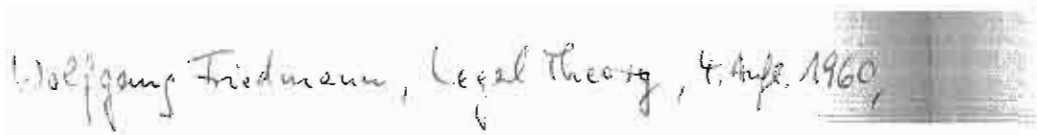

CHAPTER 23

PRAGMATIC POSITIVISM

THE AMERICAN REALIST MOVEMENT

THE healthy scepticism which, towards the end of the nineteenth century, assailed the complacency of analytical jurisprudence took two very different forms. A new legal idealism, partly of a metaphysical, partly of a sociological, bend, set out to fight the assumption of analytical positivism and turned to investigate the realities of modern society in their relation to modern law. The first and greatest attempt in this approach to social problems had been the Marxist analysis of society, but it did not have much immediate effect upon legal science, owing to a number of factors analysed elsewhere.[1] The realist movement in jurisprudence is of much later origin, and its principal home is the United States although certain Continental movements show rather similar tendencies. Nowhere was the discrepancy between the form of the law and its theoretical logic on the one hand and its sociological reality on the other hand more blatant than in the United States at the beginning of this century. No country could offer richer material for the study of the law as it worked in fact than the United States, with a Federal and forty-eight state jurisdictions, together producing innumerable precedents; with the function which the Supreme Court exercised in the political and social life of the country; with the contrast between the theoretical and practical aspect of constitutional principles; with the development of powerful corporations protected by the same individual rights as the pioneer farmer in the Wild West; with the manifold political machinations within the judicial system. These and many other factors contributed to develop a scepticism symptomatic of the crisis which affected the nineteenth century's outlook on life in the law no less than in other fields.

In the field of law two great American jurists above all may be

[1] *Cf.* Chap. 27, below.

considered as the mental fathers of the realist movement: John Chipman Gray and Oliver Wendell Holmes.

Gray, although a distinguished exponent of the analytical tendency in jurisprudence, with his insistence on sharply defined notions in the law and his opposition to any infusion of ideologies into the science of law, had begun to shake the position of analytical jurisprudence by relegating statutory legislation from the centre of the law to one of several sources and placing the judge in the centre instead. Although Gray himself still considers the making of the law from those sources as an essentially logical process, his own definition as well as his comments admit and emphasise the great influence of personality, prejudice and other non-logical factors upon the making of the law. The illustrations which Gray gives from English and American legal history show how political sympathy, economic theories and other personal qualities of particular judges have settled matters of the gravest importance for millions of people and hundreds of years.[2]

Gray prepared the ground for a more sceptical approach, which proceeded to deprecate the logical factors and to turn to the non-logical factors with correspondingly greater emphasis.

This tendency was made articulate by Oliver Wendell Holmes who, in an essay published in 1897, gave an entirely empirical and sceptical definition of the law:

> Take the fundamental question, what constitutes the law. . . . You will find some textwriters telling you . . . that it is a system of reason, that it is a deduction from principles of ethics or admitted actions, or what not, which may or may not coincide with the decision. But if we take the view of our friend, the bad man, we shall find that he does not care two straws for the action or deduction, but that he does want to know what Massachusetts or English courts are likely to do in fact. I am much of his mind. The prophecies of what the courts will do in fact and nothing more pretentious are what I mean by the law.

Here was, coming from a distinguished judge and thinker, a definition of law, in terms of consequences, and one which seemed to demolish not only any analytical certainty, but also any connection between law and ethical ideals. As has been pointed out by many competent critics, Holmes himself, neither as a jurist nor as a judge, adhered to this statement which, taken by itself, is

[2] *Cf.* above, p. 218 *et seq.*

one-sided, exaggerated and patently incorrect. In fact no one has stressed the need for legal theory with greater force or eloquence than Holmes himself, in the same essay.[3] But this particular phrase came to be something like a gospel for the followers of realism in jurisprudence who, however great their scepticism and sarcasm in regard to other jurists and their doctrines, followed this and some similar statements of Holmes J. with almost religious fervour.

The tendency thus developed by American lawyers found philosophical support in the new version of positivism, called "Pragmatism," which became popular in the U.S.A. about the same time.[4]

Pragmatism is, as its principal exponent William James said, "a new name for some old ways of thinking."[5] Its outlook is emphatically positivist:

> A pragmatist turns away from abstraction and insufficiencies, from verbal solutions, from bad *a priori* reasons, from fixed principles, closed systems and pretended absolutes and origins. He turns towards completeness and adequacy, towards facts, towards actions, towards powers. That means empiric temper regnant, and the rationalist temper sincerely given up, it means the open air and the possibilities of nature as against dogma, artificiality and the pretence of finality in truth.[6]

Pragmatism is thus indeed a new formulation of a very old philosophy. It has stimulated a new approach to law, that "of looking towards last things, fruits, consequences."[7]

No less important a foundation of legal realism than the teaching of James is that of John Dewey.[8] The essence of

[3] "We have too little theory in the law, rather than too much. . . . The danger is that the able and practical-minded should look with indifference or distrust upon ideas the connection of which with their business is remote. . . . To an imagination of any scope, the most far-reaching form of power is not money, it is the command of ideas. If you want great examples, read Mr. Leslie Stephens's *History of English Thought in the Eighteenth Century*, and see how 100 years after his death the abstract speculations of Descartes had become a practical force controlling the conduct of men. Read the works of the great German jurists, and see how much more the world is governed today by Kant than by Bonaparte." Holmes, "The Path of the Law" (1897) 10 Harv.L.R. 457, 476.

