SCANDINAVIAN REALISM

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A significant contribution to the development of legal thought has been made over the past half century by a small group of Scandinavian jurists to whom the name "realist" has been applied. Until recent years, the works of Axel Hägerström, Vilhelm Lundstedt, Karl Olivecrona and Alf Ross, the leaders of the movement, were little known in English-speaking countries. While the views of law propounded by these writers vary in detail, sometimes markedly so, they are united in their common desire to exorcize all metaphysical elements from law and in their emphasis on the need for a realistic and empirical approach to jurisprudence through the study of facts derived from experience and observation. Accordingly, they reject natural law, as being completely outside the sphere of science and reality, and legal positivism, which they regard as being honey-combed with natural law concepts. For them, notions commonly accepted as essential parts of the structure of law, such as rights, duties and the binding force of law, have no factual counterparts and exist only in the imagination or in the realm of superstition. They would limit scientific investigation to what "is", to the exclusion of what "ought to be", since moral values have no factual existence but are matters of personal evaluation which are not amenable to scientific demonstration or proof.

Although called "realists", the members of the Scandinavian school have little in common with their American counterparts, apart from a shared empirical perspective and sceptical temper and a common view that law is a social phenomenon. Whereas the American realists have been concerned with the practical operation of the judicial process and the behaviour of judges and officials, the Scandinavian realists have taken a more speculative, philosophical approach, and have been interested primarily in the functioning of entire legal systems and in the analysis of legal theories and concepts.

A more profound understanding of the tenets of the Nordic school requires a consideration of the views of each of its members.

I

The founder of the movement was Axel Hägerström, a professor of philosophy at the University of Uppsala, whose approach to the problems of law was conditioned by his basic view that the efforts of science should be confined to the elucidation of facts in the world of space and time. His writings in legal philosophy are devoted in considerable part to searching investigations into the character of fundamental legal concepts in an effort to ascertain the facts that correspond to them. His labours led him to conclude that these notions had no factual counterparts and were metaphysical, sham concepts, composed of superstitious beliefs, myths, fictions and magic.

To illustrate his reasoning, let us consider briefly his analysis of the concepts of legal rights and duties.[1] Suppose that a person is said to

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[1] Hägerström, *Inquiries into the Nature of Law and Morals*, (ed. Olivecrona, trans. Broad) 1-16 (1953).

have the right of property to a certain house. We seem to be dealing with something whose meaning is obvious, but as soon as we try to determine the facts which correspond to this idea, we land in difficulties. It might be said that the right consists of the state's guarantee to protect the owner's possession. But this cannot be so, says Hägerström, for the state does not step in until he has lost possession, that is, until his right has been encroached upon. In other words, interference by the state presupposes the existence of the right and its violation. Moreover, legal protection will be granted to the owner only upon proof of his title. But proof of title is not a precondition of the existence of the right; it is only a precondition for obtaining the protection of the state. Hence, the right of property cannot be identical with the fact of protection afforded by the state to the owner.

Another possible explanation of the nature of a right is that the state commands all persons who are not entitled to possession of the house to respect the owner's possession, and that in the event of disobedience to this command, it threatens to take coercive measures for the benefit of the owner if he should so desire. But a major difficulty confronts us here, Hägerström explains, when both parties to a dispute believe themselves to be in the right. No one has been disobedient, for disobedience implies that one was aware of the command. A person who believes himself to be in the right has never received a command addressed to him, and that is the same as if it had never been given to him. For an order that does not reach the person for whom it is intended is only an empty sound and not a real order. But even though no disobedience to a command has occurred, the state forces the party who has lost his case according to judicial decision to give up the thing if it is in his possession on the ground that the right of the successful litigant was being infringed upon. So a person's right of property cannot consist in the fact that the state commands others to respect his possession.

In the result, Hägerström concludes, there are no facts which correspond to our idea of a right of property. He conceives the right as a "power" over the thing, but not a real power. "[W]e mean, both by rights of property and rightful claims, actual forces, which exist quite apart from our natural powers; forces which belong to another world than that of nature, and which legislation or other forms of law-giving merely liberate."[2]

The notion of legal duty is similarly explained. Attempts have been made to reduce this notion to the fact that the failure to perform a certain action will result in the infliction of a sanction. But a legal duty may be quite independent of the reactions of the legislative authority against breaches of it, as is seen particularly clearly in the region of legal punishment. "A crime may, e.g. become statute-barred, and therefore not punishable. Yet no one would deny that the crime continues to have the character of a breach of legal duty in spite of its being legally unpunishable."[3]

A second explanation is that a legal duty is nothing but a command issued by the legislative authority. The difficulty here is that a legal duty can exist in certain cases without the infringer being aware of any

[2] *Id.* at 5.
[3] *Id.* at 7.

command by the legislative authority. "But, unless a person to whom a command is directed actually receives it and is aware of it, no command directed to him really exists . . . ."[4]

Hägerström's conclusion is that the notion of legal duty cannot be defined by reference to any fact, but has a mystical basis, as is the case with legal rights. To assume that rights and duties have an objective existence leads to a metaphysical or natural law conception of the legal system.

In Hägerström's opinion, we are told,[5] these notions of modern jurisprudence about the nature of rights and duties have their origin in ancient, deep-rooted magical beliefs. His inquiries into ancient Roman law led him to the realization that fundamental conceptions such as *mancipatio*, the act of buying, depended on a system of beliefs in mysterious powers which could be created and used to bring about desired effects (e.g. the transfer of rights) by employing proper words and gestures. In the *mancipatio* ceremony, the buyer, gripping the thing sold (e.g. a slave) threw a piece of copper into a scale and said: "I proclaim that this is mine and that he has been bought by me through this piece of copper." But the buyer did not become the owner of the slave until the seller took the piece of copper. Plainly the formula was not used to make a statement of fact; for so regarded, what is proclaimed was false at the moment when it was spoken. So its function was not to report facts but to establish in the person of the buyer *dominium* over the slave. He made the slave his property by using these words in the proper context and performing the proper gestures. The whole ceremony was a ritual act whose effect was to give rise to the right of property in the buyer. Modern legal institutions, Hägerström maintains, also afford evidence of belief in a supernatural world of legal rights and duties and in the magical efficacy of words to bring about changes in that world, although, of course, not to the same extent as in ancient times.[6] Unlike some of his successors, especially Alf Ross,[7] Hägerström never appears to have considered the possibility that verbal utterances about rights and duties might have a purpose other than to assert facts, as, for instance, to influence behaviour and guide human conduct. Modern linguistic philosophers have clearly demonstrated the infinitely varied uses of language, of which the fact-stating function is only one.[8]

The notions of legal rights and duties are also *psychologically* explained by Hägerström. These expressions, he says, are accompanied by certain emotions and feelings which lead to metaphysical ideas of supernatural powers and bonds. "[W]e can understand why one fights better if one believes that one has right on one's side. We feel that here there are mysterious forces in the background from which we can derive support."[9] In a corresponding way, the idea of duty is associated with a feeling of compulsion, independently of any constraining authority, to

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[4]*Id.* at 7-8.

