent interests. See also William Twining, *Theories of Evidence: Bentham and Wigmore* (London: Weidenfeld & Nicolson, 1985); William Twining, ed., *Legal Theory and Common Law* (Oxford: Basil Blackwell, 1986); William Twining & Terence Anderson, *Analysis of Evidence: How To Do Things With Facts Based on Wigmore's Science of Judicial Proof* (Chicago: Northwestern University Press, 1998); William Twining & David Miers, *How to Do Things with Rules* (London: Weidenfeld & Nicolson, 1976); William Twining & Richard Tur, eds., *Essays on Kelsen* (Oxford: Oxford University Press, 1986).

<sup>5</sup> *The Great Juristic Bazaar*, *supra* note 1 at 16.

Legal Theory. In addition to rigorous introductions to Bentham and the American legal realists, we had the opportunity to explore other theoretical traditions with guests that included Ronald Dworkin, Alan Hunt, and Roger Cotterell.

In the introductory chapter, Twining surveys the subsequent chapters, and in addition to situating and reassessing them, sets out his understanding of the role of theory and the related methodological importance he attaches to identifying standpoint, readings, and the role of narrative in relation to questions of evidence and proof. The essays in Part A assess the influence of Bentham, Llewellyn, and Hart by way of this reflective approach, with related references to figures such as Collingwood, Holmes, and contemporary theorists of pluralism and globalization. Together these essays express Twining's ideas about the role of positivism, realism, and postmodernism in our conceptions of law.

As explained in chapter two, Hart's lectures at Oxford in the early 1950s converted Twining from a reluctant law student to a legal theorist. They were a breath of fresh air within the then rather sterile English legal academic approaches, holding the promise of wider connections with contemporary philosophy and literature (and to figures such as Iris Murdoch). However, as Twining puts it, while Hart transformed the methods of analytical jurisprudence his agenda remained static. In chapter four, originally written for Hart's 1977 *Festschrift*, Twining expresses diplomatic regret that Hart remained within a restricted vision of analytical jurisprudence, lured into obsessive debates by critics and students, just as legal scholarship began to diversify and connect with social theory and the social sciences. In chapter two Twining refers to another formative influence, R.G. Collingwood, whose ideas about theory, method and practice, history as a construct of evidence and imagination, and philosophy anchored in the world of affairs, helped to articulate his dissatisfaction with abstract analytical jurisprudence. This opened the door to American legal realism.

Twining's 1973 book, *Karl Llewellyn and the Realist Movement*,<sup>6</sup> considered legal realism on historical, analytical, and applied levels, and the notion of standpoint became central to his subsequent work, articulated in his re-examination, in chapter three, of Holmes' theory of the rational amoral "bad man." In chapter five, Twining reassesses Llewellyn in light of more recent scholarship and warns against generalizations about the American legal realists. The following chapter explores the neglected aspects of legal technology and the juristic method in Llewellyn's law jobs

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<sup>6</sup> (London: Weidenfeld & Nicolson).

theory.

Twining moves to Bentham in chapter seven, a commentary on the development of Bentham studies (categorized as reconstructing and editing texts, textual exegesis, contextual interpretations, and assessments of Bentham's historical and current significance). Here, Twining sets out his ideas about different readings of juristic texts; in the following chapter, he considers the vast range of images and impacts associated with Bentham, from the auto-icon, Panopticon, university education, positivism and the empirical measure of social facts, to Bentham as reformer, political theorist, and jurist. Jurisprudence is the most extensive, but ironically, the most neglected part of Bentham's much-dissected legacy.

Bentham's bold but hopeless ambition to develop a universal jurisprudence and legislate for the world is considered in light of modern globalization and its implications for legal theory in chapter nine. Complexities explored by contemporary scholars, and not conceived of within Bentham's rationalism and reductionism, are highlighted by Twining, who at the same time is critical of the anti-rationalism of utopian post-modernism. In the following chapter, he questions the possibility, or even the desirability, of working towards a singular modern concept of law, given the generalizing across legal cultures that it would entail. The last chapter in Part A, "the Great Juristic Bazaar," is Twining's contribution to a world congress organized around the grand theme of "a general theory of law for the modern age."<sup>7</sup> His funny send up of the presumptions, parochialism, and narrowness of Anglo-American traditions of legal scholarship, involves a host of participant-customers and a bewildering array of touts and exhibits, effectively deflating any illusions of coherence or the possibility of a general theory of law. This is only the common law corner of the bazaar and, of course, few of the customers leave satisfied.

In setting the stage for the Part B essays on narrative, Twining recounts a workshop in 1986 at the University of Warwick where the organizers had sought Lord Denning to discuss the role of stories in judging and advocacy. Fortunately, they secured Bernard Jackson, a specialist on semiotics, and Twining, who had developed interests in fact-finding and proof, arguing that, "[t]he serious study of reasoning in regard to disputed matters of fact is at least as important and can be at least as intellectually demanding as the study of reasoning in respect of disputed questions of law."<sup>8</sup> Twining's basic view is that although stories are necessary to make sense of situations, they are also subversive and potentially dangerous. They

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<sup>7</sup> *The Great Juristic Bazaar*, *supra* note 1 at 365.

<sup>8</sup> William Twining, "Taking Facts Seriously" (1984) 34 *J. Legal Educ.* 22 at 37.

can be a source of invented facts to fill in gaps in evidence and undermine distinctions, including those between questions of fact and questions of law. Lord Denning was a master storyteller in more ways than one.

Chapter twelve on lawyers' stories introduces these themes while the following three chapters explore aspects of fact-finding in legal processes (chapter thirteen compares common law and civil law systems, chapter fourteen explores how good stories push out true stories, and chapter fifteen examines narrative and "common sense generalization"). The final chapter explores these ideas in the context of precedent and interpretation.

Good historians explicitly and self-consciously reflect on questions of fact or evidence and theory or imagination in the course of their scholarship. Legal scholars too seldom do so. It is of little surprise that Twining identifies Collingwood as a primary formative influence. This book provides an intellectual history of important streams of Anglo-American jurisprudence and reminds us of Twining's leading role in promoting reflection about theory and context in legal education and legal scholarship over the past few decades. Twining's emphasis on the skeptical, standpoint-questioning role of theory and his critical approach to narrative, fact-finding, and proof speak directly to issues that should be central to legal scholarship. Social theory and postmodernist approaches offer compelling means of conceptualizing law generally but they do not necessarily provide sufficient focus on many of the critical questions we need to pose about the law and its administration.