[4] The coexistence of the fundamentalist and the pragmatic strain is a fascinating aspect of contemporary American jurisprudence. The former is exemplified in constitutional interpretation and the anti-trust philosophy, the latter in "social engineering" and the realist approach to law.

[5] *Pragmatism* (1925).

[6] *Op. cit.* p. 51.

[7] *Op. cit.* p. 55.

[8] The most concise statement of Dewey's theory of law is found in his article on "Logical Method of Law," 10 Cornell L.Q. 17. See also his *Logic, the Theory of Enquiry* (1938), Chaps. 6 and 7, and Dewey's contribution in *My Philosophy of Law*

Dewey's teaching is that logic is not a deduction of certainties from theoretical principles such as the syllogism, but a study of probabilities. Logic is a theory of inquiry into probable consequences, a process in which general principles can only be used as tools justified by the work they do. As applied to the legal process this means that "the sanctification of ready-made antecedents, universal principles" must be abandoned for a "more experimental and flexible logic." The lawyer does not derive his conclusions from general principles. He starts with a problematic and often confused situation; the process of clarification involves the sorting out of certain questions. With the determination of the problem, a possible solution suggests itself to the inquirer (such as the judge). As the lawyer "learns more of the facts of the case, he may modify his selection of rules of law upon which he bases his case." Premises and conclusions are two ways of stating the same thing. Law then is an experimental process in which the logical factor is only one of many leading to a certain conclusion. Dewey also stressed the social importance of substituting this approach for that of logical positivism. Only experimental and flexible thinking in law can turn it into a steady, secure and intelligent instrument of social reform.

How the rules of law work, not what they are on paper, is the core of the pragmatic approach to legal problems. This, of course, is very general. To concretise what they had in mind, realists turned to those sciences which had begun to explore human behaviour in society. In particular they turned to economics, criminology, general sociology and psychology, and sought to utilise them for the science of law.

To study the law as it works and functions means investigating the social factors that make the law on the one hand and the social results of law on the other. Thus the realists' movement sets out to see what law is really like, by linking it at both ends, so to speak, with the facts of social life. In a wide sense it thus represents a sociological trend in jurisprudence; it accepts in principle—or rather it implies an acceptance of—Ihering's conception of the law as a means to an end. But it is not principally interested in elaborating the ends and purposes of the law.

(1941). For a full account of Dewey's logical and ethical theory, see now Patterson, *Jurisprudence* (1953), ss. 4.53, 4.54.

Therefore only one of the principal spokesmen of American realism in jurisprudence [9] has put forward a theory of the end of law, which is in essence a vindication of Bentham's Hedonism. But he does not consider the acceptance of this or any other theory of the ends of law as essential to the realistic approach. For the realist movement is not a philosophy of law, it is a modern method of approach which wants to find out what the law is, not what it ought to be. In exploring the law it is positivist, and puts its faith in science. In both these respects it agrees with the adherents of analytical jurisprudence. But instead of the single avenue of logic, realists seek to utilise the multiple avenues which modern science has opened or is opening up, for a more exact and detailed knowledge of the many factors that compose modern life.

The law is both a result of social forces and an instrument of social control. Accordingly, the field covered by the programme of realist jurisprudence is almost unlimited. Human personalities, social environment, economic conditions, business interests, current ideas, popular emotions, all these are both makers and products of the law as it is in life. It therefore is quite true, as one of the leading realists has said, that the essential feature of realist jurisprudence is "a movement in thought and work about the law." [10] As characteristic of this movement, Llewellyn enumerates a number of points, of which the following are most important:

(1) There is no realist school; realism means a movement in thought and work about law.

(2) Realism means a conception of law in flux and as a means to social ends, so that any part is to be examined for its purpose and effect. It implies a concept of society which changes faster than the law.

(3) Realism assumes a temporary divorce of IS and OUGHT for purposes of study. Value judgments must always be appealed to in order to set an objective for any inquiry, but during the inquiry the description has to remain as largely as possible uncontaminated by the desires of the observer or by ethical aims.

(4) Realism distrusts traditional legal rules and concepts in so far as they purport to describe what either courts or people are actually doing. It accepts the definition of rules as "generalised

[9] F. S. Cohen, *Ethical Systems and Legal Ideas* (1933).
[10] Llewellyn, 44 Harv.L.R. 1222.

prediction of what the courts will do." In accordance with this belief, realism groups cases and legal situations into narrower categories than was the practice in the past.

(5) Realism insists on the evolution of any parts of the law in terms of its effect.

To these points of programme correspond certain lines of approach, of which Llewellyn mentions in particular the following:

(1) A "rationalisation" which does not take the lawyers' arguments at their face value but rather as the art of the trained craftsman to make a decision plausible after he has reached it.
(2) To discriminate among rules with reference to their relative significance.
(3) To replace general legal categories by specific correlations of fact-situations.
(4) This approach involves a study of personal as well as of quantitative factors in the law. By the study of the personality of judges as well as by statistical inquiries into the remedies available in certain situations, realism hopes to predict with more certainty what the courts will do after it has shattered the traditional belief in certainty by its attack upon the logical consistency and water-tightness of the legal system.