[5]See Professor Olivecrona's valuable expository preface to Hägerström's *Inquiries into the Nature of Law and Morals*, xiii *ff.*

[6]See *op. cit.*, Chap. V for a penetrating and extremely complex analysis of the use of language involved in the formation of contracts and in legal instruments disposing of property, like wills.

[7]See *infra*, p. 29, n. 61.

[8]See, for example, J. C. Urmson, *Philosophical Analysis* (1956).

[9]Hägerström, *Inquiries into the Nature of Law and Morals* 5-6.

do or avoid certain actions. The feeling is hypostatised; an actual bond seems to exist.

The major portion of Hägerström's work is devoted to criticism of the "will-theory" of law, as found in the works of Austin and the continental legal positivists. Positivism, in its conscious opposition to the theory of natural law, regarded the law as the content of the will of the supreme power in society, which expressed itself in commands or imperatives. Hägerström rejects the will-theory as being incompatible with historical facts and inconsistent with empirical reality, for he could discover no supreme sovereign will to which the law could be ascribed, whether it be the will of a monarch, or of parliament or even the general will of the people. "[W]hen jurisprudence mistakenly tries to reduce its own mystical ideas of right and legal duty to the actual expressions of a powerful will, it merely seeks to explain ideas which have no basis in reality by something else which has as little real basis. For that there is a real will which expresses itself in law is not confirmed by the facts."[10]

He attacks legal positivism on another ground as well, namely, its natural law content. He points out, for example, that under positivist theories, the sovereign power is regarded as laying itself under obligations through legal prescriptions. These obligations, says Hägerström, cannot stem from commands by the sovereign power, but must be thought of as depending on a promise made by the sovereign power which becomes binding in accordance with the principle of natural law: *Pacta servanda sunt.* Again, the state obviously cannot create its right to issue commands by its own commands but must have recourse to a pre-existing law, a natural law on which its right is based. In truth, Hägerström exposes positivism as being thoroughly permeated with natural law concepts.

A similar criticism is made of Kelsen's theory of law. The use of the word "ought" in a jurisprudential context, as when we say that a certain rule *ought* to be applied in a case, shows that ideas taken from natural law have been introduced into the legal system. "When Kelsen propounds the question: 'What are the rules which ought to be applied by the organs of the state and observed by its subjects?' as *the* specifically juridical question, he describes as juridical what is specifically a question of natural law."[11] He also rejects Kelsen's formal system of norms on the ground that Kelsen ". . . does not allow jurisprudence to have anything to do with actual social existence!"[12] Kelsen's supernatural juridical system has no regard for the requirements of social life and, indeed, has no existence in the world of nature. The basic norm, which gives to the positive rules of law their force, is denounced as "mystical". It must be founded on natural law, Hägerström argues, since it is valid, not because it is created in a certain way by a legal act, but because it is presupposed to be valid, without being able to be founded on experience; ". . . it merely hovers in the air."[13] On this score, Hägerström's criticism has a good deal of merit.

In view of his rigidly scientific approach to the law and his concern with questions of fact, it is not surprising to find a paucity of discussion

10 *Id.* at 11.
11 *Id.* at 52.
12 *Id.* at 267.
13 *Id.* at 277.

in his writings about the realms of "ought" and of "value". In his brief remarks about "values" in the course of an essay dealing with the idea of duty, Hägerström appears to deny the existence of objective values. He reasons that so-called value judgments are not real judgments since they ascribe properties to actions or things when no such properties can be found to exist. For example, to say that an action is "desirable" ("it is desirable that he will soon come") is merely to associate in our own minds a feeling of pleasure with the idea of the action, for there is no discoverable property of "desirableness" in the action which can be identified in the context of reality. The use of the indicative form of language to express the association objectifies the value and is therefore misleading, for the only objective reality is the expression itself. Thus our ideas of goodness and badness and right and wrong amount to nothing more than our feelings and impulses. All that lies behind the expression, "This is my duty", is a feeling of conative impluse with the idea of an action by the self. For Hägerström, we are told,[14] the problem of choosing between conflicting moral values is not within the scope of scientific inquiry. Legal philosophy, if it is to be factual and scientific, must concern itself with the study of the actual function of legal institutions, with the analysis of concepts and ideas as they are actually used, and with the psychological study of the mental attitudes involved in them. Problems involving valuation, such as the purposes of law and the principles of justice, must be eliminated from the domain of scientific jurisprudence.

Hägerström's positive views as to the nature of law are not set out in a straightforward exposition but must be pieced together from his various essays. In his opinion, "Law is . . . an expression of interests . . . . [I]n the conflict of interests within a society, certain interests come to express themselves in the form of laws. The system of rules, which arises in this way, then becomes actualized because a whole mass of heterogenous factors conspire to maintain it,"[15] without any "will" intervening. Included among these factors are "popular feelings of justice, class-interests, the general inclination to adapt oneself to circumstances, fear of anarchy, lack of organization among the discontented part of the people, and . . . the inherited custom of observing what is called the law of the land."[16] He states further that the very existence of the legal order as a power "simply reduces to the fact that certain coercive rules are actually maintained through the positive attitude of the subjects towards them,"[17] and, with greater specificity, lists the three conditions necessary for the maintenance of the legal order as "social instinct, a positive moral disposition, and fear of external coercion."[18]

It is evident that Hägerström's contribution to jurisprudence is largely destructive. His goal was to test the concepts and general theories of legal science and "to pave the way for a thoroughly realistic conception of the law."[19] With the aid of logical analysis, historical research and psychological demonstration he laid bare the metaphysical, "natural law"

14*Id.* at xi-xii.
15*Id.* at 41.
16*Id.* at 39.
17*Id.* at 360.
18*Id.* at 352. Cf. Olivecrona's view, *infra* pp. 69-70, that people obey the laws because they are afraid of sanctions.
19*Id.* at xii.

foundations which underlie many legal theories, including positivism; exposed the mystical, magical features in the use and function of legal language; and revealed the scientific unreality of many basic notions of conventional legal ideology, such as rights, duties, will, imperatives, sovereignty, declarations of intention in the making of contracts and others. For this considerable service he deserves credit. It is regrettable, however, that having encouraged us to abandon the traditional theories and notions, he failed to make clear what concepts and methods he would have us adopt to fill the void.