All this leads to the conclusion that there must be much greater emphasis on the social effects of law, and of legal decisions in particular, in relation to the particular part of the community which is affected. Lastly, the realist approach agrees with the more radical sociological doctrines and the *Freirechtslehre* that there is a much larger field of free play for the judge in deciding cases than traditional jurisprudence allows. It follows from the power of selection between conflicting precedents and the ability of the lawyer to find an adequate reason *ex post* for any decision.

The borderlines between the functional or realist jurisprudence on one hand and sociological jurisprudence on the other are thus not very clear. Another leading realist defines as the realm of functional jurisprudence the "definition of legal concepts, rules and institutions in terms of judicial decisions or other acts of state force," and as the realm of sociological jurisprudence "the appraisal

of law in terms of conduct of human beings who are affected by the law." [11]

He is aware, however, that both movements are in part complementary and in part overlapping, while both "spring from a common sceptical, scientific, anti-supernatural functional outlook." [12]

That the realist movement in jurisprudence forms, in a broad sense, part of the sociological movement is certain; on the whole, it appears indeed to be complementary to that aspect of sociological jurisprudence which we have described as "sociological idealism"; for it limits itself to a scientific observation of the law in its making, working and effect where the sociologically minded idealists like Pound, Cardozo, Gény, Heck, set out to define the ends of law.

American realism is, in its juristic foundations, the counterpart of the Continental movement of which Ehrlich is the principal exponent. The characteristic difference lies in the different emphasis given to the decision of the law courts. The American realists, like all Anglo-American lawyers, are inclined to place the decision of the law courts in the centre of the law and indeed concentrate the definition of the law on decisions of courts, whereas Ehrlich devotes his principal attention to what he calls: "The living law," that is to say, the body of rules of conduct and habits most of which never come before the courts. The historical and systematic background of lawyers under the two systems plays its part in this difference of approach.

The programme outlined by the realist movement is vast. Only a small portion of the potential field open to a functional investigation has as yet been covered. Much of the attention of realist jurists, as of all sociologists, has been devoted to the question of method. Since it is a declared purpose of the realist movement to apply a scientific method of observation to the study of law, the question how far the known scientific methods can be applied to a social science like the law has to be investigated before any specific inquiry can be undertaken. The question of the relation between natural and social sciences has been one of the principal problems of scientific method ever since the social sciences became

[11] F. S. Cohen in 1 M.L.R. p. 8.
[12] *Loc. cit.* p. 9.

conscious of themselves. The answer given to this question by Neo-Kantian philosophy and, in the field of jurisprudence, by Stammler, Kelsen and Radbruch has been discussed in another part of this book. Realists approach the same problem from a different angle, by examining the practical question how far the scientific experiment on which natural sciences rely is applicable to social science in general and to the law in particular. Profound research into this problem has been undertaken by distinguished sociologists, scientists and jurists of whom Max Weber, Morris Cohen, Julian Huxley, G. A. Lundberg, R. McIver, Poincaré, Whitehead and, among jurists, Edwin Patterson, Walter W. Cook and Herman Oliphant may be mentioned.

To give even a brief survey of the research undertaken in this field by some of the most distinguished thinkers of our time is impossible within the framework of this book.[13] It is with some diffidence that the following broad results are suggested as emerging from the discussion and as being capable of supplying a working basis:

(1) The sweeping assertion that natural sciences are determined by cause and effect and thus capable of observation, accepted almost without questioning by Kelsen and other Neo-Kantian jurists, is not in accordance with modern scientific thought. Poincaré, above all, has shown that the experimental natural sciences depend on certain hypotheses which are a matter of intuition, selection and thus valuation. It is impossible to make experiments without preconceived ideas, and no experiment gives scientific results without generalisations which serve as prediction for other experiments. The changing theories on the nature of the atom illustrate the importance of theory in natural science.[14] Natural science thus acquires a teleological character.

(2) On the other hand, no social science can experiment with

[13] For a valuable selection of texts, see Hall, *Readings in Jurisprudence*, Chaps. 16 and 17.

[14] The discovery of the planetary structure of the atom, the quantum theory of the movement of particles, and the theory of relativity have between them revolutionised not only modern physics but conceptions on the relations of man and universe. The progress of these theories has been marked by a constant interchange of speculative assumptions and experiments. Moreover, such discoveries as the dual "wave" and "corpuscular" character of the electron, or the interchangeability of matter and energy in Einstein's formula, have profound effects on the theories of knowledge, causation and the forces which move the universe. (*Cf.*, among many others, Eddington, *The Nature of the Physical World*. See also, for illustrations of the dependence of scientific research on basic beliefs, Polanyi, *The Logic of Liberty* (1951), Chap. 2.)

anything like the same degree of exactness as physics or chemistry. Human nature is a less stable and more complex object of experiment than matter outside us. Above all, human purposes and valuations play a much greater part in social than in natural science. Causation in human affairs is a more complex process than in nature. Moreover, social causation differs from individual human purposes. Social relations can therefore not be dealt with by individual psychology (M. Cohen). But as natural science has found its proper method through trial and error, social science might do the same. The difference will, however, remain that the divergent ideas on the purpose of human life prevent, in the social sciences, the rectification of false theories by experiment, which, in most cases, corrects false theories in natural science.

(3) The function of fact study, that is, of experiment, in social matters therefore appears to be the investigation of facts in relation to an ultimate postulate.[15] That social facts are not susceptible to experimental precision in the same degree as natural facts, does not prevent fact study in the law from providing infinitely more reliable data than the vague generalisations hitherto prevalent.

(4) For the study of law the result is that facts must be studied in relation to valuations, ends, purposes. For example, such notions as "monopoly," "competitive régime," "fair and reasonable price," which are essential for legal interpretations of the Sherman Anti-Trust Act, must be ascertained by reference to the results of economic science.[16] Whether an employer is likely to get an injunction in a dispute with his employees must be ascertained not simply by reference to standard phrases such as "freedom of property" or "freedom of contract," but by finding out exactly what the judges concerned have decided in similar situations, or what they are likely to decide in view of their upbringing and interests. If a statute gives a magistrate discretion to substitute educational

[15] M. Cohen (*Social Sciences and their Interrelations*) asserts that the significance of social facts cannot be ascertained without reference to social ideals, and opposes Max Weber, who insists that the scientific study of the social sciences must be restricted to the study of the actual causes of social phenomena. It appears that Cohen misinterprets Weber's scientific relativism. Weber does not eliminate values from sociological research, but denies that the choice between conflicting social ideals is a scientific matter. Radbruch has applied this thesis by investigating legal systems and concepts with reference to their ultimate ideals. This is quite in line with what Cohen demands. See also above, p. 143 *et seq.*

[16] For practical illustrations of these problems, see below, pp. 376–379.

methods for the punishment of juveniles, the desirability of choosing the one or the other must be studied by analysing the effects of either on the criminality of juveniles in similar circumstances and comparable situations.

These are but a few examples of the tasks that lie ahead of the realists. Some of them have been tackled. It is mainly to statistics, psychology, criminology, economics and general sociology that realists have turned to investigate specific aspects of the law at work. The clearest achievement so far has been the use of statistics as an auxiliary instrument to test the working and the effects of the law. The use of statistics makes it possible, for example, to collect relevant data on the way how different magistrates deal with drinking offences or applications for injunctions in labour disputes, or to compare the attitude of trained judges with that of juries in specific matters.[17] Characteristic of the psychological approach are the inquiries undertaken by Haines, Schroeder and others into the personal histories of judges as an aide to the prediction of their likely reaction to particular problems. The decisive change in the attitude of the U.S. Supreme Court towards social legislation, since the replacement of judges during Roosevelt's presidency, or the vacillations of the High Court of Australia between Commonwealth supremacy and state immunity, between a *laissez-faire* interpretation of the Australian Constitution and an interpretation more favourable to economic planning, shows the relevance of such investigations.

How much room and need there is for a more extensive use of social statistics by the lawyer is illustrated by one of the most important Supreme Court decisions of recent years. In *New York v. U. S.*,[18] the issue was whether a state was liable to pay a Federal tax on the sale of mineral waters where the state itself owned and operated the mineral waters. In the dissenting judgment delivered on behalf of himself and Black J., Douglas J. saw in the application of Federal taxing power to state enterprises a threat to state sovereignty. In emphatically denying that exemption of states from Federal taxes would harm essential Federal functions, he said that a proper inquiry would reveal that the extension of state economic and social activities had greatly increased the general

[17] *Cf.*, for example, Oliphant, 10 Texas L.R., p. 129.
[18] (1946) 326 U.S. 572. *Cf.* below, p. 409.

welfare of citizens and thus the potential yield for Federal taxes. If, instead of a judicial guess, accurate social statistics were used to show the interrelation of national income and public enterprise in various fields, the decision of this, as of other vital constitutional issues, would still be fundamentally directed by ideological considerations, but the issues would be greatly clarified, and the area of "hunches," prejudices, guesses, ideological preferences would be reduced. Ideology would operate against the background of scientifically established facts.[19]

Jerome Frank has set out in his well-known work, *Law and the Modern Mind* (1930), to analyse the law from a psychoanalytical point of view. In the traditional teaching and presentation of the law Frank discerns a desire for certainty which he likens to the infant's craving for infallible authority (father complex). Lawyers in general, and judges in particular, have clung to the myth of legal certainty, by establishing a fictitious system of precedents or of complete codifications, hiding from themselves and others the fact that every case is unique and requires creative decisions. A similar myth surrounds the activities of juries. Analytical jurisprudence expresses this childlike desire for certainty and stability. Frank's own ideal is the "completely adult lawyer" typified by Oliver Wendell Holmes. Such a judge needs no external authority to support him, he has a "constructive doubt," so well developed in the natural sciences, which enables him to develop the law in accordance with advancing civilisation. Frank is well aware of the importance of the ideal element in legal development. But he rightly stresses the extent and importance of law-making which has little to do with legal principles and the reported decisions of higher courts, but results from the weighing of evidence, the evaluation of witnesses and other factors incapable of analytical subsumption or theoretical formulation. Frank has therefore suggested special training in fact-finding, evaluation of prejudices, psychology of witnesses, both for trial judges and prospective jurors.[20]

[19] Even statistics are, of course, subject to widely differing interpretations. But they give an irreducible minimum of incontestable facts (*e.g.*, unemployment figures or tax yields).
[20] For a later formulation of the late Judge Frank's views, see *Courts on Trial*, 1949. In this work the emphasis on the uncertainties of fact-finding and trial procedure, as proof of the fallacy of "higher court" rules, seems to be carried too far. The legal process consists of both. Better fact-finding or the abolition of juries may be more important for the improvement of law than a better theory of precedent or of statute interpretation.