II

Hägerström's critical sword was enthusiastically taken up by his disciple, Vilhelm Lundstedt, the most disputatious and polemical writer of the Scandinavian school. In pursuit of his object of making jurisprudence a science,[20] aimed at the lucidity of realities and based on facts, he vehemently attacks legal ideology in all its aspects, especially the method of justice, as being saturated with metaphysics. All traditional legal theories, including positivism and sociological jurisprudence, are unscientific and completely and fundamentally irrational, founded as they are on natural law or natural justice or like ideological notions that have no relationship to verifiable facts. Nor is there any objective reality to the "false notions" of rights and duties, obligations, legal claims and demands, fault, guilt or liability, all of which exist only as feelings in our minds.

He denies, too, that value judgments have any meaning, since they are entirely subjective and depend on the feelings and emotions of the person who makes them. Hence, "ought" and "should" statements and other normative expressions are metaphysical fictions, and "legal rules" or "rules of law" have no existence, although the use of such terms as labels is permissible on the ground of expediency.

His denunciation of the "false notions" of rights and duties stems from his conception of "law" as "legal machinery in action."[20a] In the case of a right, he says, the only demonstrable reality is a favourable position actually enjoyed by a person as a consequence of the functioning of the legal machinery. Under given conditions, a person can, according to the law in force, institute proceedings and thereby set the machinery of the law in motion, with the result that the public power is exercised for his benefit. A property owner is entitled to recover damages for trespass, for example, only by virtue of the fact that damages are regularly inflicted on trespassers. Therefore, if a person's so-called legal right presupposes the maintenance of the legal machinery according to which he may be entitled to damages, it is turning things upside down to say that he is entitled to damages in consequence of a breach of his legal right. Similarly, the term "legal duty" simply connotes the regular use of sanctions if a certain line of conduct is not followed.[21]

Lundstedt is vigorously opposed to the use of the method of justice

20See his *Legal Thinking Revised* 5 (1956).

20a*Id.* at 9.

21See Castberg, *Problems of Legal Philosophy* 29 (1957), where, after quoting Holmes' definition of the law as predictions of what courts will do, the author remarks: "As far as I can see, this is a pertinent summary reproduction of the doctrine which is also the main contents of the legal philosophy of Lundstedt." But Lundstedt declares that Holmes' view "has no bearing on legal science, even if it may be calculated to stimulate a legal ideologist to reflection." *Op. cit. supra* note 20 at 391.

as a guide for judges in finding solutions to legal problems. For in order to reach a truly just decision, a judge would have to take into account all manner of circumstances, such as, for example, the financial position of the parties. A person with sound feelings, he asserts, would hardly consider an award of damages to be just in circumstances where "the defendant is a poor breadwinner with many children and a wife who is ill, while the plaintiff is a wealthy bachelor."[22] Between this extreme and the completely opposite—the excessively rich defendant and the destitute plaintiff—there are many gradations which a sensitive conscience would have to consider in reaching a "just" decision. Moreover, could a defendant be "justly" blamed for having caused damages as a result of his hereditary clumsiness or highly strung and nervous disposition? If these and other circumstances were taken into consideration, there would be no law of torts, no rules regularly enforced, for feelings of justice are no more unanimous among judges than other people. Similarly, in the field of criminal law, courts would apply a paragraph of the penal code only if the circumstances showed that the punishment of the accused agreed with the feelings of natural justice. In each case, factors such as the accused's environment, upbringing, education and so on would have to be considered. It would be out of the question to maintain a criminal law. Fortunately, Lundstedt observes, courts do not proceed in this way, although certain wrong-headed and confused concepts in the law of torts, contracts and crimes are attributable to the influence of the method of justice.

On the other hand, Lundstedt clearly recognizes that the common sense of justice plays an extremely important affirmative role in law. "It is the law, the legal machinery, which takes morality in the form of the common sense of justice into its service and directs it so that man's conduct will, on the whole, accord with law."[23] While he acknowledges that there is a "kind of interaction" between law and morality, each contributing something to the other, he stresses the impact of law on community feelings of justice, rather than the reverse: ". . . *basing* law on the common sense of justice is the same as putting the cart before the horse."[24] The criminal law, for instance, has a profound influence on the deeper strata of human personality and moulds the moral consciousness of people in accordance with the needs of the community. In a corresponding manner, the law of torts influences people's habits and ideas about what is right and wrong. While Lundstedt's analysis of the law-morality relationship may not be novel or unique, it is a valuable corrective to the common idea that morality shapes and directs the law.[25]

If the method of justice is a false point of departure for legal activities, what guide should be used by judges and legislators in developing the

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[22]*Op. cit. supra* note 20 at 59.

[23]*Id.* at 391.

[24]*Id.* at 169.