There have been recent investigations [21] of the interrelations between criminal law and crime. Others [22] have examined business practice as a determining factor for decisions in commercial law. Others [23] again have studied the American Constitution, not as it stands on paper but as a living institution which gives certain possibilities of action and function to certain sections of the population. Thurman Arnold, in his *Folklore of Capitalism* (1937), has analysed the process by which powerful corporations are enveloped by the myth of the sacred right of the individual and thus enabled to carry out a policy of economic domination. The counterpart is provided by the searching analysis which Berle and Means have made of the economic, legal and social power of the corporation in modern capitalist society.[24]

These are but a few examples of the possibilities of realistic approach to the law. From the point of view of legal theory it is less important to give a complete catalogue of realistic studies of positive law than to assess the realist position in the history of legal thought.

The realist movement is firstly emphatically on the side of those who believe in science and thus in an objective criterion as a possible and also a desirable guide for the law. It is secondly empiricist in that it seeks a scientific guidance in observable facts. So great was the insistence of realists on the need for scientific fact study instead of loose generalisation, so violent their anti-metaphysical bias that it appeared to such authoritative critics as Roscoe Pound or Morris Cohen that realists believed in a solution of legal problems by this means alone, to the exclusion of legal ideals. The patent absurdity of such a proposition has been pointed out by these and other critics.[25]

But no modern society could operate without rule generalisation, at least as a necessary basis. The "upper court myth" deserves attack insofar as it pretends to teach the whole law. Such a belief was probably held by Langdell and some others, but it commends itself to few contemporary jurists. The reported cases must continue to serve as the material for legal generalisations which are an essential part of the law though not the whole of it.

21 *e.g.*, by Michael and Adler, *Crime, Law and Social Science* (1933), by Sheldon and Eleanor Glueck in many works. *Cf.* also Hall, *Crime, Theft and Society* (2nd ed., 1952).

22 *e.g.*, Underhill Moore, Yale L.J. (1929), p. 703.

23 *e.g.*, Llewellyn (1934), 34 Col.L.R. p. 1 *et seq.*; Beutel (1929) 3 Southern Calif.L.R. p. 10 *et seq.*; Arnold (*Symbols of Government*).

24 *The Modern Corporation and Private Property* (1932).

25 44 Harv.L.R. 697; 27 Col.L.R. 237.

But a great deal of self-searching and clarification has gone on within the realist movement, and more consideration has lately been given to the decisive importance of ultimate valuations and postulates for the approach to any legal problem.[26] The attempt to divorce as neatly as possible the IS and OUGHT of the law is part of this endeavour.

It is also recognised by some if not all realists that realist jurisprudence, forming part of a sociological approach to law, is not a substitute for but a supplement to analytical, historical and ethical jurisprudence.[27] This is a timely and necessary corrective to the exaggerations which have provoked the not unjustified if one-sided criticism of English jurists.[28] No one with the slightest experience of law at work, least of all Holmes J., the idol of realists, would minimise the immense function of analytical jurisprudence in the everyday administration of justice. The large majority of legal decisions and other practical legal problems are matters of routine in which precedent and the reliance upon analytical rules are sufficient to meet the situation. Even in the intensely political legal administration of totalitarian states this applies to the majority of cases. It is quantitatively a small but qualitatively a decisive number of legal situations which routine and analytical methods are insufficient to meet. The original gap between the realist movement and those who, in one way or another, emphasise the importance of the ideal element in the law is further narrowed by the later admission of leading realists [29] that the search for justice is a paramount concern of the lawyer.

Realist jurisprudence thus appears in its true perspective, namely as an attempt to rationalise and modernise the law—both the administration of law and the material for legislative change—by utilising scientific methods and the results reached in those fields of social life with which the social law is inevitably linked. The guidance must always come from the social ideals which direct a given legal order. But by the use of these scientific instruments the law can be made more rational, articulate, scientific, objective.

But if the aim is now tolerably clear, this is far less true of the

26 Llewellyn, 40 Col.L.R. 581; McDougal, 50 Yale L.J. 827.

27 *Cf.* F. S. Cohen, 1 M.L.R. 1 *et seq.*

28 *e.g.*, Allen, *Law in the Making* (5th ed.), p. 41 *et seq.* (but *cf.* the much more balanced criticism in the 6th ed. of this work) pp. 41 *et seq.*; Goodhart in *Modern Theories of Law*, p. 1 *et seq.*; and, for an American attack, Fuller, *The Law in Quest of Itself* (1940).

29 Llewellyn, *loc. cit.*, note 1. Frank, 61 Harv.L.R., note 40.

ways and means. This appears to be largely the result of the divergent ways in which the different sciences may be invoked in aid of the law. One of the necessary objectives of law—this, at least, is beyond dispute—is certainty. Analytical jurisprudence seeks to achieve certainty by relying on an allegedly complete logical system. Realism uses psychology to demolish this myth of certainty, and the psychologists among the realists, like Jerome Frank, have, at times, appeared to build up this lack of certainty into a philosophy very similar to the *Freirechtslehre*. For what else is the "completely adult lawyer" but the wise and creative judge who, unfettered by paragraphs and precedents, finds justice through a clear and cool perception and valuation of the social issues at stake. The philosopher-king of Plato's *Republic* appears in the cloak of the modern lawyer.

On the other hand, the use of statistics, economics, criminology, etc., is meant to introduce a new certainty into the knowledge of law: a certainty based on scientific experiment instead of a fallacious logic.

The realist approach to legal problems is thus essentially a ferment which can be used for very different ideologies. The whole of the realist approach appears to rest, however, upon an "initial hypothesis." The realist movement has arisen and can operate only where there is sufficient freedom in the play of social forces to make this scientific weighing possible in the administration of law; it therefore demands a society which admits objectivity, that is a fundamentally tolerant society. A totalitarian system has no room for realist jurisprudence.[30] For the political will of the legislator permeates every sphere of law with such force and exclusiveness that such factors as the economic play of forces, personal leanings, business habits, etc., are relegated to a very subordinate function, although they are not entirely excluded. Only where the legislator is comparatively passive and neutral in regard to the social forces at work in the society, can a movement like that of American realism operate and prosper.

The Scandinavian Realists

Although the association of a particular movement in legal or political thought with national or regional characteristics is not often justified, it has been so in the case of the "American" realist movement, whose origin, philosophy and representatives are associated with a particular period and trend of American thinking. It is no less justified to speak of a modern "Scandinavian realism" in legal thinking, because modern Scandinavian jurists have developed a characteristic approach to law that has little parallel in other countries. Although the word "realism" has increasingly come to be associated with this modern movement in Scandinavian legal thinking,[31] this apparent similarity to the American realist movement is a purely verbal one. American realism is, as we have seen, the product of a pragmatist and behaviourist approach to social institutions. Lawyers have developed it, with a characteristic Anglo-American emphasis on the work of courts and judicial behaviour, as a corrective to the philosophy of analytical positivism which dominated Anglo-American jurisprudence in the nineteenth century. They have stressed law in action, law as experience, as against legal conceptionalism. They have, however, been little concerned with the transcendental bases of law. While they have tended to agree with a relativistic philosophy of law, American realists have, with the exception of Felix Cohen, not sought to elaborate any philosophy of values. They have, in Llewellyn's words, assumed "a temporary divorce of IS and OUGHT for purposes of study." [32]

By contrast, Scandinavian "realism" is essentially a philosophical critique of the metaphysical foundations of law. Rejecting the down-to-earth approach and language of the American realists, it has a distinct Continental flavour, in its critical and often heavily abstract discussion of first principles. A certain unity of approach—not necessarily acknowledged by its exponents—is due to the influence exercised upon the leading contemporary representatives of Scandinavian "realism"—Olivecrona, Lundstedt and, to a lesser extent, Ross—by their teacher, Axel Hägerström.

With differences only in emphasis, all the above-mentioned jurists join hands in the total rejection of natural law philosophy and, indeed, of any absolute ideas of justice, as controlling and directing any positive system of law. In so far as they are articulate

[30] Larenz, *Rechts- und Staatsphilosophie der Gegenwart* (2nd ed., 1935).

[31] See Ross, *Towards a Realistic Jurisprudence* (1946); Dias and Hughes, *Jurisprudence* (1957), p. 481 *et seq.*

[32] See above, p. 249.

on legal values, the Scandinavian " realists " are of necessity relativists, *i.e.*, they deny that rules of legal conduct can be compellingly derived from immutable principles of justice.[33] The virtual absence of natural law thinking in modern Scandinavian jurisprudence is, no doubt, in part, attributable to the non-existence of any significant Catholic element in Scandinavia. For the mainstay of natural law philosophy—at least since the decline of eighteenth-century rationalism—has been the scholastic or neo-scholastic philosophy of the Catholic Church, and of the legal philosophers inspired by scholastic doctrine. The rejection of natural law would not, however, distinguish modern Scandinavian jurisprudence from the many other jurists of varying persuasions who equally reject natural law philosophy. The characteristic and valuable contribution of Hägerström and his disciples has been to probe beyond the rejection of transcendental justice into the validity of the entire apparatus of " rights," " duties," " sovereignty," " commands," and other basic legal concepts which have formed the mainstay of analytical jurisprudence in the work of Austin and his Anglo-American successors as well as in Continental analytical positivism.[34] Although the analytical positivists, whether Austin or Binding, rejected natural law or any other super-positive ideas of justice, they substituted for such absolute imperatives, the sovereignty of the modern state, which demands unconditional obedience to its commands, and which by virtue of its supreme power, bestows rights and duties on its subjects. In this, Hägerström and his successors have detected a " surreptitious introduction of ideas taken from natural law." [35]

A criticism of a " collective " or " general " will, or of a " will of the state," as a mystical concept that tends to legitimise the omnipotence of those in command of the machinery of the state in a manner basically similar to natural law methods, is the most important critical contribution of this school of thought.[36] Up to

[33] See, for example, Ross, *On Law and Justice* (1959), Chap. 12. Similarly, Castberg, *Problems of Legal Philosophy* (2nd ed., 1957 at p. 112) who cannot generally be classed with the above-mentioned jurists, refutes " the belief in a 'natural law' in the sense of a complete, integral system of law," but he accepts, somewhat like Stammler or Charmont, a " natural law " in the sense of rules of ideal law, which are adapted to the changing conditions of life.