[25]See Fuller, *The Law in Quest of Itself* 135-36 (1940): "It has been the service of a vigorous Swedish school of legal thought to bring home to us a realization of the extent to which the law, particularly judge-made law, shapes common morality. They have shown us how false is the common picture according to which there exists outside the law, and wholly independent of it, a body of moral precepts which exerts a kind of one-way gravitational pull on the law, against which the law operates a constant inertia, so that it lags always behind morality and only meets those minimum ethical demands which relate to the most pressing social needs. The whole 'extra-legal' body of moral precepts is to a large extent compounded of paper and ink and philosophic imagination."

law and filling gaps in the legal system? According to Lundstedt, only the "method of social welfare". Law, he says, is "nothing but the very life of mankind in organized groups and the conditions which make possible the peaceful co-existence of masses of individuals in social groups and their cooperation for other ends than mere existence and propagation".[26] Legal activities are indispensable for the existence of society and accordingly should be shaped by law-makers and courts "out of regard to the most frictionless and undisturbed functioning of the legal machinery, the social organization,"[27] that is, by the "method of social welfare". He defines this term to mean "the encouragement in the best possible way of that—according to what everybody standing above a certain minimum degree of culture is able to understand—which *people in general actually strive to attain*", including good food, appropriate clothing, a comfortable dwelling, security of property and personal integrity, freedom of action, education, ". . . in brief, all conceivable material comfort as well as the protection of spiritual interests".[28] It is not a question of what men *ought* to strive for, but only the observable fact that "the overwhelming majority of human beings . . . *wish to live and develop their lives' possibilities* . . . . there is nothing else to be determined for the developing of legal machinery than the consideration of what is required, in order that the actual aspirations of men just indicated may be realized to the most practicable extent".[29]

Notwithstanding an apparent similarity between the method of social welfare and Benthamite utilitarianism, Lundstedt distinguishes them on the ground that the latter established a certain moral principle as being objectively valid: the greatest happiness of the greatest number, whereas ". . . 'social welfare' has nothing to do with any *absolute* values",[30] and is concerned only with what people actually strive to attain. But despite all his objections to the contrary, Lundstedt's view of the end of law, namely, the encouragement of "the actual aspirations of men", itself imports an objective value.[31] The common rationale for both theories is explained by Professor Alf Ross in his discussion of the "chimera of social welfare" as follows: "Utilitarianism and the principle of social welfare, like the philosophy of natural law, are the result of the need of the conscience for an absolute principle of action which can relieve mankind of the anguish of decision."[32]

Although Roscoe Pound also regarded the satisfaction of social interests as the end of law, as Lundstedt admits, he vigorously rejects Pound's theory. For one thing, Lundstedt argues, Pound does not base his views on facts of scientific research but rather discusses "the significance of law with complete abstraction from our experience of

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26 *Op. cit. supra* note 20 at 8.

27 *Id.* at 132.

28 *Id.* at 140.

29 *Id.* at 140-41. For all his attacks on the normativistic conception of law, Lundstedt's method of social welfare, according to one writer, is founded on it, and contemplates "first a fundamental norm, which says that the good of society must be furthered, and secondly yet another fundamental norm, which says that this must be done in the manner prescribed by the commands of the law." Castberg, *op. cit., supra* note 21 at 35.

30 *Id.* at 136.

31 See Castberg, *op. cit. supra* note 21 at 100: "The very belief that certain ultimate, paramount purposes should mark the direction of legal endeavour, is in itself a metaphysical belief."

32 *On Law and Justice* 295-96 (1958).

it . . .".[33] Surely Lundstedt is vulnerable to the same criticism, for there is nothing in his work to indicate that his method of social welfare is based on scientific research rather than arm-chair theorizing and reflection.[34] He attacks Pound's classification of the justifiable claims and interests of individuals as being "nothing more than phrases heaped upon phrases without the possibility of finding any line of thought".[35] He apparently interprets Pound to mean that these claims and interests are based on value judgments and exist independently of the law, merely being recognized by the legal system. As such, he concludes, they must be founded on natural law and the method of justice. Pound is just another victim of legal ideology.[36] But Lundstedt may have erred, for Pound's interests are intended to designate what human beings actually desire as a matter of fact. Viewed in this light, it is not easy to see how Pound's and Lundstedt's theories differ in any material respect.

Unlike Hägerström, Lundstedt admits that certain evaluating activities are within the province of jurisprudence. "[S]cience in the philosophical, i.e. epistemological, sense is one thing, while science as practiced in society is another."[37] The former is concerned only with actual facts and causal connections, while the latter can be evaluating as well. In other words, the *philosophy* or *science* of law is limited to empirical observations of how law works, without judging whether it is good or bad, while in *"constructive jurisprudence"* or jurisprudence concerned with the construction of society, i.e. in *practice*, the legislator, the judge and the writer on jurisprudence must introduce his own notions of good and bad in determining such questions as whether the interpretation of a law in general or in a certain case is in harmony with "social welfare", or whether existing or contemplated laws ensure the greatest benefit to society. This concession to the need for evaluating activities tempers considerably his general thesis that value judgments are meaningless.

Lundstedt's obsession with society as the end of law is reflected in his views on crime and tort. He rejects, as a basis for the imposition of legal sanctions, such concepts as "justice", "guilt", "fault", "wrongfulness" and other notions suggesting individual blame. "[T]he regular punishment of certain actions, i.e. the so-called crimes, [is] a condition necessary for the society's existence and peaceful development."[38] He objects to the prevailing tendency to focus attention on the criminal and the individual crime and scoffs at the "fantastic idea" of reforming the criminal morally and socially. "[T]he interest of society in having crimes punished is a fact that *overshadows everything else*."[39] Liability in tort, too, should be based on the necessity of making people careful with respect to the property and personal integrity of others in order to maintain the general security of society. Since liability cannot be based

[33] Op. cit. *supra* note 20 at 350.

[34] He doesn't suggest, for example, that his enumeration of social needs is based on empirical data but simply states that they are "no doubt in accordance with prevailing social valuations." *Id.* at 138.

[35] *Id.* at 349.

[36] So, too, are Professors Harper (*id.* at 367) and Prosser (*id.* at 383). Indeed, the ubiquitous method of justice "seems to dominate the whole of jurisprudence on the continent of Europe," as well. *Id.* at 238.

[37] *Id.* at 268.

[38] *Id.* at 221.