[34] See above, pp. 211 *et seq.*, 221 *et seq.*

[35] Hägerström, *Inquiries into the Nature of Law and Morals* (ed. Olivecrona, trans. Broad) (1953) p. 48 *et seq.*

[36] See Hägerström, *op. cit.*, Chap. II; Olivecrona, *Law as Fact* (1939), Chap. I.

that point, the Scandinavian jurists would seem to agree with Kelsen's critique of the hidden or disguised idealistic philosophies as well as with Duguit's and Kelsen's attacks on the " command " and " will " theories of state and sovereignty. But Kelsen's work is in turn subjected to severe criticism, on the ground that, by detaching the " pure science of law " from all social reality, he avoids the real problems of the existence and validity of law.[37] In the *Grundnorm* which, even though it is a mere logical construct, is, in the theory of the Vienna school, the source of validity and comparison for all subordinate legislative and other legal actions, Hägerström detects a kind of mystical quasi-theology, akin to the way in which, in ancient Rome, " the act of legislation was regarded as directly creating, in a mystical and magical way, the connection between legal fact and legal consequence which was expressed in words." [38] In fact, the *Grundnorm* theory is seen as a kind of natural law philosophy, emptied of its substance, and in this criticism Hägerström would seem to join hands with a disciple of Kelsen,[39] though, from entirely different premises and with entirely different objectives.

But what do the Scandinavian critics put in the place of the whole structure of basic norms, commands, rights, duties, *et cetera*? They certainly do not deny either the validity or the reality of law as a body of " rules about force, rules which contain patterns of conduct for the exercise of force." [40] Even in the work of the most radical of the critics, Lundstedt,[41] it is assumed throughout that there is a " law," as a machinery that works, that is propelled by certain forces and that induces people to behave in a certain way, that remains apparently distinct from theology and morality, but also from mere administration.[42] But what is law, if it is neither the emanation of a natural order of things, whether imposed by God or reason, nor a system of commands issuing from

[37] Hägerström, *op. cit.*, Chap. IV.

[38] Hägerström, *op. cit.* at p. 274. Hägerström's theory of the magical origin of the Roman concept of obligation is elaborated in his work, " Der römische Obligationsbegriff im Lichte der allgemeinen römischen Rechtsanschauung " (1937) in *Modern Theories of Law*.

[39] Lauterpacht's essay on Kelsen as quoted above, p. 240.

[40] Olivecrona, *Law as Fact* (1939) p. 134

[41] See his *Legal Thinking Revised* (1956), *passim*.

[42] In Lundstedt's rambling and intensely polemic and badly organised work, it is sometimes difficult to see the differences between his approach and that, for example, of Pashukanis, for whom, in a Socialist community, all law becomes administration.

a sovereign, whether in the psychological "command" version (Austin) or in the logical and hypothetical norm structure derived from a basic norm (Kelsen)? In denying the reality of "rights," the Scandinavian jurists agree with Kelsen,[43] as with Duguit[44] though from different premises. But they cannot substitute, like Kelsen, the hierarchical structure of "pure" norms, or, like Duguit, a quasi-natural law principle of social solidarity that makes individual rights both redundant and repulsive. Quite logically, the Scandinavian critics go further in denying the reality of "duties" as well as of "rights." For Olivecrona, who, in a lucid and concise work, has essentially illuminated Hägerström's ideas, any theory of a "binding" force of law is, whether in its natural law or positivist version, a form of transcendentalism.

Positive rights are no more real than natural rights, except that they have "a corollary" in an actual security and an actual power in consequence of the regular functioning of the legal machinery.[45] For the notion of rules of law as commands of the state (implying a fictitious general will) Olivecrona substitutes the concept of "independent imperatives." These cannot be defined as commands. To those who take cognisance of the rules, the law-givers are for the most part entirely unknown. They have only the imperative statements as such before them, isolated from the law-givers, who may have died a hundred years ago. These commands are addressed to specific persons. Law is fact, a body of rules about the use of organised force, without which community life is unthinkable. It is obeyed by the fear of force rather than by the direct use of it because the rules of law are a body of "independent imperatives" representing the organised force in a community as long as they are effectively obeyed. There is, for Olivecrona, no real problem of a "final" explanation of the law.[46] The revolution is only one step in the development of the law. Without transcendental interpolations, the law can never be traced back to its "ultimate origin." When, through effective force and propaganda a new set of independent imperatives has established itself effectively in a society, a new channel has been given to a rebel, and that is the end of it.

[43] Above, p. 233.
[44] Above, p. 183.
[45] *Op. cit.* at p. 119.
[46] *Op. cit.* at p. 72 *et seq.*

The rejection of legal ideology in any form, including the whole concept of justice, has been carried to extreme length by the Swedish jurist, Wilhelm Lundstedt, whose main work has been published in English, shortly after his death in 1955, under the title of *Legal Thinking Revised*. As this title suggests, Lundstedt claims no less than that he has completely revised the foundations of legal thinking.[47] For Lundstedt, "law" is nothing but the very life of mankind in organised groups and the conditions which make possible peaceful co-existence of masses of individuals and social groups and the co-operation for other ends than mere existence and propagation.[48] This formulation does not differ greatly from the more tersely stated definition of the function of law by Olivecrona or, indeed, from the objectives of legal order as stated by Soviet jurists. In his denunciation of the concepts of rights and duties, and the rejection of transcendental ideas of justice, Lundstedt is in accord with the other Scandinavian "realist" jurists. What Lundstedt means by his rejection of the "method of justice" which, in his opinion, characterises and condemns all traditional jurisprudence[49] is far less clear, for he often speaks throughout his work of the outstanding importance in legal machinery of the feeling "for the right and against the wrong," and of the "common sense of justice." "It is only as bridled and checked by the legal machinery that the feelings of equity and justice render to society their indispensable service."[50] The great mistake of traditional jurisprudence, according to Lundstedt, is to have regarded the sense of justice or right as inspiring and guiding the law, whereas in fact "the feelings of justice are guided and directed by the laws, as enforced, *i.e.*, as maintained."[51] Law at any particular time and in any particular society is determined by "social welfare," which Lundstedt defines in a great variety of formulations, spread throughout his lengthy and polemical tirade.[52]

[47] A corollary of this is his condemnation of almost everybody else, from the natural law philosophers to the representatives of *Interessenjurisprudenz*, American realists, Roscoe Pound, and nearer home, the "Dane," Ross.
[48] *Op. cit.* at p. 72 *et seq.*
[49] *i.e.*, almost everybody except himself, his teacher Hägerström, and with some qualifications, Olivecrona.
[50] *Legal Thinking Revised*, p. 169.
[51] *Op. cit.* p. 144.
[52] The interpretation of Lundstedt's work, at least in English, is made much more difficult by the tortuous style of his writing, which contrasts with the lucid and clear

As a guiding motive for legal activities, social welfare means, "in the first place 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." [53] This includes such familiar values as the minimum requirements of material life, security of life, limb and property, the greatest possible freedom of action, "in brief, all conceivable material comfort as well as the protection of spiritual interests." This would appear to be very similar to the cataloguing of human wants and interests undertaken by Roscoe Pound or by the representatives of German *Interessenjurisprudenz*, but Lundstedt denies this vehemently, and he particularly criticises Pound for having established yet another legal ideology, whereas he, Lundstedt, simply wishes to establish "as a fact what can be observed in general, namely, that the overwhelming majority of human beings . . . wish to live and develop their lives' possibilities." [54]

The area of social welfare is described as "comprising the general spirit of enterprise and its postulate" and "a general sense of security." From this derive such postulates as "the common production of wealth and common exchange of commodities, the reliability of promises, the sense of safety to life and to limb, *et cetera*." [55] The balance between these various interests has obviously to be struck differently at different times and under different circumstances—and the consideration of "social welfare" leads Lundstedt, for example, to accept strict liability in tort as against the supremacy of the principle of guilt—but in all these respects the philosophies of "social engineering" or "balancing of interest," as analysed elsewhere in this book [56] take no basically different position.[57] Put as briefly as possible, Lundstedt appears to say that the legal machinery, *i.e.*, the compound of legislative,

style of Olivecrona and Ross who have been assisted by English editors or translators. On the other hand, Professor Broad has made Hägerström's difficult style of writing as accessible as is humanly possible to English readers.

53 *Op. cit.* p. 140.

54 *Op. cit.* p. 140.

55 *Op. cit.* p. 137 *et seq.*

56 See below, pp. 289 *et seq.*, 293 *et seq.*

57 Lundstedt apparently misinterprets Pound's formulation of categories of interests as establishing a definite hierarchy. He says that "Pound's fundamental idea of law turns out to be the well-known legal ideology although expressed in a somewhat unusual way" (p. 351). The same may, however, be said with at least equal justification of Lundstedt's own formulations, except that they are far more difficult to follow.

administrative and judicial activities, must be determined without any preconceived ideology, by the best possible balance between competing social demands, deeds and aspirations of a certain community. There is little new in this, except the author's claim to originality.

As is so often the case with intellectual criticism, the critical aspects of the Scandinavian "realist" movement are more significant than its positive achievement. Its 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.[58] By implication, rather than as a matter of articulate philosophy, the Scandinavian "realists" have demonstrated that any legal order must be conditioned upon a certain scale of values, which can be assessed not in absolute terms but with regard to the social needs changing with times, nations and circumstances. Whether law is described as a "fact," as a "machinery in action," or in any other manner, it is directed to certain ends.

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58 It should be noted, however, that Alf Ross, in his recent work (*e.g.*, *On Law and Justice*, Chap. VI, and "Tû-Tû" (1957) 70 Harv.L.R. 812), while joining in the denunciation of the fallacies of absolute concepts of "rights," has convincingly shown that "the concept of rights is a tool in the technique of presentation." In other words, it serves as a convenient "shorthand," a simplification of a multitude of conditioning facts and conditioned consequences, *e.g.*, in the description of "ownership." As long as we are aware that the "right" of ownership does not imply a claim derived from natural law or other transcendental ideas, it is a convenient and indeed indispensable tool of legal technique. In its absence, a cumbrous sequence of propositions would be needed to describe the legal aspects of what is summed up in "ownership."

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