[39] *Id.* at 239.

on "fault", all liability is "strict", and ". . . no one kind of liability is more 'strict' than any other."[40] The degree of strictness in individual cases depends on the social purpose of the rule. Lundstedt manifests a complete disregard for the importance of the individual when he attacks the method of justice for recognizing legal rights as belonging to the individual as an object or end in himself and not as an element in the community. In views like these we can detect the unwholesome seeds of totalitarianism.[41]

Lundstedt's work contains nothing excitingly new for legal philosophy. His exaggerated attacks on other schools of jurisprudence add little to Hägerström's critique, and his positive proposal—the method of social welfare—in essence is a passionate restatement of ideas propounded by other thinkers, such as Roscoe Pound. Certainly the result of his labours nowhere approaches his enunciated objective of effecting the "basic reshaping of legal thinking".[42]

III

Another adherent to Hägerströmian philosophy, Karl Olivecrona, offers a lucid account of the operation of the legal system which is free of the pugnacious and immodest tone of Lundstedt's work and the turgid complexities of Hägerström's. He is primarily concerned with presenting the facts about the law and exposing the metaphysical concepts on which traditional legal theories are founded, such as the basic assumption that law is binding. What can this notion mean, he asks? The binding force of law does not signify the fact that unpleasant consequences will ensue if the law is violated, for disagreeable consequences follow from acts that are not prohibited, such as putting one's hand into the fire; nor is it to be identified with the feeling of being bound, since the law remains binding in the absence of any such feeling; nor does it correspond with any other observable fact. The obligatory force of law, he concludes, exists "merely as an idea in human minds"[43] to which nothing in the outside world corresponds. Hence, the notion that law has binding validity, whether as natural law, or as a system of norms or as the will of the state or the people is illusory.

What then is the law? According to Olivecrona, rules of law are nothing more than "independent imperatives" which set up patterns of behaviour for those whom the law-makers wish to influence, and whose content consists chiefly of "*ideas of imaginary actions by people* (e.g. judges) *in imaginary situations*".[44] That is to say, the imagined action which is set forth in a rule of law, e.g. that a murderer should be condemned to death, is intended to serve the judge as a model for his own action when he finds himself in the situation envisaged in the rule. Although phrased in the imperative form in order to influence conduct, the rules are not commands, for in the realm of fact there exists nobody who could be said to issue these commands. The law-givers who drafted the rules may have died a hundred years ago and for the most part are entirely unknown to those who take cognizance of the rules. Nor are the

40*Id.* at 384
41See D. Lloyd, *Introduction to Jurisprudence* 247, n. 47 (1959).
42*Op. cit. supra* note 20 at 5.
43Olivecrona, *Law As Fact* 17 (1939).
44*Id.* at 29.

rules emanations from the State, for the State itself cannot exist without the law. The statements function independently, without any person commanding.

Olivecrona conceives of the rules of law as having only an intermittent rather than a continuous existence: [45]

> "We are dimly conscious of a permanent existence of the rules of law. We talk of them as if they were always there as real entities. But this is not exact. It is impossible to ascribe a permanent existence to a rule of law or to any other rule. A rule exists only as the content of a notion in a human being. No notion of this kind is permanently present in the mind of anyone. The imperative appears in the mind only intermittently."

The fact that words are written, he adds, serves only to call up certain notions in the mind of the reader. In effect, the law of a country is an immense mass of ideas concerning human behaviour.

The most vital characteristic of law, Olivecrona asserts, is its psychological effectiveness, the hold it has on human minds. The creation of new rules of law by legislation is purely "a question . . . of cause and effect . . . on the *psychological* level".[46] Persons occupying key positions are able to bring psychological pressures to bear on their fellow citizens by complying with certain formalities required by the established constitutional machinery of legislating. These pressures create the proper mental state necessary to achieve general acceptance of the rule. "[C]onstitutional law-givers gain access to a psychological mechanism, through which they can influence the life of the country."[47] And further, "[T]he significance of legislating is not that the draft acquires a 'binding force' by being promulgated as a law. The relevant point is that the provisions of the draft are made psychologically effective. And this result is attained through the use of a certain form, which has a grip over the mind of the people".[48] Control of the constitutional machinery rests upon power. Accordingly, revolutionaries who, by force, take over the constitutional machinery are able to exert the psychological pressure necessary to eliminate respect for the old legal order and establish their own regime.[49]

The history of law, in Olivecrona's view, is nothing more than a succession of peaceful and revolutionary changes. While it is possible to trace the development of law back to early periods, we can never trace it back to its "ultimate origin," since every change pre-supposes an already existing legal system, and no original foundation of a society has been revealed to us. He would limit historical investigations to changes in the law as matters of fact and, consistently with his belief that the notion of the binding force of law is an illusion, would surely reject as metaphysical any thought of seeking to trace historically the sources of "binding law" in a particular legal system.

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[45] *Id.* at 47-48.
[46] *Id.* at 52.
[47] *Id.* at 54.
[48] *Id.* at 60.
[49] This exposition bears a certain resemblance to Kelsen's theory that, when a successful revolution occurs, all norms or rules of law of the old regime cease to be valid because the basic norm, from which the other norms derive their validity, loses its efficacy when the community no longer accepts it and instead, behaves in conformity with the new order which thereby becomes the valid order.

But Olivecrona is highly critical of Kelsen's theory: "The cornerstone of the theory is the empty phrase that the basic norm is valid because it is presupposed to be valid." This, he says, "seems to amount to a declaration of bankruptcy on the part of the pure theory of law." Olivecrona, *Realism and Idealism: Some Reflections on the Cardinal Point in Legal Philosophy*, 26 N.Y.U.L. Rev. 120 at 128 (1951).

As for legal rights and duties, Olivecrona's analysis is similar to Hägerström's. These notions, he says, are fantasies of the mind; they have no place in the actual world and are ultimately related to primitive magic.[50] It is impossible to find any facts that correspond to the idea of a right. The essence of the notion of right is power, but the power is illusory, the illusion stemming from the attendant feeling of power which is objectivated. He rejects the explanation of a right as the favourable position enjoyed by a person in relation to the legal machinery, which is the essence of Lundstedt's thesis, on the basis of the Hägerströmian arguments[51] that a right is regarded as something antecedent to the ability to get the legal machinery in motion, that a plaintiff who has a right may be unable to prove it in court and that a right is thought to exist even if no action ever arises.[52] In the case of a duty, what really exists are certain feelings of obligation with which the idea of an imaginary bond is connected. But far from recommending that these notions be dispensed with, Olivecrona recognizes the importance of their behaviouristic function. Law-givers use the language of rights and duties not to express facts but to influence feelings and conduct of members of the community, who have been conditioned to respond to these notions in a way that secures compliance with rules required in the general interest, he explains.

Olivecrona's views about judgments of "ought" and of "value" are almost identical to those of Hägerström.[53] He denies the existence of absolute values and maintains that the qualities of goodness or badness which we attribute to actions are nothing more than reflections of our feelings and emotional attitudes. Although the "objective ought is a myth", our *ideas* of the ought and our emotions connected with them actually exist, and are "a highly important subject of inquiry for legal philosophy."[54]

Another aspect of Olivecrona's psychological realism is the emphasis he places on the role of force in law. "Law . . . consists chiefly of rules about force, rules which contain patterns of conduct for the exercise of force."[55] Its presence is absolutely necessary for community life, for without it there could be no security of life and limb or preservation of the economic order. The major social significance of the use of organized force, he maintains, lies in its indirect, rather than immediate, effects: "This unbending pressure on millions and millions of people, keeping their actions within certain boundaries, is of infinitely greater importance for the community than the immediate effects of the sanctions applied."[56] He explains obedience to law on the basis of the community's fear of

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[50]Olivecrona clearly regards the link between magical beliefs and contemporary legal concepts as considerably more attenuated than Hägerström would have us believe.

[51]See *supra*, pp. 2-3.

[52]For the same reasons he dissociates himself from the views of some American realists that a right is a prediction of societal conduct in accordance with a rule of uniformity. "What we mean by a right is definitely not what we mean by a prediction . . . . Do the law-givers make predictions about the actions of the judges when they lay down rules about how rights are to be acquired, transferred, etc. Certainly not. They *regulate* the future actions of judges. Nor do the judges make predictions when they 'determine rights.'" *Op. cit. supra* note 43 at 214.

[53]See *supra*, pp. 8-9.

[54]*Realism and Idealism: Some Reflections on the Cardinal Point in Legal Philosophy*, 26 N.Y.U.L. Rev. 120 at 131 (1951).

[55]*Op. cit., supra* note 43 at 134.

[56]*Id.* at 142.

sanctions, mostly unconscious, caused by the regular use of force. Like Lundstedt, Olivecrona asserts that moral standards are shaped primarily by the law and its use of force. While he does admit that "Moral ideas are certainly prominent among the motives that dictate new laws",[57] he cynically observes that moral ideas too often serve as a cloak for self-interests.

Although both Hägerström and Lundstedt attach considerable importance to popular mental attitudes in their discussions of conventional legal theories, Olivecrona goes much further in reducing all law to psychological phenomena. Moreover, his emphasis on the significance of force in law, especially as a psychological influence, seems exaggerated. The vast majority of people, we would conjecture, act in accordance with the law not through fear of possible legal sanctions, of which they likely have no knowledge, but out of common esteem for the rule of law. As Alf Ross puts the matter: "Most people obey the law not only out of fear of the police and extra-legal social sanctions (loss of reputation and confidence, etc.) but also out of disinterested respect for law."[58] However that may be, Olivecrona's general thesis does not appear to have been derived from any form of psychological or sociological research and is just as much a matter of abstract speculation as Lundstedt's method of social welfare.

IV

Professor Alf Ross, the last of the Scandinavian quartet to be considered here, is on common ground with his fellow realists in his denunciation of the metaphysical confusions which he says abound in traditional theories of law. For him, law is not of divine or other supernatural origin, and fundamental legal notions must be construed as conceptions of social reality, the behaviour of man in society, and as nothing else. Accordingly, he rejects both natural law and positivism, including Kelsenian formalism, as being dissociated from social reality and as raising law above the world of facts. He agrees, too, that the methods of modern empirical science should be used in the field of law. Legal thinking must be interpreted "formally in terms of the same logic as that on which other empirical sciences are based . . .".[59]

On the other hand, he parts company with the other members of the Scandinavian school on a number of significant matters. For example, his view that law and morality exercise a reciprocal force in shaping each other[60] does not accord with the notion held by Lundstedt and Olivecrona that moral ideas are largely determined by the law. Again, while he joins with Lundstedt and Duguit in their denunciation of the traditional metaphysical ideas in the concept of rights, and agrees that the only demonstrable reality in the so-called situations of rights consists in the function of the machinery of law, he criticizes them for failing to ask how the concept of rights might be used as a tool of legal thought.[61] The

[57] *Id.* at 162.
[58] Ross, *On Law and Justice* 54 (1958).
[59] *Id.* at x.
[60] "The institutions of the law are among the factors of environment which shape the individual moral attitudes. The latter for their part are among the practical factors which through 'moral legal consciousness' go to shape the evolution of the law." *Id.* at 63.
[61] See also Ross, Tu-Tu, 70 Harv. L. Rev. 812, (1957), where he points out that although words like "ownership" and "claim" are words without any meaning, i.e. without any semantic reference, they do serve a useful purpose as a technique of presentation, for without them, a complicated and unwieldy series of propositions would be necessary to express the legal import of these "shorthand" words.

task of the jurist, Ross asserts, is to clarify the conditions under which the concept of rights is used[63] and to define more precisely its sphere of application, which he proceeds to do. And despite his anti-metaphysical approach, he acknowledges the normative character of rules and, in this respect, differs both from Hägerström and especially Lundstedt. He regards his own views as being close to those of Olivecrona, but prefers the more general and neutral term "directives" to "independent imperatives".

In his discussion of the nature of law, Ross seeks to make clear what is meant by the concept of "valid law". In this connection he distinguishes between linguistic utterances that have only an "expressive" or prescriptive meaning, and those that have in addition a "representative" or descriptive meaning. The former express commands or rules; the latter make assertions about facts. "Directives" do not assert a state of affairs but are merely expressive of the intention to influence other persons. Legal norms, e.g. rules contained in statutes or derived from precedents or other sources of law, are directives, whereas sentences in legal textbooks are not directives; they are assertions with a representative meaning not *of* law but *about* law, to the effect that certain directives are valid law, as in the following example: "D is valid (Illinois, California, common, etc.) law."[64]

Preliminary to his analysis of the concept of legal validity, Ross considers the nature of the rules of chess. To say that a chess rule (e.g. how a particular piece may be moved) is *valid* means that (1) the rule is in fact followed by the players, and (2) they feel themselves bound to follow it. Thus, the rules make it possible, "as a scheme of interpretation",[64] to understand the actual movements and the ideas behind them and, within certain limits, to predict the course of the game. Legal rules are built on the same model, he says. " '[V]alid law' means the abstract act of normative ideas which serve as a scheme of interpretation for the phenomena of law in action [e.g., the sequence of actions involved in a contract of sale], which again means that these norms are effectively followed, and followed because they are experienced and felt to be socially binding", by the judge and other legal authorities applying the law.[65] To put the matter in another way, "valid norms" are those which "actually are operative in the mind of the judge, because they are felt by him to be socially binding and therefore obeyed".[66] In short, the proposition that "X is valid law" is a prediction of judicial behaviour and its motivating feeling.

He is critical of the explanations of legal validity offered by American "behaviouristic" realism and by psychological realism, as found in the works of Olivecrona. According to the behaviourist theory, says Ross, a norm is valid if there are sufficient grounds to assume that it will be accepted by the courts as a basis for their decision. The theory is deficient in that it seeks to predict judicial behaviour purely by external

[63] Professor H. L. A. Hart maintains that the primary function of the word "right" is not to stand for or describe anything, but only to specify the conditions necessary for the truth of a sentence of the form, "You have a right", taken as a whole. Hart, *Definition and Theory in Jurisprudence*, 70 L.Q.R. 37 at 45-47 (1954).

[64] *Id.* at 9.

[64] *Id.* at 16.

[65] *Id.* at 18.

[66] *Id.* at 35.

observation of regularity in the reactions (customs) of judges, without taking into account their "spiritual life", their experience of being bound by the rules.[67] Psychological realism holds a norm to be valid if it is accepted by popular legal consciousness. This theory, Ross points out, converts law into an individual phenomenon on a par with morality, based solely on subjective opinions, and denies the possibility of a natural law system. The correct view is that if it is fairly clear that a given rule will be applied by the courts, that rule is valid law, regardless of popular legal consciousness. From Ross' standpoint, only a synthesis of psychological and behaviouristic views will suffice to explain legal validity.

However, his own theory is not entirely satisfactory. For example, even if it is true that legal practitioners regard "valid law" as a prediction of judicial behaviour, that term can hardly bear the same meaning for judges, who, in deciding a case according to valid law, are not concerned with predictions about what they are to conclude, but are simply applying rules by which they believe themselves bound.[68]

Even less tenable is his assertion that legal norms are essentially directives to the *courts* as to how they are to exercise their authority.[69] The instruction to the private individual, he says, is implicit in the fact that he knows what reactions on the part of the courts he can expect in given conditions. By way of illustration, he observes that the provisions of the criminal law "say nothing about citizens being forbidden to commit homicide, but merely indicate to the judge what his judgment shall be in such a case".[70] His reasoning seems to be that since legal rules contemplate the use of force in their application, they must be directed to the courts, whose function it is to order and carry out the exercise of force. But this argument is still satisfied when we take the more realistic position that the rules are primarily directives for individuals and only secondarily instructions to the courts about what to do when the rules are not observed. An examination of the forms of statutory rules throws little light on the problem, as there is no consistency or system in the wording of legislative enactments.[71] Some rules appear to be directed to the enforcing authorities[72] and others are concerned with acts permitted or forbidden to the individual.[73]

In his elaboration of the concept of legal validity, Ross points out that the word "law", as a descriptive term, must be kept free of moral and emotional implications, and that a system of norms that is effectively

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[67] Thus, a custom may have developed of imposing only fines as the penalties for certain breaches of the law, even though imprisonment is also authorised. This is nothing more than a factual custom, and under the valid law, imprisonment could still be imposed.

[68] Cf. Olivecrona's reasons for rejecting the American realists' explanation of "rights". "Nor do the judges make predictions when they 'determine rights'. The judgment cannot be a prediction about what the judge is going to do in the case!" *Law as Fact* 214.

[69] See the criticism of this proposition by Arnholm, *Some Basic Problems of Jurisprudence*, 1 Scandinavian Studies in Law 43-46 (1957).

[70] Op. cit. *supra* note 58 at 33.

[71] On this point, see Arnholm, *op. cit. supra* note 69, at 43-44, who also observes that "so far as a legal rule is the result of an intention of the legislator, this intention is primarily aimed at directing the activities of the citizens." *Id.* at 44.

[72] See, for example, section 82 of the Criminal Code of Canada, 2-3 Eliz. II, c. 51: "Everyone who carries or has in his custody or possession an offensive weapon for a purpose dangerous to the public peace . . . is guilty of an indictable offence and is liable to imprisonment for five years."

[73] See, for example, section 58(1) of The Vehicles and Highway Traffic Act, R.S.A. 1955, c. 356: "No person shall drive a motor vehicle on a highway at any rate of speed that is unreasonable having regard to all the circumstances of the case . . . ."

enforced and felt to be socially binding may properly be described as "law" whether or not we happen to like the system. Thus, it is pointless to argue that Hitler's rule of violence was not a "legal order", since "a descriptive terminology has nothing to do with moral approval or condemnation. While I may classify a certain order as a 'legal order', it is possible for me at the same time to consider it my highest moral duty to overthrow that order".[74] For morality, he says, is a matter of individual conscience or attitude rather than an objective, factual phenomenon susceptible to analysis by empirical methods and hence can have no place in scientific jurisprudence.

For the same reason, an *a priori* principle of justice as a guide for legislation must be rejected. To say that a rule is unjust does not indicate any discernible quality and is nothing more than an emotional expression of an unfavourable reaction to the law. "A says: I am against this rule, because it is unjust. What he should say is: This rule is unjust because I oppose it. To invoke justice is the same thing as banging on the table: an emotional expression which turns one's demand into an absolute postulate."[75] The ideology of justice, he concludes, has no place in a reasonable discussion of the value of laws.

This is not to say that there is no connection between positive law and the idea of justice. On the contrary, Ross acknowledges the relevancy of justice in characterizing judicial decisions. The idea of justice demands that (1) there shall be a law as the basis of a judicial decision, and (2) the decision shall be a correct application of the law. "To say that the decision is just means that it has been made . . . in conformity with the rule or system of rules in force."[76] Thus, only when a judge applies a law—even a Hitlerian law—"correctly" is the decision just. And when does a decision correctly apply the law, Ross asks? "[W]hen it is covered by such principles of interpretation and such evaluations as are current in practice."[77]

Unlike some of his fellow realists, Ross is not content to limit the horizon of jurisprudence to the analysis of legal doctrine but would have it embrace the task of providing practical directions for the law-creating activities of the legislator. However, if it is true, as he argues, that no absolute validity exists, that "rightness" is an *a priori* concept that cannot be founded on rational argument, then on what basis can directives for human action be formulated? How shall we provide guidance for the legislator? Ross finds his answers to these questions in the new and still undeveloped science of "legal politics", which he defines as "applied sociology or legal technique."[78] Its central task is not to seek the ultimate purposes and values of law—for there can be no science of law as it ought to be—but rather to provide the most effective means for the "adjustment of the law to changed technical and ideological conditions."[79] The lawyer is cast in the role of the expert's referee, for "it will often be he who, after the experts [e.g., economists, engineers, sociologists, psychologists, agronomists, etc.] have had their say, will undertake the

[74] Op. cit. supra note 58 at 31-32.
[75] Id. at 274.
[76] Ibid.
[77] Id. at 285.
[78] Id. at 328.
[79] Id. at 377.

weighing and balancing of all considerations, and achieve the formulation that best integrates all motivating components".[80] Legal politics is "an art, a skill, where the value of the result is measured by being in fact accepted by others, particularly those in power . . .".[81]

The lawyer must, of course, maintain a strictly objective attitude in performing his functions, Ross maintains. Just as the natural scientist does not provide the premise of evaluation which governs his researches ("The atomic scientist does not affirm the value of producing of atom bombs any more than the student of medical science affirms the value of preserving and saving human life"),[82] so too, the social scientists in the same impersonal manner must accept the political attitudes that are in fact current in the circles of power in the community and place his insight at the disposal of given objectives without himself adopting any attitude to them. "The role of the lawyer as legal politician is to function as far as possible as a rational technologist . . . , Like other technologists he simply places his knowledge and skill at the disposal of others, in his case those who hold the reins of political power."[83]

The practitioner of legal politics, as Ross conceives it, might well find himself expected to perform tasks that most people would regard as highly disagreeable. Suppose, for example, that the policy of those in power was to eliminate the Jewish population of the state as expeditiously as possible. Ross would apparently conceive it to be the function of the legal politician to formulate and draft laws that would accomplish this objective most effectively, regardless of his personal convictions.

V

In summary, the members of the Scandinavian realist school have doubtless done good service in exploding the myth of the "will-theory" of law and exposing the metaphysical foundations of legal positivism,[84] in bringing the law-morality relationship into a more accurate perspective, and, by their analysis of legal concepts and language, in making the followers of traditional legal thought clearly aware of the presuppositions of their reasoning. Then, too, there is considerable merit in their proposal for a scientific jurisprudence that would conduct empirical, factual studies of the functioning of a system of rules in society in order to gain a deeper comprehension of what "is", although we may question whether the methods of the physicist and chemist, which they recommend, can be satisfactorily applied without qualification to the study of the dissimilar subject- matter of psychological and social phenomena.

Of less moment are their attacks on the normativistic conception of law and on the basic notions of rights and duties. Even if the conception

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[80] *Id.* at 320.

[81] *Ibid.*

[82] *Id.* at 320. How can Ross be so sure about the values of atomic scientists? Some may regard the production of atomic bombs as essential for the security of the nation and therefore "good". Others may decry the production of atomic bombs but still engage in research in the belief that the enormous benefits to be derived from the peaceful uses of atomic energy warrant the risks involved.
And surely most doctors agree that the preservation of life and health is good.

[83] *Id.* at 377.

[84] In Professor Friedmann's opinion, their main contribution "has been to pursue the detection of open or hidden legal ideologies beyond the usual criticism of natural law doctrines into the positivist concepts of command, sovereignty, rights and duties." Friedmann, *Legal Theory* (4th ed.) 265.

of legal rules as norms is of a metaphysical or *a priori* nature, it is a social reality of great practical importance and should not be eliminated from juridical thinking. For rules of law are surely considered by the ordinary citizen to have a binding force, and are probably so intended by the legislator and judge. So regarded, they influence and give direction to human conduct. It is indeed difficult to conceive of a legal order without the conception of law as a binding norm. Their treatment of rights and duties would have been far more significant had they not been content simply to demonstrate that these notions have no factual counterparts, but had proceeded to examine empirically how these notions are actually employed and what purpose they serve, and to consider whether the functioning of the legal machinery would be gravely impaired if these notions were eliminated.

Perhaps the least acceptable aspect of the work of the Scandinavian jurists is their assertion that legal science must be concerned only with facts, to the entire exclusion of problems involving valuation, such as the purposes of law and principles of justice. Even if we grant that ethical values have no objective existence,[85] as they argue, the elimination of evaluating activities as irrelevant to positive law is not warranted. For law is an intensely practical and utilitarian science that must be concerned with giving directions for human conduct. Social life gives rise to an endless number of conflicts raising questions of what is right and what is wrong, which the law must answer. Thus, every rule of law embodies a value-judgment. Human beings are end-seeking creatures, and judges and legislators in creating rules of law are motivated to seek some ideal, end, aim or purpose. Even scientific thinking, before which the realists genuflect, uses evaluations to a greater or lesser extent in the selection of the subjects to be investigated and in the reporting of observations. A complete legal philosophy, we maintain, must have not only factual knowledge but also a concept of the ends of law. Psychology and sociology cannot replace ethics and morality in jurisprudence, the Scandinavian realists notwithstanding. As Professor Campbell has admirably stated:[86]

> "We cannot conduct any practical science on the sole basis of the empiric knowledge that a leads to x while b leads to y. We must, if we are not to relapse into chaotic drift, choose whether we are going to aim at x or y; we must decide whether x or y is the better end; we must have value judgments. Whether or not our values are "real" in the same way as facts are "real", they are necessary to our thought and to our consequent practical action, and on our choice between them will depend the factual consequences of our action."

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[85] It is a moot philosophical question whether facts are any more real than values. Professor Lon Fuller states that "A purpose is a fact, but it is a fact that sets a target; it is a direction giving facts." Fuller, *American Legal Philosophy at Mid-Century*, 6 J. Legal Ed. 457 at 470 (1954).
See Castberg, *Problems of Legal Philosophy* 19: "All law must serve certain purposes. Does not our valuation of the purposefulness of legal rules assume that there are certain fundamental values in social life that we accept as objectively valid?"

[86] Campbell, Book Review, (1954) 17 Mod. L. Rev. 174 at 176.